

Master's Thesis

Political Justice on Trial: War Crimes Tribunals in a Post-Saddam Era

Giles Longley-Cook

S4621212

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Chapter 1

Section 1.1: Introduction to the thesis and historical background

This thesis takes as its premise the claim that global security and cooperation is impossible without global justice, and that global justice is itself impossible without certain shared moral norms.

On an international level, the attitude towards interstate justice, that is the accepted norm of societies in how they should deal with one another, is reflective of the way they perceive their relationship with other societies and the world order in general. Forms of diplomacy, cooperation and competition can all be used to judge these relationships. One of the key indicators of a society's moral outlook is its treatment of those it defeats in war.

For much of the 20th century, as liberal democracies largely dominated the world's political map, the central domestic tenet of liberal democracy, a reliance on non-arbitrary legalism and equality before law, would be expanded and exported to become an instrumental means of ensuring both internal and interstate stability following such conflicts. Throughout this time the application of such justice, in the form of war crimes tribunals, has remained controversial for many reasons.

Criticisms of such tribunals range from those who consider the whole enterprise false and illegitimate to those who take issue with its current methods but support the practice. The former camp consists of a diverse range of opinions, from those who see international law as a pointless enterprise and see conflict as an act of state that cannot be reduced to legalism, to those who believe liberal justice is compromised by any application to international politics due to the often sordid nature of that realm.

Those who criticize the implementation of international law from a positive angle do so more with an aim of improving its effectiveness, seeing its current state as being detrimental to these and in need of improvement. The key thinkers analyzed within this thesis fall into this category. Hannah Arendt in her groundbreaking criticism of the 1961 trial of Nazi war criminal Adolf Eichmann, focused on criticizing what she

saw as the detrimental effect politicization has upon fair justice. Judith Shklar, on the other hand, in her key text 'Legalism' argued that liberal justice should in fact be openly politicized, and that this would in fact aid its own adoption within previously illiberal societies.

In terms of reinforcing the rights of sovereign states and ensuring a better system of liberal justice, both theorists agreed that trials were the best option, but fundamentally, they disagree about whether political ends trumped legal ones, and which one ensures the other. Can, as Shklar asserts, liberal justice be politicized and compromised in the name of making it more impressive, or, as Arendt argues, does this fundamentally undermine its whole enterprise? Can the decline of war crime trial prominence be attributed to an inherent vice within our culturally and politically accepted method of carrying them out, whether in Arendtian or Shklarian fashion, or is some other factor to blame?

The context of the current debate lies within a brief but extremely dramatic and influential period of international affairs. This thesis will of course address the accusations made that the dominance of liberal justice is itself either simply a manifestation of Western domination or, oppositely, a symptom of the chronic instability of Cold War politics.

Prior to the 20th century and World War I interstate rivalries were generally viewed as just that, acts of state that were not subject to the same rules and restrictions as individual conduct within them. Other than ensuring certain securities for states, little moral value was attached to international diplomacy or the various methods of carrying it out. In imperial times aggression was often the ruler's prerogative, in particular the relative lack of European casualties in colonial conflicts helped to limit the interest in them as moral or legal dilemmas, and what voices were raised about the ability of this situation to promote constant aggression as a reasonable *modus operandi* were not particularly influential (Orwell 2014).

The origin of the increasing desire for systems of justice can largely be found in the wake of World War I. The horrendous slaughter it engendered sparked the general call for methods of restricting states' abilities to wage aggressive wars and to hold accountable those who attempted to do so. These measures were in many ways overly ambitious, which compromised their long-term effectiveness. The setting up of the League of Nations is the obvious example, but another, less well remembered, was the attempt to bring legal justice to those who had caused the war and carried out its worst excesses. Kaiser Wilhelm II of Germany was threatened with war crimes prosecution, and in the 1921 Leipzig trials various German military leaders actually faced judgment from their peers, only to be largely acquitted and receiving support from their own population, who saw them as heroes in the wake of perceived Allied extortion (Arendt 2006).

The total failure of all of these legal measures can be interpreted in different ways. In the case of the Kaiser, caution appears to be the fundamental flaw that doomed efforts to bring him to justice. As Arendt points out, the crime he was accused of was not one that set any real precedent of future prevention of conflict. Charged with 'breaking treaties' rather than anything more morally concrete, it is understandable that both political elites and the public failed to muster much enthusiasm for his prosecution (Arendt 2006, 255). After a conflict in which all sides had displayed political opportunism few national leaders would want to pursue such an enquiry far, and the general underwhelming impact of the charge itself cannot have impressed much upon anyone in light of the greater horrors of that war. Fundamentally, from a Shklarian perspective, the charge fails in setting precedent precisely because it refers to an ideal, that of peace through a complex web of treaties, that the war had already succeeded in smashing to pieces. If trials are to serve a pedagogical purpose in asserting the rightness of a certain moral or political model, it cannot be one that has already lost its appeal entirely. In any case, the Kaiser escaped justice by fleeing to The Netherlands, and the reticence of the Allied powers to pursue him further, something that may have involved breaking Dutch neutrality

The Leipzig prosecutors were equally failures in their unwillingness to push for full justice. Precisely to avoid setting international precedents, the trials were held in Germany and utterly failed at all of their stated goals. The defendants and the cause they fought for were not reviled but celebrated by their population. Not only were none convicted but also the illegalities of their actions were not demonstrated to the German people, meaning that both Arendtian need for proper justice, and Shklarian need for pedagogical ends were avoided.

Whilst this failure can be blamed on the conservatism of the victorious allies in refusing to take risks with their defeated opponents, the heavy-handed nature of their other victorious also undermined their moral high ground. Being a period of transition, much of the old political thought, that treated war and its consequences as extrajudicial acts of state, remained. Thus, whilst they were trying to impose proper legal justice upon Germany on the one hand, the allies also implemented the victor's justice of the Treaty of Versailles, trying to both punish specific individuals and also the German nation as a whole, and of reprimanding Germany for its expansionist and hegemonic behavior whilst also taking the opportunity to expand their own interests and ensure dominance of the Allies. Little wonder that the trials were seen as a sham, and soon Germany would become dominated by forces that actively exploited the feelings of injustice that the post-conflict settlement created (Sylvester 2006).

By the time the Nuremberg trials began in 1945 many things had changed that would allow those trials to set the precedent for international justice that the previous efforts had failed to do. These reasons and the trials impact will be focused upon later. For now it is safe to argue that it was these trials that would lead to post-conflict justice becoming an iconic image of liberal statecraft and ensure that future trials of war criminals would become the norm. As Robert Fine puts it, the Nuremberg trials were nothing less than the opening of a new era in which cosmopolitan law was a social fixture, with the effect of inspiring a new way of approaching international relations (Fine 2000). Arguably, the success of these trials changed the perception of international politics' end goal by changing the role of

states and interstate politics. More fundamentally they change the idea of common humanity by reinforcing the concept of shared legal rights, and punishing certain criminal acts as if they fall under universal jurisdiction, i.e. as if certain crimes are ones against all of humanity.

As will be further examined, Nuremberg can be interpreted as the turning point between an era in which political power was seen as separate from law and one in which law became the dominant goal of the other. In this sense it was truly then that liberal democracies broke the tradition of the past (Scharf 1995).

But would this change be tenable? Both proponents and opponents of Western political hegemony argue that the ability of liberal justice to be a dominant force in world affairs in fact rests upon the political dominance of the nations that spread and enforce it. Some argue further that the subsuming of political struggles into binaries of legality and illegality is itself an assertion of power in which victor's justice becomes the precedent that consistently delegitimizes any action against the interests of such liberal states. This thesis will have to further examine the implications of law's politicization, and of politics' legalization (Scharf 1995).

This politicization was extended greatly within the 1961 Eichmann trial, in which former SS officer and key figure of the Nazi Holocaust Adolf Eichmann was put on public trial in Israel for crimes against the Jewish people. This event would have monumental effects, including inspiring Arendt's own polemic regarding the nature of political trials and of justice

Suffice to say an introductory point to make about it is that it both expanded and localized the instrumentalization of war crimes trials along the Nuremberg model by pushing hard the pedagogical ends of such trials, expanding its indictment to include a whole philosophy, that of anti-Semitism, whilst simultaneously fixing a method of political action that was most famously utilized in international settings and adapting it to legitimize the sovereignty of a single nation state. This emphasis on nation-building would thus become a key feature of such trials in future, as would the trial's

focus on giving a voice to the victims, many of whom came forward as witnesses, setting the stage for a view of such trials in future as tools for reconciliation rather than solely matters of punishing (Bilsky 2004, Sylvester 2006).

Many similar trials have taken place since these events but this thesis shall argue that none have managed to repeat their success in terms of impact on political and legal theory. This is how we arrive at the context in which this paper addresses the question of the continued relevance and positive influence of politically important trials on nation building and the continued existence of a universalist worldview. It shall address the most recent infamous trial, possibly the last of its kind that has been an emblematic factor in a major political, cultural and military confrontation, the trial of Saddam Hussein following his ousting from power in the 2003 invasion of Iraq.

Taking into account the various factors that affected the outcome of this particular trial, the thesis will explore whether it can be viewed as technically successful according to the theories utilized here. The outcome of such an experiment will be to ascertain whether the trial and its context were themselves damaging to the cause of establishing international standards of justice, or if instead it suffered due to a far larger cultural and political shift. Such a shift potentially includes, according to Douglas Sylvester, a loss of consensus on the value of such trials and their methods of operating, a decline that can be found in the generally divisive and inconclusive proceedings taking place at the International Criminal Court at the Hague (ICC), and more prominently in that of Saddam Hussein in Iraq in 2006 (Sylvester 2006). Other shifts to be explored involve the work of Gregoire Chamayou and his theory on the effects of mechanized, extrajudicial warfare such as drone strikes and the potential role these play in the reversion of warfare back to a pre-Nuremberg situation whereby all such matters are once again 'acts of state' and beyond the law (Chamayou 2015).

The debate that this subject therefore engenders concerns the role liberal justice proceedings can continue to play in this fast-changing realm of political action. It will

hope to defend and vindicate the role such trials can play by exploring the dangers of foregoing them. The challenge that this argument faces is of course that of the increasing difficulty, and reluctance, that political actors and theories are having in making clear moral judgments surrounding conflicts, creating an atmosphere of fear and moral distance that easily gives way to the 'realism' of pre-Nuremberg style thought.

Arendt argues that to put someone on trial is inherently to take a risk, a risk that one might lose, fail to persuade, to accept that that person is a fellow human and shares some commonality with ourselves. The rise of drone warfare and the equally withdrawing political program that surrounds it is a direct negation of this ideal. It openly promotes itself as a means of establishing order without risk in military terms, and, as this paper shall argue, extends this risk-averseness to any form of political reckoning.

This is a particularly important debate to have as many of the conflicts and confrontations being dealt with in this fashion are best suited to a strong application of open justice, as they are most often direct results of the open wounds left by previous injustices.

The thesis thus addresses the subject of war crime trials as an element of political theory by testing central claims:

Can investigating the history and workings of a key example of its application in the 21st century, in this case the Saddam Hussein trial, tell us if it corresponds to either of the two influential theories on this subject, and if so can it tell us whether these theories still hold up?

If not, are we destined to return to a pre-Nuremberg consensus regarding the practice of international disputes?'

The thesis is structured to establish first the theoretical strengths and weaknesses, as well as the relationship between, the two central theories of international justice that it considers. These theories, Shklar's legalism and Arendt's critical approach to the Eichmann trial, are chosen because both revolve specifically around the practice of public liberal 'show' trials that were extremely influential in the 20th century, both in their legal field and in the realms of national politics, international relations and the general moral outlook of liberal democracies. Both too are in general agreement about the validity and necessity of the law but, as shall be explored, are fundamentally opposed concerning the application and importance of politics and laws interactions.

The first part of the paper will cover the theoretical debate within the defense of war crimes trials between a Shklarian and Arendtian approach, setting the frame of debate between both theorists seminal texts on the subject, Shklars' defense of the instrumentalization of law and Arendt's close account of the Eichmann trial,

This first chapter will be divided into sections that can describe the context of this debate and allow for a fair and relevant discussion of each side's merits. Thus it will begin with two chapters summarizing each theorists respective position on the subject, first Arendt's with full engagement of the Eichmann trial that was so crucial to her theory on the subject, then of Shklar's book 'Legalism' and a discussion of the key trials that that book addressed. It is imperative to spell out the overall theories gleaned from these occasions and to assess their durability, especially in light of opposing accounts contending that they wrongly assessed the character of the proceedings. It is felt however that regardless of the mistakes both made that their overall pictures remain valid and important outside of their immediate contexts. A section must be devoted to directly comparing both theories with regard to their general outlook on the role of liberal justice systems. A key point to cover will be the question of which of these two theorists has a better claim to be the 'realist' of the debate, and thus the more applicable in real life circumstances.

Having covered the theoretical basis of the subject, the thesis will thereon enact an applied, illustrative method. Thus the opening chapter to the second section must give a full description of the details and context to the Saddam Hussein trial as this shall be held up as a paradigmatic event in this thesis. Within this part it is necessary to treat the Saddam trial, so central is it to the main thesis, to the full inspection of both theories in its own right. Thus a section must be devoted to studying the trial, its successes and failures, from both theories' points of view: in part one we must ask – did the trial find justice? In part two – did it succeed in reconciling and uniting a sovereign state? – In part three - did it help to assert the liberal order? Finally one must summarize the trial and distinguish whether the successes or failures of it can be attributed to its Shklarian/Arendtian nature.

The aftermath of such a discussion will lead us on directly to chapter three of the thesis, the one that deals with the potential rise of the alternatives to liberal justice as a means of international politics. The first section of this must therefore consider the direct aftermath of the trial on Iraq as a political moment and its effect on the reputation of such proceedings in general. Such an investigation can help determine whether or not the success or failure of the trial can be said to have had a proper effect on either matter. If it can be argued that the contentious nature of the Saddam trial had a damaging effect on Iraqi nation-building, precisely the opposite effect to the Eichmann trial upon Israel, then it can be further argued that such tactics are indeed in decline or have been wrongly applied.

The next section then will argue that certain developments in the methods and aims of international conflicts have exacerbated this decline in justice-seeking and seen the return of power over justice as the key principle of international relations. Using Chamayou's Drone Theory, among others, it will argue that the high-minded aim of ending conflicts with open acts of justice, even if this can be seen merely as a form of power in itself, is being replaced as the norm by a more naked, extrajudicial aim of eliminating threats with as little engagement as possible, both militarily, politically and morally. An account must be made therefore studying which phenomena contributed to creating the other. It can be argued that the decline in justice as war

aim is not simply a neutral result of rising retributive technologies but that both signify the decline of future-orientated thinking that is so critical for the practice of justice, implying as it does a hope for stabilizing the future and properly addressing grievances (Beres 1998).

The final section will thus lead us into an examination of the real world situation we face today and ask the question of whether Justice-driven International relations remains prevalent. Gathering together the evidence of the preceding chapters it will summarize and judge whether war crimes trials still have the potential that either theorist wished them to have: Can they still be pedagogical? Can they truly bring a sense of justice or closure? Is it worth reinvigorating them as a strong cultural action or is the summary justice of the drone era unstoppable?

This thesis' conclusion will thus be a defense of this reinvigoration whilst arguing that legal theorists take on board the lessons of the past few years, that if highly public trials are seen as nothing more than glorified lynching, they will fail to have influence when put alongside methods of warfare that do the same job and with more efficiency and lack of responsibility, whilst if they desert any attempt to have political influence, they will not satisfy even the basic desire to find justice.

Section 1.2: Hannah Arendt and the Eichmann Precedent

By the time Hannah Arendt began covering the Eichmann trial in Jerusalem her philosophy regarding the nature of such regimes, the characters who represented them, and the way political philosophy could respond to them had been well established in previous works. Her attitude to national methods of dealing with such problems, especially with regard to the State of Israel, was more complex however, and her position on the nature of individuals that faced the court was equally subject to events. Both of these views would be greatly affected by her witnessing the trial.

The Eichmann case was in many ways similar to the multiple trials that had taken place since the end of World War II, reflecting the growing pattern of seeing

legitimate legal trials as a method of establishing historical records and the victory of certain moral and political codes over others. For this reason, fellow theorist Judith Shklar viewed the Eichmann trial as rather unimportant as a legal precedent, a mere continuation of the Nuremberg method (Shklar 2012).

To see Eichmann's trial as just another Nuremberg, or as a mere continuation of the multiple national trials of Nazi war criminals around Europe, ignores many elements of the proceedings and the individuals and events surrounding them that make the trial unique within both political and legal theory. It was these elements that would interest Arendt and make her experience so influential.

Adolf Eichmann had been a singular, if not especially notable figure within the Third Reich's state apparatus, his role being almost exclusively concerned with managing and directing the persecution and destruction of the Jews. More policeman than soldier, his middling position in the Nazi hierarchy had made him influential enough to be a prominent representative of the regime but just obscure enough to evade justice for fifteen years after the war (Walzer 1992).

Following the war Eichmann followed the example of many of his middling-level Nazi peers and sought refuge in anonymity in Argentina. Much of the subsequent political upheaval that would result from his abduction from that country, leading to a tougher policy of arresting Nazi war criminals, arose primarily out of a context in which such regimes, and for different reasons Germany itself, were unwilling to bring these figures to justice and in many cases welcomed them into states whose ideologies owed a lot to European fascism. As this paper will later reiterate, the political risk involved in kidnapping Eichmann therefore proved the case for considering long-term results. Whilst the breaking of Argentine sovereignty, abducting Eichmann from their territory, led to an immediate backlash against Israel, the later results, once the storm had been weathered and Eichmann's guilt fully exposed, would lead to a shift in opinion that made it much more pertinent for states to arrest/reject criminals (Arendt 2006).

Indeed, Eichmann's abduction from Argentina by Israeli Mossad agents was a singularly daring mission, one that involved considerably more effort, risk and legal argument than if they had simply assassinated him anonymously and fled the country. Such a policy, from an Arendtian perspective in this case, speaks volumes about the prevailing political priorities at the time, for which a relatively new and insecure state was prepared to go to greater risks to see justice carried out legally rather than extra-judicially. As we shall see however, Arendt and the Israeli political establishment had very different reasons for preferring this approach. The former saw it as the best way to establish justice, the latter wanted to achieve national political legitimacy via the processes of legal institutions. The question to be answered is which of these two ends should be the most important, and whether they can complement or at least coexist with one another (Arendt 2006).

Arendt, though not opposed to Israel's assertion of its political legitimacy, thought not. Her reaction to the methods and aims of Eichmann's trial in Jerusalem was rooted very much in her philosophy in which a pure liberal approach, one that prioritized the individual and ensured justice, required the focus of justice and historical readings to rest on individual responsibility, which would entail focusing on the individual defendant in a trial, rather than trying to read macro phenomena into the guilt or innocence of such individuals, as the trial would attempt to do in this case.

Moreover, Arendt was concerned by the essential finality rendered onto the judgment made in a legal setting for educative purposes. The way she saw it, and as the Israeli government intended it, the authority of a judges' assessment of Eichmann would make it harder for others to challenge the narrative created. When the prosecution lawyer at the trial claimed to be putting not just Eichmann but anti-Semitism itself on trial, he was quite deliberately putting a stamp of judgment on what should be counted as anti-Semitism, implying that the man in the dock could feasibly personify it (Arendt 2006). In order to achieve this, according to Arendt, he then had to twist Eichmann into a being that he wasn't, so that he could represent all manifestations of Nazism, the Holocaust, and centuries of anti-Semitism,

therefore reducing not just these complex phenomena, but the defendant himself into a tidy but false image.

Strict separation of political actions and philosophical truths was also imperative to her theory, implying that truth-orientated spheres, like trials or historical narratives, which do their best to establish facts, should not be mixed with the political sphere in which narratives are quite understandably manipulated and interpreted in order to encourage and establish certain future actions or outlooks (Arendt 1968). It is in defense of this theory that much of her account of the trial, later made into a book 'Eichmann in Jerusalem', was devoted, entailing an often-scathing criticism of the Israeli courts actions, which were designed from the beginning to gain political results through the use of the seemingly impartial and disinterested aesthetic of legal process.

'Eichmann in Jerusalem', adapted as it was from an original series of articles for the New Yorker, takes on the form of a courtroom report, in which the details of the trial proceedings are documented by Arendt, mixing a detailed account of the atmosphere of the process with her own assessment, which was mostly critical. Interwoven with this is an account of Eichmann's personal history, and the 'banality of Evil' that she saw in him (Arendt 2006, 252)

Outside of the legal proceedings, which Arendt believed should have stuck far more closely to the facts of the defendant's case, she was free to form political and sociological theories with which to judge Eichmann and the system in which he worked, with the aim of exposing a new form of criminal behaviour for the world to consider, that of an unthinking, or rather un-judging personality, who performs terrible actions not out of wild criminality or deviancy but out of the same, distorted, values which modern society prizes: self-preservation, diligence, malleability and obedience to authority for its own sake (Arendt 2006).

The relevance of this narrative comes to the fore with regard to how we should view war crimes trials politically, because in Arendt's view this important understanding was fatally undermined and avoided by the predominant narrative created by the

trial's heavily politicized aims. Arendt shows ambivalence to the Israeli state's handling of the trial. Her chief concern was that the trial would be used, and thus manipulated, to create a false, short-term narrative that served the interests of the nation-state over those of justice (Zertal 2007).

From the outset Arendt sees the mark of this element in the careful theatrics of the courtroom drama, and shows a durable disdain for it. For Arendt the stage-handling of the whole affair, with the court appearing like a theatre, an endless stream of witnesses telling emotional stories, often with no relevance to the legal matter at hand, even some hysterical suggestions from commentators that Eichmann should be presented in chains on television surrounded by his heroic captors, made a mockery of the justice being sought (Arendt 2006). Firstly it obscured the figure of Eichmann himself, using him to represent far larger phenomena, to the point that nobody, except Arendt it would seem, even recognized him for what he was, a remarkably unremarkable person. For Arendt, the absence of evidence for Eichmann's physical involvement in many of the accused incidents made this a disturbingly unjust way of carrying on a trial. In other cases, not as cut and dry as Eichmann's, there is an argument to be made that it sets a dangerous precedent.

For Arendt, this mixing of justice with history-making education is bad for justice and for history. As already stated, personifying the Holocaust and anti-Semitism in one individual, even one who was distorted, gives a deceptively definitive view of a complex issue. Moreover, it adds an element of closure to it that Arendt found troubling. In the very nature of playing a trial as if it is theatre is the image of a story arc, one that ends with a final act and a moral. The Holocaust was thus presented as culmination of Western anti-Jewish persecution, and Eichmann as its last great persecutor. The grand finale of this morality play came about, as described by Arendt, in the form of the most irrelevant witnesses of the trial, members of a Zionist organization, testifying as to their role in rescuing Jews from Europe, which was certainly true but also simplified, painting Zionism as their only salvation. As such, a chapter is imagined to be closed in the history of Jewish suffering, and

another one opened, in which it is the enemies of Israel in particular, such as Arab states, who are the sole heirs of Eichmann (Arendt 2006).

Arendt robustly challenged this narrative with her own description of events and actors involved, no less partisan than those of the court, but, lacking the perceived authority of a legal judgment, thus implying no final authority. Thus the theory advanced by Arendt appears to hold more merit precisely because it does not attempt to hide its aims behind the supposed moral authority and non-political nature of legality. Her own reading of Eichmann as a thoughtless man, and of the Holocaust as more attributable to modern society's rendering of certain humans as superfluous, was to her perfectly visible in observing the facts of the case and the figure of Eichmann himself, in spite of the trial's efforts to forge the opposite narrative. Thus it would seem, had the trial been carried out in a way that totally left politics and pedagogy out of the legal realm, this character would have been better exposed. It would not fit the narrative that Israel's state apparatus wanted to create, but instead the true nature of the crime and the defendant would have become clear. Arendt therefore is not opposed to the forming of narratives, but only to the manipulation of them towards preconceived ends.

One criticism of this mythologizing strongly revolves around the question of using a trial to legitimize a sovereign state. On the one hand Arendt concedes that the Jews are entitled to try Eichmann as their criminal, and that therefore Israel, as the representative of Jews, can fulfill this role. However, the requirements of the trial to legitimise a political entity also entails the delegitimation of legal rulings of anyone except this sovereign who can 'choose the exception' (Luban 2011, 9).

It seems fair to claim that this point of view encouraged some of the overt cynicism displayed in the trial towards diaspora Jews, almost agreeing with Eichmann's belief that they, lacking any political representative, had been outside of law. Indeed Arendt has been described as an 'intruder' into what had become an Israeli event, offering catharsis and assurance to the new state and its citizens (Zertal 2007, 1127). It is plausible that Arendt saw the lack of justice in the misdirected form of revenge

taken, whereby the victims were robbed of the chance to confront the real man who had wronged them, and were presented instead with an image more suited to state narratives. Once again, this unwelcome image was fostered by the active manipulation of the trial.

Thus while it was reasonably argued that Jewish lack of statehood had led to their underrepresentation at the international Nuremberg trials, the Eichmann trial did not create the necessary representation for opposite reasons. It focused in on a national level rather and sidelined the stateless whereas the Nuremberg trials overstepped them in its focus on grand concepts such as illegalizing war. That the trial helped in the nation-building exercise of Israel is generally accepted. It led to further recognition of the Jewish disaster and solidified Israel as a state that could carry out its own justice. The decision to put Eichmann on trial was consciously made to establish Israel as a place where recognizable justice was carried out as in all legitimate countries, (Bilsky 2004).

The position of Arendt then, drawn up in the wake of her experiences, is to provide us with a warning about this influential example of state-legitimacy, an openly political issue, being sought via legal means of dealing with past wrongs. Eichmann's trial was certainly not the first case of political ends being sought using legal means, but it was one of the first to do so in the name of reinforcing a moral historical narrative on a national level.

Section 1.3: Shklar and Legalism

Judith Shklar's work was more focused on legal rather than political philosophy but shared with Arendt a fundamental understanding that the practice of law is essentially political. Her central book 'Legalism' is conspicuously more theoretical and focused more squarely on legal philosophy than Arendt's, describing trials as case studies rather than journalistically. Thus she is far less concerned with the aesthetic details of the trials, focusing more on the legal arguments utilized. It is for this reason that Shklar views Eichmann's trial of lesser importance than Arendt does.

As she is more concerned with the legal theories applied, and the political implications of them, there is little for Shklar to find in this case. Eichmann's legal debates were highly similar in form to those of previous trials, centering on personal responsibility and conspiracy. Though Eichmann's case went deeper, attributing the moral rot to Nazi law as opposed to the superior orders of the Nuremberg defense, these were more or less different distances on the same route, a route Shklar is less interested in exploring than Arendt (Shklar 2012,).

Crucial to Shklar's assessment of the worth of legal practices, in the context of international politics, is their effect on political situations. Such trials, when public and influential, changed political landscapes drastically, far more often than they changed the way legal proceedings were carried out. Shklar is essentially a legal instrumentalist, in that she sees the law not as an end in itself but one that is made useful by achieving greater social and political ends, which then reflect back to strengthen the law (Moyn 2012).

Legalism cannot be seen as separate from its social setting then, and to deny this, to act as if the trials being carried out are ignoring the political situation surrounding them, or to pretend that any judge can be entirely impartial, is to simply fool oneself, and thus results in a justice that is no less compromised but also achieves less politically, having rid itself of any recognizable lessons.

But though she views legalism and the prioritizing of law as just one ideology amongst many, Shklar is no relativist. Her aim in 'Legalism' is to acknowledge this fact and to argue that if legalism is to be a mere ideology then at least one should proudly be an ideologue and see it as the best of them.

Shklar never implies that legalism in and of itself can come into being or form a society around it, as this would contradict her theory. She firmly argues that legalism is a political ideology whose role is to foster liberal politics, and can do so as long as liberalism is at the heart of it to begin with. Liberalism thus always must be prior to legalism if it is to be a positive force, and the legalist tendency works best in states

such as the Anglo-sphere democracies, which are generally tolerant and limited in terms of governance (Moyn 2012, Shklar 2012).

The case that Shklar covers most heavily in her book, the Nuremberg trial of leading Nazi war criminals, demonstrates best the enactment of her theory, though she criticized its objectives. Somewhat in line with Arendt, Shklar thought that using a limited legal space to teach grand lessons and establish vast narratives was indeed mistaken due to its sheer broadness. Rather than avoiding painting narratives, Shklar wished to see narratives painted that were possible to act upon and that demonstrated the benefits of a liberal status quo. Thus she was unimpressed by the Nuremberg prosecutions' attempt to criminalize aggressive war, as this could barely be enforced and was too vague to have any social impact on people hearing the verdict. Furthermore it opened the victor's up to the *tu quoque* charge, as none of them could be called guiltless of such acts. No political ends can therefore be achieved by punishing such vague concepts (Shklar 2012).

Thus Shklar focuses her pedagogical aims on convincing certain groups of the criminality of their regime. In the German case this involved undoing years of Nazi indoctrination. The lesson must be one that can be concretely demonstrated and relatively unambiguous. Thus Shklar focused, like Arendt, on the issue of Crimes against Humanity. But Arendt saw the limitation of Eichmann's trial, the fixing of blame squarely on a certain type of person and ideology as compromising, removing from it the ability to teach a larger lesson about modernity and the events. The litany of eyewitness accounts only served to solidify this experience, to make it unique and distinct from our reality. For Shklar on the other hand, such elements are in fact positive. Whilst she does not cover Eichmann's trial in detail, her assessment of the Nuremberg trial can allow us to speculate on her judgment of it. Given that Israel was hoping to use the trial as a lesson to the world, and especially to its own young population, it was perfectly fitting that Eichmann himself should act merely as a conduit for the reckoning with historical and political events (Zertal 2007). Whilst the actual pedagogical effects of the Nuremberg trial on Germans is disputed, less so is the effects of the Eichmann trial on international sympathy for Jewish suffering, or

on Israeli Jews, who benefitted from a sense of self-reliance and understanding of traumatic events which the trial displayed in great detail.

For Nuremberg, instead of the whimsical desire to eliminate war, Shklar thought one should instead focus on extraordinary crimes, ones unique to that system of government, in order to draw parallels between good and bad ones. Such crimes should be chosen that 'Boggle the mind' in that they would be otherwise unbelievable and create a lasting impact on social understanding and thus on political action (Shklar 2012, 169). The sensationalism of the Eichmann trial then, which so infuriated Arendt, would surely impress Shklar, turning as it did a stage of mere procedure into a political arena.

The key Shklarian criticism of the Jerusalem trial remains the lack of pedagogical potential. Like Arendt, her feelings were that the precise power of 'Crimes Against (all) Humanity' as a charge was that it acknowledged a universalizing potential, in her case the potential being to use such trials as a role model for future ones. By presenting the Eichmann trial as a closing page, and one that spoke only for Jews and their antagonists, it limited its potential impact (Shklar 2012).

Law and Politics: Compromising or Complementary?

But then of course one must ask, did not this inevitable limitation of the trial's impact result directly from Israeli attempts to locate it via politics? In this case it was the Israeli government's decision to guide the trial in such a way as to produce a lesson focused almost exclusively on Jewish identity. Why should we accept Shklar's claim that politics and law are complementary?

Shklar might parry by reminding us that political limitations are not imposed by the decisions made about the trial's conduct. As stated, they are inherent to its practice anyway, as the very process of justice in this sense is not possible without the fundamental ideologies of the society holding them. Applied to the case of Israel in 1961 then, it would be inconceivable for the trial to happen in a fully illiberal manner, or to be avoided entirely, because the society surrounding it was built upon

modern liberal values that included a respect for due process. By that same token however, it would be inconceivable that that society, built equally upon a bedrock of Jewish self-determination and the fresh memory of the Holocaust, would not contain a strong pedagogical urge focused on national legitimization and historical reckoning. To ask for one without the other would be incoherent, and we should be grateful for the latter phenomenon for making the former possible (Shklar 2012).

The real danger, Shklar warns, is the total dislocation of law from politics, which is in fact motivated by a desire to see law replace politics and the necessary compromises and human involvement it requires. As law and politics cannot ever truly be separated, this would only result in a false dichotomy. Pragmatic and debatable policy becomes indisputable law, and to be anti-liberal becomes anti-law.

Indeed, to deny laws' social and political grounding is to render it useless, because then the only option for it is to avoid politics entirely, rather than complement it. Shklar sees this phenomenon playing out in the use of natural law theories, particularly when trying Japanese war criminals after World War II. This application indicated for Shklar an attempt to unite the world within a system of naturally-grounded law, one of course that was rooted firmly in Western Christian tradition, to avoid the political tensions engendered by post-war occupation. The result was that the trials had no real meaning beyond their proceedings, and any political lesson was lost. Particularly in these cases, dealing with vastly different societies to the ones running the trials, the use of Natural Law implied a belief in an underlying knowledge of the law; one Shklar claimed did not exist in Japan, which was built on fundamentally different moral foundations, within which aggressive warfare was in fact a virtue. A liberal society like America had a duty to use the trial to educate the Japanese as they had the Germans, a duty they squandered (Shklar 2012).

What is needed to make that law effective is some actual ideology. In the face of an impotent law, the alternative becomes that of the grand evolutionary ideologies opposed to political liberalism for whom law is utterly irrelevant (Shklar 2012).

Normalizing Law versus Boggling Minds

From a Shklarian perspective, making war crime tribunals strictly universal is to make them susceptible to *tu quoque* rejoinders and the loss of any solid, applicable political measures. They must instead remain focused on pointing out the relationship between criminality and illiberal regimes, whilst displaying the advantage of liberal regimes, i.e. their adherence to legitimate legal process and stabilizing potential. The paradox for Shklar however is that such strict adherence to the rules and impartiality expected from a liberal state is unlikely to leave any impact on those watching the proceedings, implying as it does no opportunity for clear political messages.

Her answer to this is to argue that the benefits of liberal trials are best displayed when the characters and crimes tried by them are of such opposite character to the proceedings that they prove its excellence, in that the very description of them and their crimes displays to the people of their country how necessary it is to establish more liberal status quo. Far from being normalized by criminalization then, the crimes must be made to 'Boggle the mind' with their exceptional wrongness (Shklar 2012).

This 'Mind-Boggling' exercise can be found in many of the trials following World War II, and while one must concede Arendt's point that they obscured many of the realities of that conflict, they certainly illuminated very real and defining aspects as well. The focus on footage from the concentration camps at Nuremberg, and on largely unrelated but powerful witness testimony at Eichmann's trial have certainly cemented an image of Nazi Germany in public consciousness that goes far beyond the defendants (Shklar 2012).

The Eichmann testimony most certainly affected the Israeli audience, though it could be argued they were more disposed to sympathy in this case, and many others. Proof of this focus on mind-boggling facts in both cases could be found in the unofficial focus in both trials. In Eichmann's case the fact that more attention was paid to witnesses only vaguely related to the defendant showed how the proceedings were more interested in creating a strong narrative.

At Nuremberg it was telling that in spite of the prosecution's focus on aggressive war as the overarching crime, putting war leaders in greater focus than those who perpetrated the Holocaust, it was in fact the perpetrators of Crimes against Humanity who received the strongest indictments and sentences. As Arendt helpfully points out, army chiefs like Jodl and Keitel were found guilty of all charges leveled at them to receive the death penalty. Julius Streicher however was only found guilty on one charge, but that charge being Crimes against Humanity (CAH), in the form of his printing the viciously anti-Semitic 'Der Sturmer' newspaper, merited the death penalty. It was clear that despite the court's formal focus, CAH were considered the ultimate crimes (Arendt 2006, 258).

One criticism that the next chapter will deal with more directly however, was that it also was a crime which, if it would be effective in Shklar's reasoning, had to be unique to the regime. Thus Streicher hanged, but war criminals such as Admiral Doenitz and Albert Speer received lighter sentences. It can be argued that the familiarity of their actions with Allied practices spared them from the gallows, thus obscuring, at least until the Eichmann trial, the greater role played by types such as these in the genocidal war machine of the Nazis than any one like Streicher.¹

The main point however was to force moral introspection upon a people facing the vacuum of political displacement in defeat, something Shklar was sure could not be achieved in the banal, legalistic setting of a far-away process-devoted court. The point is to establish a new political order, but one that can survive self-doubt, in other words an active liberal system of government (Moyn 2012).

Having established Shklar's argument for an unavoidable and, if the politics are correct, positive relationship between law and political action, and having taken on board her assertion that this relationship requires extraordinary cases to be effective, we can compare her theory directly with that of Arendt with regard to the

¹ One could also call into question the idea that Streicher's condemnation avoided a *tu quoque* response. It has been argued that similarly vicious and dehumanizing propaganda against the Japanese race made the horrendously indiscriminate campaign against their civilian population more acceptable to Americans (Finkelstein 1998).

cases they worked upon, before we can apply both readings to an assessment of modern trials, specifically that of Saddam Hussein, to gauge which theory has been applied, and if so, to what positive or negative effects.

Section 1.4: Arendt Vs. Shklar. Clarifying Conceptual Arguments

It is useful to more clearly elaborate upon some theoretical differences regarding war crimes trials and their political implications in the theories of Arendt and Shklar.

Clarifying these meta-issues on a conceptual level, leaving aside the more idiosyncratic details of the cases each focused on in their key texts, better allows us to view them with respect to each other, viewing the deeper theoretical differences and similarities they held beyond personal circumstance. It also better amplifies the core issues and arguments within both theories in a way that demonstrates their relevance to more current cases.

Ends Beyond Mere Justice

As already noted, the appropriateness of a comparison between Arendt and Shklar on this subject rests upon their shared focus on the ends beyond mere justice. The fact that in both cases, Nuremberg and Jerusalem, the actual guilt and sentencing of the key defendants were more or less forgone conclusions denied both accounts much chance of tense courtroom drama and allowed the theorists instead to focus on the surrounding questions of decorum, politics and more philosophical/sociological interpretations of justice and accountability.

Arendt took little issue with the purely legal functioning of the trial she covered and instead focused, as fitted her philosophy of separating justice from politics, on the sociological and political environment surrounding the trial, which set it apart from those before it. Thus her work can be scathingly critical of the nature of the trial and the Israeli state conducting it whilst supporting the purely legal process and actions of capturing Eichmann.

Shklar on the other hand does not share this view of separation and thus her critique fully engages with the legal theory utilized. Thus Shklar assesses trials' success from the direct politicization involved in their proceedings and judgments. Whereas Arendt views the intrusion of politics into the courtroom as an immediate failing, Shklar reserves such judgment until she has heard what politics has to say within its walls (Shklar 2012).

Crucial to this disagreement is the question of whether one sees Justice as Arendt does, as a concept separate from the vastly different plane of political action, or as simply one desirable outcome of a trial amongst many, as Shklar does. It seems perfectly logical to follow Arendt's argument, as by definition a legal trial is a pursuit of justice, of establishing innocence or guilt, rather than secondary results. Why should Justice compromise with other considerations, such as the social demands of its circumstances as Shklar advocates? Indeed the actual pedagogical value of trials such as Nuremberg has been called into question, at least concerning the people whom Shklar thought it necessary to educate, the German people. Shklar might argue that this failure was due to the misdirection of the trial, its focus on grand concepts over more basic, applicable lessons. Nevertheless, she herself noted that the trial focused inadvertently on the uniquely horrifying crimes against humanity in Nazi Germany, so it should have had more effect (Moyn 2012).

Arendt's theory of justice is essentially about retribution, where Shklar's is about rehabilitation. Arendt, separating imperfect politics from perfect justice, is not interested in pushing Germans and Jews to get along, and recognizes in her book how the narcissistic self-pity of Eichmann was complemented by the aggrandizing proclamations of the prosecution and the sometimes hysterical tone of the witness testimony, aimed as it was at self-expression. Facts should be left to tell their own story. The most potent example of this conflict comes from Arendt's account when an Israeli writer/Holocaust Survivor was called to testify. His presentation, which may have been moving and appropriate in one of his novels, simply sounded bizarre in the witness stand of a court of law, and the whole affair ends farcically with him fainting after being asked by the judge to answer questions (Arendt 2006).

What of other political considerations then? Can Shklar's claim that trials remove political enemies, and thus avert non-judicial acts of revenge, be defended? Certainly such an aim would compromise the results, encouraging the court to place blame on a small, possibly misrepresented group to act as scapegoats. Such misrepresentation doubtless took place when Eichmann was imbued with the spirit of Nazism in his trial (Shklar 2012).

The knowledge that Nuremberg's pedagogical power was perhaps overrated undermines this claim. Furthermore, other events around that time can account for the transition to stability that are unrelated to the trial and indeed contradict its aims. According to Istvan Deak the supposed calmness of post-war transition is in fact a myth. Instead, all over Europe, including in the democratized Western countries, a general bloodletting took place on a vast scale with an aim similar to Shklar's legalism: destroying the defeated political enemy and imposing one's own power, specifically by punishing collaborators and anti-communists (Deak 1995).

That these events have not created political/legal change does strengthen Shklar's argument for a public and official form of justice in order to destroy one's enemies on an ideological level. The criminal and often ruthlessly politicized nature of these purges, designed as much to remove elements that could resist the new regimes, necessitated their secrecy and a general atmosphere of misremembering them and the past in general. A trial in contrast forced the facts to be brought out into the open, and whilst its legacy might have taken time to build, it has remained the decisive action with which we judge the post-war reconstruction.

Nevertheless, the fact does remain that Shklar cannot argue that the trials succeeded in saving the lives of innocents or in soothing the tensions between warring parties. Nor does the trial itself guarantee that the guilty will be punished, after all if it seeks to destroy the enemy then that will be who is the present threat rather than who was responsible in the past. Deak points out that many Nazis were in fact left untouched, happily serving the new regimes (Deak 1995).

The post-war process therefore seems to fall between two stools, achieving neither Shklar's rehabilitation nor Arendt's retribution. But seeing how the pedagogical aims failed, despite the best efforts of the court, it would seem that none of these extrajudicial considerations are entirely justified, and seeking justice for its own sake, proving inherently the moral superiority of the victors, would have been a reasonable alternative. And if Nuremberg achieved anything, it was the punishment of some who were undoubtedly guilty.

Contradictions: Victor's or Victim's Justice

Shklar's insistence on the education of the German people via the trial, and therefore the universal application of this technique, requires the end-goal of reinforcing a universal cosmopolitan law. The problem then with mixing the political and legal ends of a trial is that very often the notions of cosmopolitan law and national sovereignty are opposed to one another. It was this consideration, criticized by Shklar, that led the prosecutors to avoid any charges unconnected to the war itself, so as not to interfere with Germany's internal affairs (Shklar 2012).

The inauguration of cosmopolitan law at Nuremberg could have been a positive act, leaving no room for moral or legal relativism. But the vagueness entailed in this universalism was, according to Shklar, also what led to its lack of resonance with Germans. In the end it seems to Fine, in both Germany and Japan, where the attempt to apply universal law worked even less, it was not any such imposition of a law that helped rebuild the countries along liberal lines but the authoritarian imposition of a new political order by the occupying powers, undermining national sovereignty entirely (Fine 2000).

The Eichmann trial faced these contradictions even more sharply because the use of law as nation-building was never compromised by the occupation of another power. The whole affair was very much run by an independent Israeli authority. Not only did the overtly nationalistic elements of the trial, its aim to legitimize Israel as a state and representative of the Jewish people, clash with the opinions of universalist

observers like Arendt, and Karl Jaspers, but also with its own aim of putting anti-Semitism and the past on trial (Fine 2000).

The fact that both influential trials dealt with essentially similar cases, the trial and elimination of Nazism, but for different aims, one establishing international norms, the other asserting national sovereignty, creates a somewhat confused legacy from the great war crime trials of World War II. For those wishing to emulate them, which aspect is to be considered successful? After all, Shklar's assessment of the Eichmann trial as a Jewish affair appears dismissive and denies its ability to have greater effects on the world, but it also confirms Israel's ability to be sovereign, defining the law and enacting of due punishment (Shklar 2012)

Such limitations, designed to focus the power of a trial by avoiding lofty and unreachable ideals, could serve to concentrate the 'moral crisis' that is being forced by the confrontation of defendant and accuser. Certainly in the case of Eichmann it led to a great deal of international soul-searching and multiple arrests of fellow criminals (Arendt 2006). However, it potentially compromises this moral crisis by the narrowness required in order to bring to the fore the uniqueness of Jewish suffering, and in turn to justify Israel's necessity (Epstein 2014). Any universal lesson, any soul-searching was therefore restricted to those who questioned these ideas, and could be avoided by others.

Once again the two styles therefore seem to please no one if they attempt to create universal lessons and give closure to a specific set of people. Arendt's criticism of the Eichmann trial remains legitimate but it cannot be denied that it succeeded from the point of view of Jews whose main concern was their own historical reckoning. Arendt herself was not immune to its significance, acknowledging the need to defend oneself in such a way as to maximize the trait for which one has been attacked, in this case one's Jewishness. In terms of dealing with the past and providing an example of how to punish one's enemies more or less justly, Israel did succeed (Epstein 2014). Its future-orientation would be problematic however. While the Eichmann debate brought a level of catharsis to Israeli society, it came at the

cost of excluding Arab citizens, seen as outsiders and enemies in the narrative (Zertal 2007).

Creating Narratives

Arendt's objection to narrative-creation came precisely from its tendency to simplify and obscure reality in the name of a political or social end. Perhaps the largest conflict in terms of narrative creation lies in the choice between the aims of creating political harmony versus forcing a moral crisis. The latter option is primarily directed at the perpetrators of a crime and requires the opening of wounds with the aim of forcing recognition and a lesson to be learned. The former however, whilst often forcing recognition upon the perpetrator as well, requires a more delicate handling of the facts, placing them within a narrative that will end with a positive conclusion.

It was this distinction that drove the differing styles of the Nuremberg and Eichmann cases. At Nuremberg a strategy of focusing on documentary evidence ensured that emotional testimony and conjecture was kept to a minimum. The very logic of the trials was to contain the post-conflict vengeance urges and that had led to the Treaty of Versailles in 1919. Furthermore, the US government felt a need to justify its intervention to its own people, an objectively political motive (Chakravarti 2008, Shklar 2012). The logic of such a trial was therefore to minimize the presence of the judging parties, and with it the image of victor's justice, and to maximize the defendants' personalities and responsibilities, so as to lay national guilt on their shoulders and expose them fully as the enemy.

The Eichmann trial, by contrast, had no such imperative to justify its punishment of Eichmann to its own people! The aim became forcing a moral crisis upon the outside world, which had been largely indifferent and evasive until then, and to provide a cathartic experience for the Jewish victims, something many of them leapt at judging by the huge number of volunteers willing to testify in court (Arendt 2006). Other than a certain reconciliation with its own past, there was little political reconciliation aimed for in the Jerusalem trial. If anything, the shoring up of National legitimacy, displaying the necessity of an independent Jewish state, required a more agonistic

approach that set political communities apart from one another, and that evidenced the continued existence of danger, this time from the nation's Arab neighbors (Arendt 2006).

One could argue that had a more Arendtian model been followed, separating this political incentive from justice, then the more procedural forms of legitimization, displaying Israel's liberal justice system and ability to punish its offenders, would have shone out more clearly, not becoming bogged down in a more politically idiosyncratic national event that eluded outside comprehension.

Sonali Chakravarti, whilst disagreeing with Arendt's accusation that such elements were 'cheap sentimentality' (Arendt 2006, 251) and praising the Eichmann court style, actually cites as the perfected form of victim-centric justice the Truth Commissions of Post-Apartheid South Africa, in which such testimony was heard and grievances addressed but no convictions were found. As we shall see later on, this method has its drawbacks, but it actually coincides with Arendt's own suggestion of holding Eichmann's trial in Israel, only to then send him before an international body for actual sentencing, thus separating cold justice from the cathartic testimonials. Certainly the eventual record would have been clearer, and less compromised by political necessity, but it would have been unlikely to satisfy the need for self-determination of Israel, and its large Survivor population, whose chance to enact justice of their choosing would be removed to a higher power, as if the new state were irrelevant (Chakravarti 2008).

Politics as Extrajudicial

One of the key problems that made trials such as Eichmann's intellectually interesting for Arendt is that for all her belief in the necessity of separating politics and law, war crimes trials most often revolve around crimes which are so large and abominable that they, in her words, 'explode the limits of the law' (Arendt 1992, 54) entirely, making the very recourse to legal action appear futile and irrelevant when dealing with them. How exactly can a trial, with its strict definitions and protocols, and the limited charge of murder, and even the death penalty, possibly deal with the

act of attempting to exterminate an entire race of people as part of a plan to reshape humanity? Such an act was part of a grand ideology that necessarily saw itself as above and beyond the limits of law. A trial on its own, that refuses to engage with such a theory, cannot surely overwhelm and obliterate it.

Here Shklar's idea of viewing the enforcement of law as an ideological move presents a possible solution, as by challenging this opposing ideology through one of the mediums of liberal ideology, in this case a fair trial, one exposes its incompatibility with decent authority whilst reducing it to just one ideology amongst others, a losing one at that. Crimes once unutterable and incomprehensible are thus reduced in the dock to aberrations that can be confronted with our own, morally superior system. For Shklar, asserting this dominance through the judgment realm of law avoids the relativism of power politics.

Of course, such an advantage only remains as long as liberal justice can maintain its liberalism via illiberal means such as show trials, something we can by no means take for granted. If trials from Nuremberg to the present ICC have failed to shake off the image of victor's Justice, this may be precisely because their political considerations are unavoidably obvious. Even the seemingly neutral aspiration of smoothing over a new political landscape and reconciling people with it will be clearly resented by those who supported the old system and feel disadvantaged by the new one.

An Arendtian perspective that simply accepts that such things are inevitable seems therefore more desirable, as it feels less need to compromise for these ends. As she later argued, law will never successfully change the political landscape by itself; this requires actual social change, which often entails the existence of a liberal political system beforehand that allows such change to happen via the conflict of opinions (Arendt 1968). In retrospect then, the attempt to impose guilt and a respect for liberal justice on post-war Germans appears as futile as was the imposition of such measures on the Japanese. When change came, it did so thanks to political change, not legal displays.

The compromises found in the Eichmann case displayed fully through Arendt's account the limitations and contradictions in the political uses of War Crime trials. The greater success of this trial in its aims implies that if political objectives are to be considered in a trial of this kind, then ones that aim at asserting sovereignty and retribution are more desirable, if only because their more limited scope has better chance of success.

In the next section we shall see how Shklar and Arendt's visions of the uses of legalism have been enacted over the years following their publications. This thesis shall maintain that the trial of Saddam Hussein in Iraq stands as a critical case due to the fact that it contained the potential to be either one of the two trial types these theorists covered, an Eichmann trial or a Nuremberg, and in the end it held elements of both. We must explore which of these elements led to its failure. Does it confirm that overt political usage of law is destructive to it or that law should have been further pressed to political advantage?

Before we can make such judgments, we must find out how international law came to the point where such a trial could take place. Between Eichmann and Saddam the 20th century has seen a raft of legal actions of this kind, many with the same conflicting aims of finding closure, political purpose and vengeance through justice. Where and why have they succeeded or failed? Tracing their progress can teach us that they were building up from 1945 to a grand ideal age of law controlling the excesses of politics, but that the political reality they depended on is now eroding.

Chapter 2

Section 2.1: After Eichmann, Justice in the age of Balance of Power

The end of World War II presented a successful display of trial justice, and set an example of bringing vicious and aggressive regimes to account in a legal manner. Ironically it grew in the same context of a solidifying political stand-off between the great powers that would ensure that most conflicts and political struggles of the century would be handled in a non-judicial, politically belligerent and competitive way.

Unfortunately for Arendtians the two great powers facing each other and competing for the right to adjudicate over conflicts and the conception of justice were the same powers that had brought Nazi Germany down and placed its leaders in the dock. Having rejected the Nuremberg defendant's claims of what Robert Fine calls 'cynical realism' (Fine 2000, 299) in defense of their actions, these powers would themselves operate under this logic for the next half century in order to preserve the delicate status quo and their own power as much as possible.

The cynical realist school of thought that would dominate Cold War international relations would famously be epitomized in the mixture of paranoia and Realpolitik that would apply to politics and also the social and judicial realms. And naturally, this ideology, focusing as it does on tact, secrecy and compromise, does not lend itself well to the atmosphere of accountability and principle necessary to achieve Arendt's idea of justice, nor to the openness and ambition necessary for Shklar's pedagogy and reconciliation.

In context it is only fair to be perhaps somewhat forgiving of this mutual political order that emphasizes not rocking the boat. Almost any conflict, if maximized so as to bring international attention and justice, could have escalated quickly into nuclear war. The nuclear deterrent served essentially as a reminder that the conflict, wherever it surfaced in 'hot' proxy wars, was permanent, and had not reached the

end that is necessary for post-conflict reckonings to take place. The necessary right/wrong dichotomy, separating the criminal elements from a world-order that could hold them to account, did not exist in a large enough capacity to be effective. The crusading spirit that had driven the defeat of Nazism, and could have surfaced at any moment in the clash of Western/Communist ideology, had to be curtailed by a delicate political web (Shklar 2012)

Nevertheless, the idea of justice remained strong, at least in the Western imagination, and in the ideals of international politics. The attempts of soldiers and state officials to hide behind higher orders has, under the infamous title 'The Nuremberg Defense' become practically a dirty cliché in Western consciousness, and seen as the last resort of indefensible criminals.

Trials also continued, sometimes creating risks to the status quo, the Eichmann case in 1961 being a prime example. For a while it was in itself somewhat an act of Realpolitik, utilizing a system of justice to impose political aims, in this case Israel's legitimacy as representative of the Jewish people, it combined this with a non-political urge to seek out Nazi war criminals and bring them to justice regardless of the immediate political fall-out and with no respect for the national laws they hid behind. The alternatives, either leaving him alone or murdering him in secret, would have been equally inspired by realpolitik, and would have brought no seriously positive universalist consequences. The choice that was made was the riskier one, but held the greatest reward (Arendt 2006).

However, there was another aspect to the Eichmann trial that negated some of the political risk. The criminal it brought to trial was representative of a pre-Cold War regime and crime whose actions were condemned by both power blocs of the Cold War equally. Whilst many people ignored the reality of Nazi atrocities and were indifferent to the fate of its perpetrators, few influential parties dared voice open support for it anymore. This is perhaps unfair to the Israelis as they were of course facing their own political rivalries aside from the Washington/Moscow standoff. It remains true however that while Eichmann's trial may have been politically

contentious for a number of reasons, challenging Nazi ideology before its political supporters was not one of them. Post-Nuremberg, the wrongness of the Nazi cause had become standard understanding.

Indeed, the very portrayal of Eichmann's trial in Israel as a sort of curtain call to put on show anti-Semitism reflected a view within the country of the Holocaust as a great culmination of events, the desired conclusion being that the birth of Israel would put a stop to this (Elon 2006). A wider version of this understanding saw Nazism and World War II as a grand finale as well, ending an old decadent age and ushering in a new more hopeful one. It was therefore easier to put old Nazis on trial in its wake, to confirm as it were, the end of this cycle by condemning the past, than to enact the same principles of justice on present conflicts. Such simple analysis could even be jeopardized by the defendants themselves, such as when Klaus Barbie, former SS commander in Lyon, was brought to trial in France in 1983. Having brought in a German to be tried for crimes against French citizens, the French court found itself being reminded of its own atrocities committed in North Africa after the war, in counter-insurgency operations similar in style and ruthlessness to that carried out by Barbie (Fine 2000). The trial was a success in that Barbie was convicted, but in terms of coming to terms with the past, it seems the defendant succeeded in making a mockery of the trials intentions (Peterson 2007).

If we are to find real evidence of the trials of Nazi war criminals having a positive effect on international law it cannot be simply their ability to inspire the bringing to justice of others who were involved in the same crime. Arendt would want them to set universal values by which other such crimes could be judged and tried. Shklar would want to see the liberal justice and political system behind them, replicated throughout the world. In terms of achieving either of these goals, it is arguable that it was the collapse of the Cold War and the judicial stasis imposed by its political necessities that would spark a renewed interest in using such trials to settle disputes and bring justice. The big test then, before we judge the Saddam trial, is to see whether the spree of judicial actions that occurred during and after the collapse of this world order were helped or hindered by the victorious West's attempts to

promote liberal regimes in the wake of collapsed regional powers. In an odd sense, it is possible to see a replication of the victor's justice model that followed World War II in this. Something a Shklarian would accept, but an Arendtian criticize, is that many such trials have been implicitly about putting the old regimes and their political ideologies on trial, as well as the past itself, and confirming that those holding the trials, liberal regimes and their allies, are the future. How did international trials develop after Nuremberg, and why did they still leave room for national groups to feel like they needed alternative forms of justice?

International Bodies

The rise of international criminal legal bodies in the wake of Nuremberg appears fitting with the tone of Universalist optimism that followed the immediate success of an international trial. But in many ways, they also conformed to the more realist view of trying to order the world in such a way that individual smaller powers cannot act so independently as to upset the balance of power.

In its ambitious rebuilding project, carried out by several nations so as not to appear too self-serving, Nuremberg marked an end to the old tradition of Jus Post Bellum, as described by Gary Bass, that stated it was wrong to impose new regimes or to culturally alter a nation after victory, and that their sovereignty was to be respected (Bass 2004). In fairness the allies found themselves with little choice but to do such things as the regime they had fought was not only too abominable and aggressive to be left in power but had been destroyed to such an extent that for Germany to rebuild a functioning, stable government would have been almost impossible in the immediate aftermath of the war. Thus the national sovereignty of the conquered nation suffered a blow. Moreover, the international nature of the Nazi crimes made the possibility of simply leaving the trial as an internal domestic affair impossible. The course was therefore set to separate the criminals on trial from the national body they claimed to represent, allowing Germany to move on but also removing the punitive aspect of the Allied occupation. The trial of individuals, now stateless criminals, was the punishing act (Bass 2004). The occupation and political restructuring of Germany was a political, humanitarian matter. The lessons drawn

from this method would be that in future, especially when large powers had the means to impose international law, crimes against humanity would be seen as of universal interest, and those who perpetrated them would be outside the realm of political necessity. The victims of such crimes could appeal to the human race as a whole and their rights could be protected by those who were not their assigned state representatives (Fine 2000).

The destruction and chaos unleashed by the Third Reich, and its subsequent isolation as a political entity, can be said to have reinforced the idea that criminality, whether by governments or individuals, is inherently entwined with chaos and instability. The subsequent nuclear standoff gave further credence to this logic. A criminal regime was by definition a 'pariah', not only harming people but also placing the whole international order in danger (Fine 2000, 295). As civil wars become more and more impossible to contain, both materially and ideologically, the distinction between an internal national affair and an international crisis blurs considerably, making it appear more reasonable for outside bodies to both intervene on what they see as the side of right, and to pass judgment over those who they hold responsible (Scharf 1995).

This focus on prevention, on making sure a crime is not repeated or that its consequences do not spread, is profoundly Shklarian future-orientation. The problem of course is that if crimes are to be considered worthy of countering and prosecuting because of their ability to upset the international order, then the act of hunting down war criminals might easily be censured in this way too, as the search for justice, for Arendtian retribution, is equally capable of bringing about disharmony. Forcing people to acknowledge grievances and divisions is the point of such trials.

It seems then oxymoronic to see the global society both as something aimed at achieving justice and stability on a global scale. If the two are to work together (and be enforceable) there is an inevitable compromise in which some justice can be achieved, but only to the extent that it does not upset the balance of stability, and,

also inevitably, that those capable of enforcing the law must have some choice over who is and is not criminally dangerous. Moyn advises us to accept this compromise if we are to have any justice whatsoever. It makes no sense that an international court, which is capable of infringing on and thus changing the nature of national sovereignty, should act naively as to its political responsibilities (Moyn 2014). As for the claim that this global society is in fact unequal, and works in the interests of a greater power, the one capable of enforcing the laws, Shklar would doubtless reply in the affirmative. After all without such a compromise there would be no law at all, as no one could force states to abide by rules. It is better that the one doing the enforcing, the patron and power behind international legal bodies, should be a liberal power (Moyn 2014).

The problem of course is that those who come under fire from both the military and legal arsenals of the great international powers hardly see themselves as being justly treated. Moreover the sheer imbalance of power and distance involved in a global legal body serves only to exacerbate their feelings of powerlessness and injustice as they feel that their situations are too complex to be adjudicated over fairly by a faraway court (Black 2012). One of the most famous post war trials dealt with the Former Yugoslavian wars, conflicts that likewise arose from the instability of post-Communist Europe. Eager to restore order, but also to be seen as fair, the International Criminal Tribunal for the Former Yugoslavia (ICTY) walked an unsteady and fine line, which many claim it failed to toe. What can a closer examination of it, and a comparison to the Nuremberg precedent, tell us about international trials and their impact?

The trial of Yugoslav war criminals at The Hague was not strictly speaking victor's justice, nor can the ICTY be reduced to a NATO tool. The great power's role in judging the conflicts, like their role in fighting them, was hands-off and at the least made an appearance of neutrality. If this was the imposition of a new world order, and a new method of conflict resolution, it was in many ways deliberately avoided as an image.

Opponents of the ICTY, and of the ICC system in general, come from both sides of the argument, indicating once again that it pleases no one in the attempt to appear both effective and impartial. To the defendants and their political supporters, the vast majority of whom were Serbs, the trials did not exonerate NATO from the charges of power-play and self-interested involvement, but rather proved them to be an attempt to put the final stamp on their victory by vilifying the vanquished. Even from a neutral position, the finality of seemingly impartial justice does have an effect of defining the heroes and villains of a conflict, with the villains almost exclusively being the losers (Kampmark 2016).

NATO intervention had already been strongly criticized for its inability to appreciate the complex political situation in Former Yugoslavia, the Western Press having (in what would become a familiar trope) identified the Serbs and their actions with Nazism, their leaders turned into Hitlers, the other Yugoslavs into Poles and Jews and, presumably, NATO leaders taking on the mantles of Churchills and Roosevelts. Even dissident Serbs voiced concern at the West's seeming inability to judge the conflict on its own terms and instead reverting to World War II to understand it (Finkelstein 1998). For such critics the claim that NATO intervened in Yugoslavia with only a neutral desire to restore peace is ludicrous. Not only do they see in its actions an attempt to reshape the region along Western lines (something not necessarily problematic in a Shklarian sense) but in such a way as to make the resulting nations weaker and more amicable to outside power (Djurasovic 2016).

In a war in which all sides saw themselves as victims, the idea of putting war criminals on trial cannot in itself bring about closure and understanding. Having proceeded along a more Shklarian route of focusing largely on Serb crimes, few representatives of the other ethnic groups were ever convicted at the ICTY (Johnstone 2016) the court failed to press home its justification for this, i.e. by convincing the Serbs, as it had most of the world, that their crimes had been significantly worse than those of their opponents.

Whether one blames Western naiveté or self-interest, the problem is not unique to the handling of the Yugoslav trials. It has been pointed out that the ICC in general cannot escape the charges of bias or political expediency due to its affiliation with the UN, and specifically with the UN Security Council, which chooses the prosecutor (Scharf 1995). Its method of lessening the obvious problems this raises has consisted mostly of depriving the trials it holds of anything that could open them up to the charge of being show-trials. Thus the pageantry that Sylvester considers useful for creating a strong impression of justice is dispensed with, making the proceedings long, dry and boring (Sylvester 2006). He directly criticizes the ICTY for allowing Slobodan Milosevic, its most high-profile defendant, to speak freely and raise appeals as much as he liked, arguing that this not only gave the man a platform from which to preach his cause and disrupt proceedings, but also to delay justice to the point where the world simply lost interest.

Probably unintentionally, Milosevic succeeded in delaying judgment long enough for him to die of natural causes, robbing the court, and his victims, of closure. Had he lived however, it seems unlikely that his fate would have been any more politically fulfilling. Moyn points out how, in the case of the long and expensive ICC trials for the Rwandan genocide, the one verdict achieved, after 14 years, hardly brought any sense of closure or justice (Moyn 2014). If the limit of the law, the death penalty, is exploded by such crimes then such smaller sentences cannot hope to have any impact. Even a stronger sentence, such as that of Radovan Karadzic in 2016, does not seem to serve any purpose. A forty-year sentence hardly seems an appropriate response as legal retribution. Nor does it please anyone politically. Responses from either side of the media debate on the subject indicate that both sides had made up their minds long before as to the defendant's guilt. The slow trial proceedings revealed little that could shock anymore. The only shock came when the sentence was pronounced, stating that, having refused to share the world with others, Karadzic would be allowed to continue sharing it, from a foreign jail cell.

National Trials

It is hardly surprising then that post-conflict nations have followed Israel's example of eschewing international bodies as a bringer of justice and instead forming their own legal bodies to deal with such crimes.

The successors to the Eichmann precedent have utilized a variety of means to achieve similar results to that trial, such as to bring internal harmony through confrontation with past events whilst also asserting national sovereignty and political legitimacy for the accusing government. Key to such strategies was the expediency of creating closure via the seemingly risky strategy of airing grievances openly, focused on the form of certain individuals.

Prominent examples of these have, like the international trials, largely come around the end of the Cold War, and involved the condemnation of fallen and discredited regimes after a period of time in which the situation could stabilize somewhat, such as in the case of the trials of Khmer Rouge leaders in Cambodia.

As in the Eichmann precedent, these trials could take on the role of legitimization of the new order in these nations following the discord and illegitimacy of the indicted regimes. As such it made more sense to hold them at home where it would be easier for the local population to witness justice being done, and because it would make more sense for the criminals to be punished inside the state in which their victims lived (Beres 1998). This goes beyond merely asserting political sovereignty for a new elite (although it does not escape this charge) and for nations where huge amounts of the population were victims of the deposed regime, great emphasis has been placed upon the principle pioneered in Jerusalem in 1961 of placing the victims and their experiences in the foreground when designing these courts. This prerogative has an added advantage as in many such cases a lot of the responsible parties are beyond the reach of justice. Thus if giving the victims closure and exposing their suffering is paramount then national trials make more sense (Fine 2000).

Particularly in the case of the Rwandan Gacaca courts, based on the old tradition of people's courts, this style of justice allowed victims to represent themselves and see justice done in a way that they felt brought closure. The general terms of

international law are not so equipped to deal with the idiosyncrasies of such cultures and conflicts in this way, as demonstrated by Jewish frustration at Nuremberg and the catharsis of the Eichmann trial, and likewise for Rwandan frustration at the ICC compared to their home trials. As Arendt put it, 'if attacked as a Jew one must defend oneself as a Jew' (Epstein 2014, 904), which the Jewish state did in 1961. Similarly, Rwandans, and many others like them, would feel that true justice would come from confronting their past on their own terms, rather than submitting to a foreign body to bring justice. Unlike the international trials however, holding domestic trials invalidates the 'puppet' accusation made by defendants, and indeed both the Nuremberg defendants and Eichmann complained that they should be tried by their peers (Fine 2000, 300).

At the same time however, such trials, held in such close proximity to their crimes, have been accused of fueling the sense of disunity and grievance that was created by or even instigated the crimes that are under investigation. Many Rwandans for example felt that the Gacaca trials were so loosely controlled in terms of process and justice that they created a situation in which anyone could be dragged up and convicted, keeping old enmities alive as they were usually at the cost of the Hutus community. Nor can they claim to have ended the suffering by providing a legal alternative to revenge. Perhaps due to the shambolic nature of the justice carried out, and the small punishments inflicted, unlawful reprisals still occurred against fleeing Hutus, exacerbating the conflict by punishing indiscriminately and bringing further instability (Rettig 2008).

Gacaca remain open to the charge of having simplified the conflict in Rwanda but not it seems to the politically desirable end of bringing about closure via punishing a scapegoat. Whereas Eichmann's trial reopened the wounds of the Holocaust, it did so whilst also focusing on one individual who could be punished almost ritually in order to move on. It may not have been accurate but it was politically successful. The Rwandan courts however have, according to Max Rettig, failed in both senses, having simplified the occurrences but not to the extent that two communities can put the past behind them (Rettig 2008).

Just as the International Court is accused of protecting the current powers of the world, so local courts have been accused of solidifying the new political order (Epstein 2014). The Rwandan trials would fair no better in this respect, from top to bottom they have been accused of cementing new power hierarchies, whether it be governmental or local, used as they are to settle old scores and personal vendettas (Rettig 2008). Nevertheless, the alternative that they might face could be the example of the Leipzig trials mentioned in chapter 1, where an unchallenged political order that existed before the conflict simply protects its own and makes sure no justice is carried out (Sylvester 2006).

A key factor perhaps, in ensuring a better result from trials held closer to home on the terms of the affected community, is the exact opposite of that necessary for International trials, that being time enough for stability to return. Peterson argues that whilst Nuremberg's quick and final judgment following World War II inspired many people to wish to return to normality, it would take many years before the more Victim-centered and national-orientated Eichmann trial could become viable, because time had allowed for peace and therefore for people to confront the past more forcefully, which in turn inspired other, more reticent countries to seek justice as well. Using this example, and that of Argentina, where almost a generation passed before the criminals of the military Junta were held to account, Peterson argues for the need to await the social consensus and conditions before putting legal methods to direct use, an argument that can have some foundations in Arendt's own belief in the need for legal methods to have a grounding in social forces before action can be effective (Peterson 2007).

An interesting alternative that attempted to find a solution to these problems was the use of Truth Commissions in Post-Apartheid South Africa. Following years of abuses and oppression, and faced with entrenched hatreds that went far beyond one small collection of political perpetrators, the situation in South Africa when Apartheid fell was certainly dangerous enough to erupt into lawless reprisal. As a method of diffusing this and moving on, whilst also ensuring a sense of justice could

be reached, scholars such as Sonali Chakravarti have lauded the creation of Truth Commissions as ways of dealing with this. By allowing a focus on victim's testimony, as well encouraging dialogue between injured parties, these commissions appear to offer a system of both dialogue and closure, as they required utmost confrontation of the truth about what happened under the regime but without the threat of revenge or indictment against those who took part. Without punishments being dealt out, except to a few most egregious persons, it could not be claimed that a legally sanctioned reprisal was happening (Chakravarti 2008).

It would seem then that the key tenets of successful national trials could roughly be calculated as being that they are seen to bring justice and closure but not in such a way that merely affirms a new political elite, and that they illuminate the past without encouraging the continued divisions that are direct results of what occurred. Thus courage to confront the past is necessary, and a deep sense of stability that allows for a time period to pass in which a nation can consolidate. In a globalized they will be disadvantaged compared to International ones, in that they can be seen as irrelevant outside their immediate context and thus do not encourage the world to acknowledge the past actions. Some form of international support, simply perhaps in a basing in universally recognized standards of justice is necessary if they are to be effective.

We have seen then how both possible routes evolved over the 20th and beginnings of the 21st centuries, and how political situations within this time-period effected how they managed to bring justice or be politically relevant. We must see then, under the various conditions we have been investigating, such as political stability, justice, etc., the Saddam trial, which involved elements of both methods, was shaped by this political backdrop and whether or not it succeeded in any of these fields, perhaps to the detriment of other considerations.

Section 2.2: The Saddam Trial pt 1: Did it secure Justice?

From its conception Saddam Hussein's case would be an idiosyncratic mixture of the elements that had characterized the most famous international and national war crime trials. Like the Serbian leaders before him, his downfall would come at the hands of a confrontation between a belligerent anachronistic state and a new order. Yet like the Nazi leaders of Nuremberg he was also separated from the political question, implicated instead in a vast international conspiracy revolving around secretive networks and evil ideologies. After months on the run he was discovered hiding in rural Iraq, and immediately demanded the right to negotiate as President of Iraq. Instead he was taken into captivity as a POW, and then handed over to the Iraqi interim authorities.

Great political imperatives led to the decision that Saddam should be tried by an Iraqi court rather than an international one, taking into account the need to legitimize the new Iraqi government, and the coalition invasion, and to avoid the image of victor's justice. That this decision, and many other aspects of the court, was directed by American intervention, confounds any attempt to distinguish the trial as a purely national affair, whilst its composition of Iraqi personnel and focus on internal Iraqi crimes, despite the fact that the invasion had been motivated partially by suspicion of international crimes, meant it cannot be called an international trial either (Sceats 2005).

Like the Eichmann trial, the trial revolved largely around one iconic individual, in this case Saddam Hussein. He was not alone however, and shared the dock with other Baathist leaders from his regime. Rather than finding a general indictment against the regime's brutality and corruption, the trial focused on a single incident, one that could be concretely linked to Saddam, the leveling and massacre of the Shiite town of Dujail in 1982 in response to an assassination attempt (Sceats 2005). The tribunal subsequently found Saddam Hussein guilty of this crime, and plans were in store to extend the prosecutions, to cover other crimes he committed, such as the genocidal Al-Anfal campaign against the Iraqi Kurds (Peterson 2007), but these came to nothing. Instead Saddam was sentenced to death and hanged in 2006, in timing,

many believed, with the necessities of Iraqi and American elections (Sceats 2005). In the event, Saddam's execution, filmed on a grainy camera phone, would become a far greater media spectacle than any moment of his trial. Millions in the West and the Middle East would watch it. Such events are themselves highly risky, which is one of the reasons why they are performed discretely. The Nuremberg executions were notoriously messy; the Eichmann one is noted by Arendt for the dignity of the proceedings (Arendt 2006). The Saddam execution was a macabre farce, with many commentators noting that the only person to show dignity was the old dictator himself. Saddam Hussein dropped to his death amid cries of 'Muqtada' from an audience hailing the new Shiite political force in Iraq, one violently opposed to the US installed regime (Bazzi 2016). Later we shall discuss how this managed to undermine much of the work done by the trial to legitimize the new government.

Having explained the background and events of the trial we must assess whether or not it was a success in itself, to better understand whether subsequent developments, both political ones in Iraq and legal ones in terms of how war criminals are handled, can be explained through, or in spite of the trial itself. First of all then, did it achieve the basic Arendtian requirement of securing justice?

This condition gets off to a bad start due to the confusion about what Saddam was actually, or should actually be, on trial for. Like many cases before, the evidence against Saddam was overwhelming to the point of foregone conclusions. Yet apart from direct incidents it was problematic to confront the wide expanse of his criminality, exploding as it did the limits of the law. Plans were made for wider trials covering larger events but no agreement could be found on whether it would be politically wise or legally feasible to try Saddam for general crimes such as aggression (especially after Iraq had been invaded). The complex nature of the events themselves also made a clear conviction of genocide difficult (Sceats 2005). Moreover, in terms of public continuity there is obvious dissonance regarding the judgment upon Saddam Hussein. The Coalition had invaded Iraq and delegitimized its government on the basis of its supporting terrorist organizations like Al-Qaeda and creating weapons of mass destruction (WMD). These were the crimes that, in

the minds of many Westerners, Saddam was guilty of without a shadow of a doubt. Yet the crime he was tried for did not match up with this, in fact it took place at a time when Saddam was on far friendlier terms with the West. Can it be called true justice, when for many in the West Saddam's crime was not the one he was tried for, and in fact in all likelihood he was not guilty of? The Eichmann and Nuremberg trial faced similar dissonance regarding what the exact crimes were that that they were trying to judge, but not nearly to the same extent (Arendt 2006).

The concentration of the trial on a relatively minor incident served both political and judicial purposes. In the Dujail case it was indeed easier to prove direct involvement, and at the same time it avoided serious questions about wider conspiracies that could have embarrassed the court and its international backers. Had, for example, the court ever progressed onto issues such as Saddam's military ventures outside Iraq, which included using chemical warfare against the Iranians, he would have been better placed to mimic Klaus Barbie by counter-accusing Western nations of complicity and hypocrisy. The case of Dujail was a good one in that Saddam could plead neither higher orders, nor the ignorance sometimes accorded to distant political leaders when faced with the crimes of their militaries (Parks 1995). By avoiding such difficult issues however, justice would be stunted as well. The vastly criminal nature of Saddam's regime could not be fully demonstrated by minimizing the charge against him to avoid embarrassing his enemies. Whereas there is great merit in using minor, provable cases to display the nature of a regime, by imagining them magnified and repeated by it, this style can also work the other way, distorting that image (Fine 2000). Arendt decried the attempts of the Israeli court to prove small incidences of personal cruelty by Eichmann not only because they were often impossible to prove but because in doing so they mystified the nature of the man and his crimes, creating a false, misleading image. Having already achieved such a mystification of Saddam via a media campaign, it could be argued that his trial similarly failed to confront a clear image of the man and his regime.

Some of this obfuscation could be argued to come from the fact that the court was, as Douglas Sylvester put it 'Engaging Evil', something that is difficult to do within the

formal confines of the law, hence Sylvester's insistence that it may as well simply set aside the pretense of process and magnify the pageant (Sylvester 2006, 1).

Eichmann's trial faced this dilemma in that, while the man himself failed to live up to most expectations, the memory of the Holocaust, and its perpetrators were sufficiently seared into the minds of the audience that there was little chance of unblemished facts being assessed. Similar circumstances saturated the Saddam trial, only this time the images were more erroneous, such as his association with Al-Qaeda terrorism. The guilt in both cases was indisputable, but whether it was the whole truth could not be fully reckoned with.

Avoiding looking like overt imperialism had also been part of the reasoning for letting the trial happen in Iraq, and great pains would be taken to maintain this image, something which would lead to greater dissonance as no amount of nation-building trappings could gloss over the fact of coalition invasion and occupation, let alone the hand Western officials were playing in organizing the trial itself. Whilst an Arendtian might point out that imposing a new regime and liberal trial system was at odds with finding proper justice, a counterargument might be that leaving the case to be handled of a more traditional Iraqi style would simply have invoked a lynching of Saddam and his followers. In this case then, an imposition of a liberal Western solution, and finding the best possible justice would be complementary. Part and parcel of this liberal tradition is the concept, alien to the likes of Saddam Hussein, as it was to the leaders of pre-Nuremberg Europe, that acts of state are not in fact immune to international law. It would seem then, that if justice was truly to be done, whether in Iraq or elsewhere, a political confrontation, one between those who considered the internal affairs of a nation to be its own business and those who wish to uphold international standards, was inevitable. In a more nuanced approach however, it could be argued that whether one viewed Saddam's crime as an international concern, one that assaulted humanity in general, the justice reached for him would be affected by this. (Sceats 2005).

In a climate of international concern the question of whether the court was impartial enough to achieve justice becomes moot. It would seem however, that a foreign

judge would not have faced the same dilemmas that Iraqi ones did, no matter how much one accepts the greater capacity for victim empathy that modern media affords us. Whilst holding the trial in an Iraqi setting may have avoided the charge of victor's justice, it is hard to see how the subsequent victim's justice would be any less partial. Efforts were made to keep judges off the bench whose background would have made them biased against the defendants, but this could not have been a watertight measure considering the magnitude of their crimes (Sceats 2005). Even if the judges were as neutral as possible, the toxic atmosphere of post-invasion Iraq would have made their jobs considerably harder. Trial members were constantly under threat from both pro and anti Saddam militants throughout its duration, encouraging perhaps a desire to rush proceedings, or at the very least an inability to assess the facts in and of themselves (Peterson 2007).

Most problematic about such trials is that in a sense they manage to be both victor and victim's justice. The Iraqi court trying Saddam represented not only members of the population persecuted and oppressed by him but also the triumphant new political state system that had replaced him (Cockburn 2015a). Many national trials following serious internal atrocities face this problem. The Eichmann trial was certainly a victim's trial, centered on the suffering of the Shoah, but it was run through with triumphalism, emphasizing the power of Jewish survival by punishing the Jewish people's greatest enemy. In both cases this triumphalism was toned down in order to preserve legitimacy but the proceedings were undeniably tarnished by it. Shklar would argue that none of this would be prevented by holding the trial in a foreign, neutral manner, and the only result would be less impact. Foreign judges, especially in the modern globalized world, would be no less biased against Saddam and feel no less empathy for his victims. Detailed evidence of his actions, in the form of testimony and graphic video evidence, would be available to them and thus capable of moving them no less than it would have done in 1946 or 1961, when witness testimony was considered contentious precisely because it allowed greater, more emotive detail than other evidence.

Whilst the foreign judge may be affected by such evidence, and biased innately against tyrants, they would not suffer the same political expediency guaranteed to affect their decision either way. From a justice perspective, the long drawn out cases at The Hague are infinitely preferable to the rushed, chaotic Iraqi drama. Little argument can be made, other than citing the inherent justice of a sovereign state trying its own criminals, that the National court would have been more just than the international one. Whatever pressures one sees placed upon the ICC to conform to Western interests, vastly greater pressure was upon the court in Iraq, both from Western interests and internal Iraqi ones, including the lawless sections of society pressuring the court from both sides. In this case then perhaps Arendt's somewhat Byzantine solution of holding a significant symbolic trial inside the country and then deferring the defendant to the International community for sentencing, would have been better suited (Arendt 2006). Such an arrangement might have allowed Iraq to face up to its past without compromising the legal verdict. However, this also appears unfeasible in both circumstances. Nothing would have looked more shambolic than holding the entire ceremony only to have to defer judgment, and both the new Israeli and Iraqi courts would have looked diminished in stature, calling into question the entire enterprise of setting up independent judiciaries.

As the clear problem facing the court was how to appear politically legitimate, find a suitable verdict and be openly just, there was no ideal solution except to look to the fact that the successful trials of the Nazis took place under conditions of peace. Nuremberg could be forcefully imposed due to total Allied victory, whilst Eichmann's trial was sufficiently late for Israel to have established itself as an entity. We can conceivably link the ability to hold a more or less orderly and internationally recognized trial with the stability of the surrounding political situation, either by having established legitimate and strong state authority or by allowing sufficient time to pass that tensions have lowered. In the case of Iraq, neither was achieved. Over the next chapters we shall see how the trial failed to establish political legitimacy, and one of the factors was that justice was rushed because the governing powers wished to use law, or the display of law, to affect social currents, forgetting

that while law can complement these currents it cannot impose them from amid a vacuum, which is what political Iraq had become around the Baghdad courtroom.

The Saddam trial managed to take what should be a legally riskless position, trying someone for crimes of which their guilt is a forgone conclusion, and still managed to let the risks associated with the trial colour its image of justice (Sylvester 2006).

Elements essential to due process, such as allowing the defendant to speak, could not be curtailed due to outside pressure to appear legitimate, yet increased the risk emanating from the Iraqi audience who might be persuaded by his statements. A less risky political situation outside the court would have allowed for more risk being taken within it, with the greater prize being a more thorough display of Saddam's toxicity (Peterson 2007).

Like the previous trials referred to here, the Saddam trial did justice in that it punished an unquestionable criminal, but like them too it did so in a manner which strictly speaking cannot be called just. As we shall see however, where those trials compromised strict justice for political gain and social benefits, the compromise made in this trial was one that benefited none of these. As we shall see becoming a growing trend, one which leads away from Trials as a legitimate method of ending conflicts, the political circumstances that tarnished the justice of the Saddam trial were not ideological as in the earlier cases, but of necessity, the lack of control that required an undermining of the legal action clearly against the wishes of the court as opposed to due to their will. The failures symbolized an order losing faith in its own legitimacy and responding with increasing resort to extremity and covertness, neither of which make good legal precedents (Walzer 2007).

Section 2.3: The Saddam Trial pt 2: Did/Could it legitimize a Sovereign Iraq?

Saddam was gifted portentous final words by the chaos of his execution. Assured by his taunting Shiite executioners that he would go to hell, Saddam replied 'To the Hell that is Iraq?' (Fisk 2009, 6).

Like Israel had been around Eichmann, so Iraq can be said to have been more or less united in hatred of Saddam, regardless of sectarian lines, and like Israel there were those who nevertheless objected to his execution. The depths of these divisions and their root causes were however far deeper and more violent, and appear to have been vastly exacerbated by the execution footage (Bazzi 2015). As will be discussed, this video contributed massively to the unraveling of a united Iraq, but first it must be assessed whether this undermined any gains made during the trial toward uniting Iraq and asserting its sovereignty, or if the whole process had been doomed from the start. In other words, could Saddam Hussein's trial fulfill the purpose of national trials to legitimize sovereign states in the face of unfortunate odds, or was it part of the problem?

A Victor's Court?

Regardless of hindsight, it was indeed the will of the Iraqi people that Saddam should be tried in Iraq, and general consensus also indicates that the trial was intended to act as a nation-building exercise, as reported by Leona Bilsky, who directly compares it to the Eichmann trial in this respect (Bilsky 2004). Naturally one has to be skeptical in retrospect, given the many blunders and miscalculations the American governors made in assessing Iraqi popular mood. Experienced on-the-ground reporters such as Patrick Cockburn remain highly doubtful of claims that average Iraqis cared much about Saddam's fate once he was out of power (Cockburn 2016).

It is worth noting however that the same could indeed have been said of many Israelis in 1961. Whilst Eichmann and all he represented was thoroughly despised by the state's Jewish citizens, a disconnect of a different kind was noted, in which the memory of the Holocaust amongst citizens who were survivors rubbed uneasily with those who were not and wished to define their state and themselves differently. The Holocaust was thus something of a divisive issue, separating those who had suffered it from the original pioneers of Israel who wanted a more positive political program and, in some cases, to forget their own inability to intervene. Ben-Gurion's desire to educate Israeli youth and non-European Jews about the Holocaust was motivated by this lack of communication between generations suffering serious disconnection

(Arendt 2006). The power of this decision to educate the nation's youth in this way, combined with other means of improving their future, can be seen perhaps by judging the demographics of Iraqis who subsequently rejected the new state entirely. The average Islamic State (IS) foot soldiers, as reported in *The Nation* magazine, are Sunni Iraqis who grew up during the post-Saddam occupation, with little memory of the Baathist regime. Their experience of modern Iraq is one of sectarian victimization and disenfranchisement of their community. Little wonder then that Saddam's defiant last moments might strike a chord with them (Wilson 2015).

The Jerusalem trial had been the final great political act of a man who had well established himself as the architect of the Israeli state. It was therefore fittingly run in similar fashion to Ben-Gurion's political style; heavily planned to the point of authoritarianism (Zertal 2007). The audience he was addressing was made up of invested Israeli citizens happy to see their state asserted and its enemy punished, as well as young and more foreign Jews. Any objectors on political grounds were not substantially present within the country, or politically important without it. Crucially, whatever Israelis felt about Ben-Gurion's politics, he was unarguably representative of them, as a founding father. In comparison, the political machinations surrounding the Saddam trial were anything but united. At every level the trial was politically controlled by and in the interests of the occupying coalition and an Iraqi political elite, which had been and remained hugely disconnected from the realities in Iraqi society (Cockburn 2016).

Possibly because of their similar history of being subjected to outside forces, the Iraqis shared the Israeli desire for self-determination. This included the inherent right to try their former oppressors. Even more strongly than the Israelis, Iraqis had reason to feel that foreign handling of Saddam would be just another subjection of their post-colonial country to the World powers (Shklar 2012). It was therefore a major thorn in the side of any such plan that the origins of the political state within which this action took place was one not only of foreign intervention and control but at the hands of a power whose interests had been and remained opposed to these aims. The US behind-the-scenes work, given its past contradictory relationship with

the Baathist regime did much to blur the necessarily clear lines between the victor/oppressor relation of the court which Arendt notes was so important to the political success of the Eichmann trial (Arendt 2006).

In post-invasion Iraq real power lay with the US occupying force and no amount of political spin appears to have been strong enough to convince the Iraqi public otherwise. It would therefore appear to have been wiser, if one was to respect their wish to control the trial, to avoid fixing political significance to it. If law is to be seen as an assertion of sovereignty, the sovereign being in Shklar's words 'he who says what is law' (Shklar 2012, 52) then to hold the trial in such a manner was to assert the sovereignty of the US government over Iraq, or at least that of a new regime that was in all other respects entirely reliant on the US for its security and legitimacy (Cockburn 2016). Were one to make comparisons to the Nuremberg trials of course, one could note that the control of the court by occupying powers is not in and of itself detrimental to its ability to find a result beneficial to national progress. Criticized for its cost to Allied taxpayers and its general imposition on Germans, it took many years for Nuremberg to become retrospectively seen as beneficial to Germany's future.

A key difference however was that whilst Nuremberg undoubtedly had elements geared towards Allied benefit, its cost to their citizens was not matched by the gains they or their governments made from it. Both trials were aimed at persuading Americans of the justness of the cause of going to war, but the other Allies in World War II would have been just as satisfied without the often irksome procedure of due process (Shklar 2012). The long-term nature of their aims went far beyond the political desires of a few politicians and this is arguably what gave the trial its enduring legacy. The trial of Saddam was, by comparison, far more limited and its subjection to American short-term interests far more noticeable. Many suspected that the trial George bush hailed as a 'major achievement for a young democracy' (Peterson 2007, 258) had much more to do with boosting the President's own chances in upcoming midterm elections, even having the date of Saddam's death sentencing moved to come just before the election date (Cockburn 2016).

The short-termism and opportunism of the Saddam trial was sadly reflective of the entire political project surrounding it. Bass criticizes the very idea of imposing puppet regimes and reconstruction on vanquished enemy nations, noting that Churchill had blamed the weakness of Germany's Weimer Republic on its image as an enemy imposed edifice. Briefly, he also offers the reasons for the success of the equally enemy-imposed governments of post-Nazi Germany by warning that political reconstruction requires the utter destruction of total war (Bass 2004). Materially speaking, such destruction was indeed imposed on Iraq, mostly at the hands of secondary forces such as economic disruption and internal ferment. Missing however was the political revolution that had swept Germany. Power exchanged hands but grievances remained. Of equal importance was the attitude of those supposedly being reprimanded via the imposition of justice. Having promised that the war was not against Iraqis, and having hardly fought any Iraqis (most deserted rather than fight for Saddam) the new regime could not connect to the people whom it might otherwise hope to educate or acclimatize to the new order (Cockburn 2015a). Few Iraqis sympathized with Saddam, and equally few with the new government punishing him. With so little Iraqi investment it was doomed to be a sideshow in their internal politics. For people outside Iraq, order could, in Louis Renes Beres term be 'restore[d]... in the soul' (Beres 1998, 671) through a trial that seemed to right wrongs. Iraqis however were experiencing nothing but disorder, in body far more than soul.

The instability of life outside the courtroom contributed heavily to the lack of impact in Iraq. Western audiences had the luxury of viewing the trial as a natural continuum of the entire campaign, one they could view safely: Saddam was a criminal, now he is punished. For Iraqis however, a natural dissonance arose surrounding the legacy of Saddam and his role in their political landscape: Saddam was an oppressor, now he is tried by the new oppressors. For Israelis in 1961, Eichmann's trial was essentially in keeping with the narrative of resistance to outside assault (Arendt 2006). Being a fully Israeli affair, that trial could ignore difficult facts such as the question of Jewish collaboration and, much to Arendt's chagrin, paint an alternative narrative. In Iraq

however, with coalition troops still holding the nation together, no such pretenses could be sustained. If law was, as Shklar accused, being utilized as an alternative to governing, then in this case it was a literal exchange. Iraqis were given the privilege of enacting law, but Americans governed (Shklar 2012)

In a trial that was aimed essentially at assuaging Western fears little room could be made for Iraqi long-term political needs. It was a strange victor's court, one that didn't want to be seen as such whilst at the same time trying to convince the World of the power of its prosecutors. The trial was politicized, but to the wrong ends. By painting Saddam as the ultimate anti-Western demon, little could be done to persuade Iraqis of the importance of punishing him, not when most of them associated the current chaos with the West (Peterson 2007).

Effects of/on Sectarianism

Amid an increasingly sectarian breakdown in post-invasion Iraq the Saddam trial could act as a unifying element, no matter how small. Though seemingly futile in hindsight, there were aspects of the trial which, had they been handled differently, could have contributed to lessening rather than intensifying the divisive sectarian nature of the political settlement in Iraq. It is also difficult to overemphasize how much the subsequent execution of Saddam undermined any such gains the trial may have made. It shall be argued here that this resulted not just from the poor policy judgments of the Iraqi government, but from the new nature of public reception of post-conflict judgment within which spectacle overrides process, inhibiting the influence of controlled tribunals.

The use of a trial centered on a figure like Saddam who was detested practically universally amongst Iraqis, regardless of sect or ethnicity, could have acted as a catalyst for finding common ground and a sense of shared achievement. This could emulate the success of the joint handling of the Nuremberg trials by the otherwise distrustful Allies. The added difficulty of course in this case was that Saddam, unlike the Nazis at Nuremberg, had represented one of the groups that was now charged with finding political settlement in Iraq, the Sunni community. A major problem for

the reunification of Iraq was the fact that this community was viewed by the others as the long-term ruling elite and oppressor, of which Saddam was only a symptom (Cockburn 2016).

It is here then that a Shklarian dynamic could have been exploited to a much greater degree. In his defense of Adolf Eichmann, the German lawyer Dr. Servatius argued that his client was merely a 'scapegoat' burdened with the sins of all anti-Semites and Germans (Arendt 2006, 247). In a sense of course he was correct, and had the trial been more to Arendt's liking this fact would have weighed with the court. But in a trial so openly aimed at exposing greater truths via the defendant, his statement had little impact. Moreover, he was also wrong in his definition, as a scapegoat is traditionally one upon whom the sins of the many are burdened in order to relieve them of guilt, whereas Eichmann was quite the opposite, a vessel through which the sins of the many were to be brought out into the open and confronted. In the Israeli court this was not problematic, in fact it was beneficial to the aim of asserting Jewish independence and holding non-Jews to account.

The aim of the Saddam trial by comparison was not to draw out a large community's guilt through one person, but to reconcile multiple communities. An utterly victim-centric trial would only have deepened the rift in society that needed repair (Peterson 2007). In this context there would have been great merit to actually fulfilling Servatius' claim and making Saddam a definitive scapegoat into which the many divided Iraqis could pour their guilt and start afresh. Kurdish and Shia hatred for Sunni, and the returned distrust and feelings of betrayal could have been assuaged if more had been made of just how unrepresentative the Baathist regime had been of Sunni in general. It would not have been a perfect solution. No amount of spin could escape the fact that Sunni had fared better under his regime than the others, but this too had been a minority. Even if it were small however, the trial could have made greater efforts to make this clear, by focusing for instance on crimes Saddam committed against his own sect, or preferably acts of brutality that had been less conspicuously sectarian than his massacre of a Shia town. Little justice would have been lost as there were no shortages of cases in which Saddam had

violated members of every Iraqi group. As sectarian as his regime had been, it was also perfectly possible to interpret it alternatively, for Baathist Iraq could not be reduced to a state in which Sunni thrived and all others suffered. The arbitrary brutality of his regime was testimony to the limitations of its support base (Cockburn 2016).

Alternatively, and perhaps preferably, as the demon of sectarianism had to be addressed one way or another, there could have been merit in utilizing the trial to highlight the sectarian nature of Saddam's regime, and therefore to discredit utterly any who attempted to use this tactic as policy (Dreyfuss 2006). By showing how the hated dictator had been a master of divide and rule, a greater case could have been made for unity. Saddam's rule could have been made an example of how divisive methods are the hallmark of brutal, unrepresentative regimes. Sadly, the principle of division was at that very moment being applied by the new occupying power, which depended on Kurdish support (gained with the promise of autonomy) and the rule of favoured Sunni politicians.

Such measures would however have required those responsible for the trial to have an intelligent understanding of Iraqi society, or at least enough humility to defer to local opinion. The evidence suggests that this was distinctly lacking in the Allied administration running it (Cockburn 2016). Moreover, in lieu of total control over the political situation in Iraq the ruling power had to make what Shklar defines as an appeal to the lowest common denominator in order to keep some semblance of control (Shklar 2012). Power, which is required to make law, is after all not simply a monopoly of violence, which the coalition and Iraqi government could not even lay claim to anyway (Shklar 2012, Peterson 2007). If law is a poor substitute for governing then this is partially because without the ability to govern law becomes toothless, and has to submit to the whims of power. Thus a trial which should by all rights have been an attempt to prevent state fragmentation ended up becoming just another part of the problem. The attempt to do by law what could not be done by politics only served to drag Iraqi law into the cesspit into which Iraqi politics was sliding (Arendt 1972)

The theoretical background to this crisis goes beyond Iraqi social division. It also calls into question the basic disagreement of Shklar and Arendt; whether or not imposition of law can have beneficial effects on people's moral and social make-up. It is difficult to judge fairly given the extreme circumstances surrounding the courtroom, but if one considers that the execution of Saddam, following a trial that many perceived as being sectarian and retributive in nature, then it is possible to claim that the fate of Saddam, as approved of by the new rules of Iraq, thereby validated the new *modus operandi* of Iraqi political actors, whereby sectarian tit-for-tat attacks predominated. These methods may have already been inevitable, but in its poor handling of the case, the regime proved that it too was not above them, and thus could present no civilized alternative to the factional mayhem of the old regime and the new illegal warlords (Shklar 2012, 131).

In this sense the trial was an enormous misfire as it failed to demonstrate any sort of cultural and legal renewal. As described by Uri Avnery, the Israel within which the Eichmann trial proceeded was one driven by one particular motivation: shaking off a past and asserting a new, better order (Avnery 2013). The trial in Jerusalem fitted into this vision in both theory and practice, heralding in itself a new age in which Jews were masters of their own affairs, and following a strong narrative of closure, struggle and finally redemption through the creation of a nation state. Beres gives similar arguments for the execution of Saddam Hussein within Iraq, citing Kant's interpretation of execution as a method of ensuring a totally new beginning (Beres 1998). On a symbolic level an orderly, dignified handling of Saddam could not only have displayed the authority of the new Iraqi government but also its ability to enact this authority in a manner far superior to the regime it had replaced.

As it happened however, this was never achieved, and as stated, a lot of this had to do with the execution by hanging of Saddam Hussein on 30th December 2006, less than thirty days after his sentencing. Whatever image of order and process the trial had attempted to display was utterly unraveled by the dissemination of the video of this event, captured both on official tape and a camera phone in the audience. The

fact that someone could film such an event on their phone in itself gave the proceedings a chaotic bearing and allowed Saddam's voice and the shrill voices of his executioners to be heard unfiltered (Partlow 2007). The official tape, whilst doubtless intended in the name of transparency, bore far too close a resemblance to the grainy videos of torture and execution that Saddam had distributed during his reign to instill fear and awe in the populace. It only served to discredit the administration (Bazzi 2016).

The videos are not unique but in this circumstance the situation around the execution was highly tense in Iraq. The freedom afforded by easily attainable and concealable camera-phones ensured that containing the narrative of the execution was almost impossible, and thus an angry and confused population was exposed to the unfiltered (yet still unclear) last moments of Saddam. Iraqi Sunni saw an alarming spectacle that went far beyond the old dictator himself. They saw Shia witnesses and state officials alike joining in the triumphant and enraged mockery of the Sunni tyrant and clearly proclaiming their loyalty to Muqtada al-Sadr, the staunch anti-Saddam and anti-American leader and a symbol of rising Shia power (Bazzi 2016).

The image of Saddam as an Arab, Sunni and Iraqi patriotic martyr, something few would have previously afforded him, was greatly enhanced by this display (Bazzi 2016). If the punishment of oppressors by bright new nations is supposed to unite those nations under new orders, then nothing could have destroyed the quest for this more than the sight of Saddam dying at the hands of a sectarian mob, under orders from a Shia government widely seen as a pawn of Iranian interests, having been captured and held by an occupying American army (Cockburn 2016). Saddam should have been easier to get a clear picture of. And yet, Like Eichmann, Saddam somehow managed to become whatever people wanted to see him as, depending on his presentation and on their own perspective.

Any high-profile trial will reveal far more about the accused than mere guilt or innocence, and one could argue in fact that attributing such omnipotence to specific individuals serves no one more than the defendant themselves. Figures like

Eichmann or Saddam, who were in many ways rather pathetic and ridiculous, got the opportunity to 'deck... [themselves] in borrowed plumes' (Arendt 2006, 44) thrown upon them by prosecutors ready to portray them as all-powerful entities. This gave Saddam a chance to reassert the strongman image that had been greatly dented by his inglorious war record. In principle the case made in the trial was an ideal one for the job of portraying Saddam in a realistic way that did not perversely glorify him. The Dujail massacre was not only brutal but also petty, an over-reactive response to a minor assassination attempt (Cockburn 2016). Its details showed Saddam to be cruel, paranoid and obtuse, far removed from his projected image as a bold, unifying Arab leader. A well-managed trial could have exposed Saddam for what he was, no Shakespearean tyrant but the 'poor player who struts and frets his hour upon the stage...full of sound and fury, signifying nothing' (Shakespeare 1967, 85). All that should have been necessary was to keep the proceedings under control and stick to the facts of the case.

Unfortunately, buckling under political pressures, the trial replayed Nuremberg's 'tortur[ing]' of history in order to try Saddam in such a way as to avoid mentioning his past relations with those who now judged him (Shklar 2012, 147).

The Factor of Timing

The haphazard impression created by the trial and execution of Saddam owed as much to poor timing as it did to internal strife, and in fact these two elements complemented each other significantly. Even if the new Iraqi state did not have a clear-cut vision of how exactly it should be ordered, a problem even the best-envisioned social contracts face, much could have been gained by allowing its rulers to gain experience before acting (Shklar 2012). Such experience could have come, according to Shklar, by laying out a 'post-mortem' of the regime (Shklar 2012, 168) allowing the new regime to examine it in detail, to pick apart and study its characteristics and methods of control so that they might avoid repeating its mistakes and cruelties.

The problem of course, is that such introspection requires external stability and the ability to control the inevitable explosion of emotions and recriminations that would be triggered. The destabilized Iraq, with its equally unstable and isolated government, was in no position to unleash these forces (Cockburn 2016). Aware that allowing Saddam too much leniency would anger the Shia, and that appearing to lynch him would anger the Sunni, the trial would effectively fall between two stools, appearing shambolic in every respect (Peterson 2007). The trial could not have been a place for 'dangerous truths to be aired' given the dangerous situation (Peterson 2007, 263). Ironically, perhaps if it had it may have had more impact. Peterson's claim that Iraqis were highly interested in the trial proceedings is contested by other commentators who claim average Iraqis were far more interested in surviving and ensuring their place in the new Iraq. Amid such a transient atmosphere it is little wonder that the long, dry court exchanges should be ignored but that the concise, shocking video clip of the execution should be so influential (Cockburn 2016, Kampmark 2015).

It certainly did not help that the administrations in charge of the trial (Iraqi and American) lacked experience and ideological vision, leading to short-term gain being their main motivating factor (Cockburn 2016). In this respect in particular an ugly result of distorted Shklar logic comes to the fore. Shklar wanted such trials to be pedagogic events but did stress that the desired audience for this was the defeated population, in her case Germans. She did not see the benefit of using the trial to convince skeptical Americans that the cause of going to war had been just. The mistake was repeated, with perhaps more cynicism, by the Bush administration, which needed to convince Americans that the Iraq war had been a worthwhile venture. Faced with accusations of illegality and irresponsibility, it had to be proved to Americans that Saddam's fate was indeed tied up with that of the Al-Qaeda terrorists whose actions had inspired the invasion. Saddam had been toppled for crimes, and supposed future threats in the form of WMD, against Americans. The trial was thus never destined to be a truly Iraqi affair through which the nation could face and address its own unique suffering and find a solution. It was imposed according to the needs of outside forces. In this respect it mirrors the Tokyo trials as

described by Shklar in her book. With little understanding of the culture they were facing and with strong political motives guiding them, the Americans had imposed a thoroughly unsatisfactory and non-influential justice on the post-war Japanese (Shklar 2012). In that case at least, American control was sufficient to hold the conquered nation together by force. In Iraq they had neither the legal nor the military means to have such staying power.

So then we must concede that whilst the Saddam trial made no contribution to the establishment of a united sovereign Iraq, it need not have been a futile exercise by definition. Whilst the image of inevitability is prominent in retrospect, the evidence and previous examples suggest that there were ways to avoid this outcome.

Section 2.4: The Saddam Trial pt 3: Asserting a Liberal Order

An inability to foster national unity need not be the death-knell of a political society or action. Many Western societies, rebuilt after the destruction of World War II, have never truly re-developed an entirely healthy sense of self and have retained social divisions. For agonists like Arendt and Shklar this need not be a problem, for unity as an end in itself is not only often authoritarian but also hollow (Shklar 2012). Moreover, it could be argued that the liberal politics of those societies on the whole, combined with sometimes-enforced stability, allowed such divisions and political apathy to exist without endangering the functioning of state. Thus another end that might be strived towards in such trials, including Saddam's might be the legitimization of liberal practices in states that until then had only known arbitrary authoritarianism.

So, even if Iraq did not gain sovereign unity, or if the justice of the trial was imperfect, a validation in Iraqi minds of the benefits of liberal practices could have been a mark of success. Certainly, in an age of globalization, the conference upon Iraqis of the right and means to promote liberal political acts in their society could have been a point of unity between the international participants. Indeed, one of the purposes of the trial, as noted by Sceats, was the declaration that Saddam's

crimes were a Universal concern (Sceats 2005). Calls were being made for enacting policies in Iraq that would increase its sense of being treated fairly within a family of nations, so as to make the imposition of liberal institutions more popular. The setting up of a fair justice system and a display of its benefits were ostensibly feasible and unobtrusive methods of promoting liberal values in Iraq, directly invoking the memory of such projects' success in post-dictatorship nations in Europe (Bilsky 2004). If this was a failure, this was due to mistakes and obstructions from outside forces or does its failure betray an inherent flaw in the Shklarian policy itself.

Liberal Disorder

One of the main selling points of liberal institutions, as seen by Shklar, through the fostering of a fair but highly effective justice system was that it would be clearly be associated by citizens with order and security after a period of arbitrary control. The use of a public trial should, in theory then, display that justice can be gained via due process as opposed to quick revenge, that power is much more solidly based when it acts through an accountable, controlled system of law, and that liberal freedoms can provide social coherence better than authoritarian sentiments (Shklar 2012). Indeed, in bringing peace in the wake of wars started by ideology-driven dictatorships, liberalism had been well-placed to portray itself as the defender of order, whereas violent ideologies 'violat[ed] the order of mankind' (Arendt 2006, 272).

The problem then was that in this new Iraq exactly the opposite appeared to be happening. Far from bringing stability and fairness, the invasion and occupation of Iraq had simply opened it up to powerful destabilizing forces, and the lives of ordinary Iraqis had become more precarious than under Saddam.

Shklar argues in favor of presenting evidence discrediting old regimes by 'boggling' the minds of its people and others. This could work in Germany, where fair trials and reconstruction were associated with new order, compared with the arbitrary and sadistic Nazi actions revealed at Nuremberg and Jerusalem. Sadly however, it seems unlikely that the details of Dujail, or even larger Baathist atrocities, horrible as they were, could successfully boggle the minds of Iraqis in 2005-6. Suicide bombings and

sectarian executions had become daily occurrences, whilst the security services, Iraqi and foreign, acted in many cases as little more than lawless, corrupt militias. Not only had nothing improved, but also legality was utterly abused and degraded, with jails filling up with citizens, often without trial or charge or on the flimsiest of evidence, for sectarian or corrupt reasons (Cockburn 2016). If the failure of the system was not mind-boggling enough, more corrupt and petty in some ways than even Saddam had been, so was the sheer brutality of the new violence (Cockburn 2016). On the day that Saddam was executed, a supposedly monumental event, he was in fact only one of eighty-one people who died in Iraq (Shapiro 2007).

Under such circumstances, the application of law for educative purposes in how legal solutions produce harmony appear not only irrelevant but counterproductive. The court's inability to control Saddam Hussein's outbursts, and the concurrent failure of the executioners to control the Shiite mob's rage, resembled the failure of the Iraqi government to contain the growing Sunni insurgency in Northern Iraq, or even to control elements of its own support base. What in a stable constitutional democracy is diversity, became utter chaos in the near-anarchy of Iraq (Moyn 2014). If any education was achieved via this process, then for the Sunni it was merely that liberal justice is simply another tool with which one's community can be persecuted, while for the Shia it was that such a process does not secure one's dominance enough (Shklar 2012).

Liberal values, including justice, would not be seen as such a hindrance if their drawbacks could be presented as necessary features of an improved system. When the entire situation has become worse however, as it had done in post-invasion Iraq, attempting to use the trial as a pedagogic example only had the opposite of desired effects, for the public will indeed associate it with the new order, which they dislike. In this case the trial's failures arose out of the near-anarchy status of Iraq, and this failure conversely contributed to this anarchy (Shklar 2012). Liberal law, which had once been seen as bringing peace to disordered societies, now appeared to bring chaos, or at least the agents who preached its values brought chaos, often whilst acting in illiberal ways (Cockburn 2016). Once again what mattered was not actual

successes but the ability to project them. President Bush compared Iraq's situation with those of post-war Germany and Japan, praising past American interventions for leaving 'constitutions, not occupying armies' (Bass 2004, 385). This was of course a half-truth, as the United States had in fact remained highly influential and involved in both of those nations' governance, but crucially, public-memory of those occupations allows his narrative to be perceived as true, and much of America's perceived right to act as an international policeman has been derived from this perceived success (Bass 2004). It contrasted heavily with the visible failure to create any stable political landscape in Iraq and the subsequent need to police it with foreign troops. As this dragged on, the very justice of the invasion disappeared, tarnishing every attempt to assert liberal values along with it, including a justice system. Such aspirations as the restoration of stability, peace, freedom and justice were thoroughly undermined when the act of attaining them, the toppling of Saddam Hussein, led to the exact opposite results emerging in Iraq.

Liberal Justice: Corrupted by Political Action

It seems then that the problem with mixing politics with the law, as Arendt warned, is that the political has greater capacity to subsume the legal, and if the political is compromised, then the legal will be also. Shklar may have been correct to argue that politicization of law is inevitable, and in an age when the narrative of politics could be controlled more easily, such as at the time of Nuremberg, the solution may have been to push a strong narrative through trials, but in an age when controlling the narrative is increasingly impossible this becomes untenable. In terms of manipulating the truth and perception the law is handicapped by its need to also be fair and contain some, if not all, due process.

The slow and limited nature of successful trials means that they struggle to keep apace with political moods and developments. Even trials sped up for expediency cannot hope to catch up with post-war developments, whilst paradoxically, the longer they wait for the situation to calm down the more irrelevant they become to the political future (Bass 2004). Thus a trial in Baghdad designed to indict tyranny and usher in the importation of liberalism appeared hopelessly outdated and lost

from the start (Moyn 2014). Indeed, one element not properly reckoned with, was the new association of liberal justice and universalism with the loss of national sovereignty. The treatment of Saddam as an individual accountable to international bodies may have been intended as a universalist gesture of solidarity against tyrants, but it also implied the meaninglessness of Iraqi independence, and thus called into question the very use of having sovereignty (Fine 2000). By Shklar's own definition, the law, tied to political matters, very much defined who is sovereign, and as the trial was created by Americans, who also governed Iraqi politics, it made it clear that they, not Iraqis were sovereign (Shklar 2012).

When the political situation is unstable and the political leaders incompetent, then the appeal of short-term, imperialist style governance increases. This style lends itself to supporting what Shklar terms the 'lowest common denominator' of society in order to maintain control (Shklar 2012, 82). Thus American acquiescence had to be made to the recently empowered Iraqi Shia, much against Washington's wishes, just to maintain some semblance of power. As this entered all Iraqi political life, so it polluted the trial, and came to a head in the execution of Saddam (Cockburn 2016).

The Vicious Cycle: Importing liberal Values the West itself no longer trusts

The problems that hindered the Saddam trial go far beyond the chaos of Iraq just as the success of Nuremberg cannot be limited to the passivity of post-war Germany. A crucial difference lies in the political attitudes of those who created and managed the trials. Nuremberg and others were imposed against the odds and were in many ways unprecedented. It could be argued that the force driving them was not any tradition of liberalism but the will of their instigators to push that system, and to take risks to make it happen. In contrast, the trial of Saddam came in the wake of many similar trials, making it more of an expected and standard procedure. But this would mean that if those who caused and created it had themselves lost faith in the necessity or potency of liberal practices or international law, then its animating feature was essentially hollow.

The problem with understanding legalism as an ideology in the Shklarian sense is that this would essentially doom it to the fate of all ideologies in what is increasingly becoming a supposedly post-ideological age (Shklar 2012). If law had once been a solution to increasing political division and apathy, now it too was being infected by the apathy of political life. In the wake of political ideologies, Shklar's prediction that only trivialities would remain appears highly cogent, but this fate is also being shared with the ideologized version of legalism. Certainly in the case of Iraq, the legality of invasion was treated with contempt. Why should anyone have taken Saddam's trial any more seriously (Shklar 2012)? Worryingly, it would seem too that without the mediating power of law, and of political culture that allows for disagreements that are not legally binding, such triviality rests easily with the rise of belief systems that are based on totalistic, hidden truths impervious to legal or political debate (Shklar 2012). Thus a campaign against terror, within which Iraq became swept up, was justified in the Manichean language of Good and Evil, in which neither the limits of law nor the mediation of politics made sense. Out of the chaos this created, an equally uncompromising faith would gain power in the form of resurgent radical Islamism (Cockburn 2015a).

That such beliefs could arise and become so popular speaks to the disintegration of belief in cosmopolitan law that Nuremberg had enshrined. This in turn implies a collapse of the universalist humanism that had underpinned that ideology in the first place (Fine 2000). According to Karl Jasper's assessment, the undermining of national sovereignty implied in the Nuremberg principles universalism was countered by its role in enforcing individual responsibility. Thus the restraining effect on state actors by the former could conceivably be replaced by the restraints of individual accountability (Fine 2000). It was precisely this sense of responsibility that appears to have been lacking considerably from the planning of Saddam's downfall in general and from his trial in particular. Much of the methods of administration of both imply a desire by most people involved to not be connected in any concrete litigable way (Cockburn 2016). Indeed very few members of the Bush administration can be described as exhibiting the 'political presence' that Arendt herself defined as responsibility (Herzog 2004).

The loss of this universal humanism that might have inspired a more hands-on approach to justice in Iraq ensured a loss of any trial's power. Without a shared community there can be no judgment, thus the already politicized verdict against Saddam becomes just another statement to be disagreed on by parties (Bilsky 1996). With no unifying event, Iraq was left with no accord, and thus no long lasting constitution.

Shklar's diagnosis for how to combat these problems appears outdated, even if her prognosis was correct. The failure of Saddam's trial in asserting liberal institutions was not necessarily preordained, but it was certainly doomed when none of the parties responsible for it genuinely believed in the value of this as a method. Instrumentalized law requires a purpose to which that instrument is applied, and the control of people who know how to use that instrument and believe in its value. None of these things were present or at least united in Saddam's trial. The question we must then approach is whether this indicates that instrumentalizing justice is too risky if it must be at the mercy of such agents.

Section 2.5: The Saddam Trial pt. 4: Summary. A Shklarian or Arendtian Failure?

Finally this section will briefly discuss whether, on a theoretical level, Saddam's trial could be more accurately described as an Arendtian or Shklarian affair by exploring which aspects of each theory were applied in it and discussing which ones appear to have been more influential upon its character and outcome. Did one set of aspects compromise the other, or was it the very indecisiveness of the trial's procedure, leading to the collaboration of two similar but fundamentally separate styles, that doomed it to failure?

Arendtian Aspects

Though many aspects of the trial of Saddam were similar to one's she noted in the Eichmann trial, not all of them can be categorized as Arendtian. The application of a trial towards the end of asserting national independence, or for the benefit of

victims, were examined in detail by Arendt, and in some cases gained her understanding if not approval, but they were never recommended by her in her book. Doubtless she would have approved of Iraqi insistence on managing the trial much like she did of Israel's desire to do so with Eichmann. Nevertheless, whilst she showed compassion for such desires, she was still unreservedly critical of the negative effects they created.

Notable Arendtian aspects are ones that one can determine from her criticism, sometimes expressed directly or simply hinted at via her rejection of the opposite route being taken. Among these recommendations that were applied in Iraq, most prominent was the attempt to focus the trials' actual procedure ostensibly on finding justice alone, and thus avoiding 'drawing pictures' (Arendt 2006, 120) that covered realms beyond the provable facts of the case. Not a major adoption of theory in itself, this was indicative of a greater characteristic of the trial that sought to avoid any overt political bias in its execution. Arguably this was an accidental tribute to Arendt in that the decision to avoid strong political message was in itself a politically motivated tactic designed to avoid exacerbating sectarian and political tensions in Iraq. Nevertheless, the result was that the subsequent handling of the case was done in such a way as to adhere more closely to Arendt's ideal: avoiding unnecessary flair and woolly surmise, allowing the defense their right of expression (at least in the courtroom itself (Peterson 2007)).

The drawbacks of this style, as discussed in the preceding chapters, was of course the exaggeration of the sense that the trial was small and irrelevant. Arguably, the fact that such a sense was already prevalent, and would have been difficult to combat except at the expense of truth and stability, could have justified a closer adherence to procedure, as the inevitable compromise that resulted from attempting to be influential and stabilizing only succeeded in delegitimizing the process without making any justifying political impact.

Given the deteriorating situation in Iraq and the increasing lack of interest in Saddam that partially resulted from this, a responsible and bold authority might have opted

for Arendt's seemingly radical solution of allowing Iraqis to pass some independent judgment on Saddam before transferring him over to a disinterested, international body that could have been better suited to giving him a fair dispassionate trial. That this would have had a negative effect on Iraqi national sovereignty or the coalition's image of legitimacy seems absurd given how low these already were. Cooperation with an international court might have done much to mend the image of the USA as being indifferent to international law, something that had greatly hampered any attempt to gain legitimacy. Previous examples have indeed shown that this is not a perfect solution but it would at least ensure a fairer trial than the one carried out, and perhaps done more to relieve tension as well. As in the case of Former Yugoslavia, many people were not happy with the result, but it caused no slide into chaos either. Figures such as Milosevic and Karadzic, once powerful symbols of both hatred and veneration, were somewhat robbed of any such impressive power by their fates. Far away from their target audience, allowed relative freedoms of expression and appeal, and denied the martyring power of the death penalty, such people rarely remain potent symbols for long. Meanwhile, whatever reconciliation or confrontation needed to happen in Iraq could have been carried out in a non-legal setting, perhaps in politics, or some form of Truth Commission.

But, sadly, the leaders behind the trial were neither bold nor responsible. Had they been more certain and publically supported in their political values (or had political values that could attain either of these merits) they would perhaps have been bolder in their decision. As it happened, the decision to leave the trial in the hands of Iraqis, as indeed every aspect of national rebuilding was aside from military control, was motivated not by any faith in Iraqi national vigour or competence, as with the Israelis in 1960, but through precisely the opposite, an inability to gauge Iraqi political climate or to truly involve its people. As the next section shall elaborate upon, this attitude would help to create a tendency in political attitudes to conflict justice and reconstruction that would focus more on the micro-management of security rather than macro aims supported by stable and confident ideology. If Eichmann's trial was a failure in pure legal terms, this did not translate into political failure in Israel because the process was supported by a strong ideology and desire of the Jewish

people. Without this it would have ended in failure due to its procedural flaws, as Saddam's trial did.

Shklarian Aspects

The Shklarian tone of the trial was more pronounced, even if it was done badly and without the necessary courage or competence. Certainly the desire to utilize a public trial of an iconic figure as a method of education and asserting political improvement was present. As covered previously, this education was more aimed at vindicating Western actions before their own citizens than of liberalizing Iraqis, but it also had the aim of proving the superiority of a new law-centered system of government and asserting the authority of Iraq's new administration. It would seem that whereas Arendt becomes present in the machine via unintentional motives, Shklar's theoretical mark was more firmly stamped upon proceedings, in that with Saddam's guilt, and in many ways his fate, already ascertained, the real business of the court was to establish gains other than mere justice. And these gains focused heavily around the ability to assert a new liberal order via a public act of condemning a rejected system and displaying the benefits of the new one through example.

Once again, the problem with applying these ends to this trial was the sheer half-heartedness with which it was conducted. As Shklar's theory of justice is far more mission-like and dependent on strong-willed commitment from those who use it than Arendt's. Applying it without this commitment has more adverse consequences. The hollow and hypocritical lesson forced through by such a trial is arguably worse than not attempting to teach any lesson at all, as the latter may at least have intrinsically educative elements that can be gleaned by outsiders over time. The former however ends up reinforcing a lesson that is false, or that is confused and thus treated with contempt. The fact that neither side of the debate in Iraq were satisfied and thought themselves ignored shows how dissonant an effect this creates. Creating a false narrative is of course what Arendt accused the Jerusalem court of doing, and in many ways she was correct. Whilst her view of Eichmann is now influential, the simplistic, Whiggish interpretation of Nazism fostered by the trial has also survived in some strength, potentially muddying the

waters of historical and political research. At least in that case however, sufficient order reigned in and around the courtroom for two differing narratives to develop and argue. In 'the Hell that [was] Iraq' both militarily and politically, a clear assessment of the man and regime on trial, let alone the ability to safely debate it, was and remains treacherous and elusive.

Within this chaos, the promotion of certain new, improved values becomes utterly self-defeating, as it only further vindicates every suspicion the subjected people held about so-called 'liberal' regimes and their intentions. This indeed leaves the architects of the invasion and post-invasion justice between a rock and a hard place, but it was a position of their own making. As Shklar's given examples show, the desire to remake the world in a positive way need not be doomed to failure, but as subsequent cases also show, it will be if those carrying out do not (at least convincingly) believe in it or have the stomach for enacting it.

Time waits for no Theory

In weighing up the two theories in the context of the late 20th century political atmosphere, it would appear that Samuel Moyn is correct in saying that Shklar's is superior (Moyn 2012). The acceptance and embracement of the inherent politicization of major war crimes trials does appear to be the more workable route in an age when those carrying them out could control the narrative but were still liberal enough to allow free expression of disagreement. Nuremberg is a prime example of this. Eichmann's trial is more contentious, but as argued here, it can be said to have had positive effects on national sovereignty without suppressing Arendt's and others critical interpretations of it.

However, what may have worked in the somewhat exceptional time-period of the Cold War cannot be translated into a successful model for times in which the balance of power is less secure. Not only has any serious consensus around political action been lowered, but the parallel rise of a ubiquitous and fast-moving media culture has greatly compromised governmental control over public policy and narrative. These developments have in many cases been very much for the better. It is harder

for governments to invent pretexts for starting wars, or to manipulate systems of justice for propaganda purposes. But this new freedom has come at the price of compromising genuine efforts to assert new nations or to promote liberalizing influence to cultures and states that are clearly deficient in human rights and stability. Part of the latter development in particular is not so much that political bodies have lost a monopoly over information but that the nature of media and public consumption of information has changed significantly in a way detrimental to the success of influential trials. Part of the failure of the Saddam trial to create any impact came from the fact that in a sense he had already faced a trial in the form of the US media and had been found resoundingly guilty. As the next section shall explore further, the nature of modern warfare and its perception in the public eye is simply no longer suited to the method of using post-conflict trials as a gauge of duties, guilt and political progress (Baudrillard 1996).

The next section will display how the rise of fast-moving narratives and confused, constant struggles between increasingly elusive political actors has fundamentally jeopardized the potential of trials to be of political value as they previously were. The Saddam Hussein trial played a fundamental role in creating this new reality, disillusioning many as to the capacity of formal justice to provide political stability or absolution. We must therefore examine the culture that has replaced the finalistic culture of tribunals as a perceived form of justice, that being the extra-judicial and immediate culture of securitized assassinations. Having displayed how the Iraq war and the Saddam trial managed to undermine the role of legality and the hope of improving the world through law and political action, we shall explore the result of this, and argue that the rise of 'drone culture' i.e. the culture of discrete non-legal violence as policy, heralds a general retreat from political judgment.

Chapter 3

Section 3.1: After Iraq: The Future of War Crimes Trials in Politics

It is the assertion of this thesis that the visible failure of the Saddam Hussein trial to achieve any of the goals set out as the legitimizing targets of major War crimes trials, in full view of the world, landed a crippling blow to a political tactic and global institution left over from the Cold War.

Having covered this failure in the preceding chapters, this chapter will complete the thesis by setting out a description and explanation of the developments that have succeeded, and in this thesis' understanding, responded to the decline of legal justice as a mediator of foreign policy and the general retreat the Western democratic world has made from any attempt to spread ideals of international legalism. The alternative policy that has risen to the fore in the wake of this retreat is the immediate and securitized policy in the tradition of the 'cynical realism' expounded by the Nuremberg defendants.

Before discussing the nature of the rising alternative to post-conflict trials an account must be given of how events since the Saddam trial indicate a further decline in the effectiveness of this system, thus displaying the how the fall of the trial's political and social value has continued and runs parallel with the emergence of other means. A brief description must therefore be given displaying the continued failure of Iraq since the trial, and of international justice attempts in general.

Post-trial Iraq: 'That colossal wreck'²

Little of what has happened in the years following the death of Saddam Hussein has redeemed the purposes of the trial. The forces unleashed during, and partially due to, his trial and execution have not only gone unabated but have increased to a point where the very existence of Iraq as a single country is looking like a lost cause.

Whereas Ben-Gurion forcefully ran the every aspect of Israeli policy with a 'cult of unity' (Zertal 2007, 1128) in mind, the subsequent leaders of Iraq have run a state in which disunity has been practically encouraged. The Saddam trial appears not only to have failed to heal wounds but to have opened even more. At the time of writing the unofficial and ideological rifts in Iraqi society have turned into actual physical barriers, with the Kurds creating a de facto autonomous state, the Sunni areas largely subsumed into the new Islamic State (IS) and the Shia majority trying to control what's left (Cockburn 2015a). Whatever Iraqi identity or sense of belonging there was has gone.

Gone with this identity is the firm memory of the past that a trial was meant to secure. Far from creating a permanent record of Saddam's evil character, his disposal and subsequent events have aided in ensuring that the truth about him remains elusive and subject to ideological interpretation and misremembering. Writing in 2007, Jeremy Peterson writes hopefully of a greater consensus amongst Iraqis, and predicts that while it will take years to fully see the impact of the trial, it is unlikely that the regime will be forgotten for its horrors (Peterson 2007). Whatever consensus Peterson saw is long gone, with some Iraqis remembering Saddam more favorably than they had when he was alive (Dreyfuss 2006). Other than the Sunni, or security forces desperately trying to blame post-invasion resistance on Saddam's loyalists, few Iraqis appear to think much of Saddam any more (Cockburn 2016). And those groups themselves do not exactly remember him in the strictest sense. As noted before, Sunni missing their safer lives under Saddam do so from the horror that is Iraq today, forgetting that his regime was almost as insecure and often just as brutal. Those who imagined Iraqi resistance came from those loyal to him similarly

² Shelley, 1977

ignored or forgot the truth: that Saddam inspired very little loyalty amongst the Iraqi resistance (Cockburn 2015a).

The misremembering of Saddam echoes in some ways the misremembering of Joseph Stalin in Russia today. As described by Stephen Cohen the often-fantastic memory of Stalinist greatness, order and stability is often evoked in Russia as a response to the corruption and weakness of the current government (Cohen 2016). Little interested in Stalin the man, those who invoke him use Stalin the symbol. One reason for this working is that Stalin's memory is obscured enough for debate to remain regarding his involvement in crimes, him never having been called to account. If Saddam Hussein, who did undergo a trial and account of his crimes during his life, can undergo a similar resurrection so soon after his toppling, it calls into question the entire process as a form of record-production.

If anything can testify to the failure to cultivate a liberal politics in Iraq, it is this fondness for the previous dictatorship. But this is nothing compared to the total rejection of all forms of democratic politics that the civil war has unleashed. Chaos in Baghdad has led to massive revolts from Shia political groups (Cockburn 2016). More strikingly, the ease with which Sunni-dominated Northern Iraq was taken over by IS in 2014 heralded just how disillusioned the population there was with the new order, and how weak the grip and support of central government was (Cockburn 2016). With its utter rejection of modernity and Western values, and its dedication to ancient Sharia law, IS represents the total rejection of any such project to import liberalism or nations, recognizing neither law nor governments (Cockburn 2016).

For Iraqis then, the trial of Saddam has proved to be neither a 'culmination' (Elon 2006, viii) nor a 'transition' (Chakravarti 2008, 223). Its failure to aid any new creation of an Iraqi democracy derives from its own failure of purpose. It signaled the end of Saddam, an individual, and the end of Baathism (though that had hardly been alive). Of chaos and terror, it had nothing of value to say.

Second in Farce: Failures of trials since Saddam

Since Iraq there have been few trials that have reached similar levels of coverage or political fallout. Those that have come close have been continuations of the interminable ICC trials at The Hague, with the main developments being the sentencing or demise of long-prosecuted prisoners.

None of these have done anything however to liberate international law from its ideologized image. In his defense of instrumentalizing the ICC Samuel Moyn argues that 'promotionalism' is one end of the court, as it promotes accountability despite power (Moyn 2014, 59). But the loss of any concrete, positive ideology which might be promoted by the public execution of law leaves only power, which many minor states and political groups see as being promoted instead. Law, once seen as the alternative to power-politics, has instead become associated with it. The response to this has been a rejection of the ICC's legitimacy as adjudicator. Unfair rulings arise as much out of ignorance as out of malice, producing the same arbitrariness in the eyes of the warring parties as a tyrant would. The grand show trials of the Nazis worked because guilt had already been established. But actors in obscure and complex conflicts cannot be tried with this foregone conclusion in mind without creating contentious results (Peterson 2007). The ever-changing information emerging from the Syrian civil war is such an example. Evidence that not long ago might conclusively have proven one party's guilt is constantly changing, making it almost impossible to build a narrative of accountability (Hersh 2016).

The growing reaction to the perceived inability of international bodies to bring correct justice might lead to national trials of the Eichmann variety becoming more popular, applying universal laws to fixed areas. Problematically however, whereas the young Israel desired to prove itself to the democratic world and assert its statehood, the current crisis of international law runs parallel with a general disillusionment with statehood, particularly in the war-torn Middle East. Those who reject the ICC also reject in general the liberal justice standards of the West as they see it, viewing these standards as nothing but a front for imperialist expansion, an accusation the West cannot counter as long as it lacks ideological depth (Black 2012). In this context the cynical realist demand of the Nuremberg defendants to be tried

by their peers resurfaces, but this time with no realistic alternative as the very states that might hold them to account are also rejected or delegitimized (Fine 2000).

In this way the less-flexible realm of law ends up absorbing the spirit of politics and joining the 'perpetual war' of ideas, with no true final judgment being realized (Shklar 2012, 123). Law is thus endangered as a privileged realm, whilst conversely the politics that it comes to emulate is itself in decline, having stagnated by becoming too dependent on law to find its justifications (Shklar 2012). The trials that result from this stagnating system are arguably neither hugely harmful nor helpful to the international task of resolving conflicts and giving dues. Convictions are achieved but little change is resulting from them, certainly in terms of pacification. The model trial it appears for the 21st century is in fact the Tokyo trial that Shklar derided. No harm came from it, but no good either. Like the Americans who created that trial, the Powers behind the modern ones have great military power but little cultural hegemony or understanding (Shklar 2012). Such trials will continue, but no 'action' as defined as something public requiring interpretation and communication, is taking place (Bilsky 1996, 140).

Trials have ceased to be spaces in which 'public memory' is assigned or the real 'reckoning' between forces is witnessed (Van der Wilt 2012, 10). Aside from loss of faith in their judgment, they simply cannot prove compelling enough to garner attention. It is noted of the Karadzic conviction that it was not momentous for many outside its direct sphere of interest, partially because the verdict itself was rather pedestrian compared to tumultuous world events, specifically the recent bombing of Brussels (Johnstone 2016). In an era of quickly shifting narratives and perceived dangers, it is hard to imagine that even a populist and less rigorously fair trial like Eichmann's could garner so much attention. Their ability to affect events has simply been outpaced (Moyn 2014).

The added factor to this increasing failure has been the political tone and strategy of the War on Terror, whose influential style is particularly poorly suited to the inclusion of post-conflict judgment and resolution. One can define the War on Terror

as essentially a battle between big ideologies. The Islamist cause which The West attempts to face is in essence similar to the revolutionary ideologies such as Communism and Nazism, in that it does not recognize any legal barriers to its growth, this time exacerbated by the fact that the rival ideology comprises both Nazism's revolutionary zeal and Imperial Japans cultural disconnect from Western ideals (Shklar 2012).

Such disconnect has appeared in practice, with Islamist leaders failing to recognize the courts set up to try them. The plotters of the 9/11 terrorist attacks, led by Khalid Sheikh Mohammed, expressed during their Military Commission trial not only a refusal to recognize any secular court or law, but a total disregard for the death penalty itself, thus nullifying any real power the process had over them or their movement (Cockburn 2009). Such a response explodes the limits of law in a different way, as it likewise renders any punishment unfitting. Moreover, a system which, at root, derives its purpose from the ability to assign individual responsibility comes up against a wall when those it judges not only reject its authority and do not fear its punishment, but also reject the belief in such responsibility, seeing themselves as agents of a higher power (Fine 2000).

Perhaps in response to this impotence, the American government responded to protests by similarly negating the importance of the trial, promising guilty verdicts and death sentences (Cockburn 2009). Not only do these threats ring hollow given the attitude of the defendants, but they undermine the process by displaying how much of a burden the prosecuting power considered them. Sheikh Mohammed himself observed that the trial was a mere formality, and was not wrong to point out that its validity had been undermined by the fact that it was deemed redundant after he and the others had already been detained and tortured, treated as guilty, in Guantanamo Bay detention center (Selsky 2008). Indeed the secrecy and lack of process involved in the now iconic Guantanamo method of dealing with prisoners in this conflict has damaged any attempt at due process, firstly by making the trials appear unfair, and secondly because this method implicitly treats detainees not as reprimanded criminals but as security threats in an ongoing operation. It is this element that has come to the fore and, as we shall now explore further, is taking

precedence in the operation of International order. The power of trials emanated from them being post-conflict forms of reestablishing order through chaos. In an age when the conflict never ends, they cannot retain this power, as information remains obscured and interpretations change regularly with the political priority of the moment. In this age of uncertainty, the sure, clear judgment of the court is overshadowed by the hidden, urgent reflex of the assassin. Blind justice cedes to the all-seeing drone.

Section 3.2: Overpowering Justice: Legalism in an age of security

This chapter will address how the falling interest in applying public trials to war crimes results from a failure of belief in the ability to win public approval of the authority actions and in creating lasting, persuasive arguments and precedents for the worth of such action. It will begin by recounting the narrative of how this shift happened in the 21st century and displaying thus how the origins of this growing phenomenon can be seen in various Cold War conflicts in which cynical realism reigned, such as the Vietnam War. It will then argue in detail how the rise of summary justice and weaponized security measures respond to a growing desire amongst political elites and systems to remove the risk and responsibility integral to the process of assigning guilt and ascertaining facts in open tribunals.

The Hunt: Killing Quietly from Phoenix to Drones

In Shklar's view legalist purists and political realists share a conception of politics as being a perpetual conflict, hence their belief that law has no place in this sphere (Shklar 2012). This need not be harmful to the pursuit of law in post-conflict situations so long as the logic of political and military antagonism ended when conflict itself did. With no clear distinction between the political/military actions and the legal act of assessing them, the 'terror and propaganda' (Shklar 2012, 144) of the former realm can become part of the latter, thus compromising its necessary elements of openness and dialogue.

A public trial might serve the purpose of limiting the criminal culpability to a small minority, but with the subliminal aim of raising their followers' awareness of their responsibility. The militarized alternative of execution within the war context works with a similar logic, but without the redeeming feature of education. At the height of war crime tribunal prestige, following Nuremberg, such activities were not publically acceptable, and operations like the CIA's Phoenix program in Vietnam were highly secretive. The Program grew as much out of military intelligence logic concerned with eliminating threats as out of the crusading mission against communist infiltration. It involved creating death lists of known Vietnamese communists to be captured or killed, a task assigned to U.S soldiers and hidden within the fog of war (Valentine 2016). A worrying development then is the fact that whilst it remains infamous, the Phoenix model thrived as a counter-terrorism strategy and is in fact entering the mainstream as an acceptable method of meting out international justice.

The logic of drone warfare, assessed in detail in Gregoire Chamayou's book 'Drone Theory', covers not just the use of robotic killers to take out terrorists from the sky but an ideological shift towards normalizing summary justice and the blurring of the distinction between combat and execution, whether performed by an unmanned plane or a Special Forces soldier. Much like Phoenix, it encourages a view of conflict as a constant hunt for aberrant individuals who are both opponents and criminals, turning warfare into an endless policing exercise (Chamayou 2015).

This process has no due process, and no accountability. The Eichmann trial prosecution may have been subservient to Ben-Gurion but they also had to stick within the bounds of legal process and public scrutiny. The organizations that carry out the assassinations by drone and soldier, using the prerogative of military secrecy, report only to the president, and are otherwise unrestrained (Wolf 2013). What has become increasingly publically acceptable is the concept that such a strategy, incorporating Phoenix-style kill-lists, cynical realist logic and an absence of any desired culmination can be equivalent, perhaps even preferable to war crimes tribunals as a measure of applying justice and pacifying conflict (Chamayou 2015). Immediacy becomes the defining feature of this style of political justice. The courage

of an assassin is different to that required to face your opponent in open court and allow them speech (Chamayou 2015). It is more akin to the courage in the face of immediate danger familiar to soldiers. Instead of war aiming to create conditions of law, war becomes law itself (Chamayou 2015). The quest for immediate results is increasingly cutting out agents of justice once seen as integral but now seen as impediments to efficient policy.

'Good Clean Vengeance'³: Loss of Risk

As the Saddam trial proved, even when one has sureness of guilt, trials are risky enterprises. To have the ability to conduct them influentially, as this thesis has shown, one must have not only certainty of guilt but also the ability and will to control the narrative accordingly. Both the Nuremberg and Eichmann trials displayed these capabilities (Arendt 2006). In an interesting caveat, Arendt addresses the option of simply assassinating Eichmann and then demanding a trial in which to exonerate his killer by exposing the target's own crimes. She cites two examples of this rough justice, and argues crucially that they were only justified because the assassins were politically disenfranchised, lacking a state or higher power that could have operated a trustworthy legal prosecution (Arendt 2006).

The question then arises: why could Israel, a small and relatively isolated state, think it worth the risk to kidnap Eichmann and hold a lengthy public trial in 1961, but fifty years later the powerful United States felt it neither risk-worthy nor necessary to do the same with Al-Qaeda leader Osama bin-Laden? Bin-Laden's guilt was as assured as Eichmann's and if anything the risk involved in capturing and trying him was lower (Hersh 2016). The reason given for the decision to kill rather than capture was the well-being of the soldiers themselves. In this sense it was a typical operation of the United States' new war criminal hunting policy: killing quickly with the aim of constantly averting risk (Chamayou 2015). The narrative of bin-Laden's death in particular was one that mixed military action with justice implementation, in which

³ Shklar 2012, 159

summary execution was justified by being portrayed as a firefight and intelligence-gathering served as a trial. Crucially, whilst it was clear that the motive and jubilant reaction to the killing was based on bin-Laden's past crimes, great effort was put into portraying the action as being motivated by future security risks (Hersh 2016).

This emphasis on fear as a driving priority of policy directly contradicts the essence of public trials in which societies 'dare to sit in judgment' (Arendt 2006, 295). It speaks to a fear not only of not being able to defeat one's enemy but also of the implications of one's own actions. The rise of summary justice as a publically acknowledged and even celebrated tactic not only lowers the risk to soldiers' lives, but also the political and moral risks engendered by arrests and lengthy detainment of foreign nationals (Chamayou 2015). The ability to take such risks requires the presence of a solid foundation of a society's values; a foundation which Shklar felt was eroding long before the current crisis (Shklar 2012). Like the resistance fighters described by Shklar, the mentality veers towards vengeance without risking political compromise or legal debate. To 'stay the hand of vengeance' (Scharf 1995, 66) that would once allow for true law to be practiced, increasingly is seen to be a pointless act that creates security risks.

In military, and in political terms then, this shift indicates an end to the dualistic view of war and the war-crime trials that follow, in which a clear right and wrong existed but needed to be proven. In place of the risky strategy of proving the superiority of one's political system and assigning justice, the more fearful practice of elimination of individual threats arises and is accepted as the normal method of dealing with such conflicts (Chamayou 2015). As shall be seen however, these methods are not as precise as they are claimed to be, and the spectre of collective guilt and punishment begins to reemerge. Crucial to this resurgence is the erosion of individual responsibility that has ironically resulted from the decline of formal justice, even as it is replaced by individual-focused vengeance.

'Dangerous Material'⁴: Loss of Responsibility

As stated, the political risk associated with public trials conferred upon those carrying them out certain responsibilities, such as to be certain of the ability to prove guilt, to appear fair and generally to stick to the moral high-ground. Their responsibility was to take risks and accept the results. In a system of summary justice, where secrecy is necessary for security, responsibility takes on a very different meaning. In contrast to the trial system which forced self-reflection and the concept of universal responsibility, the 'Area of Responsibility', or AOR (Chamayou 2015, 123) of the drone program is a specifically designed mode of compartmentalization designed to limit such self-reflection and deny culpability. Just as the agents who carry out the executions are themselves dislocated from the act and its consequences, so the targets are also robbed of agency and responsibility. Whilst it may focus on individuals, this ideology does so in such a way as to remove these individuals from their political or social setting, to the point where they are not even discussed as culpable persons deserving punishment but as 'material' that needs to be neutralized (Chamayou 2015, 24).

In fairness, those who carry out these actions have to spend much time and effort sifting through evidence in order to determine the guilt (or at least the reasonable threat) of those they target, much like the prosecution in trials have to diligently collect evidence with which to convict. Such killings have gone wrong and provoked backlashes. But they are considerably harder to prove due to the lack of transparency, justified of course in the name of security. They also cannot be argued over until it is too late for the victim (Cockburn 2015b). Moreover, in order to gain maximum sentencing, prosecution during trials had to prove and press home the defendant's link to greater political systems and ideologies that gave their crimes a deadlier meaning and themselves a greater responsibility (Arendt 2006). The vagueness of a system that does not include open airing of evidence undermines the ability to prove such links, allowing unclear and distorted pictures to emerge. In such an atmosphere, the worrying fact is that justice comes to resemble more closely the

⁴ Chamayou 2015, 24

arbitrariness associated with unaccountable tyranny than the open rule of law, depriving those executing it of the moral high-ground. And thus the weakness of justifying illiberal practice on the grounds that they are done by liberal powers for good ends is exposed in full. For in doing so the very liberal ideals being protected are undermined and relegated to lesser importance in public perception.

The loss of transparency entails the loss of any real reckoning or confrontation, not only between ideologies but also between victim and perpetrator, dulling any sense of closure. In particular, the focus on threat necessarily turns the focus of assassinations and their coverage toward the potential future victims of a war criminal, rather than their actual past ones. This future-threat focus contributes to the degradation of record-creating as a value of justice, and further indicates a retreat from political understanding as it implies an inability to create future stability by making examples of responsible individuals. Having already reduced the role of law-makers, judges and capturers in the practice of war justice, this development now serves to cut the victims out as well, imperiling the very definition of the process as being one about seeking justice. In the absence of the public agreement of certain responsibilities and justice ideals the process is instead reduced to the 'private, uncontrolled vengeance' Shklar talks of as being replaced by formal process, in which unknown, biased individuals make decisions on guilt and punishment (Shklar 2012, 158). With little connection established between the targets and actual crimes, punishment becomes meaningless and is replaced by mere 'annihilation' (Chamayou 2015, 44). As such this annihilation, making no reference to punishment, suits the post-Iraq mentality that wishes to avoid terms such as the latter which implies a definite ideal of justice standards. By leaving such moral or political authority behind, only violence remains (Shklar 2012).

In this atmosphere the arbitrariness that is fostered in the 'Rule of nobody' (Arendt 2006, 289) potentially becomes even worse, as responsibility lies not only with unaccountable but human bureaucrats, but instead increasingly with autonomous machines. The virtues of these machines, their ability to quickly and precisely exterminate threats, encourages the very glorification of spontaneous violence that

Shklar associates with fascist mentality (Shklar 2012). Once again this elimination of personality works both ways. Saddam's trial proved how risky it is in the media age to place too much stock in creating an iconic figure to punish, as the narrative cannot be controlled. Thus it becomes in the interests of both parties to avoid focusing on iconic leaders, as from the pursuers point of view this would mean fully addressing them and their beliefs, whilst for the pursued this means exposing that individual to the risk of assassination.

If open justice served any purpose it was to force power to expose itself and justify its actions. Increasingly deprived of a sense of justification, the power behind hunting down war criminals increasingly relies on a system that negates the need to face such confrontation and scrutiny. The act of effacing evidence, whether it be the suicide-bomber who kills himself or the drone pilot who kills the target, thus depriving the public of their testimony, deprives legalist bodies of the chance to hold power to account. In this sense, both tactics serve to explode the law, separating acts from consequences in a manner that makes it increasingly difficult to discover individual responsibility (Chamayou 2015). If the terrorist forces and the Special Forces pursuing them share any common idea, it is that they are not subject to publically agreed rules due to the expediency of their mission, and the secrecy with which they operate inhibits any questioning of this mentality (Hersh 2016).

In the face of this rising phenomenon then, we must conclude by addressing what this entails for the future of universal justice ideals.

Chapter 4: Conclusion

Section 4.1: The Death of Cosmopolitan Law?

In this final chapter we shall deal with the main political consequences of the post-Iraq shift to security focus and summary justice and consider arguments for curbing these trends. Specifically how the normalization of ignoring process has revitalized the control of power over justice, whilst simultaneously depriving that power of serious moral and political authority. This in turn creates a political standoff in which dialogue and pedagogy no longer have a role, as no universal standards are aspired to. The continued inability of public legal systems to be associated with creating stability and justice sullies the political ideologies that promote them, which is why both Western democracies and their enemies are rejecting them. It will be argued that this spiral downwards will be disastrous for ending seemingly permanent conflicts.

'Becoming the Law'⁵: return of compartmentalized Acts of State

Due to the assertion of universal standards of justice during and beyond the Cold War, even Western politicians lived under the threat of the accusation of war crimes. Even if this was mostly ineffective, it did display clear moral boundaries that law imposes as a rebuke to the relativism of parochial politics. From Vietnam to Iraq, such accusations have served to isolate the perpetrators in such a way as to keep the society and government united, separating criminal elements from the rest (Chamayou 2015). Certainly it was rarely successful, and never resulted in the leaders themselves going to trial, but it displayed justice and public trials as an aspiration of resistance to criminal tyranny. Though they rarely received it, people valued justice.

The invasion of Iraq created mass disillusion not only through its failure to produce a trial of Saddam that could justify Western legal action, but also because the

⁵ Chamayou 2015, 131

architects of this failure escaped any repercussions themselves. Despite overwhelming evidence of wrongdoing and massive calls for accountability, the wars have continued and those who lied gone unpunished. If Iraq proved that the liberal ideal of spreading justice and stability is dead, it also proved that any attempts to remedy this problem are also obsolete.

The loss suffered from this fallout is that of tempered idealism that allows international justice to succeed. As argued, such trials require faith in deep universal standards whilst also acknowledging that ordered systems are required to achieve such standards. In opposition to these arises simple idealism, which motivates revolutionary ideologies or the cynical realism that usually results when both of these options fail. As shall be expanded on later, idealism and cynicism share the common trait of disrespecting law, viewing it as useless and meaningless. But whilst such cynicism may have been restricted to the defendants at Nuremberg, at the Saddam trial, they oozed out of the dock and into the surrounding society, and from there into the entire political outlook concerning the war. Supporters and detractors alike agreed the trial, and the entire occupying project, was a hatchet job (Kampmark 2015). Soon within Iraqi society power was split between the cynics who thus thought democracy and justice were just good fronts for self-interest, and idealists who rejected all law and justified any action to further their religious project.

In the liberal West however, whose ideals had been tested in Iraq, cynicism was largely the only development. Having applied the language of justice and freedom in their enterprise, having taken a truly evil figure to court, having invested so much in political power, to see it so quickly and openly fall apart did irreparable damage to all such ideals. The rise of the 'Act of State' mentality can therefore be understood as a defensive reaction to this disillusionment, a retreat into the comfort of cynicism. As the previous chapter described, drones and Special Forces squads operate secretly and are answerable only to the executive. With these representing the mainstream method of removing enemies, gone are the days when governments had (or at least felt the need) to justify their case before the people, or when a defendant could

embarrass that government with its own conduct, as Barbie did. In a permanent state of crisis, such actions cannot be tolerated, posing as they do, security risks (Arendt 2006).

Carl Schmitt argued that sovereignty lies with that which decides on exceptions, i.e. who is in or outside the law (Luban 2011, 9). So long as this lies, at least publically, in the hands of an independent judiciary, then the conditions for domination are curbed. But the rise of executive assassination as normality threatens to undermine this progress. Provided with drone Kill-lists, U.S presidents can now determine the entire process, judging guilt and assigning punishment all in one, based on information both copious and classified, out of reach for ordinary citizens (Chamayou 2015). Not only does this new formula privilege certain officials over fellow citizens, it also privileges strong states over others. Before, at least in theory, a universal standard existed. But when this standard falls, aided in no small part by the corrupting effects of the Saddam trial, the leap from holding legal trials to killing outright becomes smaller, after all, is it not all simply Western power-play? Thus the new system succeeds in undermining not only universal ideals but also the national Sovereignty ideal of the Eichmann trial. By overriding national borders in order to pick off individuals, summary justice makes both concepts irrelevant, neither being a protection (Fine 2000). Deprived of any concrete standard by which to judge right and wrongful action, the only standard left becomes that of who performed it, thus reviving parochialism. This Shklarian logic, which may have worked with trials that required openness, only supports domination when it can no longer be questioned.

Ironically, and dangerously, this vast expansion of power coincides with a distinct loss of authority, that being legitimate and recognized moral/political right. Drone programmes expand parallel to the shrinking of recognition of international law, which itself increasingly comes to be seen as merely the will of power rather than the result of agreed upon principles (Chamayou 2015). Indeed, the current status quo could be compared to the stateless assassins Arendt talks of, as mentioned in the previous chapter, killing in revenge then justifying themselves. Yet they had the excuse of not having any justice apparatus to which they could appeal, and indeed

having committed the act they then had to defer to outsider judgment. Their actions implied desperation, a lack of power (Beres 1998). That the world's only superpower's behavior should resemble these figures attests to its lack of authority and responsibility to the rest of the world. The powerful states once charged with securing order and justice now display 'no suggestion of going to live' in the same world as those they police as Chamayou puts it (Chamayou 2015, 23). His term is eerily reminiscent of Arendt's charge that Eichmann's crime was refusing 'to share the earth' (Arendt 2006, 279) meaning not just that he had attempted to obliterate others but also that he had refused to acknowledge a shared moral universe in which he was accountable.

It is in this moral landscape, one lacking responsibility or reciprocity, that short-termism and technical solutions to political problems prosper (Chamayou 2015). By design, the assassin – man or machine – indicates a politics in which consequences and prestige are irrelevant. Preferring to be unseen, they do not have to look just. This drift into parochialism away from open universalism emerges out of the disastrous attempt to publically enforce justice internationally, such as in Iraq, whose consequences have convinced Western politicians that responsibility is best avoided if they are to succeed (Chamayou 2015). Worryingly, this irresponsibility, short-term thinking and lack of dialogue all indicate an increasingly immature mode in leadership that echoes the same attitude permeating the Special Forces assassins who carry out their policies. Politics then becomes 'childish' just as military action has (Hersh 2016, 9).

'A Glimpse of the Future'⁶: post-conflict pedagogy in permanent war

A significant development of the Saddam trial was that it was one of the first such trials, upheld by the superpowers, to proceed even as the conflict it addressed continued and grew around it. As stated, this developed largely from the irrelevance of Saddam to the national situation. The resulting chaos and lack of any closure sets the scene for a loss of faith in the concluding power of justice in conflict. Whereas

⁶ Chamayou 2015, 127

once liberal justice had brought an end to the chaos spread by totalitarians, now they seemed to bring the chaos themselves (Fine 2000). Not only does this tarnish any image of liberal democracy but it also undermines the expectation of peace and stability being the status quo. Amid this growing acceptance of interminable conflict, the necessity and even relevance of post-conflict trials can only diminish. Shklar's instrumentalization, the promise of future improvement and political gain that justified potentially farcical affairs like Nuremberg, becomes obsolete, and the process, now tied to those promises, goes with it (Shklar 2012).

In place of justice, security is sought, and thus in place of the horror inspired by recounting crimes, fear of future ones becomes the main concern. Faced every day with reports of new outrages and promises of new ones, the ability to force a moral reckoning in a courtroom by detailing past acts becomes lowered. Amid a growing, often indefinable 'war on terror' the attempted post-mortems of specific regimes becomes subsumed into an ever-changing narrative (Chamayou 2015). Amid ongoing terror, the actual potential for grand gestures intended at reorientation and renewal for battered democratic principles, as Karl Jaspers had hoped Nuremberg would do, appear increasingly impossible (Fine 2000). For one thing, with an absence of agreement on root principles, there is nowhere to which pariahs can be reoriented. In place of this only cynical power-play arises. The state of mind that Shklar defines as justice entailing, defined by responsibility and universalism, is clearly in retreat, and with it goes any restraint on might-is-right thinking. The more it becomes unrecognizable, the harder it becomes for a society to spread such ideals, or believe in them itself (Shklar 2012). Chamayou poses the unnerving question of how long a society can go on recognizing its own insistence on justice when it has given up on extending this as a valuable right (Chamayou 2015).

The killing of figures such as al-Awlaki, before discussing the morality of the act serves to suspend and eventually to nullify judgment. For once deprived of its action-forming possibility, judgment simply becomes opinion. Whilst judgment was made before the assassinations, it was secretive and justified by duress, allowing it a relativity not afforded to tribunal decisions. The increasing reliance on distant

machines to carry out sentence also serves to remove the importance of human judgment from the process. It is important to note that the meditation and discussion created by these events does not, Arendt argues, compensate for the responsible, definitive and courageous act of deliberation entailed by genuine judgment (Arendt 2000). It becomes clear then that the collapse of liberal justice as a defining feature of modern international politics is an increasing risk, and that of the many factors causing this, events in Iraq have been pivotal, if only for its role in exposing the problems in Western ideology without allowing for any solution.

Section 4.2: Concluding remarks

The concluding verdict of this thesis is a negative one for the prospects of the continued political relevance of war crimes tribunals, either for aiding international stability or ensuring national integrity.

This thesis has asked two interconnected questions concerning the overall issue of the political nature and future of war crimes trials, specifically focusing on ones that are of international interest and are indicative of seismic political and cultural shifts. It has endeavored to create a clear narrative within which this question is of the highest political importance: one that began with the Nuremberg trials, when a parochial power-centric ideal of statehood was replaced by an idealist, universalist one in which law was central, both to establishing the legitimacy of states and the rights of individuals within them. It was this centrality that made highly publicized war crimes trials such as Nuremberg, Eichmann's and those of the ICC so iconic and consequential. How secure has this status quo actually been, and does it have a future in an era of rapid global change?

The theoretical understanding of such trials, their political use and the role and nature of law in general have been examined through the contending theories and key legal texts of Hannah Arendt and Judith Shklar. This thesis has aimed at comparing both theories in terms of what they argue should be the practice of public trials, bearing in mind that both prioritized political outcomes. It has taken as its theoretical base the belief shared by both authors that such justice, and preferred,

open political systems that accompany it, are ideal and worth defending against arbitrary violence and power-politics. Therefore the main debate between them has been how best this liberal system can be upheld amid political volatility. In keeping with this focus, the thesis has thus focused on what it considers a crucial case through which both theories can be compared, as well as being a key junction in the history of international law, that being the trial of Saddam Hussein in a mixed environment of Iraqi national politics and Western/international efforts to fight a political conflict in the Middle East. By analyzing this trial in detail, it has found strong elements of both theories in practice, and the opportunity to critique these theories by comparing them to each other in the context of a real life example. Having given a verdict on the various aspects of the trial in this vein, and given extensive concluding arguments as to the fallout of this trial, both political and legal, it remains pertinent to restate these original questions and summarize how they have been answered in the thesis.

Amid the continuing existence of trials, both international ones like the ICC and national ones, it would appear that political communities, whether liberal democracies or not, have not entirely lost their belief in the importance of public execution of justice. But the rot at the core of this faith has undoubtedly set in, and the Saddam trial should be considered the most prominent manifestation of this development. The application of highly politicized justice measures were carried out by powers who had lost their sense of needing them, and in a time when the political stability that had allowed them to be enforced was over. This goes toward explaining their failure. The failure of said authorities to recognize that the power of such trials emanated from these elements was what led them to push these ideals hard, making their failure more obvious and influential.

In light of this situation, the thesis has argued that Arendt's insistence that supposedly changeless law not be subjected to changeable political needs becomes more pertinent, as legal bodies now have to prove that they are not as transient and fallible as the political ideologies of those who utilize them. It is their perceived hollowness and irrelevance that is enabling the rise of unaccountable, parochial

political and military practices, such as summary assassinations. For the law to prove it is still strong and universal, more attention should be paid to curbing the rise of this increasing grey zone of legality and morality in which drone warfare operates. Instead, as it stands, the greatest legal role currently being played in this widening crisis of meaning is by lawyers and theorists employed by the operators of such systems to justify their actions and their right to remain unchallenged (Perungini & Gordon 2015).

Is the Saddam trial a test for these two competing theories and their relevancy? :

Through its application of their theories this thesis has displayed that Arendt and Shklar's descriptive and prescriptive analyses are still relevant to the understanding of the role of law in political action. By applying these theories rigorously and testing them through this landmark example, it further argues for the significance of the trial as a revealing and consequential event in legal/political history. Both theorists have much valuable insight to apply to the Saddam trial, but it is the view of this thesis that the trial largely displays the pitfalls of Shklarian instrumental legal theory. The continued political prioritization of such trials turns toxic in the absence of any sincere politics to be promoted, and the untruths allowed in order to ensure such political results are increasingly impossible to sustain. Shklar's analysis may have been bold but it required a political bedrock that no longer exists, causing her far larger structure to fall with more destructive results. Arendt's solution has in the long run proved to be superior, given the situation liberal democracies find themselves in, addressed in the final main question.

Are we returning to a pre-Nuremberg consensus? : As described recently, the West does appear to have 'lost the language of law' (Kassem 2016) and the further this goes unaddressed, the more easily we shall slip back into accepting international politics being defined by power struggles with no true respect for a law that defends national sovereignty and individuals, but only the rights of rulers. Shklarian instrumentalization, having been validated in trials, becomes toxic in an era of summary justice, permitting bending the law further in the name of greater goods. To this, an Arendtian insistence that law applies to all and cannot be bent to serve

short-term political interests is more pertinent than ever. In an unfortunate twist however, such a development appears more unlikely as process-heavy trials slip into the background. A grand gesture and media event, such as Saddam's has only served to undermine them further.

In answering these questions this thesis has created a clear narrative connecting the various stages, comparing their qualities and displaying how norms have been created and challenged to lead to our present situation. Its primary analysis of the Saddam trial has created an in-depth explanation of how all these links come together to contribute to the event and its consequences. In terms of theory it has similarly cross-examined the main theories and others to create a genealogy of thought.

Necessary constraints of time and space have left certain areas in want of further research. For example the wider world of national trials, including many idiosyncratic events, which nonetheless contain representative elements, can be further investigated as to their impact on local politics and legal thought, especially ones in parts of the world where the influence of the post-world War II trials and liberal democracy in general have been lower. Further examples too can be elaborated upon regarding the rise of accepted illegal action within politics that go beyond the assassination campaigns of war, in areas that touch upon economic boycotts and diplomatic confrontations, which do not necessarily link closely to the subject of trials but are nevertheless part of a growing trend towards arbitrariness.

Such aspects warrant deeper research. But within this thesis, the more direct route has been taken, to examine a wide, influential subject such as international justice and examine the results of its political development. Those robbed of fair trials and victim's closure have been the first to feel the result of the decline of these ideals and institutions, but this thesis predicts that our wider societies will come to feel their impact as war moves away from the realm of law in which its impact is judged by its effect on citizens and states, and returns once more to being the domain of

relativist political-technical cliques whose rules are largely outside of universal law.
In other words, when it becomes once more 'the sport of Kings' (Shklar 2012, 198).

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