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Spectacles and Spectres

Political Trials, Performativity and Scenes of Sovereignty

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submitted for the degree of
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declaration

I hereby declare that the work presented in this thesis is my own, except where explicit reference is made to the work of others.

abstract

Political trials are generally understood as extraordinary events in the life of liberal democracies, dramatically staging claims to and contests over political authority and legitimacy. Notably, political trials often attract commentary on their theatrics whereby the spectacle becomes a matter of uneasy scrutiny, despite the tacit cross-cultural acknowledgment that the trial is an inherently theatrical form. This thesis is an attempt to conceptualise the political operations and effects of the relation between performance and performativity in trials, treating these as separate but related terms. It proposes a new framework for studying political trials by drawing on theories of performativity (J.L. Austin, Jacques Derrida, Judith Butler, Shoshana Felman, Stanley Cavell) which assist not only in rethinking the role and effects of performance in trials, but also in introducing a multivalence to the meaning of 'political' in political trials. In other words, performative theory allows the formulation of the politics of trials beyond its standard conception in terms of the utilisation of legal procedure for political ends or expediency, instead attuning us to the unconscious processes, inadvertent gestures, ghostly operations, structural infelicities and other similar dynamics that recast the political effects of legal proceedings. This thesis is therefore an attempt to conceptualise the spectacles and spectres of justice at the intersection of law and politics. In addition to incorporating brief discussions of various 20th and 21st century political trials to develop this theoretical framework, it offers close studies of three cases: the 1921 Berlin trial of Soghomon Tehlirian, and two contemporary 'deep state' trials from Turkey – the Ergenekon trial, and the Hrant Dink murder trial. A sustained concern is with legacies of political violence, how they are addressed or contained by law, and how they are perpetuated by law.

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introduction

The beginnings of some of the questions pursued and ideas developed in this thesis can be traced back to my involvement in the World Tribunal on Iraq (WTI) from mid-2003 until late-2005. My first encounter with the idea of organising a war crimes tribunal was in an email from a friend on one of the listservs of Turkey's anti-war movement, about a week into the US and UK-led war on Iraq. The movement in Turkey had secured significant victories in the months prior to the start of the war, most notably blocking a parliamentary proposal to allow deployment of US troops from Turkish territory.¹ This was important given not only that the leaders of the governing party were strongly in favour of the proposal (thus our campaign was successful in convincing a critical number of MPs to defect from the party line), but also and more crucially, given Turkey's geopolitical positioning as a special and dependable ally for the US in the Middle East and an immediate neighbour to Iraq with a land-border length of around 350km. This victory, the majority anti-war public opinion in Turkey, as well as our awareness of being part of a truly global anti-war movement had reassured us that we were going to stop this war, with our bare hands, before it begun.

We could not. When the war was launched on 20 March 2003, like many others, I was seeking meaningful ways to continue my activism. This proposal for

¹ 'Turkey Upsets US Military Plans,' *BBC*, 1 March 2003, <http://news.bbc.co.uk/1/hi/world/europe/2810133.stm>.

organising a global people's war crimes tribunal was intriguing, though I had my reservations about the legalistic form. Once we started discussing and networking around the proposal locally and internationally, we found out that the same idea had emerged simultaneously in different parts of the world. Eventually, over a period of two years, WTI sessions were held in Barcelona, Brussels, Copenhagen, Genoa, Hiroshima, Lisbon, London, Bombay, New York, Östersund, Paris, Rome, Seoul, Stockholm, Tunis, as well as multiple cities in Japan and in Germany, to culminate in a final session in Istanbul in June 2005.² All of these sessions were organised by local groups or coalitions that were autonomous but horizontally linked to the global WTI network, whose organising principles were collectively laid down in a 'Platform Text' that was the outcome of three days of discussions during the first international WTI network meeting, held in Istanbul in October 2003.

I was involved in organising both the New York session and the culminating Istanbul session. One of the most interesting questions for me in this two-year process had to do with the area of overlap between the performance of the tribunal and its performativity; in other words, the relation between its theatrics, its staging and self-presentation on the one hand, and its political claims and effects, its implication and postulation of some form of authority on the other hand. What were the political implications of opting for a tribunal rather than another form of manifestation? What was it that we were playing at and playing with, or perhaps, playing havoc with, in playing out a series of tribunals? There was a general awareness within the WTI network of the tradition of civil society tribunals³ that preceded the WTI; so that for instance, the organisation in Brussels called itself the *BRussels* Tribunal in a salutation to the 1967 Russell Tribunal. There was also a will to uphold certain values and principles of international law, as the WTI in part understood itself as responding to the failure and silence of international institutions in upholding these principles with regard to the war on Iraq. Further, there was an acute awareness of the limitations of existing mechanisms of accountability beyond

² For a succinct overview of the WTI process, its context and rationale, see Falk (2008) who dedicates a chapter to this initiative. The proceedings of the culminating session are collected in Sökmen (2008). See also the documentary *For the Record: The World Tribunal on Iraq* (Dadak et. al. 2006).

³ Also referred to as people's tribunals or citizens' tribunals, see discussion in Borowiak (2008: 165n11).

questions of enforcement. Thus the WTI Platform Text states as among its aims, ‘expand(ing) notions of justice and ethico-political awareness’ and ‘formulat(ing) recommendations for international law’ in an attempt to ‘break the tradition of victors’ tribunals’ (WTI 2003).

The question of how the sessions should be staged in a way that addresses these concerns was raised at the October 2003 global network meeting of the tribunal. This was an important gathering, as it was the first time that representatives from the various tribunal initiatives around the world came together to seek and spell out common principles beyond the logistics of coordination. The WTI Platform Text was produced at this meeting, and serves as a ‘constitution’ of sorts, naming the endeavour, telling a story of its origins, listing the sources of its legitimacy, announcing its tasks and aims, and providing indicators as to ‘The Form of the Tribunal’ under a separate section entitled as such. Indeed, it emerged at the discussions in this meeting that the question of form and self-presentation was inseparable from concerns on principles. As one participant, publisher Müge Gürsoy Sökmen, noted:

To do this with credibility and legitimacy, we do not need to replicate existing official forms and mechanisms. This is not a theatrical display of how the officially set up courts and tribunals should have acted and decided and operated if they had upheld international law like they are supposed to. This would belittle our endeavour and undermine it. ... We should keep in mind that many bodies that in procedure and form claim to stick to international law, are in effect condoning its violation. (qtd. in Çubukçu 2011: 435)

Already in this contribution, certain key tensions between the form and substance of ‘doing justice’ are identified: in responding to the failure of international institutions to deliver substantive justice, we should not be attempting to mimic them formally, since it is that very form that has shrouded some of these institutions’ complicity in the injustices perpetrated. Indeed, the attempt to mimic an official tribunal would make the WTI look ridiculous – as if it were desiring the status of an official transnational institution, as if it were desperate for a form of recognition that it could never attain. Instead, the formal elements of the performance of the tribunal could be derived from the nature of the initiative itself

as a coalition of activists and experts across borders, across professions, and political convictions.

In the end, the specific decision on how to perform each session was left to the local coalitions organising the sessions. Yet one paragraph made it into the Platform Text (WTI 2003) as a guideline:

Being confronted with the paradox that we want to end impunity but we do not have the enforcement power to do so, we have to steer a middle way between mere political protest and academic symposiums without any judicial ambition on the one hand, and on the other hand impeccable procedural trials of which the outcome is known beforehand. This paradox that we are just citizens and therefore have no right to judge in a strict judicial way and have at the same time the duty as citizens to oppose criminal and war policies should be our starting point and our strength.

So the collective decision was to go beyond ‘mere’ political protest and ‘mere’ academic event; but also to avoid mock/show trials that remained loyal to existing tribunal formalities by theatrically mimicking common legal procedures. Instead the idea was to come up with stagings and performances that communicated something of the ethos of this undertaking with all its paradoxes, weaknesses and strengths. However, in the desire to go beyond ‘mere political protest and academic symposiums without any judicial ambition’, a particular claim to authority is discernible. Further, a ‘duty to oppose’ is invoked, and this was rearticulated by Arundhati Roy in her closing speech at the culminating session in Istanbul, where she served as the chair and spokesperson of the jury:

To ask us why we are doing this, why is there a World Tribunal on Iraq, is like asking someone who stops at the site of an accident where people are dying on the road: Why did you stop? Why didn't you keep walking like everybody else? (Sökmen 2008: 490)

The invocation of a duty to act is at once a postulation of a certain type of ethico-legal subjectivity, whereby ‘we’ would be liable for negligence if ‘we’ were to fail to act. Further, this is the performative conjuration of the law before which ‘we’ would be liable for failing to act. It is also a form of self-legitimation and self-authorisation, as the duty is invoked to validate action as not just justified but also necessary.

This particular self-authorisation dovetailed with another posited origin of authority, namely, the global movement against the war. The claim was that as an initiative born out of this movement, the WTI has justice on its side. Further, a tradition of mobilisations was invoked for self-authorisation as the WTI claimed to act ‘on the basis of the struggles of the past to develop systems of peaceful co-existence and prevent future aggression and breaches of the UN Charter’ (WTI 2003). Since the official institutions that these past struggles helped create have failed in the case of the war on Iraq, the WTI claimed the responsibility and the moral authority to act and to bring ‘the principles of international law to the forefront’ (ibid.).

As anthropologist and WTI activist Ayça Çubukçu notes, it is significant that ‘the concepts of legitimacy and authority and the identification of their “sources” consume[d] the foundational encounter’s “living agenda”’ (2011: 439), that the participants felt that these were the questions that needed to be addressed at this initial meeting. But it is also significant that the question of how the tribunal sessions should be staged emerged concurrently with these questions of authority, legitimacy and their sources. It is as if the claim to authority generates the necessity to think about how to perform that authority. Here we enter the scene of performativity, as a concept distinct from but intimately related to performance. As will be seen, the overlap between performance and performativity in trials is one of the concerns that found its way into this thesis.

Several months after the meeting at which the Platform Text was produced, Jacques Derrida declined an invitation to participate in the WTI, but agreed to give an interview to Lieven de Cauter, a philosopher involved in organising the Brussels session of the tribunal. In the interview, Derrida apologises for not being able to actively take part in the Brussels session due to his illness, but emphasises his support, though with certain clear reservations. He finds the initiative promising in its ‘symbolic value in a call to reflection we are in need of, and which the states are not taking care of, which not even institutions like the International Criminal Court are taking care of’ (Derrida and de Cauter 2006: 262). He repeats that he ‘believe[s] in its considerable symbolic effectiveness in the public domain’ but comes across as apprehensive about the possibility that the organisers will not choose their

targets prudently, perhaps that the initiative may fall into a populist anti-Americanism of sorts. He advises:

I would hope that you would treat those you accuse justly, that yours would be an undertaking of true integrity, devoid of preliminary positioning, without preconditions, that everything would be done in serenity and justice, that the responsible parties would be accurately identified, that you would not go over the top. (ibid.)

Before it was published, the interview was distributed to the WTI listserv. I remember reading it and asking myself: What kind of performance would be considered to ‘go over the top’? Derrida is not asked to and does not explain himself on this point in the interview, but one imagines a fantasy of WTI participants as mini-Vishinskys on makeshift stages, wagging their fingers at poorly-defined imperial monsters, and denouncing the evil conspiracies of the wicked witches of the West. Granted, his unease is to some extent understandable: as he gives an interview to lend his support in principle, he thereby offers his ‘countersignature’ to this initiative in which he could not have much say other than what he says in the course of this interview. Thus it is important, and was at the time so for some of us involved, to pay close attention to his words.

In his wish-list, Derrida seemed to equate doing justice with the absence of ‘preliminary positioning’, which would in turn yield a performance of serenity that avoids ‘going over the top’. The problem with this formulation was that the WTI was not exactly an initiative ‘devoid of preliminary positioning’. It was precisely the shared understanding that the US and UK-led attack on Iraq was illegal and unjustifiable that had brought people together to organise a tribunal in the first place. In the words of international law expert Richard Falk (2005: 92) who served both as an advisor to the WTI from the initial stages of planning onwards and as the chair of the Panel of Advocates at the WTI’s culminating session:

[The WTI] proceeds from a presumption that the allegations of illegality and criminality are valid and that its job is to reinforce that conclusion as persuasively and vividly as possible. The motivations of citizens to organise such a tribunal do not arise from uncertainty about issues of legality and morality but from a conviction that the official institutions of the state, including the United Nations, have failed to act to protect a vulnerable people against such Nuremberg crimes as aggression, violations of the laws of war, and crimes against humanity.

What would it look like had we heeded Derrida's advice? Would we have had to suspend our preliminary positioning, or would we have had to 'perform' a suspension of this preliminary positioning? Is the absence of preliminary positioning a condition for doing everything in 'serenity and justice' and without 'going over the top'? Or, to ask the question the other way around, would preliminary positioning necessarily result in a performance of agitation and injustice, a performance that goes over the top? Reporting on the culminating Istanbul session of the WTI, Richard Falk (2008: 178) writes:

There was no pretense of neutrality or balance. The advocates were chosen for their familiarity with or exposure to the situation in Iraq, and because they were known and respected as critics of American policy in Iraq. The Jury of Conscience, which was as convinced about the underlying issues before the tribunal got under way as were the advocates, responded to the various presentations with unrehearsed questions, and after their deliberation and much internal discussion, issued a final unanimous assessment that was called the Declaration of the Jury of Conscience.

Thus the preliminary positioning was not suspended for sake of the performance of the tribunal. Instead, the endeavour sought to attain credibility for its preliminary positioning through reliable resources and reasoned frameworks. Yet note the adjective 'unrehearsed'. There is a gesture here towards the classic identification of justice in the event of the trial with spontaneity, immediacy and liveness.

Falk further proposes 'truth-telling' as a measure of WTI's justice: 'The credibility of the WTI depends on its capacity for effective truth-telling that engages public opinion, and withstands fair-minded critical scrutiny' (ibid.: 179). And indeed, this seems a more relevant gauge for this particular endeavour than that of the lack of preliminary positioning. The latter is an idealised condition that is desirable (though often structurally compromised) in formal legal institutions and exercises of justice, such as criminal courts and trials. The purported absence of a preliminary positioning would actually have been self-defeating considering that the WTI's self-assigned task was the substantiation of a preliminary positioning that was initially expressed *en masse* on streets by those who opposed the war.

What of 'serenity', then? Why this word and not another? In retrospect it proves a difficult adjective to judge the WTI by: in the two sessions I participated in, there was critique, eloquence, intellectual challenge, and an air of collective

inquiry; but also the buzz of collective agency, the disquietude of testimony, and the inevitable conflict of differences. So I no longer know what to do with Derrida's 'serenity'. But at the time, what I understood of this prescription was something like a performance that is convinced of its justice, or a performance that performed its own conviction in its own justice: the cool calm of addressing the matter to be judged without resorting to agitation, inflammatory rhetoric, grandstanding, or such other 'unseemly' supplementation. I remember thinking that this must have something to do with the question of authority, that perhaps the performance of the conviction in one's own justice is intimately related to authority.⁴ Could it be that authority is the performatively produced effect of a clearly legible conviction in one's own justice?

It was around the time of Derrida's WTI interview, and very much in the heat of the challenge of organising the New York session that I came across Hannah Arendt's work on the trial of Adolf Eichmann for the first time. I was struck by the force of her polemics, and somewhat scandalised by the oppositions she sets up in the opening passages of the book. Arendt begins by offering a visual description of 'the house of justice' in which Eichmann's trial took place. She claims, with characteristic disdain, that the architect of the courtroom 'had a theatre in mind' (Arendt 1994: 4), though she fails to note that the site was indeed originally a public hall for concerts and plays, converted into an improvised courtroom for the event, as there were no courts large enough to accommodate the numbers that were expected at the historic trial (Lahav 1992). Arendt also provides in these pages a description of the performances of the judges and the prosecutor. She appreciates the judges for not being theatrical in their conduct at any point during the proceedings, and for trying 'to prevent the trial from becoming a show trial under the influence of the prosecutor's love of showmanship' (Arendt 1994: 4). She notes that the odds were high against this effort due to the political origins of the trial – it was made possible by Prime Minister David Ben-Gurion's illegal but expedient decision to kidnap Eichmann to stage this trial for various ideological and pedagogical ends. Arendt writes:

⁴ See Schmidt (2010) for a consideration of the relation between authority, authenticity, and the performance of sincerity.

And Ben-Gurion, rightly called the ‘architect of the state,’ remains the invisible stage manager of the proceedings. Not once does he attend a session; in the courtroom he speaks with the voice of Gideon Hausner, the Attorney General, who, representing the government, does his best, his very best, to obey his master. ... The latter’s rule, as Mr. Hausner is not slow in demonstrating, is permissive; it permits the prosecutor to give press-conferences and interviews for televisions during the trial, and even ‘spontaneous’ outbursts to reporters in the court building ... it permits frequent side glances into the audience, and the theatrics characteristic of a more than ordinary vanity... (5-6)

Mr. Hausner is said to fully indulge in ‘all the nice pleasures of putting oneself in the limelight’ (6) and his performance is diametrically opposed that of the judges. Arendt writes that in the conduct of the judges,

At no time is there anything theatrical... Their walk is unstudied, their sober and intense attention, visibly stiffening under the impact of grief as they listen to the tales of suffering, is *natural*, their impatience with the prosecutor’s attempt to drag out these hearings forever is *spontaneous* and refreshing, their attitude to the defence perhaps a shade over-polite...their manner toward the accused always beyond reproach. They are so obviously three good and honest men that one is not surprised that none of them yields to the greatest temptation to playact in this setting (4, my emphases)⁵

It is often conceded that the Eichmann trial had the trappings of a show trial (e.g. in Mueller 1961: 7; Bilsky 2004: 92-93). These opening passages in Arendt’s account are nevertheless curious. She regards the prosecutor’s portrayal of his sense of justice as ‘showmanship’, and yet the judges’ portrayal of their sense of justice is regarded as a token of their goodness and honesty. The setting is that of a theatre, the prosecutor playacts, but somehow the judges manage not to. She understands the judges’ performance to be a non-performance, it is ‘natural’. One wonders, would she describe their performance as one of ‘serenity’? Could ‘serenity’ be the sign of a performance that forgets its performedness, its very status as a performance? The judges, according to Arendt, are unstudied, spontaneous, sober, attentive, able to grieve, impatient with twaddle, polite, and beyond reproach. But the spontaneity of the prosecutor is doubtful, with scare-quotes around the adjective when she refers to his outbursts. In her criticism of the prosecutor’s conduct, there

⁵ Throughout the thesis, I will signal only my added emphases on citations, so that it can be assumed that unsignalled emphases are in the original.

is an implicit suggestion that justice requires a certain kind of performance, and her applause of the judges' conduct implies that the kind of performance that justice requires is something that passes as non-performance, that is, non-theatrical. Why assume that the performance of the judges in this case is non-theatrical, unstudied, and unprescribed? May it not be that the judges, too, were aware that there is a certain protocol for displaying justness, for posing as just, a certain attitude that is deemed becoming of doing justice? When it comes to the formal instance of 'doing justice' in the formal setting of a court, why should the sobriety and solemnity of the authorities that judge be necessarily deemed 'natural'? May it not rather be that the common-sense expectation of how justice should be performed is at the basis of that particular kind of performance? Hence, may it not be that this particular kind of performance is indeed studied and prescribed?

As I argue in some detail in Chapter 1, Arendt's investments in the way this trial was staged had to do precisely with its performative aspects. She wanted the trial to redefine and substantiate the notion of crimes against humanity for the future of international law. In this regard, the trial's dominant performance starring Gideon Hausner constituted a failure for Arendt, and mirrored or symptomised its infelicitous performativity, its inability to offer the much needed legal innovation that may go some way to address the atrocities that threatened to 'explode the limits of the law' (Arendt and Jaspers 1992: 54). Her conviction that this was not an 'innocent' failure, a mere inability to cope with the enormity of the task, accounts for her brilliantly bitter polemic in her 'report'. The failure was instead due to the prioritisation of other investments, namely Ben Gurion's vision for the trial's performative outcomes: state-sanctioned historiography, Zionist propaganda, and a veritable threat to Israel's potential and actual foes. According to Arendt, the trial failed in certain crucial respects because it was engineered to succeed in achieving these prioritised set of performatives, which she understood to be parochial and misdirected, if not outright corrupt.

In Arendt's response to the Eichmann trial, just as in Derrida's response to the WTI, we see the coincidence of questions of performance and performativity. However, we also see in Arendt's response the confounding of the conceptual terrain of performativity with that of performance. What she takes issue with is first

and foremost the performative pretensions of the prosecution, but this critique is initially formulated in terms of disdain for the prosecutor's performance. Arendt doesn't even pose the problem with the Eichmann trial as one of 'bad theatre' as opposed to 'good theatre' (cf. Cole 2010: 2), but rather as a problem of theatricality pure and simple. Something of what Jonas Barish (1981) termed the 'antitheatrical prejudice' is clearly in evidence here, and indeed, Arendt is taking recourse to what happens to be a very common trope: theatricality is an accusation that is often encountered in prose on political trials.

It seems, however, that Arendt's discomfort with how the prosecutor attempted to stage the Eichmann trial was closely related to her understanding of the task of judgment in the face of the unprecedented. In a lecture Arendt prepared following the controversy unleashed by her work on the Eichmann trial, she wrote of the faculty of judgment in the following terms (Arendt 2003: 27):

only if we assume that there exists a human faculty which enables us to judge rationally without being carried away by either emotion or self-interest, and which at the same time functions spontaneously, that is to say, is not bound by standards and rules under which particular cases are simply subsumed, but on the contrary, produces its own principles by virtue of the judging activity itself; only under this assumption can we risk ourselves on this very slippery moral ground with some hope of finding a firm footing.

Here we see a formulation of judgment that particularly emphasises its performative quality: the judgment is to bring into being the principles on which it is based, in a 'fabulous retroactivity' (cf. Derrida 2002b). Hence, the responsibility of judgment is linked to a responsiveness to the matter to be judged, rather than the loyalty to existing standards and rules. In this sense, Arendt's formulation of the spontaneity of judgment is to some extent incompatible with the judicial practice of judgment. Although legal judgment should ideally also be attuned to the distinctions and uniqueness of the case at hand, loyalty to rules and precedents is much more of a priority in law than in Arendt's scheme. While Derrida (2002a: 251) shares this view of judgment as reinventing law, his formulation of performative reinstitution in relation to following existing rules and standards is one of 'not only, but also', as opposed to Arendt's 'not, but':

To be just, the decision of a judge ... must not only follow a rule of law or general law but must also assume it, approve it, confirm its value by a

reinstating act of interpretation, as if, at the limit, the law did not exist previously – as if the judge himself invented it in each case.

Derrida thus recognises the importance of preserving existing law but suggests that a just judgment is one that suspends existing law and judges as if it didn't exist in the first instance.

Arendt's emphasis on the value of the spontaneity of judgment explains something about why she approved of the 'natural' spontaneity of the judges in the Eichmann trial and detested what she perceived as the feigned spontaneity of the prosecutor. Likewise, the 'as if' in Derrida's formulation explains something about his advice to the WTI and how it should be performed: as someone well aware of the composition of the tribunal, what he may have meant by an 'undertaking of true integrity, devoid of preliminary positioning, without preconditions' was perhaps the call for the performance of an 'as if' that suspended the existing preliminary positioning – as if it weren't there in the first place. While these explanations may assist us with a more careful reading, they fail to settle two critical and related issues that surface in Derrida and Arendt's commentaries. One is the deep ambivalence of the significance of performance for law; the other is the conflation of performance and performativity in law. Trials are particularly conducive sites for the manifestation of both of these issues.

The former, the ambivalence of the significance of performance for law, is to some extent captured by the importance attributed to live performance in trials (Auslander 1997; Mulcahy 2008; Leader 2010), especially in common law jurisdictions. On the one hand, this importance is intimately related to the expectation we find in Arendt and Derrida that a judgment ought to be responsive to the novelty and uniqueness of the issue to be judged. The very *liveness* of trial performance is supposed to signify a *liveliness* on the part of all participants to that which is adjudicated. But there is always a flip side to this: the strict conventions of live performance in the trial (the organisation of space and the bodies in space, the authorisation of speech, the rituals of conduct, the costumes, and so on) are also precisely what risk a perception of the rehearsedness of what transpires, which in turn may lead to the dismissal of proceedings as pure theatre. Julie Stone Peters discusses this in terms of the historically ambivalent relation that law has had to its

own theatricality: 'Theatre is law's twisted mirror, its funhouse double: ever-present, substantiating, mocking, reinforcing, undermining' (2008: 198).

The other issue is the conflation of the showing of justice (performance) with the doing of justice (performativity). That legal performance and performativity are closely connected is idealised in the classic formulation of 'not only must justice be done, it must also be seen to be done'. While at face value this seems to be a relatively unproblematic combination of the doing and showing of justice, it may be necessary to consider to what extent the grammar of 'not only, but also' does justice to the nature of the combination. Notably, the classic formulation originated in a judicial bias case where bias was not proven but suspected. It merely 'appeared' that there may have been bias, yet the appearance was sufficient to quash the original conviction.⁶ Unseen justice was justice undone. We may ask, then, is it possible to speak of two separate instances, one doing, the other showing, so that justice is 'not only' done, 'but also' shown; or do we instead have a strange conflation of the two whereby it is difficult to tell them apart? In a rare literature review on law and performance, Peters (2008: 185) writes of the 'ontologically ambiguous fusion' of performance and performativity in law. She does not then go on to try to separate the two, and surprisingly even uses the two concepts interchangeably at times, in an otherwise incisive discussion of legal performance.⁷ Then again, perhaps there is no simple way of undoing this fusion, which on one level tells us that law owes its powers and processes of alchemy precisely to the conflation of its performance and performativity. Nevertheless, one task that this thesis undertakes is the attempt to rethink the relation of legal performance and performativity as separate but related issues.

It is never easy, and perhaps ultimately impossible to give a thorough account of the origins of an intellectual inquiry or a particular curiosity. In relating something of the constellation of experiences, readings and thoughts that brought

⁶ The original formulation by Lord Hewart was 'a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.' (R v Sussex Justices, Ex parte McCarthy [1924] 1 KB 260)

⁷ The uncritical conflation of performance with performativity is something we encounter often in academic literature across disciplines, and I discuss some of the conceptual quagmires produced by this conflation in Chapters 2 and 3.

me to the subject of this study, I try to provide a situated account of my preoccupations here, the ways in which some of the questions pursued in this thesis initially took shape. But of course, a departure point is just that, where you end up is never fully determined by where you begin. In the end, this thesis is not about civil society tribunals or people's tribunals, such as the World Tribunal on Iraq, that have no power of enforcement in the strict sense of that term. Its focus is on political trials instead – actual legal proceedings backed up by state power, but those that have an explicit political significance. In rethinking the legal and political implications of the overlap between performance and performativity in formal instances of doing justice, political trials prove to be privileged as objects of study, as they can reveal dynamics that are otherwise disguised in legal proceedings. Their status as purported exception affords insight into the norm, that is, into the dynamics of performativity at work in what are deemed 'ordinary', or non-political trials – if such a distinction is ultimately valid.

If I were to formulate the scope of this thesis in its most abstract form, it would be something like this: This thesis is an attempt to conceptualise the relation between the form and the substance of doing justice. But justice happens to be a worldly thing, and thought has to attach itself not only to ideas and concepts but also to issues and materials. So then: This thesis is an attempt to conceptualise the relation between the performance and the performativity of trials, treating these as separate but related terms. In doing so, it takes political trials as its primary object of study, and proposes a new framework for studying trials by drawing on theories of performativity. The idiom of performativity proves felicitous both for rethinking the role of performance in trials, and for introducing a multivalence to the meaning of 'political' in political trials. In other words, performative theory allows the formulation of the politics of trials beyond its standard conception in terms of the utilisation of legal procedure for political ends or expediency, instead attuning us to the unconscious processes, inadvertent gestures, ghostly operations, structural infelicities and the like in legal proceedings. This thesis is therefore an attempt to conceptualise the spectacles and spectres of justice at the intersection of law and politics. A sustained if relatively subdued concern has to do with legacies of

political violence, how they are addressed or contained by law, and how they are perpetuated by law.

Although the phrase ‘political trial’ has much currency, there is no single definition of it. Further, the distinction between a political trial and an ordinary trial proves to be provisional rather than categorical. I begin Chapter 1 with a brief overview of the different definitions we find in scholarship addressing political trials. Rather than encountering a common designation in this literature, one gets the sense that a political trial is difficult to describe but ‘you know it when you see it’ – perhaps an important sense to hold on to for understanding what makes a trial political. My preliminary exploration of the question of definition is therefore intended as a way to open the question up rather than circumscribing it. The hope is that the thesis as a whole will provide a more multivalent answer to what the ‘political’ may signify in that particular phrase in various instances.

The greater part of Chapter 1 is taken up by a close study of three works on political trials, all published in the early 1960s in the United States: Otto Kirchheimer’s *Political Justice* (1961), Judith Shklar’s *Legalism* (1964), and Hannah Arendt’s *Eichmann in Jerusalem* (1963). These works go beyond the predictable outrage vis-à-vis the unkosher mixing of law and politics that political trials are conventionally understood to signify, instead offering more varied accounts and conceptualisations of the phenomena. In this sense, they can be seen as marking a theoretical shift in the literature on political trials. The instigator for this shift is very legibly the Holocaust trials – Nuremberg for Kirchheimer and Shklar, and the trial of Adolf Eichmann for Arendt. Thus the urgency we find in these works to think critically about the politics of political trials can be attributed to a felt necessity to come to terms with the legacy of the Holocaust trials, which were themselves attempts to come to terms with an unprecedented form of political violence. Most significantly for the rest of this thesis, in all three works we find incipient formulations pertaining to the performativity of legal proceedings. Kirchheimer, for example, discerns the ability of law to enact its own foundations into being through the trial. Arendt invests in the legal substantiation of the notion of ‘crimes against humanity’ as a way to performatively produce humanity as legal community. Shklar’s identification of the performative function of a trial is one that

brings embodied practice into play: the performance of a trial as a legalistic ritual can performatively recreate a culture of legalism. These insights into the performativity of trials serve as a point of departure for my discussion in the following chapters.

In Chapter 2, I engage closely with theories of performativity from J. L. Austin to Jacques Derrida to Judith Butler and beyond, and investigate the range of insights that performative theory allows for studying (political) trials. The combination is not incidental, Derrida has noted that ‘the juridical is at work in the performative’ (2000: 46). This proves pertinent when we read J. L. Austin’s lectures on performatives carefully. For Austin, law serves not only as a fertile resource for many of his examples, but also as an ideal paradigm for performativity. This special relation between law and performativity has been taken up by numerous scholars, some of whose works I draw on to conceptualise the performativity of legal proceedings. But primarily, I work with an idea that Austin introduces in passing: performatives often *masquerade* as constatives. The counterpart of this in law, that is, the masquerade of legal performatives as constatives is not accidental but rather necessary ‘to produce the sought-after effect’ (Derrida 2002b: 49).

I elaborate on this idea of the masquerade and its relevance for studying trials by drawing on Butler’s conceptualisation of the centrality of conventionality (understood as a sedimented historicity) for performativity, and on Derrida and Costas Douzinas’ formulations concerning the performativity of law. I propose that the various performative operations of legal proceedings are often disguised as constative functions partially through the hyper-conventionality of trial performance. This, then, anchors a new perspective on the coupling between performance and performativity in the trial: conventions of embodied trial performance assist in disguising a trial’s performative operations and allow law to operate as if it were fate. In other words, the overlap between performance and performativity works to create an appearance of inevitability. In this analysis, political trials can be defined as legal proceedings whose performative structures are publicly exposed, thereby resisting the closure of inevitability. I elaborate on this proposal in the concluding section of Chapter 2.

Chapter 3, entitled ‘Sovereign Infelicities’, is a transitional chapter in the overall structure of the thesis: it continues to engage with theories of performativity in their relevance to political trials, and prepares the initial ground for my case studies in the remaining two chapters. Here I tease out the implications of performative theory’s critique of sovereignty for studying the so-called ‘sovereign spectacle’ of trials. This critique comes to full fruition in Judith Butler’s work, but can be discerned from J. L. Austin onwards, given his emphasis on the doctrine of infelicities. Austin’s thorough account of the many ways in which performative utterances can fail indicates that infelicities should not be deemed accidental and external to his theory of performativity but rather paradigmatic. This account of Austin’s theory requires arguing with Derrida’s reading of Austin, and has a close affinity with Shoshana Felman’s take on Austin. So I allow myself the space to work through the readings and misreadings of the status of sovereign agency in theories of performativity.

The conclusion I draw from this review is that the very idiom of performativity complicates the scene of sovereign agency through its emphasis on citationality (or conventionality) and performance (embodied practice). These are two necessary conditions of performativity that always already undermine the possibility of absolute presence, unfettered intentionality, and other such attributes of sovereign agency. Carrying these insights over to the study of (political) trials requires the generalisation of performative theory’s problematisation of *sovereign agency* to the critique of a broader notion of *sovereignty*. While such transference is not always fully justified, the trial accommodates it well due to not only its particular makeup and dynamics pertaining to conventionality and embodied performance, but also the overall workings of sovereignty that it accommodates. I further substantiate the relevance of this transference through a discussion of three scenes from three different political trials: the Chicago Conspiracy Trial of 1969-70, Saddam Hussein’s 2005 Dujail trial, and the 2013 trial of student protesters Alfie Meadows and Zak King in the UK.

The overall point of Chapter 3, then, is to propose that performative theory allows the conceptualisation of the political in political trials beyond its overdeterminations. While the sovereign model for configuring the politics of a

trial reduces it to questions of expediency and imagines the scene of the trial as one that is mastered by sovereign wills and intentions, the performative model instigates a more multivalent appreciation of the political at work in a trial. It does this by sharpening our awareness to how law's structural unconscious may play out in a trial, and how embodied practices of participants bring fears, desires, anxieties, fantasies, projections, fetishisations and the like onto the scene of the trial to unsettle and recast the political as it transpires in the proceedings. So the arc of the movement from Chapter 1 to Chapter 3 can be identified thus: a rigorous follow-up of the initial proposals we find in the 1960s' literature on political trials concerning the performative operations of trials will bring us to a much more multivalent account of the politics of any political trial.

This conceptualisation of the vagaries of the political in trials serves as the groundwork for my case studies in Chapters 4 and 5. In Chapter 4, I offer a close study of the 1921 Berlin trial of Soghomon Tehlirian –an Armenian survivor of the 1915 genocide– who assassinated Talât Pasha, the Ottoman statesman widely seen as the mastermind of the genocide. In Tehlirian's trial, the political transpires as a shared state of haunting following the defendant's introduction into the courtroom of the figure of a ghost. I trace the signs of this common haunting in the trial transcript as it is inflected in the interventions of the presiding judge, the testimony of witnesses and psych-experts, the arguments of the defence counsel, and finally in the acquittal verdict of the jury. In giving a form to the impossible recognition of political violence, the ghost effects the most felicitous of all performatives in the trial. The participants' susceptibility to haunting create a political effect that is beyond any individual or stately sovereign strategies or damage limitation exercises at work in the trial. While I also take account of such strategies and exercises in my reading of Tehlirian's trial, my main emphasis is on the political role of the inadvertent, the ghostly, the speculative.

In Chapter 5, I turn to two contemporary trials from Turkey: the trial concerning the assassination of Armenian-Turkish journalist and human rights activist Hrant Dink in 2007, and the Ergenekon trial. Both of these trials concern the so-called 'deep state' – a phrase widely used in Turkey to evoke powers operating with impunity through and beyond the official state structure. While state

involvement is inscribed all over the case file, the Dink murder trial is not officially considered a deep state trial and the process has been marked by the disavowal of the state's role in the assassination. On the other hand, the indictments and the first instance judgment in the Ergenekon trial proudly claim that this trial purges the long-standing deep state to finally fully attain the rule of law in the republic. Before going on to discuss these two trials in detail, I offer a brief institutional history of the Turkish deep state to give a better sense of the kind of dynamics that the phrase invokes. Then, as a way of introducing the complications involved in putting the deep state on trial, I explore the different ways of conceptualising this notion.

The idea of *raison d'état* offers, perhaps, the best way of grasping the range of alliances and activities that this phrase refers to. As a governmental rationality, *raison d'état* evaluates the legitimacy of a state's activities solely with reference to the preservation and perpetuation of the state. Technically, the adjudication of deep state activities can be stage-managed to maximum effect as a 'return' to rule of law (from, say, *raison d'état*). However, there needs to be some kind of remove between the prosecution on the one hand, and the defence and the acts under consideration on the other hand, that is, between the state and the deep state for this to be a felicitous spectacle. This could either be a jurisdictional remove, or something like a 'transitional justice' remove, so that there is at least the appearance of a conflict between the prosecution and the defence. In the absence of such a remove, the trial effects a number of peculiar performatives: the state is performatively produced in the scene of the trial as both law and its transgression and most importantly, the ultimate instability of the idealised opposition between *raison d'état* and rule of law is exposed.

In the Hrant Dink murder trial, there is clearly no remove between prosecution and defence, so that the criminal justice process legibly operates as an extension of the crime. In the Ergenekon trial, there seems to be such a remove at first sight, as it has all the signs of a 'successor regime trial', and all the clamour of radical, incommensurable difference. However, as I try to show in my reading of the case file, beyond all the noise and commotion, beyond the accusations and counter-accusations of conspiracy, we can discern a deep consensus among the defendants, the prosecutors and the judges. This is a consensus that produces the

(deep) state as fetish in the scene of the trial. In my reading of the two cases, I pay attention to how law's ways of knowing contribute to the performative production of the state in these trials. In the Dink murder trial, a logic of dissociation produces the sneering state, where the sneer of the state is much like the grin without the cat. In the Ergenekon trial, a logic of hyper-association produces the state as a conspiracy of conspiracies. I conclude the chapter by signalling another way of knowing the (deep) state, one that follows traces, spectres and other leftovers of sovereign agency in a counter-conspiracy against the conspiring case files.

1

theorising political trials

The literature on political trials is, in one sense, vast. For well-known early instances we could easily go as far back as the 4th century BC to the two *Apologies*, namely, Plato's and Xenophon's respective accounts of Socrates' defence in his trial for impiety.¹ Curiously, this trial from 399 B.C. often crops up in contemporary works on political trials. This is true not only for works intended for a wide readership (e.g. Harris 2006; Kadri 2005), but also for the more systematic studies that aim to provide a genre definition of sorts by presenting an encyclopaedic compilation of accounts of various trials (e.g. Christenson 1991; 1999), as well as for the more analytic treatments (e.g. Kirchheimer 1961). The persistence of this fascination with a trial that is two millennia and four centuries old could perhaps be explained by the lively intellectual legacy of Ancient Greece and its philosophers, if not by a hint of nostalgic envy on the part of the contemporary scholar who gazes with awe upon the philosopher whose philosophising was deemed so influential as to be worthy of a public trial and capital punishment. Yet another explanation for the untimely contemporaneity of Socrates' trial would be that his defence involved quintessential elements of what today would generally be recognised as a political defence.

¹ In Ancient Athens, the charge of impiety, which had been utilised in political trials of the previous decades (see Bauman 1990) included three specifications: not believing in the gods of the city, introducing new divinities, and corrupting the youth (Brickhouse and Smith 2004: 79).

We encounter in many contemporary political trials something akin to Socrates' attempt to ridicule his prosecutor Meletus² with the charge of 'playfulness',³ 'insolence and unrestraint and youthful rashness' and of 'contradicting himself in the indictment' (Plato 1979: 26e-27a). Similarly, it is quite common for political defendants to attempt to turn the trial on its head so as to accuse the accusers, like Socrates does when he tells Meletus 'You have cared nothing about the things for which you bring me in here' (25c); and condemn the condemners: 'this brings disgrace not on me but on those who condemned me' (Xenophon 2008: ¶26). One among many examples in this regard was the rhetoric employed by Mohammad Ali Jouhar, one of the leaders of the Indian Khilafat movement, during his 1921 trial for conspiring to seduce troops from their allegiance: 'I have no defence to offer. And there is no need of defence, for it is not we who are on trial. It is the Government itself that is on trial. It is the Judge himself who is on trial. It is the whole system of public prosecutions, the entire provisions of the law that are on trial' (Gaubá 1946: 177-178). Consider the immense drama of Socrates' refusal to repent to avail himself of a lesser sentence – could we not say that something of that drama was replayed in the 1951 trial of American communists Julius and Ethel Rosenberg, who refused to plead guilty to save their lives?⁴ Isn't Socrates' outright defiance of death echoed in Algerian FLN militant Djamilá Bouhired's famous laughter upon hearing her condemnation to death by a French military court in 1957? And what do we make of the eerie similarity of wording between Socrates' address to his juror/judges 'men of Athens,

² Meletus was the first to accuse Socrates according to Plato's dialogue *Euthyphro* (1961: 170 2b). In the *Apology*, he appears as one of the three accusers. Most criminal proceedings in Ancient Athens at the time were initiated by private individuals. The accusing individual would draw the indictment and if the charges were deemed admissible by a magistrate (*arkhon*) following a preliminary inquiry (*anakrasis*), the trial would take place before hundreds, and in some cases thousands of jurors. The civilian accuser would play the role of the prosecutor in the trial. Thus in Socrates' trial Meletus was both plaintiff and prosecutor. For a detailed discussion of procedure in Ancient Athens, see MacDowell (1978: 24-40, 237-254).

³ Or 'pure flippancy' according to the Hamilton and Cairns edition (1961: 13).

⁴ The Rosenbergs did not advance an overtly political defence in their trial, however we can appreciate with the benefit of hindsight the political significance of their refusal to divulge any incriminating information while obediently answering every question and seemingly accepting the court on its own terms. See Sam Roberts, 'Father Was a Spy, Sons Conclude With Regret', *New York Times*, 26 September 2008, <http://www.nytimes.com/2008/09/17/nyregion/17rosenbergs.html>.

I am now far from making a defence speech on my behalf, as someone might suppose. I do it rather on your behalf' (Plato 1979: 30d) and Saddam Hussein's exclamation 'I am not defending myself, I'm defending you!' as he pointed with his index finger at the judge in his 2005 Dujail trial? Admittedly, the two exclamations do two quite different things: one is the 'I' of a liminal figure of a critic, the philosopher-pariah about to be banished from the body politic, who claims to defend 'you' from 'yourselves' who have indicted 'yourselves' by indicting 'me'; while the other is the 'I' of a deposed sovereign who reclaims the prerogative to speak on behalf of 'you' and claims to defend 'you' from the other.

Nevertheless, such tropes (the arrogation of the defence of the body politic, counter-indictment, counter-condemnation, ridicule, defiance of punishment, and martyrdom through refusal of mitigation or mercy) are so common in defendants' statements in political trials that one is tempted to trace the political defence speech as a genre onto itself, with Socrates' defence as an early instance. The hall of fame of this genre would then include Emile Zola's statement to the jury at his trial for criminal libel following his defence of Captain Dreyfus in his famous open letter 'J'accuse' (Zola 1998: 55-61); Alexander Berkman and Emma Goldman's speeches at their trial for conspiracy to defeat military registration (Berkman and Goldman 1917); Georgi Dimitrov's address at the Reichstag Fire Trial (Dimitrov 1964); Fidel Castro's defence speech at the Moncada Trial (Castro 1968); and Nelson Mandela's four-hour-long statement from the dock at the Rivonia trial (Mandela 1979), among others. While I do not pursue this question of the defence speech as genre in this thesis, the theoretical framework I propose for studying trials explains the unique effectiveness of the criminal trial as a platform for the political defendant. Where the stakes of speech are so high as to be a matter of life or death, freedom or incarceration, condemnation or exoneration, the performative potential of speech acts become virtually unbounded. It is perhaps not exactly a coincidence that published speeches of political defendants were all the rage in tsarist Russia in the lead up to the Bolshevik Revolution (Wood 2005: 22-23). Nor is it exactly an exaggeration to identify Mandela's trial speeches as articulating 'a new constitutional order, one that had yet to come into being' (Cole 2010: 56).

The nature of the defence is rarely identified in the literature on political trials as definitive, as that which renders a trial political. One key exception in this regard is the work of the late French-Vietnamese lawyer Jacques Vergès who is often credited as the originator of the theory and practice of the ‘strategy of rupture’ (Vergès [1968] 2009). Vergès’ rupture defence is a strategy of explosive incommensurability. It is the refusal to enter into dialogue with the court about the facts of the case or the points of law. Such radical noncompliance with the terms provided by the legal system and advanced by the prosecution is meant to tend towards an outright defiance of the sociopolitical order. In this sense, the strategy of rupture aims to take the trial outside the courtroom.⁵ Importantly, Vergès indicates in his *De la stratégie judiciaire* that the rupture strategy need not be limited to political trials. We cannot derive the significance of this from his practice as a lawyer, as he was known for his role as defence counsel in trials that were already of political significance, involving political defendants and/or political crimes.⁶ However, in theory, what determines the politics of a trial for Vergès is the attitude of the defence towards the social order represented by the court, rather than the nature of the crime or the stature of the criminal (Vergès [1968] 2009). Such an approach could potentially render the traditional distinction between an ordinary criminal trial and a political trial redundant, since hypothetically any criminal proceeding could be politicised through a successful rupture strategy. It must be noted, however, that Vergès’ approach is based on a particular, somewhat romantic

⁵ ‘Interview with Notorious Lawyer Jacques Vergès’, *Spiegel*, 21 November 2008, <http://www.spiegel.de/international/world/interview-with-notorious-lawyer-jacques-verges-there-is-no-such-thing-as-absolute-evil-a-591943.html>. Let me note in passing that what Vergès has baptised the strategy of rupture does not seem to have originated with him. We can identify a predecessor in the figure of communist lawyer Marcel Willard who founded L’Association Juridique Internationale and advocated throughout the 1920s and ‘30s a similar strategy of refusing to engage with the courts in the terms laid down by the accusation and instead using the courtroom as an arena, a stage for propaganda (Israël 2005). Willard’s approach was based on a letter by Vladimir Lenin, written in 1905 in response to members of Russia’s Social Democratic Labour Party who had been arrested the previous year and had consulted him as to how to proceed with the defence (ibid: 149). Further, Lenin seems to have derived his wisdom on defence strategy from the revolutionary trials of the previous decades in Russia (Wood 2005: 23). Thus a preliminary genealogy of Vergès’ rupture strategy takes us through Willard and Lenin, back to the late 19th century Russian political trials.

⁶ Vergès’ clients included, among others, Algerian FLN militants, Nazi war criminal Klaus Barbie, international Marxist-Leninist terrorist Ilich Ramírez Sánchez (aka Carlos the Jackal), and more recently the former Khmer Rouge head of state Khieu Samphan.

conception of crime. His 1968 tract where he develops the concept of rupture departs from the claim that every crime is a signal issued to life as a challenge for it to change. We find a kindred spirit in Theodore L. Becker (1971: xi) who introduces his edited volume on political trials with the suggestion that in a sense every trial is political, because ‘courts are government agencies and judges are part of the “system”’. While there is some truth in these approaches, they do little to explain the persistent ability of ‘political trial’ to signify something, though not necessarily just one thing.

defining the genre

According to a somewhat narrow technical legal definition that is often utilised in scholarly work, a political trial is a criminal trial in which the defendant is charged with a political offence. We may then ask, what is a political offence? In the introduction to *An Examination of Trials for Sedition Which Have Hitherto Occurred in Scotland*, Scottish jurist Lord Henry Cockburn exclaims, ‘To see no difference between political and other offences is the sure mark of an excited or stupid head’ (1888, 1: 68). The subject of Lord Cockburn’s treatise, sedition, is indeed often considered a classic political offence, along with treason and espionage. However, the contemporary criminological definition of political crimes is not limited to such classic offences against the state, but rather encompasses a wide range, including offences perpetrated by individuals with specific political affiliations (including state actors), those perpetrated against politically significant victims or targets, politically motivated offences, and offences leading to politically significant effects or outcomes (Ross 2012). As the scope is thus widened, the distinction between ordinary and political offences is blurred to the extent that it becomes somewhat difficult to avoid Lord Cockburn’s positive diagnosis.

Trials involving classic offences against the state are sometimes referred to as ‘state trials’ in the Anglo-American legal tradition. This designation comes from an early English source which has eventually come to be known as Howell’s *Complete Collection of State Trials* (Cobbett et. al. 1809-26). First published in 1719 in four volumes by Thomas Salmon, and eventually developed by 1826 into thirty-three volumes overseen by several consecutive generations of editors, including Sollom

Emlyn, Thomas Bayly Howell, and his son Thomas Jones Howell, *State Trials* was a compilation of trial records annotated with editorial comments. According to one interpretation, the definition of ‘state trials’ that effectively emerges in the Cobbett and Howell collection is not limited to proper offences against the state such as treason and sedition, but allows a broader scope, including trials of politically inspired riot and murder, parliamentary privilege proceedings, suspension of habeas corpus and the resort to court-martial proceedings against civilians (Binnie and Wright 2009: 9). However, according to another commentator, none of the editors throughout the decades ever provided a clear distinction between a ‘state trial’ and any other trial, and the designation was ‘generally used to indicate a case which had been of major political significance, though it was never so strictly defined as to exclude the more notorious cases of divorce, bigamy, or abduction. The primary aim of such collections however, seemed to be a demonstration that legality and justice were far from being identical on every occasion’ (Thomas 1972: 7). Here we come back to the definitional problem that saturates much of the work on political trials. In this sense, this initial delineation of politically charged crimes can be seen as an intriguing contribution to the literature on political trials, with early articulations regarding the instrumentalisation of law for political ends,⁷ and notes and commentary, especially those of the Howells, openly promoting libertarian checks on governmental abuses of the law.

The seventeen volume *American State Trials* compiled by John Davison Lawson (1914), in contrast, seems misnamed: though the editor claims it to be the US counterpart to Howell’s collection, it is neither confined to offences against the state, nor to cases with political implications, instead providing a loose assemblage of sensational and controversial criminal trials in US history. The more recent *Injustice: State Trials from Socrates to Nuremberg* by Brian Harris (2006) utilises a similarly broad and thus vague definition of the designation. A contemporary endeavour that falls more squarely within the Howell genre is the chronologically

⁷ E.g. Emlyn in his 1730 preface to the collection writes on treason trials as ‘the fatal engine so often employed by corrupt and wicked ministers against the noblest and bravest patriots, whose laudable opposition to their pernicious schemes those ministers are very ready to construe into Treason and Rebellion against the Prince; thereby confounding their own and the Prince’s interest together...’ (Cobbett et. al. 1: xxvi).

organised *Canadian State Trials* series (1996-2009), currently covering the period 1608-1914 in three volumes, with additional volumes forthcoming. In the introduction to the first volume, the editors, in their attempt to provide a definition of ‘state trials’, initially entertain a broad conception, to suggest that perhaps any trial that involves governmental interests could be brought under the heading. However, they note that this would ‘encompass innumerable kinds of trials relating to ... state security, of course, but also political corruption, federal/provincial disputes over jurisdiction, gender politics, native land claims, and so on’ (Greenwood and Wright 1996: 10). Thus they then opt for a more narrow definition and limit their scope to ‘state security’ in the existing volumes of *Canadian State Trials*, only covering perceived and actual threats to, and law-related dimensions of state security, including but not limited to treason and sedition trials. Notably, a definition of the political trial that departs from a narrow interpretation of the nature of the offence so as to limit it to trials involving offences against state security actually covers the great majority of trials that are generally identified as political, especially when we consider that such offences may have been designed to regulate the limits of political dissent.⁸

Given that the thirty-three volumes of the Howell and Cobbett edition were later supplemented by eight volumes of *State Trials: New Series* edited by Sir John Macdonell and published between 1888-98, the massive collection can be considered a major publishing feat for nearly two centuries. Donald Thomas (1972: 2) explains the ‘vogue’ for *State Trials* not only in terms of ‘a taste for the texture of life’ in the 17th and 18th centuries, but also as ‘an instrument of political debate and social inquiry’: ‘In its 18th century origins the *State Trials* collection had been a weapon of party politics, while to the late Victorians it remained a classic of political education by example’. This combination of privileged insight into a milieu and political exposure for pedagogical or ideological/critical ends in fact captures something crucial about the motivations behind much of the later literature on political trials. This is as true for works that drive at a definition of the genre of political trials through compilations of discussions of various trials deemed political

⁸ For a contemporary study that primarily adopts such a narrow ‘political crime’ definition to identify political trials, see Posner (2005).

(e.g. Christenson 1991, 1999; Harris 2006), as for those that limit the designation to trials of former heads of state (e.g. Laughland 2008) and studies with more carefully defined scopes such as a specific period in the history of a particular country,⁹ a certain legal doctrine,¹⁰ or a particular piece of legislation,¹¹ thus containing the politics of political trials. In all these, we see the attempt to grasp and portray something either about how power works (or worked, at a particular time and place), or about the overt and covert political dynamics in a society, the political culture of a state as crystallised in political trials where power exposes itself. In this sense, the key appeal of studying political trials must be that each political trial serves as a flash of lightning that momentarily illuminates its milieu.

the theoretical shift

While there are many studies of political trials in this vein, conceptual work on the subject is relatively rare. The rest of my discussion in this chapter is centred on what I read as a particularly productive moment of theorising on political trials. Read together, Otto Kirchheimer's 1961 study *Political Justice: The Use of Legal Procedure for Political Ends*, Hannah Arendt's *Eichmann in Jerusalem: A Report on the Banality of Evil* of 1963, and Judith N. Shklar's 1964 book *Legalism: Law, Morals and Political Trials* comprise some of the most theoretically interesting work on the subject. These studies were all published in the United States, but their concerns were clearly global. They appeared following a period that could perhaps be ironically deemed the 'golden era' of political trials, namely, the three turbulent decades in mid-20th century that witnessed the Moscow Trials of the late 1930s in the USSR, the trials of dissidents in the Third Reich, the Cold War trials of communists in the US during the 1940s and '50s, the show trials around the same time in Hungary, Czechoslovakia and other Eastern Bloc countries, the Nuremberg and Tokyo trials in the wake of World War II, the trial of Nazi functionary Adolf Eichmann in 1961 in Israel, and the famous South African political trials: the

⁹ E.g. Noorani (1976) and Gauba (1946) on political trials in India during the British rule; Pereira (1997, 2005) on political trials during Brazil's military regime; Lobban (1996) on South African trials in the 1970s; Hain (1984) on the UK's political trials of the late '70s and early '80s.

¹⁰ E.g. Spicer (1981) on conspiracy.

¹¹ E.g. Belknap (1977) on the Smith Act in the US.

Treason trial and Nelson Mandela's incitement trial. These writings display an unprecedented and rarely surpassed rigor in their respective treatments of the question of political trials, and it is in these works that we find the first theoretical formulations pertaining to what I understand as the performative aspects of political trials, something that I explore in detail in Chapter 2.

First and foremost, these works should be read as highly significant attempts to come to terms with and reformulate the legacy of the International Military Tribunal (IMT) at Nuremberg. This claim is not necessarily self-evident. Otto Kirchheimer's *Political Justice*, still the most comprehensive and systematic attempt to address, categorise and theorise the role of political concerns in legal proceedings, covers several hundreds of pages, two centuries and many countries before it gives its main 'concern' away, only in the last chapters: How to historicise our understanding of the Nuremberg trial¹² within a generalised context of political justice? A similar movement marks Judith Shklar's work on what she refers to as the social ethos or ideology of legalism: only in the last quarter of her influential *Legalism* are we allowed to understand that the foregoing legal-philosophical critique was meant as the groundwork for an attempt to mould a new perspective on the Nuremberg trial, one where politics can and must be seen as a key element of certain types of legal proceedings. On the other hand, Hannah Arendt's report on Nazi functionary Adolf Eichmann's trial in Israel is first and foremost that, a thorough account of the proceedings. However, it also operates as Arendt's alternative indictment, defence, judgment, and sentencing of the defendant. When read as such, one of Arendt's primary concerns in the text emerges as the attempt to lend more of a conceptual substance to the notion of crimes against humanity, which had indeed received too narrow an interpretation in the Trial of the Major War Criminals before the IMT at Nuremberg.¹³

¹² 'Nuremberg trial' here refers to the Trial of the Major War Criminals before the IMT.

¹³ Article 6(c) of the Charter of the IMT (1945) specifies crimes against humanity as 'murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds *in execution of or in connection with any crime within the jurisdiction of the Tribunal*, whether or not in violation of the domestic law of the country where perpetrated' (emphasis mine). In the judgment, 'crimes against humanity' figured in this contingent and peripheral definition, i.e. only in connection to war crimes or crimes against peace. It was thus limited to acts committed between 1939-1945: 'To constitute crimes against humanity, the acts relied on before the outbreak of war must have been

Insofar as they articulate the political with regards to this legacy (explicitly, and as I argue, performatively in Arendt's case), these three studies, taken together, represent a key moment in the theorisation of political trials. They constitute a new direction in the literature, providing more nuanced articulations and explorations of what until then had only been addressed in terms of deviation from the true course of justice. This shift was in part a necessity imposed by their very milieu: in the dark, dismal aftermath of the unprecedented nature and scale of Nazi crimes, the cosmopolitan possibilities opened up by the formulation of 'crimes against humanity', and the emergence on the horizon of the notion of a 'world order' seem to have compelled these thinkers to avow, think critically and creatively about, and in some cases even advocate for the role of the political in legal proceedings. In other words, Nazi crimes and the ensuing trials appear to have *forced* them to think in new ways about the uneasy relationship between politics and law in the space of the courtroom, precisely because a retreat into the ideal of the mutual autonomy of these two spheres was no longer an option. One of the premises of my study is that an understanding of political trials, if it is to have contemporary relevance, must begin from this moment of theoretical shift. This is not solely because today's discourses around notions such as 'the international community', 'crimes against humanity', and 'humanitarian intervention' implicitly or explicitly evoke the very context that these thinkers strove to address; but also because, and primarily for the purposes of this study, it is in the works of these three thinkers that we encounter the attempt to capture, articulate, and theorise the performative elements of political trials.

in execution of, or in connection with, any crime within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime. The Tribunal therefore cannot make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter, but from the beginning of the war in 1939 war crimes were committed on a vast scale, which were also crimes against humanity; and insofar as the inhumane acts charged in the Indictment, and committed after the beginning of the war, did not constitute war crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted crimes against humanity' (IMT 1946).

kirchheimer: setting the parameters

Otto Kirchheimer's *Political Justice* (1961) is an impressive study of the various facets of the relationship between politics and the legal form. Mainly focusing on the 19th and 20th centuries with occasional forays into the 18th century, Shakespeare, and antiquity, this highly comprehensive attempt to address, categorise and theorise political trials provides a survey map of the field, as it were, setting out the parameters by which to understand any given political trial structurally and strategically. The trials are presented in their historical and political context so as to emphasise their political function and public effect, and to expose the sometimes failed schemes of the authorities involved. The sobriety of the account is staggering – the flair of the text is in its intellectual deeds rather than its rhetorical feats.

Neither is the author's position expressly stated, only revealed through the very quality and rigor of the critical labour constituting the work. Thus the catalytic 'problem' and organising principle of the text becomes recognisable only when this critical rigor becomes somewhat compromised, a thitherto absent ambiguity emerges, along with the more personalised voice of the author. This is how I read Kirchheimer's introduction of the Nuremberg trial towards the end of his book, which in turn resignifies the preceding investigation and analysis as an attempt to contextualise this particular political trial. In this section, I present a skeletal version of Kirchheimer's theory of political trials, to then move on in the next section to his discussion of the Nuremberg trial, which, though bracketed by his general theory, is nevertheless not properly contained by it, thereby obliging the reluctant author to the beginnings of a new formulation of the politics of trials.

Kirchheimer defines political justice as the use of the 'devices of justice to bolster or create new power positions' (vii) and identifies three main categories of political trials:

- 1) a politically significant trial involving a common crime;
- 2) a regime's attempt to eliminate its political foe (classic political trial);
- 3) defamation, perjury and contempt trials manipulated to bring disrepute upon a political foe (derivative political trial)

The first and the third categories are quite straightforward. In the first, the prosecution of a common crime is imbued with political significance due to its

politically-tinged motive, content, *dramatis personae*, context or public effect. One famous contemporary example that could be listed under this category is the O.J. Simpson trial.¹⁴ The third category, the derivative political trial, is ‘a volatile, ambiguous, widespread device opening up opportunities for those who are excluded from the fruits of political power’ (76), whereby an ordinary member of the public may manage to provoke an established political figure into initiating a defamation suit. If a trial ensues, the plaintiff’s character and virtues, private life and political decisions will come under public scrutiny, providing a forum for his/her lay adversaries. The example Kirchheimer offers is Friedrich Ebert’s libel case against a German nationalist agitator who called him a traitor (81), another good example would be the 1954-55 Kastner trial in Israel.¹⁵

Most of Kirchheimer’s discussion in the book revolves around the second category, the ‘classic’ political trial, whereby a regime may attempt to incriminate its foe’s public behaviour; use the trial as an opportunity to elicit information that sheds unfavourable light on its foe (52); and/or portray its foe’s opposition to official policies as treason (62) so as to secure judicially-sanctioned repression. The classic political trial is sometimes only ‘a skirmish in a continuing battle’, sometimes ‘a flourish after decisive action has been taken elsewhere’ (232), and in rarer instances a crystallisation of the conflict between the established authorities and their foes. Kirchheimer also provides a subcategorisation for the classic political trial: an established authority’s political resort to courts may be a matter of necessity, choice or convenience (419). As a matter of *necessity*, it is merely a technical device such as when, to follow the example given in the book, a political

¹⁴ Though there was nothing ‘political’ about the alleged crime of murder itself, its motive, or the actors in question in the O.J. Simpson trial, it was a political trial in its public effect and context. This is because the defence’s image of the trial pervaded its popular perception, especially among the African-American population of the US. In this perspective, the crux of the trial was not establishing the defendant’s guilt or innocence vis-à-vis the murder of his wife, but whether a black man could find justice in a white legal system. The very context of the trial, a traumatic history of racism and ‘white justice’, and the trial’s conjuration of ‘the ghost of the Rodney King trial’ (Felman 2002: 62), was an essential element of this public effect.

¹⁵ In this trial, an elderly Hungarian Jew was accused of defaming the Zionist leader Rudolf Kastner by alleging that he had collaborated with the Nazis. As the court sought to establish whether his claims against Kastner had merit, the defendant became the *de facto* accuser during the course of the trial. Thus his acquittal amounted to a symbolic conviction of Kastner, who appealed the decision, but was assassinated before the court reached a ruling. For a thorough and engaging discussion of the politics of the Kastner trial, see Bilsky (2004: 19-82).

dignitary is assassinated, the assassin is caught, and it is necessary that s/he should be tried in court for the crime (419). Even though the standard criminal procedure may be applied in such a case, Kirchheimer would deem it different from an ordinary murder trial, i.e. political, if only by virtue of the stature of the individuals involved (48), in this case that of the victim. The recourse to court as a matter of *choice* connotes the preference of judicial action instead of (or along with) the many other methods available to repress a political adversary (i.e. illegal or administrative repression). According to Kirchheimer, political trials motivated by choice may not always go according to plan (422), as the cooperation of the judiciary must be secured in order to legitimise the repression of foes (421). Finally, a regime's motive for launching a political trial may have to do with *convenience*: it may have recourse to a trial in order to create effective political images as part of a propaganda campaign to manipulate public opinion (419).

For Kirchheimer, the image-creating capacity of a legal proceeding is essential: characterised by the 'dramatic configuration of a contest' and conducted under the 'glaring lights of publicity', the process is most tellingly utilised in political trials, whether for 'pedagogical effect' (109), 'internal mobilisation' (18), or the upper hand in a 'popularity contest' of ideologies (233n13). Kirchheimer deems a political trial's image-creating effect vastly superior compared to other political strategies: in employing a telling image, the political trial 'elevates the image from the realm of private happenings and partisan constructions to an official, authoritative, quasi-neutral sphere' (422). Furthermore, the political trial is more successful than parliamentary proceedings in providing the masses with a more intimate sense of political participation: 'Its rules are intricate. Its immediate results may be quite spectacular. Its illusions are sufficiently hidden from the onlooker not to disturb his sense of drama and aesthetic enjoyment' (430). By using a complete and effective (though not necessarily meaningful) image, the political trial offers a reduced and simplified understanding of history, which further enlivens the show (423). The spectacular aspect of a political trial is emphasised throughout the text, with a telling choice of words including 'the show' (53), 'fireworks' (54), 'cinerama' (53), and 'cinematic episode' (114).

However, it is important to note that Kirchheimer introduces a crucial distinction between political trials and show trials: the political trial, no matter how carefully staged, always involves an *irreducible element of risk* for the political authorities, threatening to break through the façade and invite alternative interpretations of what is actually at stake in the proceedings. This is defined in comparison to, for example, the Soviet show trials, where the element of risk was fully eliminated, as they were ‘total’ productions in which even the defendants’ role, participation and ‘confessions’ were stage-managed and orchestrated. The political trial, on the other hand, has to play itself out on a public that is host and witness to the process, is preoccupied and identified with it, and perhaps even entertained by it. Kirchheimer’s identification of this irreducible risk as the essential condition of a ‘political trial’ effectively crystallises his entire resignification of the notion, in its distinction from a ‘show trial’. It is important to note that this intervention comes in the midst of the Cold War, when the two designations, political trial and show trial, were often used interchangeably, and mostly reserved for legal proceedings in undemocratic regimes. Thus Kirchheimer’s understanding of the ‘risk’ in a political trial proper: the event is shot through with uncertainties stemming from legal procedure, political commitments of witnesses and interpretation of defendants who might be able to hijack the proceedings to create very effective alternative images (118). Another source of uncertainty is the very ‘judicial space’¹⁶ itself, i.e. the freedom of the judge or jury in deciding a case based on their own interpretation and evaluation. While noting that any jury is driven by the ‘urge towards spontaneous conformity’ (223) therefore structurally conservative; and taking heed of the restrictions on a judge’s supposed and championed impartiality (specific political inclinations and sentiments that stem from his/her membership to a dominant minority) Kirchheimer nevertheless locates a progressive possibility in the space of judgment: ‘the most awesome as well as the most creative part of the judicial experience: the entertaining of a small but persistent grain of doubt in the purposes of [one’s] own society’ (233). So, although bound by the parameters of established authority and

¹⁶ Kirchheimer’s use of this term does not incorporate any actual spatial/architectural analysis, referring solely to the discretion to judge independently.

the urge to guard and conserve it, the judge can still partake creatively in the political fate of the community.

This discussion of the ‘judicial space’ is one of the only signs of a positive evaluation of the place of the political in legal proceedings in the entire text, and unlike the rest of the discussion, this glimmer of possibility is formulated not in terms of instrumentalisation of the legal form, but rather in terms of an opening for innovation within it. The discussion is also crucial insofar as it introduces a split or a differentiated signification in the notion of ‘the political’ as it is deployed in the text, whereby it begins to designate something other than expediency. And yet, this *différance* is neither explored nor openly acknowledged within the text, creating a tension that hinders the strength of the analysis. We will later see that Judith Shklar’s understanding of political trials begins with a diagnosis of precisely this problem of the split within the ‘political’ of political trials. But in Kirchheimer, the tension created by this as yet unacknowledged split is transferred on to, or reflected in his discussion of the Nuremberg trial, a discussion that incorporates the performative element in political trials without naming it as such.

judgment on nuremberg

Notably, Kirchheimer locates the Nuremberg trial in the context of a wider discussion on ‘trials by fiat of the successor regime’, i.e. cases in which a new regime uses the trial form to publicly pass judgment on the policies and deeds of the previous regime, as a way to differentiate and thereby define itself in idealised terms: ‘Setting the new regime from the old and sitting in judgment over the latter’s policies and practices may belong to the constitutive acts of the new regime’. Thus, Kirchheimer asks: ‘Which are the value structures that transcend the lifetime of a political regime against which acts of predecessors can be measured?’ (308). History’s classic answer to this is the patriotic norm, often formulated in terms of treason in the trials of toppled monarchs, i.e. Charles I and Louis XVI, as well as in various 20th century cases including the trial of Joseph Caillaux and the Riom trial.¹⁷ In all these cases, former leaders were accused of acting against the best

¹⁷ The 1942-1943 Riom trial was an abortive attempt by the Vichy regime to try their predecessors on charges of causing the defeat of France by Germany in 1940. The trial was supported by the

interests of the nation. However convenient the patriotic norm and similar criterion may have proved in various successor trials, they all fall short of evaluating the criminality of the deeds of a regime such as the Nationalist Socialist rule in Germany, which calls for the necessity to define a universal yardstick, ‘a fundamental notion to which all groups and nations must at least submit, if not always subscribe’ (319). Thus contextualising it, Kirchheimer goes on to discuss the Nuremberg war crimes trial before the IMT in detail as ‘the most important “successor” trial in modern history’ (323).

His treatment of the subject is characteristically thorough: he considers the wisdom of the concept of *l'état criminel* with respect to understanding individual responsibility; moves on to a careful discussion of the nature of each of the three main charges in the trial (crimes against peace, war crimes, crimes against humanity)¹⁸ within their historical/political context; and finally responds to four of the defence arguments, the rejoinders that ‘retain more than technical interest’ (327). Rather than following the order of his argument, I will focus here on three aspects of his discussion: a reaffirmation of the possibility of innovation within the judicial space; an unequivocal affirmation of the constitutive potential of the Nuremberg trial; and an investment in the notion of ‘crimes against humanity’ as a universal yardstick, despite and beyond all his reservations.

Kirchheimer’s reaffirmation, within the Nuremberg context, of innovation in judicial space, comes curiously incorporated into his rebuttal of the defence argument regarding victor’s justice. His response to the rejoinder that flags the prejudicial, partisan quality of the court is almost an exclamation of ‘well, tough luck’:

the rebuttal is simple and unavoidable. It goes straight to the very nature of political trials. In all political trials conducted by the judges of the successor regime, the judges are in a certain sense the victor’s judges... In a somewhat wider sense, all judges, not only those of a successor regime, are working under the conditions of the existing legal and political system which they are duty-bound to uphold (332)

Nazis, who hoped it would also establish for posterity that the responsibility for initiating the war rested with France.

¹⁸ Note that he leaves out what he deems to be the ‘unnecessary’ charge of conspiracy, which also found a very narrow interpretation in the final judgment, even though it was an important part of the prosecution’s case.

Enter stage left, a previously absent cynicism in argument. He then goes on to relate an anecdote from the London Conference where the Charter for the IMT was drawn up: USSR representative Nikitschenko explained their vision for a speedy procedure that would guarantee the execution of the convictions as they had been previously announced by the heads of the Allied establishments, whereupon US representative Justice Jackson took it upon himself to expound on the traditional Western position regarding the distinction between the executive power to set up a tribunal and organise the prosecution, and the independent role of the trial judges evaluating the evidence presented to them. ‘Both the cynical realism of the USSR representative and the apparent traditionalism of Justice Jackson’, Kirchheimer concludes, ‘overstate their respective cases’ (333). His no-illusions position on the matter is: the acknowledgement that it is a successor, i.e. political, trial need not rule out an expectation for some level of independence in the judicial space. The corroboration for the existence of such independence at the Nuremberg trial came, for Kirchheimer, in the form of three acquittals in spite of the protests of the USSR team.

As for his further elaboration on the constitutive potential of a political trial, in what I understand to be his only recourse to the first person in the text, Kirchheimer states that ‘This kind of hybrid prosecution, which mixes political accountability for planning and initiation of aggressive war with criminal responsibility for inhuman conduct, has to our eyes a politically justified element’ (324). The reference to hybridity here has to do with the question of responsibility and the nature of the crimes: the ‘crimes against peace’ formulation is meant to establish the responsibility of the governing ranks of the regime for the policy course they had taken. The other two charges are devised for establishing personal responsibility, directly concerned as they are, with the quality of human action ‘regardless of the hierarchical level at which it occurred’ (326). The ‘politically justified element’ of this hybrid prosecution has to do with the historical moment – Kirchheimer is convinced that warfare in contemporary society will necessarily lead to the very negation of the human condition, that is, to crimes against humanity. Thus he understands the constellation of the three charges as an appropriate one for the context that necessitated the elimination of aggressive war.

And yet, right after this statement he goes on to explain how the ‘crimes against peace’ notion failed to set a precedent,¹⁹ as the coalition behind the IMT broke up ‘before the ink on the Nuremberg judgment had time to dry’:

Had the noble purpose of the crime against peace charge succeeded, had it helped to lay a foundation for a new world order, the uncertain juridical foundation of the charge would now be overlooked and the enterprise praised as the rock on which the withdrawal of the states’ right to conduct aggressive warfare came to rest. (324)

Nowhere else in the text do we find such an unequivocal affirmation of the performative promise of political justice, as it is formulated here in view of its failure. Had it not failed, he seems to say, the enterprise could not have been discredited on charges of political justice. This is a wonderfully succinct articulation of the performative potential of political trials to enact into being their own foundation,²⁰ in what Derrida (2002b) would later identify as a ‘fabulous retroactivity’. This insight, however, is not integrated into the main body of Kirchheimer’s comprehensive theoretical investigation of the subject.

Finally, Kirchheimer finds in the formulation of ‘crimes against humanity’ a universal measure, namely, the answer to his earlier question concerning the ‘fundamental notion to which all groups and nations must at least submit, if not always subscribe’. By way of concluding his discussion on Nuremberg, he suggests that the typical infirmities of the trial stemming from its very conditions of existence and structure as a successor trial should not hinder us from acknowledging its ‘lasting contribution’:

that it defined where the realm of politics ends or, rather, is transformed into the concerns of the human condition, the survival of mankind in both its universality and diversity. ...the feeble beginning of transnational control of the crime against the human condition raises the Nuremberg judgment a notch above the level of political justice by fiat of a successor regime. (341)

We may question the wisdom of this split between political concerns and concerns regarding the human condition – why should the realm of politics end where the concerns of the human condition begin? What kind of conceptualisation is that of

¹⁹ See Zolo (2009) for a more contemporary analysis of this failure.

²⁰ See Chapter 2 of this thesis for a detailed discussion of this dynamic in political trials.

the ‘political’? Where does that relegate the ‘legal’ with regards to the ‘political’? But perhaps more importantly, the rhetorical strength of this conclusion does not quite follow from Kirchheimer’s own analyses concerning the impossibility of enforcing a common guideline for crimes against humanity in the absence of a ‘world authority to establish the boundary line between atrocity beyond the pale and legitimate policy reserved for the individual state’ (326). In clarifying the difficulty produced by this absence, Kirchheimer gestures towards the various policies of cruelty underway in the world at the time of writing, such as the French in Algeria, the South African government, and the Hungarian regime – they ‘might continue to have a very different viewpoint on the meaning of the concept’ (ibid.), he asserts with typical restraint. He further suggests that this may have been a reason why the IMT had very limited recourse to the crimes against humanity charge, opting instead for the war crimes charge where possible. In that sense, and within the universe of Kirchheimer’s critique, the precise content of Nuremberg’s ‘lasting contribution’ is not actually clear. Kirchheimer does attempt a more confident presentation of the matter, suggesting in the lead up to his ‘lasting contribution’ flourish that

those fact situations which we have since come to describe as genocide have established signs, imprecise as they might be, that the most atrocious offences against the human condition lie beyond the pale of what may be considered contingent and fortuitous political action, judgment on which may change from regime to regime (341)

Yet the sheer number of qualifiers in this statement leave hardly any substance, other than the veritable reality of horror in the face of atrocity. It is as if atrocity is the limit not only of the political but also of critique for Kirchheimer.

Indeed, in his further and final remarks on Nuremberg in the conclusion of the book, we find a slightly different articulation. The lasting contribution of the trial, we are told this time, is the image that it created. The permanence of this image will not be effaced by any criticism of the trial, nor did it owe its strength to the mastery of the tribunal: the record of the Nazi regime was ‘so clear-cut that the image produced in court could not but appear a reasonably truthful replica of reality’. Remarkably for this otherwise decisively declarative jurist, Kirchheimer’s final judgment on Nuremberg comes in the form of a rhetorical question:

while it retained many overtones of the convenience type of trial, did the Nuremberg trial, with all the hypocrisy and grotesqueness deriving from its very subject, not belong very profoundly in the category of a morally and historically necessary operation? (423)

This, it seems to me, is a more truthful presentation of the ‘problem’ that Nuremberg posed for Kirchheimer, namely, the quandary of being forced to affirm political justice, not in principle, but in the face of atrocities beyond the pale. It explains something of the exceptional treatment Nuremberg receives in a book dedicated ‘to the past, present, and future victims of political justice’, and committed to an incisive critical dismantling of such judicial productions. Nevertheless, it is also this exception that seems to have catalysed and informed the grand project itself, while allowing (or imposing on it) the beginnings of a critical turn in thinking about political trials. As for the task of substantiating ‘crimes against humanity’ as a notion and in its promise, Kirchheimer doesn’t quite get there, though we will see that Hannah Arendt achieves this with a kindred sensibility, and quite eloquently. Kirchheimer’s lasting contributions to the field are found in his explorations of the significance of political trials beyond the question of deviation from the proper course of justice: his insistence that a liberal democracy is the proper home for a political trial with its irreducible risk and image-making function; his attribution of the possibility of political creativity within the traditional judicial sphere; and his nascent acknowledgment of what I formulate as one performative operations of a political trial.

shklar: politics of a trial

Published only three years after Kirchheimer’s somewhat tormented treatment of the Nuremberg trial, *Legalism* by Judith Shklar (1964) is astonishingly forthright about the matter, also situating it within a more general, if not as exhaustive, discussion about political trials. The main thrust of the book is an illuminating critique of what she refers to as legalism: the ethical attitude that equates moral conduct with rule following, and finds various concrete manifestations in philosophy, ideology and social institutions. Shklar’s discussion helps us understand that the traditional difficulty of thinking creatively and critically about political trials is one that is rooted in this widespread ideology, which posits law

and politics as mutually exclusive: law is seen as separate from political life, but also as superior to mere politics (8); law aims at justice while politics looks only to expediency; the former is neutral and objective while the latter is the unpredictable product of competing interests and ideologies, and so on (111). According to Shklar, the traditional adherents of legalism, ‘in their determination to preserve law from politics, fail to recognise that they too have made a choice among political values’ (8).

Indeed, one of the most enlightening aspects of the book is its discussion of legalism as a particular political attitude, finding expression in policies domestically and internationally. Shklar conceptualises law itself as a political action. This, however, does not mean that every form of legal politics is legalistic – the question here is ‘what sort of politics can law maintain and reflect?’ (143-44). While affirmative of the political function of legalism, its ability to give rise to the sort of political climate in which judicial and other institutions flourish, Shklar is highly critical of the ideology’s inability to recognise its own function in these very terms, its constant denial of its own political contribution: ‘legalism as an ideology is too inflexible to recognise the enormous potentialities of legalism as a creative policy, but exhausts itself in intoning traditional pieties and principles which are incapable of realisation’ (112). For her, political trials in general and the Nuremberg trial in particular crystallise this paradox.

Shklar notes that anyone who suggests that the judicial process is not the antithesis of politics, but just one form of political action among others will be accused of Vyshinskyism. Her retort is simple, and goes to the heart of the split in Kirchheimer’s discussion: ‘There’s politics and politics’ (143). In other words, the crux of the matter is not whether or not trials are political institutions, but rather what political values they serve (220). Her categorisation of political trials is based on the principle of legality, *nullum crimen, nulla poena sine praevia lege poenali*: there shall be no crime without law, and no punishment without a crime. With regards to this principle, she suggests that in a political trial either the law or the crime may be missing, or both may be present. Thus her three categories (152-53):

- 1) there is law but no criminal act: legally innocent acts will be misinterpreted so as to seem criminal;

- 2) there is no law which designates the actual acts performed as criminal: laws may be invented on the spot or drawn by analogy, or rules (or their interpretation) may be so vague that virtually any public action can be construed to appear criminal;
- 3) there is both law and criminal act: trials involving espionage, treason, sedition whereby the aim is the elimination of a specific sort of political enemy.

After announcing the latter (which neatly corresponds to Kirchheimer's category of classical political trials) as 'the last and third possibility', she goes on to state that 'There is, however, a very rare situation in which there is no law, no government, no political order, and people have committed acts so profoundly shocking that something must be done about them' (153). This is her introduction of the Nuremberg trial into the discussion, as a political trial but an exceptional one that defies the closure of her own categorisation. Note that this initial formulation of the trial's necessity in terms of the primacy of the atrocity in question echoes the devolvement in Kirchheimer's discussion of the Nuremberg trial, where his inability to fully invest in the future of either 'crimes against peace', or 'crimes against humanity' had left him face to face with the atrocity, which in turn became the irreducible ground for the necessity of the legal proceedings.

Analysing the Nuremberg trial in terms of how legalistic ideology and politics operated through it, she emphasises that the architects of the trial had to come up with various fictions in order to alleviate their own legalistic concerns. One such fiction was that an international legal system analogous to municipal law existed. Another was that the law was 'there' by virtue of various previous war conventions.²¹ And finally that the judgment was going to be an act within a legal system, enhancing the strength of that system, contributing to the future of international law (146-147). None of this is valid for Shklar. Her alternative verdict on the significance of the Nuremberg trial is as follows: As a great legalistic act, and insofar as it concerned itself with crimes against humanity, naming them for what they were, the trial could help the immediate future of Germany in its

²¹ In the London Conference that produced the Charter for the IMT, Justice Jackson spoke of the task as one of 'codification'.

ideological impact. Although the court lacked a strict legal justification, and although there wasn't even a pseudo-legal basis for 'crimes against humanity', the trial was effective. By taking the form of a fairly executed exercise in legalism, it contributed to the legalistic ethos in Germany (151), specifically reinforcing the dormant legal consciousness, the traditional legalism of Germany's professional and bureaucratic classes (156). More generally, 'awakening the Germans to their past as a means of influencing their future political conduct' (193) was of great importance in a context where the question of responsibility vis-à-vis crimes against humanity was a complicated one, given that Nazism was a well-adhered social movement.

Therefore, in Shklar's evaluation, based on not whether or not a trial is political, but what kind of politics it promotes, the Nuremberg trial as a political trial actually served liberal ends, promoting 'legalistic values in such a way as to contribute to constitutional politics and to a decent legal system' (145).²² Notably, none of the other political trials referred to in the book (the Tokyo trial, the Moscow trials, *US v. Dennis*, the trial of the Rosenbergs) are discussed in such terms, that is, as serving liberal ends. In fact, her conclusion concerning political trials in her 'Epilogue' to the book further emphasises Nuremberg as exception: In countries where constitutional politics prevail, the political trial 'can only be a destructive device'. In a totalitarian system, political trials are 'no better and no worse than the politics of such an order in general'. But 'where there is no established law and order, in a political vacuum, political trials may be both unavoidable and constructive' (220).

Shklar's understanding of 'constructive' is quite far from Kirchheimer's sense of what the Nuremberg could have or may have achieved in its 'constitutive' capacity. For Shklar, the trial held no promise for the world peace to come, for the future of international law, or for possible transnational control on atrocities beyond the pale. In fact, Shklar prefaces her analysis of the Nuremberg trial by a masterfully tight critique of positivist philosophies of international law, where she

²² A more contemporary version of Shklar's argument is found in Osiel (1997) who advocates for the value of 'monumental didactics' of liberal show trials in the aftermath of administrative massacre. For Osiel the illiberal use of courts for liberal ends, particularly for influencing collective memory of historical episodes of atrocity, is fully justified.

dismantles projections of the ‘autogenesis’ of law on to the international sphere, and concludes that:

Law does not by itself generate institutions, cause wars to end, or states to behave as they should. It does not create a community. Only the disingenuous misuse of the word ‘autogenesis’, allowing as it does the confusion of the validation of rules with their historic causes, origins, and force, can permit anyone to believe that law will create world society through operative judicial tribunals. (131)

Nor is there any measure of cosmopolitan solace in the formulation of ‘crimes against humanity’ for Shklar. In her particular brand of ‘liberalism without illusions’ the performative element of the Nuremberg trial is confined to the immediate future of its immediate context: the best we could hope for the Nuremberg trial to have achieved is the reinstatement of legalism in Germany, in that it was an exercise in restoring order by means of an enactment of orderliness.

Some of Shklar’s thinking in *Legalism* fails to follow through properly. What is promised as an exceptional take on political trials in general and the Nuremberg trial in particular ends up devolving into a discussion of Nuremberg as exception. That is, her suggestion that we look at what kind of politics is advanced in a political trial does not yield much except in its application to the Nuremberg trial. And yet, Shklar’s head-on address of the problem of political trials is nevertheless a refreshing intervention, even if only in terms of disrupting legalistic habits of thought. Her retort ‘there’s politics and politics’ cuts through some of the unnecessary knots that legalistic habits in approaching political trials can get us into. In this sense, it reflects back on Kirchheimer’s quandary, in which what remained unthought was precisely the shifts in the meaning of the political. The problem, however, is her specification of ‘the political’; in other words, it is difficult to work with Shklar’s criteria of evaluation without sharing her particular political position, which is a certain form of liberalism that takes democratic constitutionalism for granted.

arendt: a trial of one's own

Much of Kirchheimer's sensibility about politics of trials in general, and Nuremberg in particular, including his suggestion that the trial may have signalled the feeble beginnings of a desirable transnational control over 'crimes against humanity', is shared by Hannah Arendt in her work on the 1961 Eichmann trial, which appeared in print first as a series of articles in *The New Yorker* in early 1963, and was published as a book entitled *Eichmann in Jerusalem: A Report on the Banality of Evil* ([1963] 1994) in the following months. To argue that it is an authoritative contribution to the literature on political trials would be stretching it beyond recognition – Arendt's report is focused on a single trial, it involves neither a general theory of political trials, nor even a section dedicated to the subject. But though it may not theorise political trials directly, it should nevertheless be read as an important address of the question, one that furthers our understanding of performative operations within the space of a political trial. Nor would this necessarily constitute an over-interpretation, a zealous 'reading into' the text of our own considerations: Arendt's account of the trial is anchored by an acute understanding of a range of performative possibilities it held, what it could effectively constitute by means of its very enactment. Moreover, she had a vision as to the best ends this performative potential could serve, one that was at odds with both the calculations of the trial's architects, and the court's actual conclusions. Her so-called 'report' is in fact best read as a 'retrial', during the course of which she reorganises and supplements the evidence presented at the trial, provides her own responses to various legal concerns, and passes her own judgment on the trial.²³ Effectively, the report as retrial is the enactment of an alternative performative.

To give a brief overview of the case: Nazi functionary Adolf Eichmann, responsible for overseeing the mass deportation of Jews to extermination camps in Eastern Europe, was abducted by Israeli secret service operatives from Argentina, where he had been living under a false identity. He was secretly transferred to Jerusalem to be tried under Israeli law for crimes committed against the Jewish people during World War Two. The affair sparked controversy internationally, and

²³ Notably, in an essay responding to the controversy caused by the book, Arendt referred to *Eichmann in Jerusalem* as 'my "sitting in judgment"' (2003: 22).

Israel's right to try Eichmann was challenged on several legal bases, most importantly: the illegality of Eichmann's abduction (that he was brought to Israel in violation of Argentina's sovereignty); the problem of Israel's territorial jurisdiction (Israel was to try Eichmann, who was not an Israeli citizen, for crimes committed outside Israel, against persons who were not Israeli citizens); the problem of retrospectivity (Israel was to try Eichmann under its Nazis and Nazi Collaborators [Punishment] Law of 1950 for crimes committed before the institution of the law, thereby flouting the principle of legality); and the issue of what could be referred to as 'retrospective sovereignty' that Israel was to try crimes that were committed before its own establishment (an interesting bridge between the criticism regarding territorial jurisdiction and the one regarding retrospectivity).²⁴ However, Israeli Prime Minister David Ben-Gurion had made up his mind, the trial did happen and was quite a happening. For the first time in Israel's brief legal history, cameras were allowed into the courtroom which rendered the trial an early international media event (Lahav 1992: 558). The hearings lasted four months, the court, after another four months of deliberation, convicted Eichmann on all charges and sentenced him to death. Both his appeal and plea for mercy were rejected, and Eichmann was hanged in May 1962.

In an interview he gave to the *New York Times*, David Ben-Gurion was asked 'What do you hope to achieve by bringing Eichmann to trial?'. The diplomatic answer most appropriate in the midst of much controversy would perhaps have been something along the lines of 'the truth concerning Adolf Eichmann's liability for Nazi crimes'. Even a vague, unsubstantiated invocation of 'Justice' would perhaps suffice as a relatively uncontroversial answer to what the trial was supposed to achieve. But instead, Ben-Gurion took the bait and explained in detail what he aimed to achieve. First, he wanted to 'establish before the nations of the world' the evils of anti-Semitism: 'They should know that anti-Semitism is dangerous and they should be ashamed of it' – a warning to potential foes. Second, he wanted the Israeli youth, the generation who had grown up since the Holocaust, to know the most tragic facts in their history – state-sanctioned historiography.

²⁴ Baade (1961), Green (1960), Robinson (1960) and Rogat (1961: 23-32) provide in-depth discussions of these issues.

Third, he wanted to show the Jewish Diaspora that Judaism always faced a hostile world and only the establishment of a Jewish state had enabled the Jews to hit back – Zionist propaganda.²⁵ And finally, the trial was to address Israel's neighbours on its unhappy borders: 'It may be that Eichmann's trial will help to ferret out other Nazis, for example, the connection between Nazis and some Arab rulers' – a threat to actual foes.²⁶ As such, the trial was obviously a political trial of the convenience variety in Kirchheimer's sense, meant to make images for a variety of public audiences.²⁷

One of the central narrative strategies that Hannah Arendt employs in her account of the trial is an adversarial set up, not between the prosecution and the defence as one would expect, but rather between the prosecutor and the judges. She accuses Attorney General Gideon Hausner of 'love of showmanship' (4), of enjoying 'all the nice pleasures of putting oneself in the limelight' (6), and 'doing his best, his very best, to obey his master', i.e. Ben-Gurion, described in turn as the 'invisible stage manager of the proceedings' (5). On the other hand, the judges are 'unstudied', 'sober' and 'natural', their responses 'spontaneous and refreshing' (4), serving 'Justice as faithfully as Mr. Hausner serves the State of Israel' (5). Attempts on Hausner's part to turn the proceedings into a show trial that would suit Ben-Gurion's vision were to some extent neutralised by the sobriety of the judges, Arendt reports.

Aside from problems of performance, she finds the prosecution's case seriously flawed on a variety of bases. First, it was built 'on what the Jews had suffered, not on what Eichmann had done' (6). Hausner introduced an endless procession of survivors as witnesses, though their testimony on truly atrocious facts rarely ever implicated Eichmann. Arendt stresses, over and over again in her account, with what Shklar could see as a legalistic insistence, that the sole

²⁵ See Rogat (1961) for an intriguing critique of these three pedagogical aims of the trial.

²⁶ David Ben-Gurion, 'The Eichmann Case as Seen by Ben-Gurion', *New York Times*, 18 December 1960: SM7, 62.

²⁷ In a telling anecdote, Arendt recounts how the prosecutor invited witness after witness to testify to the horrors that the Jewish people suffered in the Holocaust, without a view to whether the evidence presented had anything to do with the deeds of the accused. When the judges objected to irrelevant testimonies, the prosecutor would insist and plead with them to let him complete his 'general picture'. At one point, the presiding judge was pushed to exclaim 'we are not drawing pictures here' (Arendt [1963] 1994: 120).

legitimate concern of a criminal trial is to determine individual responsibility and punishment: ‘Justice demands that the accused be prosecuted, defended, and judged, and that all the other questions of seemingly greater import... be left in abeyance. Justice insists on the importance of Adolf Eichmann, son of Karl Adolf Eichmann’ (5). Second, the prosecutor misunderstood and misrepresented the novelty of the crime in question. Rather than recognising in it an entirely new type of criminality, directed at blotting out a whole ethnic group from the face of the earth, Hausner chose to contextualise it within the long history of anti-Semitism, beginning his opening address with Pharaoh in Egypt and Haman’s decree. Arendt ruled: ‘It was bad history and cheap rhetoric, worse, it was clearly at cross-purposes with putting Eichmann on trial, suggesting that perhaps he was only an innocent executor of some mysteriously foreordained destiny’ (19). Third, the prosecution’s case was flawed in its representation of the criminal in question, attempting to prove him a monster, an evil mastermind, ‘superior of Himmler and the inspirer of Hitler’ (211). Arendt’s response to this is her controversial ‘banality of evil’ formulation, which she explains as a profound inability to think for oneself, namely, from the standpoint of somebody else (48), living instead by borrowed clichés that are entirely devoid of reality (53). In addition to these substantive contentions, Arendt criticises the prosecution’s case on the basis of its own *raison d’être*. If the aim was to expose the full picture with regards to anti-Semitism and the Holocaust, they should have ventured into the complicity of ‘all German offices and authorities in the Final Solution – of all civil servants in the state ministries, of the regular armed forces, with their General Staff, of the judiciary, and of the business world’ (18), rather than being ‘so careful not to embarrass the Adenauer administration’ (119). And if it was to serve as a show trial, the prosecution’s case should have been properly stage-produced for one: ‘a show trial needs even more urgently than an ordinary trial a limited and well-defined outline of what was done and how it was done’ (9).

From the first pages onward Arendt’s audacity is palpable, it is as if she’s saying, you have made a fine mess of this trial, let me show you how it is done. And indeed, she emerges in the text as a force to reckon with. In most part, Arendt’s so-called ‘report’ on the trial is effectively a ‘retrial’. She presents her

own prosecutorial case, in which she radically reorganises the evidence presented at the trial to specifically pinpoint Eichmann's responsibility. She draws on evidence gathered by the authorities in the preparations for the trial but omitted by the prosecutor (such as the 3564-page German transcript of the autobiography that Eichmann 'had spontaneously given the police examiner' [235]), and she also supplements this with her own thorough background research, i.e. the legal, political and bureaucratic developments in Nazi Germany to situate Eichmann in his immediate milieu. As if that weren't enough, and in a move that was to spark the greatest controversy, Arendt presents a case for the defence as well:

The facts for which Eichmann was to hang had been established 'beyond reasonable doubt' long before the trial started, and they were generally known to all students of the Nazi regime. The additional facts that the prosecution tried to establish were, it is true, partly accepted in the judgment, but they would never have appeared to be 'beyond reasonable doubt' if the defence had brought its own evidence to bear upon the proceedings. Hence, no report on the Eichmann case, perhaps as distinguished from the Eichmann trial, could be complete without paying some attention to certain facts that are well enough known but that Dr. Servatius [defence counsel] chose to ignore. (56)

This is how she introduces her discussion of Eichmann's collaboration with Jewish functionaries and well-known Zionist leaders, devoting a substantial section to Jewish collaboration in the expulsion of the Jews from Germany before the war (56-67), and a separate discussion of Jewish collaboration in the 'Final Solution' (117-126).

Consistent with the general form of her retrial disguised as a report, Arendt also provides her own judgment of Eichmann. She crafts it in response to a thorough analysis, and again, supplementation of the actual judgment passed by the District Court of Jerusalem: Arendt expresses her approval of the court's refusal to follow the prosecutor's 'general pictures', instead strictly addressing itself to weighing the charges brought against the accused (253-54). She also acknowledges the various difficulties the judges faced in handling certain aspects of the evidence (208-209, 219). Arendt then summarises the court's response to the various objections brought to its jurisdiction point by point, and often unsatisfied by the court's arguments, she provides, in detailed and lengthy arguments, her own justifications regarding jurisdictional concerns that have been posed (254-267).

This includes, among other feats, the jurisprudential dismantling of the passive personality principle which the actual judgment relied on (260-61), and a fascinating, if odd, reformulation of the principle of territoriality (262-63). Before formulating her own judgment on Adolf Eichmann, Arendt passes her verdict on the court's judgment: the failure of the court, she explains, consisted in its not coming to grips with three fundamental issues (274). First of these was the problem of impaired justice in the court of the victors, which comes with the usual crisis of inequality between prosecution and defence in preparing for the trial (274-75). The second problem according to Arendt, was the court's inability to provide a valid definition of the crimes against humanity (275) – a point I discuss in more detail below. Thirdly, the court failed to arrive at a clear recognition of the new criminal who commits this crime, who is 'terribly and terrifyingly normal' (276).

Then in the final few pages of her epilogue, Arendt goes on to pass her own judgment on Eichmann, in a startling second person address, beginning with 'You admitted that the crime committed against the Jewish people during the war was the greatest crime in recorded history, and you admitted your role in it' (277-78).²⁸ Then, after various considerations concerning collective guilt, individual responsibility, the irrelevance of determining psychological disposition or motives, Arendt concludes her judgment and sentences Eichmann to hang:

And just as you supported and carried out a policy of not wanting to share the earth with the Jewish people and the people of a number of other nations –as though you and your superiors had any right to determine who should and who should not inhabit the world– we find that no one, that is, no member of the human race, can be expected to want to share the earth with you. This is the reason, and the only reason, you must hang. (279)

This stark address is Arendt's substantiation of the notion of 'crimes against humanity', for which the judgment of the Jerusalem court could not provide a valid definition in her opinion. In focusing primarily on 'crimes against the Jewish people', the court failed to recognise in the crimes that Eichmann was accused of, an unprecedented crime, different from known crimes not only in degree of

²⁸ Judith Butler (2012: 151-180) provides an intriguing reading of Arendt's judgment on Eichmann, emphasising its performative aspect and highlighting what I identify in terms of 'retrial', albeit solely with regard to the eventual moment of judgment: 'Something is being written and displayed in a book. The book of justice is being written and shown in Arendt's own text' (161).

seriousness but also in essence (267). Arendt bases her interpretation of crimes against humanity on the now traditional, albeit ‘modern’, conception of criminal law, whereby a crime is first and foremost a breach of the law of the community. A criminal proceeding, therefore, is not carried out in the name of the victim, but in the name of the community whose law has been breached. Criminal justice is aimed at restoring order to the community, rather than enacting vengeance for the victim (261). Crimes against humanity are crimes against the human condition of diversity and plurality for Arendt, precisely because the desire to disappear a people from the face of the earth is an attack upon ‘human diversity as such, that is, upon a characteristic of the “human status” without which the very words “mankind” or “humanity” would be devoid of meaning’ (269). Therefore, the crime of murder and the crime of genocide are not of the same order, ‘the point of the latter is that an altogether different order is broken and an altogether different community is violated’ (272).

In one sense, the very formulation of ‘crimes against humanity’ becomes the performative foundation of this ‘altogether different community’. The necessity to address the atrocity, an unprecedented form of political violence and an unprecedented crime, through law, results in the performative production of not only the law that retrospectively censures the atrocity as crime, but also of the community which the law is understood to stem from. In other words, it is the crime in its novelty that produces the law and the community, but law’s dynamics of performativity can allow it to cast this entire operation as its own. This is why, as part of this discussion, Arendt argues that the only proper court to try these crimes is an international criminal court, in the absence of which the Israeli authorities could have called for one upon capturing Eichmann, or they could have rendered the court in Jerusalem an international one. According to Arendt, another option altogether was that after the District Court of Jerusalem passed its judgment and sentenced Eichmann, Israel could have waived its right to carry out the sentence, turning instead to the United Nations to ‘make trouble’ by ‘asking again and again just what it should do with this man whom it was holding prisoner; constant repetition would have impressed on worldwide public opinion the need for a permanent international criminal court’ (270). The repetition of such a demand

would potentially result in the performative production of such a court and with it the ‘altogether different order’ and ‘altogether different community’.²⁹

What Arendt does not analyse in her report is the performative that the court’s judgment *did* manage to enact, though she seems to have been well aware of it. This was the performative institution of Israel as the indisputable representative of world Jewry.³⁰ Here is how it went: In the judgment, the District Court of Jerusalem states that its jurisdiction is based on a dual foundation. The first is Israel’s right and, it is argued, obligation under international law, to try Eichmann due to the universal character of the crimes in question. The second is Israel’s right based on the specific character of these crimes as being designed to exterminate the Jewish people. With regards to the latter, the judgment quotes two authorities on the necessity to establish a close and definite connection between the crime and the prosecutor: Hyde and Dahm. Hyde wrote:

In order to justify the criminal prosecution by a State of an alien on account of an act committed and consummated by him in a place outside of its territory... it needs to be established that there is *a close and definite connection between that act and the prosecutor*. (qtd. in DCJ 1962: 810)

Dahm stated: ‘Penal jurisdiction is not a matter for everyone to exercise. There must be a “linking point”, a legal connection that links the punisher with the punished’ (qtd. in DCJ 1962: 829). The judgment then links these arguments to Grotius’ views on the right to punish (830):

Grotius holds that the very commission of the crime creates a legal connection between the offender and the victim, and one that vests in the victim the right to punish the offender or demand his punishment. According to natural justice the victim may himself punish the offender.

Then the judgment explains that these were crimes committed against the Jewish people and argues that ‘if there is an effective link (and not necessarily an identity) between the State of Israel and the Jewish people, then a crime intended to

²⁹ Repetition is a key element of performativity in Judith Butler’s conceptualisation, as I discuss in the next chapter.

³⁰ Cf. Rogat (1961: 16-17): ‘By trying Eichmann, and thus stressing crimes against Jews, instead of, or at least in addition to, crimes against humanity as a whole, Israel also took for granted its leadership of world Jewry and its right to speak for all Jews. And it simultaneously said, even to the most emancipated Diaspora Jew, “We’re doing this for you, and in your name. You will be regarded as involved in the trial. You have to think about and take up a position about your Jewishness”.’

exterminate the Jewish people has a very striking connection with the State of Israel' (831). What is the effective link between Israel and the Jewish people? The judgment tells us that it 'needs no explanation':

The State of Israel was established and recognised as the State of the Jews. The proclamation of 14 May 1948 opens with the words: 'It was in the land of Israel that the Jewish people was born,' dwells on the history of the Jewish people from ancient times until the Second World War, refers to the Resolution of the UN assembly of 29 December 1947 which demands the establishment of a Jewish State in Eretz Israel, determines 'the natural right of the Jewish people to be, like every other people, self-governing, in its sovereign State'. (ibid.)

They conclude:

It would appear that there is hardly need for any further proof of the very obvious connection between the Jewish people and the State of Israel: this is the sovereign State of the Jewish people. (ibid.)

Note the language of self-evidence: to argue the 'very obvious' connection that 'needs no explanation' the judgment refers to Israel's foundational document, the Proclamation, which as a performative foundation itself constitutively depends on this same logic of self-evidence (cf. Derrida 2002b). So the sole foundation given for establishing this obvious, self-evident link between the State of Israel and the Jewish people is a pure performative.

Arendt does not discuss this particular operation of the trial in these terms, though she does mention that Israel regarded any calls for an international tribunal for Eichmann as a belittlement of its sovereignty:

for Israel the only unprecedented feature of the trial was that, for the first time (since the year 70, when Jerusalem was destroyed by the Romans), Jews were able to sit in judgment on crimes committed against their own people, that, for the first time, they did not need to appeal to others for protection and justice, or fall back upon the compromised phraseology of the rights of man – rights which, as no one knew better than they, were claimed only by people who were too weak to defend their 'rights of Englishmen' and to enforce their own laws. (271)

For Arendt this constitutes a fundamental misunderstanding of the substance of 'crimes against humanity', and the Israeli authorities' inability to grasp the promise that a proper address of such crimes could hold for the future, even if the address

must be formulated in ideal terms. She notes that this trial will therefore be no precedent, even though there is a definite need for one, because once the unprecedented (i.e. genocide) has appeared, it may become a precedent for the future, thereby necessitating a proper address. Had the Eichmann trial staged the performative that Arendt envisioned (and enacted in her text), by calling into being an international tribunal and/or by properly substantiating crimes against humanity, it would have served as such a foundation. I would slightly amend her position to say that the Israeli position is better read in terms of neither misunderstanding, nor the 'inability to grasp' but rather a competing performative that does effectively function as a foundation, though not for what Arendt had envisioned.

It has been argued (Felman 2002, Douglas 2001) that Arendt's approach to the Eichmann trial is properly legalistic in Shklar's sense, that her insistence on the strict separation of the legal and the extralegal within the space of the trial, her obstinate definition of the scope of the trial in terms of doing justice to the accused and nothing else, was a sign of her inability to grasp the other significant functions the trial served. I believe this approach misses the point. Arendt is in fact fully aware of the limitations of a legalistic approach to the problem at hand,³¹ as well as the various dimensions of the 'political' at stake, including her own political vision. Her argument in favour of strict adherence to procedural concerns in the proceedings is not an argument for closing the legal form onto itself. On the contrary, it is for grounding what is novel on a solid platform, in other words, for allowing innovation where no precedent exists, precisely on the basis of adherence to certain other formal precedents. In this sense, Arendt's contribution can be read as a full appreciation of how a performative functions in J. L. Austin's sense, as I discuss in detail in the next chapter: certain conventions have to be in place for a performative to be felicitous.

³¹ In the first letter she wrote from Jerusalem to Karl Jaspers, she complained about the prosecutor's 'overly legalistic' argument, which was 'full of nonexistent precedents, on which the prosecutor focuses instead of stressing the unprecedentedness of the case' (Arendt and Jaspers 1992: 434).

between atrocity & performativity

Though Kirchheimer, Shklar, and Arendt shared the same milieu, read and referenced one another's works, and exchanged letters, the style and substance of their approach to the question of political trials could not be more varied.

Kirchheimer's historical and theoretical rigor is complemented by sober caution in his writing, lending the work an authoritative and principled credibility that may camouflage the deep ambiguity of his evaluation of the Nuremberg trial. In contrast to Kirchheimer's troubles around the admissibility of political concerns in a trial, Shklar's work is marked by the ease of a sceptical distance that refuses to invest in what holds out a promise for both of the other writers: the future of international law vis-à-vis crimes against humanity. Her conclusions may not be very tight on every point, but Shklar's critique is invaluable in that it helps us to be attuned to the more legalistic undercurrents in existing thinking on political trials, accounting for some of the tension in Kirchheimer's discussion of the Nuremberg trial. Arendt's work on the Eichmann trial, on the other hand, is a thorough research project disguised as a journalistic report, marked by an acutely incisive, daring and fast-paced wit, clarity of vision, and precision of argument. It is a record of not only what happened at the trial, but also of what should have happened. Arendt rectifies omissions in legal argument, evidence, and the scope of the trial, effectively providing us with a retrial, with no pretence of modesty. The book is important for understanding political trials in what it *does* as much as in what it says.

Taken together, these three works constitute a crucial moment in thinking about political trials. The imperative to think and to think well is an almost tangible aspect in each of these works, concerned as they are with one form of doing justice in the face of thought defying atrocities, namely the legal response to the deeds of the Nazi regime. The urgency becomes even more manifest as each writer acknowledges in his or her own way the difficulty, if not the impossibility, of properly addressing the atrocities within the legal idiom. Each legal formulation of the Nuremberg trial falls to pieces in Kirchheimer's hands, who still feels obliged to confirm the moral and historical necessity of the operation. 'There are no civilised responses that are fitting,' Shklar admits, 'and certainly no legal norms that can cope with what the Nazis did to Europe' (167). 'The Nazi crimes, it seems

to me,' Arendt wrote to Jaspers in 1946, 'explode the limits of the law' (Arendt and Jaspers 1992: 54).

Kirchheimer's hesitation and Shklar's scepticism about legal innovation may point to the limitations of their thought in the face of an unprecedented form of political violence. In other words, atrocity serves as a limit to critique in their accounts of the politics of political trials. On the other hand, it seems to me that Arendt's thought strove to precisely go beyond the atrocity. It is significant in this sense that her often quoted exclamation about Nazi crimes exploding the limits of the law, which I have quoted here as well, was a private thought communicated to a friend, rather than one elaborated in public writings. And when she did invoke this thought again in a public essay she wrote in 1964, she couched it in the past tense:

At the time the horror itself, in its naked monstrosity, seemed not only to me but to many others to transcend all moral categories and to explode all standards of jurisdiction. (Arendt 2003: 23)

The frustration we read in Arendt's work on the Eichmann trial is thus the frustration of one who has identified a direction for legal innovation to go beyond the 'speechless horror' before the atrocity, a horror 'in which one learns nothing' (ibid), only to find a more parochial performative operation at work in the trial, indexed to the atrocity in pursuit of less worthy political aims.

We can easily trace the influence of Kirchheimer, Shklar and Arendt in later writings on political trials, particularly in the works of liberal thinkers who attempt to formulate, and in some cases advocate for the politics of trials beyond considerations of expediency.³² The point of departure that Kirchheimer, Shklar and Arendt provide for this thesis is somewhat different. As my foregoing discussion suggests, I am particularly interested in the incipient formulation of the performative operations of trials that we find in these three works, which allows a particularly keen thinking of the politics of political trials. Kirchheimer's recognition of the ability of law to enact its own foundations into being is an apprehension of both the promise and the threat of the performativity of law, which

³² Cf. Osiel (1997), Teitel (2000), Douglas (2001), Felman (2002), Bilsky (2004, 2010) among others. See my Conclusion for a brief discussion of the more problematic contemporary liberal uptakes of the 1960s critical work on political trials.

explains something about his cautious hesitation.³³ Arendt's insistence on substantiating the notion of 'crimes against humanity' so as to reformulate humanity as legal community, and her critique of the parochial nationalism operative in the Eichmann trial displays a similar awareness of the performative promises and threats of a political trial. Notably, Shklar departs from the positions taken by the other two concerning the key performative function of the political trial, in refusing to 'believe that law will create world society through operative judicial tribunals' (131), a belief that she attributes to legalism. However, the performative potential she does recognise is noteworthy in itself, as it brings the question of performance and enactment into play. Her idea that legalistic rituals like the Nuremberg trials will reanimate Germany's legalistic culture resembles the structure of ideological conversion that Slavoj Žižek (1989: 38) formulates with reference to Blaise Pascal: go through the motions of faith, and the faith will come. In Shklar's understanding, the performance of the trial itself was going to performatively recreate the culture of legalism that was destroyed during the Nazi era.

In the next two chapters, I attempt to further develop the insights that Kirchheimer, Shklar and Arendt offer into the dynamics of performativity in political trials. In doing so, I primarily turn not to the literature on political trials, but rather to theories of performativity, beginning with the work of ordinary language philosopher J.L. Austin who coined the term 'performative'. Notably, Austin was a contemporary of Kirchheimer, Shklar and Arendt's. Most of Austin's important work on performative utterances were published contemporaneously with the three works I have discussed here, immediately after his early death in 1960. But even if these political theorists may have had access to the *vocabulary* of performativity, it was only after the uptake of Austin's theory by poststructuralist thinkers that performativity began to yield its fruits as a *grammar* of thought that is particularly valuable for studying law, politics and their intersections. Nevertheless, just as we can read performativity into Kirchheimer, Arendt, and Shklar's work on political trials in retrospect, so too we can read a preoccupation with the politico-judicial into Austin's theory of performativity, as I discuss in detail in the next

³³ Cf. Felman (2003: 12-13): 'Now, threats, too, constitute a sort of negative promise'.

chapter. In that sense Austin's keen interest in how things were done with words in law foreshadows later poststructuralist inquiries into the performativity of the juridical. In the next chapter I attempt to tease out the significance of the overlap between theories of performativity and critical legal thought for studying political trials.

2

performativity, performance, political trials

You are more than entitled to know what the word 'performative' means. It is a new word and an ugly word, and perhaps it does not mean anything very much. But at any rate there is one thing in its favour, it is not a profound word.

J. L. Austin (1970: 233)

English analytic philosopher J. L. Austin's term 'performative' has been revised, rethought, rearticulated and reworked in various ways since its coinage, not only by his successors in that same tradition of philosophy such as John R. Searle and Jerrold Katz, but also, and much more influentially for critical theory, by Jacques Derrida, Shoshana Felman, Judith Butler, and Eve Sedgwick among others. It would not be an exaggeration to say that the term has had an eventful history as the subject and scene of some polemic and controversy – I have in mind, for example, the exchange between Derrida and Searle in *Glyph*, and the various outraged responses to Butler's reworking of the term for gender theory. Then again, a certain amount of intimacy with theories of performativity begets the sense that there is something quite outrageous about the notion itself. Felman (2003) has masterfully traced this 'scandal' as already part and parcel of not only Austin's coinage but also the very style of his thought. I endeavour here to bring something of that scandal to bear on our understanding of political trials. This chapter and the next are intended to explore the grounds and potentials of this transference.

I begin the chapter with a brief introduction to Austin's theory of performative utterances. Intriguingly for the purposes of this thesis, a close reading of his investigation of the performative reveals a stark opposition between the status in his theory of theatrical uses of language on the one hand, and that of legal uses of language on the other. Austin clearly devalues the theatrical while elevating legal uses of language over and above ordinary language, his main object of study. This privileged status of the legal field with regards to performativity, Austin's preoccupation with how things are done with words in law, and his fascination with legal language to the point of making something of a fetish of it is quite significant, especially given that later philosophical work, such as by Derrida and Butler have also worked with the notion of performativity to articulate something about law. Indeed, as Derrida has noted, 'the juridical is at work in the performative' (2000: 467). My take on Austin's term and its implicit challenge to think the operations of the juridical anew is to explore what theories of performativity may teach us about political trials and also, trials in general. In one sense, this is an attempt to build on the insights that Otto Kirchheimer, Judith Shklar and Hannah Arendt's work on political trials afford with regards to their performative operations, but one that relies on a thorough engagement with theories of performativity to tease out more fully their relevance for understanding legal proceedings. The argument here goes beyond the question of how performative speech acts are utilised, feature or figure in trials. Instead I am interested in demonstrating that performativity as a model for configuring and understanding the relationship between value and fact, force and convention, being and appearance, linguisticity and materiality can help us understand how political trials function, somewhere between sovereignty and legality, politics and (in)justice.

The questions of performance and performativity are often intertwined in a political trial, presenting themselves as coupled and at times indistinguishable. I attempt to formulate an explanation for this coupling by rethinking their relation as they overlap in the trial. Here the importance of conventionality for the theory of performativity, and the inclination of performatives to masquerade as constatives serve as key. Reading Butler's conceptualisation of conventionality as a sedimented historicity alongside Derrida and Costas Douzinas' formulations of the

performativity of law, I propose that the embodied conventions of the trial bolster the masquerade whereby its performative operations masquerade as constatives, allowing law to operate as if it were fate. Political trials lay bare the performative operations that are more difficult to discern in ordinary trials.

introducing the performative: fetishes & parasites

Coined by J. L. Austin, the term ‘performative’ takes centre stage in his William James Lectures delivered at Harvard University in 1955, posthumously edited and published as *How To Do Things With Words* (1975). That this volume has come to serve as the definitive resource for Austin’s speech act theory is somewhat curious, for the work is not quite conclusive and certainly not as clearly articulated as those that Austin himself prepared for publication. The lectures begin with his famous distinction between constative and performative utterances, the former being the classical ‘statement’ of analytic philosophy, describing some state of affairs or stating facts, either truly or falsely. Performative utterances, on the other hand, will be seen to be actions in themselves when looked at closely, even though they may be initially mistaken for statements. They do not describe, report or constate anything, but rather enact in their very utterance, the reality they purport to describe. Austin’s classic examples include ‘I do’ (as uttered in the course of a marriage ceremony), ‘I bet you sixpence it will rain tomorrow’, ‘I promise I will be there’, and so on. In this sense, the immediate referent of a performative utterance does not exist outside or prior to itself—although importantly, its frame of reference does—nor is the performative utterance the outward expression, report or sign of an inward spiritual act (1975: 10); the utterance *does* rather than describes, producing or transforming a situation. Consequently, performatives cannot really be said to be true or false, even though they may fail or succeed in other respects. To such failure or success Austin refers in terms of the ‘infelicity’ or ‘felicity’ of an utterance.

Therefore instead of truth-conditions, performatives have conditions of felicity, which Austin sets out in six rules (14-15). The first rule concerns the existence of a conventional procedure that allows the performative to do what it does. The second rule is about the appropriateness of the persons invoking the procedure and of the circumstances in which the procedure is invoked. The third

and fourth rules concern the execution of the procedure: ‘it must be executed by all participants both correctly and completely’ (15). The fifth and sixth rules have to do with thoughts, feelings and the follow-up actions of the participants in the procedure. Austin discusses these six rules under the rubric of ‘the doctrine of the *Infelicities*’ and provides a thorough categorisation of potential failure: breaches of the first four rules constitute ‘misfires’ and that of the last two rules ‘abuses’. A ‘misfire’ can be a ‘misinvocation’ (rules 1 and 2), or a misexecution (rules 3 and 4), and so on.

Austin lays out the hazardous path of performativity in such detail that his categories of failure eventually begin to overflow their boundaries. Midway into the lectures he goes on to undo the clean-cut constative/performative distinction by considering in what way some infelicities that are proper to performatives can also afflict the constatives, and in turn, how performatives can be said to be true or false in certain ways. Timothy Gould (1995) incisively interprets this particular move in Austin as a strategy

to drag the fetish of true and false into the same swamp of assessment and judgement in which we find the dimension of happiness and unhappiness that afflicts our performative utterances (...) to seduce us away from the reassurances of that dichotomy into a larger appreciation of the common miseries of utterance – whether constative *or* performative. (23-24)

Indeed, towards the end of his lectures, Austin does confess a desire to ‘play Old Harry with two fetishes which I admit to an inclination to play Old Harry with, viz. 1) the true/false fetish, 2) the value/fact fetish’ (151). Thus the performative/constative distinction is put aside in favour of seeking ‘more general *families* of related and overlapping speech acts’ (150). Using the tripartite classification of the locutionary as the act *of* saying something, the illocutionary as the act *in* saying something, and the perlocutionary as the act *by* saying something, Austin attempts to formulate the beginnings of a new doctrine pertaining to all the possible forces of utterances, or as he puts it elsewhere, of ‘*what one is doing in saying something*, in all the sense of that ambiguous phrase’ (1963: 33). But rather than entirely fulfilling this promise in *How To Do Things With Words*, he suffices with a preliminary classification of verbs with regards to their potential force in speech acts.

Instrumentalised thus as a provisional category to ‘clear up some mistakes in philosophy’ (1970: 252) and later suspended as an ultimately untenable designation by its coiner himself, the term ‘performative’ has nevertheless gained quite a lot of currency in theoretical jargon ever since. Interestingly, one often encounters it in a forgetfulness or disavowal of its origins in ordinary language philosophy, instead used merely as the adjectival form of ‘performance’, to refer to something like ‘theatrical’. That ‘performative’ of all terms is afflicted with such forgetting of origins is something of a philosophical irony.¹ The shift in usage may have to do with the term’s reinterpretation in performance studies through the prioritisation of embodied behaviour over language. Nevertheless, it is important to critically reflect on what Andrew Parker and Eve Sedgwick (1995: 1) have identified as ‘one of the most fecund, as well as the most under-articulated’ areas in theoretical writings around performativity: ‘the oblique intersection between performativity and the loose cluster of theatrical practices, relations and traditions known as performance’. As I hope to show in this chapter, the trial proves a particularly rich object of study for exploring this intersection between performativity and performance, especially when we take as our point of departure an insistence on the distinction between the two terms.

The conflation of the performative with the theatrical is one that Austin would have taken issue with, as indicated by the few appearances that theatre makes in *How To Do Things With Words*. For example, before going on to detail the myriad ways in which a performative utterance can be infelicitous, he remarks, by way of a methodological exclusion (22):

...a performative utterance will, for example, be *in a peculiar way* hollow or void if said by an actor on the stage, or if introduced in a poem, or spoken in soliloquy. This applies in a similar manner to any and every utterance—a sea-change in special circumstances. Language in such circumstances is in special ways –intelligibly– used not seriously, but in ways *parasitic* upon its normal use—ways which fall under the doctrine of the *etiologies* of language. All this we are *excluding* from consideration.

¹ Cf. Shoshana Felman (2003: 44): ‘the very performance of the performative consists precisely in performing the loss of footing: it is the performance of the *loss of the ground*’ (44); or Jacques Derrida (1988: 12): ‘What would a mark be that could not be cited? Or one whose origins would not get lost along the way?’

We encounter this off-hand reference to theatrical and other recitational performance then and again in the work, always as an example of the ‘non-serious’, ‘parasitic’ uses of language. Notably, the theatrical here is a very limited designation, referring to actors on stage, playing parts, reciting lines. Parker and Sedgwick call attention to the world of associations evoked by Austin’s choice of the word ‘etiolation’:

What’s so surprising, in a thinker otherwise strongly resistant to moralism, is to discover the pervasiveness with which the excluded theatrical is hereby linked with the perverted, the artificial, the unnatural, the abnormal, the decadent, the effete, the diseased. (5)

Indeed, here the age-old ‘antitheatrical prejudice’ (Barish 1981) seems to be in full swing, even if Austin’s lectures are peppered with references to Greek tragedy and Shakespeare. A close reading of Austin’s oft-cited passage reveals, however, that it is not necessarily theatre per se that he finds it necessary to exclude from consideration, but citational uses of language more generally. Further, Austin’s seeming ascription of an ontological privilege to non-citational uses of language² may also be read as a strategic move, since the greater part of his project, his thorough and entertaining discussion of infelicities, involves the exploration of how such ‘serious’ uses of language can be hollow in their own particular ways. So it is as if the ‘non-serious’ theatrical or citational is excluded so as to be able to better highlight the failures of utterances that populate the higher rungs of Austin’s hierarchy.

When we look for a wider sense of performance as embodied practice, we find that Austin pays some, though fleeting, attention to it. He glosses over the importance of tone of voice, cadence and emphasis in making utterances (1975: 74); as well as gestures accompanying the utterance of words such as winks, pointings, shruggings and frowns (76), but there is hardly any ‘performativity’ attributed to such bodily functions. Their significance is reduced to the speech situation, mentioned only in their immediate and direct relation to speech acts,

² One of the key matters that Derrida (1988) takes issue with in his reading of Austin is precisely this distinction (and thus hierarchy) that Austin introduces between citational and non-citational utterances. Derrida flags that all language is citational, and that citationality is the very condition of iterability. I discuss Derrida’s take on Austin in more detail in Chapter 3.

which remain at the centre of his inquiry. Even then, Austin does not offer a discussion, not even for characteristic humorous effect, of situations where the bodily performances accompanying an utterance may reverse or nullify the latter's performative force. The potential for such performance related ruptures in contexts of convention will be relevant for considering the overlap between performativity and performance in the scene of a trial, as I discuss in Chapter 3.

juridifying the performative: the scene of law

H.L.A. Hart, speaking of Austin as a colleague and friend in an interview he gave in 1988, said 'he was naturally interested in law. He would have made a formidable QC' (Hart and Sugarman 2005: 273).³ Indeed, reading Austin, one gets a palpable sense of how intrigued he must have been by legal uses of language. He explicitly acknowledges the insights that legal language affords into ordinary language, in his essay on excuses⁴: 'it is a perpetual and salutary surprise to discover how much is to be learned from the law' (1970:188). The categories, distinctions and precautions Austin finds in law's idiom afford him a certain analytic clarity which he draws on to explore the workings of ordinary language, including the role, function and problems of performative utterances: 'Examples are more easily seen in the law; they are naturally not so definite in ordinary life, where allowances are made' (1975: 36). Many such remarks throughout the lectures gesture towards law as a kind of solid ground, as opposed to the 'boggy' consistency of ordinary language in which Austin finds himself 'floundering'.⁵ Hart, who admits to being 'tremendously impressed' by Austin's work on performatives and cites him among the primary sources of influence for his brand of legal positivism,⁶ recognised this

³ The two men were in close contact from 1945 when Hart took up a position in Philosophy at Oxford University where Austin was a major force to reckon with. Hart was immediately drawn into Austin's circle, attending his weekly seminars for 'philosophy hacks', and later jointly teaching seminars with him on a variety of topics (Lacey 2006).

⁴ This he deems a topic 'both contentious and practically important for everybody, so that ordinary language is on its toes: yet also, on its back it has long had a bigger flea to bite it, in the shape of the Law' (1970: 185-86).

⁵ See Sedgwick (2003: 16-17), for her elegant discussion of the language of texture in Austin.

⁶ The influence of Austin's speech act theory in Hart's first academic paper (1949) is almost tangible from the first sentences onward. Hart accounts for this influence further in the introduction to his *Essays in Jurisprudence and Philosophy* (1983: 2-3). In turn, it has been suggested that the

clearly when he stated that in Austin's idea of performative utterances, 'the law came into its own' (Hart and Sugarman 2005: 274).

Thus, if theatrical and other citational uses of language are relegated to the status of parasite in Austin's paradigm, legal uses of language come across as particularly privileged. Austin recognises that 'many of the "acts" which concern the jurist are or include the utterance of performatives' (19). He further notes that the legal profession is particularly attuned to the peculiarities of the performative (19), ready with a terminology to cope with them (24), and takes special precautions to avoid the many varieties of infelicity to which such speech acts are exposed (22). Austin draws some of his most felicitous examples of the performative from legal scenarios. Further, the primacy of legal language in Austin's project survives the abandonment of the performative/constative scheme. In his later tripartite classification of locutionary, illocutionary and perlocutionary force of utterances, Austin chooses to focus mostly on the illocutionary. An illocutionary act is the force of an utterance *in* saying something, so this category is the new counterpart of the earlier definition of performative utterances. By way of an explication, Austin provides a list of verbs that, when used in the first person singular present indicative active form, have explicit illocutionary force.⁷ A quick glance at this list indicates how many of the conventional utterances that are quintessential to law and legal proceedings include verbs with explicit illocutionary force: acquit, convict, find (as a matter of fact), hold (as a matter of law), appoint, dismiss, order, command, sentence, fine, pardon, plead, press, quash, annul, repeal, and the list goes on (1975: 153-63). Austin classifies such verbs under five categories, the first three of which are primarily used in legal language: verdictives 'typified by the giving of a verdict, as the name implies, by a jury, arbitrator or

influence was mutual: 'Herbert's legal input to seminars with Austin almost certainly contributed to the latter's development of his famous "speech act theory"' (Lacey 2006: 145). Although Austin himself dates the origins of his speech act theory to 1939 (1975: vi), that is, six years before meeting Hart, the recurrent references to the law in *How To Do Things With Words* and an explicit acknowledgment of Hart in a footnote for providing the term 'operative' (as in, 'operative clause') as the possible legal counterpart of the performative, do point to a fruitful exchange.

⁷ These verbs in this mode (first person singular present indicative active) also yield what Austin had defined earlier as the explicit performative. When I am not referring to Austin's particular discussion and classifications, I use illocutionary speech act and performative utterances interchangeably in the rest of this discussion.

umpire’; exertives, ‘the exercising of powers, rights, or influence’; and commissives ‘typified by promising or otherwise undertaking’ (150).

Hence at first glance, law seems to be a fertile resource for many of Austin’s examples, utilised liberally for purposes of illustration. But upon more careful reading, it becomes clear that law for Austin actually serves as a privileged order of language vis-à-vis performativity. The evaluative scheme that Austin identifies for determining the force of these utterances corroborates this interpretation. If we recall the doctrine of the infelicities, according to Austin, the felicity of a performative utterance depends primarily on the existence of an accepted *conventional procedure*, the appropriateness of the *circumstances* for invoking such procedure, whether the person invoking the procedure has the genuine *authority* to do so in the given circumstances, and whether the procedure is executed by all participants correctly and completely (14-15). So already in this initial evaluative configuration, it is as if we find ourselves in a scene of law. In detailing conventionality, circumstances and authority as conditions of felicity, Austin predictably draws his examples from law, but chooses unusual ones: When he discusses the question of convention, he invokes the practice of *talaq* in Islamic law, namely a husband’s ability to effect a divorce by repeatedly pronouncing ‘I divorce you’ (27). In attempting to clarify the issue of authority, Austin makes an interesting allusion to social contract theory (29). And when he explains the possible mismatch between convention and circumstance, he does so with reference to how lawyers work with the notion of precedent (32).

While law serves as a key paradigm for Austin’s conceptualisation of the performative, his work has in turn been utilised in legal studies, albeit not very extensively. In addition to H.L.A. Hart, a relatively early uptake is by the Swedish jurist Karl Olivecrona (1962) who advocated for a critical approach to legal language that could capture the fact that it does not mirror reality but shape it, and discussed legal performatives as part of his analysis. In later work, Olivecrona (1971) coined the term ‘performatory imperatives’ for conceptualising certain performative legal formulations as imperatives without addressee. Further, Olivecrona understood performative utterances as ‘the language of magic’ (1962: 175) and thus as providing a clue for the historical link between the modern

languages of law and ancient law's magical formulae (1971: 231). Another Scandinavian legal realist, Alf Ross, also engaged with Austin's work on speech acts, most extensively in an article entitled 'The Rise and Fall of the Doctrine of Performatives' (1972) where he proposed to replace the term 'performative' by 'normative', and to bring a definition of 'legal acts' and 'conventional acts' under this new concept of 'normative acts'.

Later utilisations of Austin's speech act theory in its relevance to law are found across the wide terrain of law and language scholarship, but here John R. Searle's revision of Austin tends to dominate. Work by linguists provide technical analyses of legal speech acts (e.g. Kurzon 1986) and offer specific taxonomies of the legal use of performatives (e.g. Cao 2009). On the other hand, some legal scholars who engage with speech acts downplay their jurisprudential significance (e.g. Rodriguez-Blanco 2013). Timothy Endicott (2002: 946) goes so far as to suggest that 'it is a dangerous mistake' to think that the theory of performatives is important to legal theory, though does not explain what exactly the danger is. Such hasty dismissal proves injudicious when we consider, for example, the work of legal philosopher Marianne Constable whose imaginative uses of speech act theory may have something to do with the fact that she chooses to bypass the Searlian inflection of Austin. In her earlier work, Constable (2008) introduced a shift to the debate on the *Miranda* warning given by the police to suspects in the United States, by reading it as a speech act that effects a transformation in the circumstances of speech and notifies the suspect of this transformation. Understood as such, the *Miranda* warning serves as an opening to justice that takes account of the problematic speech conditions of pre-trial interrogation, and preserves the trial as the proper site of speech and as the site of proper speech. In her more recent work Constable (2014) inquires into claims of law as performative and passionate utterances, the latter being Stanley Cavell's development of Austin's idea of the perlocutionary act. This approach allows her to both appreciate the conventionality of legal speech acts, and to go beyond that framework to consider the unconventional legal appeals to right and justice, and the question of law's hearing.

A particularly inspiring line of thinking on performative utterances and law could be traced back not to legal theorists but to Austin's fellow philosophers

Jacques Derrida and Judith Butler, whose reformulations of performativity with regards to the juridical have fed into legal scholarship in diverse ways. Even though remarks on law and performatives are found scattered across Derrida's oeuvre, often with unsignalled cross-references, his most influential texts on the subject are 'Force of Law' (2002a) and 'Declarations of Independence' (2002b) with key resonances between the two texts. The former is Derrida's reading of Walter Benjamin's 'Critique of Violence', prefaced by a consideration of the relationship between deconstruction and justice. Here Derrida proposes that law is founded performatively, thus the ground of law is ungrounded, and this ultimate groundlessness of law in turn yields its deconstructability. He suggests that any critical reflection on law should take into account its intrinsic structure whereby '[t]he very emergence of justice and law, the instituting, founding and justifying moment of law implies a performative force, that is to say always an interpretative force and a call to faith' (241). 'Force of Law' has been alive as a key reference in critical legal studies since it was first delivered at a symposium at the Cardozo School of Law in New York in 1989.⁸

In 'Declarations of Independence', Derrida offers a brief reading of the U.S. Declaration of Independence, drawing on the concerns of his earlier piece on J.L. Austin's speech act theory, 'Signature Event Context' (1988), such as the instability of the constative/performative distinction, and the vagaries of signature. He points out the undecidability that makes the Declaration what it is: Is this the constative statement of an already existing independence, or is it the performative enactment of that independence? He further discusses the aporias of signature in the document: the representatives sign the declaration on behalf of the people, but the latter do not exist as such prior to the signing, the people come into being in the act of the signature. This Derrida identifies as a 'fabulous retroactivity' operative in the instituting performative. Although much shorter than 'Force of Law', the analysis of performativity we find in this text has also found important resonances in critical legal thought.⁹

⁸ The symposium papers are collected in *Cardozo Law Review* 11: 5-6 (1990), some directly respond to Derrida's essay.

⁹ See, for example, Jacques De Ville (2008) who teases out the significance for constitutional theory of Derrida's emphasis on performativity in 'Declarations of Independence'.

Judith Butler's most direct engagement with law and Austin's theory of performativity is found in *Excitable Speech* (1997), her contribution to US debates on the legal regulation of injurious speech, including hate speech, flag and cross burning, pornography, and coming out as gay in the US army. This is a work that questions how speech acts, what it means to call for the legal regulation of speech, and what kinds of ideological and political investments such calls involve. As a compelling critique of left liberal legalism, *Excitable Speech* complicates the scene of the juridical through the theory of performativity. Although not as explicit about its relation to law, Butler's earlier work on gender also involves a thinking of the juridical. In the preface to the 10th year edition of *Gender Trouble*, Butler ([1990] 1999: xiv) explains that her formulation of gender performativity was inspired by Derrida's reading of Kafka's parable 'Before the Law':

There the one who waits for the law, sits before the door of the law, attributes a certain force to the law for which one waits. The anticipation of an authoritative disclosure of meaning is the means by which that authority is attributed and installed: the anticipation conjures its object.

Interestingly, the text by Derrida (1992) that Butler refers to is not one in which he explicitly engages with performativity as such. This may point to the significance of the theory of performativity more as a grammar of thought than as a vocabulary of thought. Butler's acknowledgment here is also notable for indicating that her thinking of performativity was at once, and from the beginning a thinking of law, the subject 'before' the law, and the question of subjectivisation. Her theorisation of performativity has also been taken up in legal studies in fascinatingly diverse ways.¹⁰

¹⁰ A thorough account of Butler's uptake in legal studies is beyond my purposes here. However, for examples indicating the diversity of legal scholarship that followed from Butler's formulation of law and performatives: See Elena Loizidou (1999) who engages with Butler's theory of gender performativity for a critical reflection on rape law. In her monograph *Judith Butler: Ethics, Law, Politics* (2007) Loizidou elaborates in more detail on the potentials that Butler's theory of gender performativity holds for critical legal thought more generally. Ritu Birla (2011) approaches Butler's work on performativity from an engagement with colonial law's dual production of the modern economic subject and the pre-modern cultural subject, and reads Butler as a 'unique legal theorist' whose theorisation of performativity cuts across and identifies the slippages between law as *logos* ('neoliberal market sovereignty' in Birla's field) and law as *nomos* (convention). Martha Merrill Umphrey (2011) draws on Butler to offer an incipient theorisation of the performativity of trials.

constating the performative: masquerade as metaphor

There is one seldom noted moment in Austin which I find to be particularly suggestive for thinking about the relationship between law and performativity. Early on during the very first of his lectures in *How To Do Things With Words*, in a section aptly entitled ‘Preliminary Isolation of the Performative’, Austin warns against the capacity of performatives to disguise themselves as constatives:

The type of utterance we are to consider here is (...) one of our second class – the masqueraders. But it does not by any means necessarily masquerade as a statement of fact, descriptive or constative. Yet it does quite commonly do so, and that, oddly enough, when it assumes its most explicit form. Grammarians have not, I believe, seen through this ‘disguise’, and philosophers only at best ‘incidentally’. (4)

Thus the performative is said to often *masquerade* as a descriptive or constative statement, seeming to display a relation of externality to its reference, and thereby deceiving us into ascribing it a ‘truth value’ in such disguise. This is because the explicit performative, the most classic of Austin’s examples in the form of first person present indicative active, partakes in the structure of a statement. A judge’s utterance of the words ‘I sentence you to four years of imprisonment’ at the end of a criminal trial may come across as a statement in form but it is not so in fact – we are warned not to be deceived by appearances. Even though Austin holds the legal use and scrutiny of language in high esteem, a curious footnote that he appends to this passage tells us that he thinks jurists do not necessarily fully grasp the philosophical implications of their pragmatic distinctions:

Of all people, jurists should be best aware of the true state of affairs [i.e. the disguise whereby performatives masquerade as constatives – B.E.]. Perhaps some now are. Yet they will succumb to their own timorous fiction that a statement of ‘the law’ is a statement of fact. (4fn2)¹¹

The implicit suggestion here is that statements of law are often performative utterances. So just as performatives can be distinguished from constatives, statements of law can be distinguished from statements of fact. As experts dealing

¹¹ Also, later on in the text: ‘Only the still widespread obsession that the utterances of the law, and utterances used in, say, “acts in the law”, must somehow be statements true or false, has prevented many lawyers from getting this whole matter much straighter than we are likely to - and I would not even claim to know whether some of them have not already done so’ (19).

in performatives, jurists are in a privileged position to see what all grammarians and most analytic philosophers have failed to see: they should be able to understand that what seems to pass as a statement of fact is sometimes the very production of that fact, the enactment, as it were, of the factual order in question. Jurists must understand this, Austin seems to suggest, because this is the ordinary mode in which law operates.

Austin's idea that performatives disguise themselves as constatives is quite significant, and his use of the metaphor of 'masquerader' to describe this operation is noteworthy. First of all, the metaphor brings the excluded theatrical through the back door into Austin's theory, as part and parcel of his initial definition of the performative. The performative, we are told, is that which often disguises or passes itself off as constative. So there is always already a staging involved in the performative, whereby it disguises the fact of its enactment. The performative both stages its referent, and stages itself so as to look as if it is merely stating rather than staging its referent. The staging is thus doubled so as to conceal the fact that there is any staging involved.

Further, 'masquerade' happens to be charged with theoretical associations and resonances in thinking about law and performativity. It is interesting that neither Jacques Derrida nor Judith Butler, both of whom have recast Austin's rather restricted, though admittedly rich, notion of the performative in divergent and astounding ways, make much of this stage entrance, its introduction by the master of ceremonies as a 'masquerader'.¹² And yet, the idea that performatives are disguised as constatives, as well as the word masquerade do resonate through both of their works, especially powerfully in Butler's *Gender Trouble* ([1990] 1999), where an extended discussion of the way masquerade figures in Joan Riviere and Jacques Lacan provides part of the groundwork for Butler's notion of the performativity of gender (55-73). It is here that she offers an initial, albeit seemingly provisional, version of what she later elaborates in terms of gender performativity: 'masquerade may be understood as the performative production of a sexual ontology, an appearing that makes itself convincing as a "being"' (60).

¹² Butler (1997: 51, 81, 175n11) does draw attention to it in *Excitable Speech* but only as a way to bring a wider set of utterances (i.e. subjunctive ones, or instances of hate speech) under the rubric of the 'performative'. See also her brief mention in Butler (1990a: 1717).

In Derrida, the echo of the masquerade is fainter, though it affords further ripples of reverberation. In ‘Force of Law’, Derrida cites a passage by Montaigne by way of introducing the ‘performative force’ of the ‘instituting, founding, and justifying moment of law’, the ‘call for faith’ that lies at the foundation of law in the form of a performative:

Even as women, when their naturall teeth faile them, use some yvorie, and in stead of a true beautie, or lively colour, lay-on artificiall hew... embellish themselves with counterfeit and borrowed beauties; so doth learning (and our law hath, as some say, certain lawfull fictions, on which it groundeth the truth of justice). (qtd. in Derrida 2002a: 240)

Makeup, mascara, masking, masquerade... Though obviously intrigued by this analogy to quote it at length, Derrida does not do much with it except to go on to briefly evoke a definition of law as a ‘masked power’ (241). He does, however, question what a legitimate fiction is, and what it may mean to found the truth of justice.¹³

Interestingly, we find these ‘lawfull fictions’ reverberating back in Austin in the footnote quoted above, where he states that jurists ‘will succumb to their own timorous fiction that a statement of “the law” is a statement of fact’ (1975: 4fn2). The phrase ‘timorous fiction’ here is an intriguing choice of words by one known to be meticulous with them, and could be read as encapsulating a summary criticism of natural law theory:¹⁴ jurists anxiously seeking to conjure a factual basis of law where there is none, a truth to law or outside it, which in turn will serve as its origin and foundation. This fictive operation is said to be timorous, marked by fear, nervousness, and lack of confidence. Is the intimated fear produced by the knowledge that there ultimately is no such factual basis? Are we to understand that jurists choose to take shelter in a fiction rather than acknowledging and thus braving the performativity of law? A reading of Austin’s ‘timorous fiction’ along these lines is further echoed in Derrida’s essay, where Montaigne’s ‘lawfull fiction’ is interpreted in terms of ‘the fiction necessary to found the truth of justice, and the

¹³ A similar inquiry is at work in Derrida’s ‘Before the Law’ (1992), to which the latter part of Montaigne’s quote provides the epigraph. And as I have alluded to above, elsewhere, Derrida (1988, 2002b) discusses in more detail the effects of the disguise of performatives as constatives.

¹⁴ Olivecrona (1962: 190; 1971: 234) briefly signals towards the potential utilisation of Austin’s work on performatives for a critique of natural law.

supplement of artifice called for by a deficiency in nature, as if the absence of natural law called for the supplement of historical or positive (that is to say, an addition of fictional) law' (2002a: 240). The language of supplement is noteworthy here, lest we forget that the supplement for Derrida (1997) not only augments but also supplants – it is an operation at once of addition and replacement.

We encounter a variation on the theme of 'fiction' vis-à-vis 'nature' in Butler's early work where she casts gender performativity in terms of the function by which the truth-effect of an essence to gender is produced, and thus gender naturalised:

The tacit collective agreement to perform, produce, and sustain discrete and polar genders as cultural fictions is obscured by the credibility of its own production. The authors of gender become entranced by their own fictions whereby the construction compels one's belief in its necessity and naturalness. (1990b: 273)

For Butler, then, the cultural fictions of gender are so convincing that they not only hold their authors enthralled and in thrall, but also efface their own fictive origins. The logic of Derrida's supplement is thus at work here as well. The collective agreement to sustain the fictions masquerades as the law of nature.

These echoes and resonances across the three thinkers yield an interesting pattern which in turn can be understood to characterise performativity. The masquerade in these constellations serves as an inconspicuous trope linking the respective discussions of Austin, Butler and Derrida, and a nexus around which performativity is laid out in terms of a special configuration of the relation between fact and fiction, nature and artifice. In Austin's case, the masquerade whereby a performative is likely to pass as a constative destabilises the very category of the latter as the distinction becomes increasingly unsustainable in myriad ways by the end of the lecture series. Butler poses the key question of 'What is masked by masquerade?' to Joan Riviere's 1929 essay, only to conclude that rather than connoting an order of farce that is subordinate to and superimposed on a true order of being, masquerade names the very operation which produces the truth effects of 'genuine' gender identities. In Derrida, there is no extended discussion of the mascara, though the trajectory of his essay tells us that this make-up, rather than supplementing or enhancing 'nature', masks its performative foundation – thus the

make up becomes a mask behind which lies not a face but a play of forces. Masquerade as metaphor thus marks performativity as a threshold operation, passing as constative, and obscuring and collapsing a strict delineation between being, appearance, and becoming.

law & the force of convention

Admittedly, Austin is not entirely accurate in his assessment of the failure of jurists to appreciate that the statements of law are not statements of fact. As far back as 1605, Flemish jurist Leonardus Lessius wrote about promise (*promissio*) and donation (*donatio*) as being ‘practical signs, actuating what they mean’ (qtd. in Visconti 2009: 394). Further, the positivist tradition from Jeremy Bentham and J.L.’s namesake John Austin onward can be read as recognising at some level the performative quality of law. Nevertheless, suppose that one of the imaginary jurists with whom Austin is in conversation in his brief footnote were to respond, offering the rejoinder that statements of law do not resemble performative utterances as much as they resemble constative statements, in the sense that there is a law out there –whether in the form of statute or precedent, whether based on a conception of sovereign command or normative system–, a law that exists prior to individual legal statements, and to which such statements correspond, very much in the same way that constatives correspond to facts that are outside and prior to themselves. Thus, the jurist would say, a statement of the law constates existing law, which is its ‘factual’ referent. If such a conversation were to take place, would Austin still accuse our imaginary jurist of succumbing to a ‘timorous fiction that statements of “the law” are statements of fact’? Would he say that it is misguided to speak of a law ‘out there’, existing prior to its utterances, rather it is each and every individual statement of the law that reinstates and reifies the law? (cf. Derrida 2002a) Would he thus claim that what purportedly derives from law in fact performatively brings it into being?

Probably not. Austin’s response would more likely be a corrective, a fine-tuning of terminology, something along the lines of: To say that existing law constitutes the ‘fact’ to which individual legal utterances pertain truthfully or falsely would be to say that a judge’s ‘I sentence you to four years of

imprisonment' describes something already extant in the law, as if you were always already sentenced to four years of imprisonment, perhaps even before your trial or your alleged crime, but in any case, sometime before the judge made the utterance, and the judge was merely stating this fact. Applied to utterances of the law, the constative model produces this kind of absurdity (unless we literally believe in something like fate), whereas thinking through the same scene in performative terms would help us better understand the dynamics involved.¹⁵ Thus Austin would presumably counter-propose that existing law should not be understood as the *fact* out there which then determines the truth or falsity of statements of law, but rather as a context of *convention* that determines their felicity. It is the very conventionality of law, or law as convention, that renders the performative model key for the legal field. Here is, Austin would say, not only an established code of procedure and set of conventions, but also often the appropriate authority with which to invoke them, crucial elements determining the felicity of a performative. Thus it is legal conventions and legal authority that would render the judge's sentence a felicitous performative, enabling him/her to indeed send you to prison for four years with his/her very utterance in the right circumstances.

Notably, the seemingly absurd scenario produced by the constative reading of the sentencing scene (i.e. you were always already sentenced to four years of imprisonment) corresponds to the way in which law operates as if it were fate. In other words, the constative fallacy vis-à-vis law that Austin complains about actually explains something about the way law works, how it operates precisely to produce such fallacy. We find a clue of this in Derrida's reading of the Declarations of Independence, when he writes of the ambiguity of the structure of the law-instituting U.S. Declaration of Independence: 'This obscurity, this undecidability between, let us say, a performative structure and a constative structure, is *required* to produce the sought-after effect' (2002b: 49). Thus the masquerade of legal

¹⁵ There is a line of debate in legal theory in this vein, in response to Hart's (1949) work on ascription which was clearly inspired by Austin on performatives. Hart's early claim that legal language was primarily characterised by ascription of legal consequences to actions rather than descriptions of these actions was challenged by scholars such as P.T. Geach and George Pitcher who proposed that legal performatives, such as the passing of sentence, involved and were premised on factual referents, such as findings of fact in a trial (Schauer 2006: 855n5). Later, Hart (1983) agreed with his critics though without fully explaining why. See also Endicott (2002).

performatives as constatives, or in Derrida's words 'the whole game that tends to present performative utterances, as constative utterances' (51) is not accidental, but rather necessary.

We find a more thorough account of this in Costas Douzinas's essay on 'The Metaphysics of Jurisdiction' (2007). Douzinas writes of the 'common metaphysical structure that regulates jurisdiction', the latter (*juris-diction*) understood as both the speech that institutes law, that is, the saying of law or the diction that speaks the law, and what the instituted law speaks (22). These two aspects of law's speech 'are inescapably intertwined' (ibid). The metaphysical structure of jurisdiction involves, according to Douzinas, two different axes that are rendered indistinguishable: 'the universal and the particular as well as the performative and the constative. Their cohabitation helps confuse the four poles of the two dyads' (24). It is precisely this confusion, the indistinguishability that upholds the metaphysics of jurisdiction. Therefore, the glimpse of 'the gap between particular and universal or between performance and statement' is also a glimpse of the potential failure of law's claim (27). A grasp of these gaps allow 'both violence and critique [to] launch themselves in law' (ibid).

In Douzinas's account, the legal counterpart of what Austin discusses in terms of the constative fallacy, or the masquerade is a product of *judicial organisation*, one that is particularly effective in liberal democracies:

In our liberal and democratic societies, forgetting the gap is the more common form: judicial interpretation and judgement are organised in a way that conceals the original performance of the law in favour of its reasoned and coherent statement. (ibid.)

This emphasis on organisation, reasoning and coherence is important. The masquerade is at its most convincing when the system appears as efficacious and thus as felicitous as possible. Note, however, that Douzinas maps the distinction he makes between the diction that institutes law and the speech of instituted law onto a distinction between 'performing' (performatively instituting) law and constating existing law. So the performative and the constative appear as two separate instances. The mapping, however, need not be so neat. As Derrida reminds us, law produces its desired effect through the destabilisation of the distinction between performatives and constatives. Just as instituting performatives are often disguised

as constatives, each ostensible ‘statement’ of law, no matter how ‘reasoned and coherent’, can be said to share in the force of the instituting performative that lies at the origin of law. Thus ‘statements’ of law do not only conceal the instituting performative that founds law, but also bolster instituting violence with their own performative violence which they also disguise beneath the masquerade of constating existing law.

We find yet another, if more roundabout, clue of the operation of law as producing the constative fallacy in Judith Butler’s (2012) reading of Benjamin’s ‘Critique of Violence’. Here she hones in on Benjamin’s brief discussion in his essay of the myth of Niobe, and finds there both an account of legal subjectivisation and one concerning the link between law-instituting and law-preserving violence. According to the myth, Niobe, a mortal, bragged about her fourteen children, and claimed that she was better than Leto, the goddess of fertility who only gave birth to two. Offended and furious, Leto sent her children, Apollo and Artemis, to punish Niobe by killing her sons and daughters. Benjamin writes ‘But their violence establishes a law far more than it punishes the infringement of a law that already exists’ (Benjamin 1996: 248). Artemis then turned Niobe into a rock from which her tears streamed eternally. Butler finds a key to Benjamin’s Gordian essay in this image of the petrified subject whose punishment is not a response to the infringement of already existing law, but is rather the very institution of law. It is a law-making violence that transfers the burden of that violence (the killing of fourteen children) onto the subject as a petrifying guilt: ‘To be a subject within these terms is to take responsibility for a violence that precedes the subject and whose operation is occluded by the subject who comes to attribute the violence she suffers to her own acts’ (Butler 2012: 79). The anger of the gods institutes itself as fate and law. Further, it is not only the fabulous retroactivity of the law-instituting performative that operates as if it were fate, but also law-preserving violence as well. As Butler writes, ‘In the end, it would seem, the model of law-instituting violence, understood as fate, a declaration by fiat, is the mechanism by which law-preserving violence operates as well.’ (72)

To further explore the significance of the operation of law *as if it were fate* (or the masquerade of legal performatives as constatives), we may link the

foregoing to Butler's insightful account of conventionality in relation to performativity in *Excitable Speech* (1997). Here she trains her gaze on not only the force of convention but also the 'logic of iterability' which is inherent in convention and yet 'governs the possibility of social transformation' (147). Since her main interest lies in sketching the potentials as well as the limits of performative agency, she provides a keen reading of the vagaries of the relation between the performative and its context of convention. This relation is almost always one of institution (each performative utterance reinstates the convention) but it is *not necessarily* so, also offering a possibility of rupture and insurrection. Herein lies the scandal of the theory of performativity: the very theorisation itself of how performatives work includes the recognition of not only performative failure (infelicities) but also performative contradiction and subversion. The theory holds out the possibility of rupture in the horizon of conventionality whereby a reiteration need not necessarily function as a reinstatement. Thus the context of convention need not be figured as an immovable mover, but rather understood in its contingency, as a process of 'historical sedimentation' (1990b).

For Butler, each performative utterance that draws on 'the force of reiterated convention' is a 'condensed historicity'. This points to the particular temporality of performatives that Butler explains with reference to their 'ritual or ceremonial' form identified by Austin:

they work to the extent that they are given in the form of a ritual, that is, repeated in time, and, hence, maintain a sphere of operation that is not restricted to the moment of the utterance itself. The illocutionary speech act performs its deed *at the moment* of the utterance, and yet to the extent that the moment is ritualized, it is never merely a single moment. The 'moment' in ritual is a condensed historicity: it exceeds itself in past and future directions, an effect of prior and future invocations that constitute and escape the instance of the utterance. (1997: 3)

In this account, the performative utterance extends itself both into the past and the future. It stretches into the past insofar as it owes its conditions of being and felicity to a historical sedimentation of conventionality, and into the future insofar as it constitutes a reinscription (or potentially, transformation) of that conventionality. Butler's temporalisation of the role of convention in the theory of performativity renders the latter a powerful analytical instrument for law, posing 'context as more

than just the historical and empirical framework *for* law, contemplating it instead as the historicity of law itself, of law understood as ever-shifting convention, or the always already situated norms that become sites for citation' (Birla 2011: 90). This temporal figuration of the performative also explains something about the masquerade of performatives as constatives. What creates the constative expectation or the masquerade can be understood as a temporal horizon seemingly entirely saturated by convention. In other words we can propose that legal performatives often pass as constatives because law as convention often passes as inevitable.

the political trial: performativity & performance

Theories of performativity can be utilised to account for what transpires in a criminal trial on a number of levels. The most obvious is a literal Austinian approach concerning the language used in a trial: many of the key utterances in the course of a trial are performative utterances. We already get a flavour of this from the various examples that Austin uses. Objecting, finding (as a matter of fact), holding (as a matter of law), convicting, acquitting, sentencing are often effected through explicit or implicit performative utterances in the trial. In a sense, trials not only contain but are sustained by performative utterances. They provide the skeletal structure through which a trial plays itself out, the mainstays on which the linguistic rituals of trials are built.¹⁶ But beyond this immediate, and perhaps rather inconsequential, observation, we may draw on work on law and performativity to identify other dynamics of performativity operative in a criminal trial that are essential to its functioning.

In this sense, the status of the criminal trial as a key instance of law-preserving violence in the modern state is necessary to take into account. While the trial is not the only medium through which the state acts to exercise its monopoly of violence, it remains, along with various choreographies of policing, one of the most

¹⁶ For a lucid illustration of this, see Marianne Constable's (2011: 637-39) reading of *Morissette v. United States*, 342 U.S. 246 (1952).

visible features of law-preserving violence. Thus despite its ‘demise’,¹⁷ the trial can be understood as an essential medium through which the legal system continues to stage itself as if it were fate. On the basis of my discussion in the previous section, I would like to propose that the criminal trial is felicitous to the extent that it effectively disguises its performative operations as constative. These masquerading operations include the establishing of the facts, the interpretation of law, and the application of substantive law to the facts of the case. The necessary paradox is that although these have to be disguised in the trial as a series of constative functions, or perhaps in order that they are successfully disguised as such, the trial has to be performed. It has to take its course, play itself out, preferably without any seeming or at least overwhelming prejudice on the part of those who are to arrive at a verdict at the end of the process, so that the outcome is not fully foreseeable in advance. This quality of live performance, the process of making a case, representing, defending, arguing, challenging, evaluating narratives of fact and matters of law in the setting of a forum is part of what lends the trial its authority to pass as inevitable, as fate. Hence the necessity to submerge the trial in an avalanche of conventionality.

I would further like to propose that *the political trial can be defined as a legal proceeding whose performative structures are publicly exposed*. In other words, trials that are identified by their public audience as political tend to afford critical insight into the performative structure of proceedings, otherwise disguised in the daily grind of the courtrooms. As I discuss in more detail below, the exposure of the performativity of a trial is usually due to a crisis of masquerade, that is, a failure in one of the several ways in which performatives ordinarily disguise themselves as constatives in the course of a trial. The fact that the question of trial performance often comes under scrutiny in political trials, and accusations of theatricality (‘show trial’, ‘circus’, ‘kangaroo court’, etc.) begin to fly around may be closely connected to this exposure of performativity. When the conventions of trial performance cannot bolster the sense of inevitability, they begin to stand out in their theatricality.

¹⁷ Namely its gradual replacement by administrative handling of offenders, plea-bargaining, and, perhaps in a more laudable turn, restorative justice initiatives – see discussion in Duff et. al. (2004: 3-17) of the continued significance of the trial, despite its increasing rareness.

It is here that we may begin to think, as Sedgwick and Parker have encouraged, about the overlap between performativity and ‘the loose cluster of theatrical practices, relations and traditions known as performance’ in the space of the trial. In other words, we may ask: How and to what extent does the hyperconventionality of trial performance assist the masquerade whereby the performative functions of a trial parade as constative? The rigidity of performance practices extends over every nook and cranny of the stage of the criminal trial: the organisation of space, the distribution of bodies in space, the regulation of their movement, the required bodily gestures, the ordered proceedings, the prescriptions and restrictions of clothing, the authorisation of speech, the formalised language, and so on. Could it be that the rather anachronistic conventions governing a trial’s performance work to reinforce a perception of its absolute inevitability? Everything was performed as it ought to have been, thus the outcome is what it ought to be. Could this appearance of necessity, in turn, bolster the masquerade whereby the key performative functions of the trial pass as constative? In other words, can the overlap between performance and performativity in a trial be identified in terms of the production of an appearance of inevitability? This would mean that the conventions of embodied performance in a trial assist in disguising its performative operations.

One such operation has to do with the truth-seeking function of the trial, which notably involves a performance of constating. The trial authorises a fact-finding mission that is both institutional and collective in character, the latter more pronouncedly in jurisdictions that employ juries. In the adversarial jury trial, there is further a special emphasis on live oral testimony which is understood to enhance the truth-seeking function of the trial (Auslander 1997; Mulcahy 2008; Leader 2010). Witness testimony occurs live in the trial as a performance of recollection (Auslander 1997: 20). Its authenticity is then subject to scrutiny on two main accounts: demeanour and confrontation (Leader 2010). The attention to demeanour calls for a performance of credibility: it calls on the body of the witness to verify truthfulness, much like in trials by ordeal where it was believed that the accused’s body under ordeal would ‘speak’ the truth. In turn, the principle of confrontation provides the discursive complement to the embodied truth of demeanour, and

renders the adversarial trial an agonistic space of conflict over narrative and meaning. In inquisitorial systems where there is less of an emphasis on live testimony and more so on the documentation of the case, the case file acquires a similar function of enacting the truth of the trial.¹⁸

The forensic narrative produced as to what has happened beyond reasonable doubt is then taken as authoritative: it shapes the very language of the public discourse around the event, so that, for example, the ‘alleged/ly’ in public reports is dropped after factual details are decided on in a criminal trial. The trial thus produces a privileged account for historiography. This explains, to some extent, recourse to the criminal trial in collective attempts to negotiate the past, for example, in transitional justice scenarios or post-conflict societies:

the appeal of the courtroom lies ... in the stability of its order, in discourse that is limited both temporally and lexically according to the rhetorically imposed turns for speaking and the fixed validity of words, coded according to the place from which they are uttered, as compared to the amorphous talk, or rather noise, by which we are normally surrounded (Vismann 1999: 279)

The usual cacophony of the public sphere is filtered through a highly formalised and stylised orchestration in the trial, which lends a particular weight to its findings. The historiographical privilege is also why political powers have been known to opt for criminal trials in attempts to authorise their version of events as official history (Koskeniemi 2002; Douzinas 2012). Curiously, the constative function of the criminal trial is often referred to as ‘establishing’ the facts, a verb that not only conveys the constative sense of ‘confirming’ and ‘validating’, but also the more performative function of ‘instituting’. The potential gap between the truth and its representation in the trial has been captured by a distinction between ‘substantive’, that is, actual truth and ‘formal legal truth’, namely ‘whatever is found as fact by the legal fact finder’ (Summers 1999: 498). That the story could have been told otherwise always remains a possibility, but a felicitous trial is partly so because it has successfully banished this possibility from public perception, to the extent that the performativity of the retelling, of the establishing of facts is shrouded in the constative function of describing the facts.

¹⁸ See Chapter 5 for a discussion of the role of the case file in Turkey’s Ergenekon trial.

Often in political trials, the potential gap becomes visible. The trial may fail to fully convince the public that the facts that it has ‘established’, its performance of the constative is indeed constative, congruent with reality; or to put it more simply, if it has failed to assure that its representation of what happened is truthful. The trial may occasion suspicions that facts have been manipulated through forged or fabricated evidence, false testimony and the like, so as to ‘frame’ the defendants. It may be that the evidence is suspected to be fabricated not during but before the trial by the police, the intelligence service, or a third party. Even then, how this evidence is handled in the trial, how it is substantiated or invalidated becomes a focus of attention, revealing something about the performative operation involved in the finding of facts. A famous example is the 1951 trial and conviction of Ethel and Julius Rosenberg in the United States, on charges of conspiracy to commit espionage during wartime. An effective public campaign was launched only after their conviction, dividing international and domestic public opinion regarding their culpability at the time of their execution in 1953, and for many decades after. While subsequent evidence has suggested that Julius Rosenberg was indeed involved in espionage for the USSR, it is still contested whether this involved the transmission of any useful information on the atomic bomb, which was the actual reason for the capital sentence, and whether Ethel Rosenberg was involved in espionage at all.¹⁹ Further, it remains the case that their conviction at the time was secured on the basis of false evidence (Schneir 2010). The history of political trials provide many other examples in this vein. The publicity of suspicion pertaining to the truthfulness of fact-finding in a political trial occasions an exposure of the fact-finding mechanism’s contingency, which is usually shrouded in performances of orderliness and solemnity.

Another key performative operation of the criminal trial can be identified as the application of laws to the case at hand, which raises the classic jurisprudential question of fit between the facts of a case and existing law. While this is an issue that has engaged thinkers of law from at least Aristotle onwards, political trials

¹⁹ Sam Roberts, ‘Figure in Rosenberg Case Admits to Soviet Spying’, *New York Times*, 11 September 2008, <http://www.nytimes.com/2008/09/12/nyregion/12spy.html>; Sam Roberts, ‘Father Was a Spy, Sons Conclude With Regret’, *New York Times*, 26 September 2008, <http://www.nytimes.com/2008/09/17/nyregion/17rosenbergs.html>.

problematise it in particularly pronounced ways. In perhaps the majority of political trials, neither the facts, nor the law itself is in question, but the legal interpretation of the facts are. That is, the trial may not necessarily be beset by suspicions or claims that facts are being fabricated, the point of contestation and controversy is rather the legal spin that the prosecution puts on them. So that, for example, various coincidences are prosecuted as ‘conspiracy’ (Chicago Conspiracy Trial, USA, 1969-70); a public criticism of ceaseless war is cast as ‘discouraging the people from military service’ (the trial of superstar Bülent Ersoy, Turkey, 2008); or what may well be deemed performance art is legally interpreted as ‘hooliganism motivated by religious hatred’ (Pussy Riot Trial, Russia, 2012). In such cases, there is again the suspicion that the defendants are ‘framed’ but this time the frame itself becomes visible and exposed as potentially problematic.

The starkest exposure of the frame occurs in trials concerning acts of civil disobedience: the facts of the defendants’ acts are not in dispute, nor is their illegality – the defendants attempt to call the laws themselves into question as either irrelevant or illegitimate. Existing laws are contested with an appeal to justice, in the name of higher laws or principles – constitutional or moral (Veitch 2006). On the flipside of civil disobedience cases, we have the kind of political trials that Kirchheimer, Shklar and Arendt were primarily concerned with. In successor regime trials, the commonsensical temporal relation that is expected from an ordinary legal proceeding is overturned. Rather than the anticipated canny order of a narrative arc proceeding linearly from law to breach to trial to judgment, the prosecution may be understood to retrospectively institute the law where there was none. As Kirchheimer and Arendt fully grasped, when felicitous, this type of political trial institutes law, it is a constitutive moment that seemingly draws on legal conventions, but in fact founds a new order of conventionality. Thus, how faithfully procedural conventions are performed, how closely courtroom etiquette is followed and what kind of a theatrics of justice is displayed tend to be absolutely crucial in these kinds of cases for their felicity. In a sense, loyalty to procedure and conventions of performance replaces the necessity for preceding legal authority.

What is exposed in a stark light in civil disobedience and successor regime trials can be said to be at work in every criminal trial whereby the very event of the

trial can be said to relate to its larger context, the particular legal system of which it is an instance, performatively. As Martha Merrill Umphrey (2011: 120) suggests:

trials are law-making (not just law-applying or law-interpreting) events *because of their performativity* ... they not only enact law, both theatrically and linguistically, in their very doing, but also performatively constitute the law they enact.

Thus a trial should be understood not as a statement of law, but rather a reinscription of law that not only draws on precedent and legislation but also effects their further sedimentation. However, operative in the representational strategies involved in both the retelling of the facts in a manner that can be legally assimilated, and the further performative function of applying legal rules and standards to this retelling is what Shoshana Felman has referred to as a ‘cognitive view of language’, which disguises these processes as a series of transparent congruities. In Felman’s characterisation of the cognitive view, ‘the question of knowing is confused with the question of judging; the illocutionary act of judgement is experienced as a pure constative or cognitive’ (2003: 14). The strict procedural restrictions and the stringent conventions governing the performance of the trial allow law to stage its illocutionary operations as pure constatives whereby law seemingly exercises a masterful cognition of itself, the crime and the criminal. Notable in this regard is Ross Charnock’s linguistic analysis of judgments that overrule precedents (2009: 413):

Common law judges are not simply reluctant to overrule explicitly; they often go to the extent of denying, contrary to the evidence, that their overruling decisions imply a change in the law at all. They claim instead that these decisions are mere declarations of the true state of the law, in the face of misapprehensions derived from mistaken decisions in earlier cases.

So even in the most obvious performative operation of overruling, recourse is often sought to a constative masquerade.

Butler’s work incites an understanding of *how* the masquerade masks in law: legal performatives masquerade as constative owing to the sedimented conventionality of law. Derrida and Douzinas, on the other hand, offer an insight into *what* the masquerade masks in law: it masks the performative violence that lies at the foundation of law. According to Douzinas, the metaphysical structure of

jurisdiction that is based on a confounding of the legal performative and the constative is at its most vulnerable in trials where there is an explicit challenge to jurisdiction. The examples he gestures towards are the Nuremberg and the Yugoslav war crimes tribunals, which ‘resorted to the sheer fact of their establishment by the victorious or the powerful to get around the challenge of their jurisdiction’ (2007: 27). These are indeed limit cases since the concurrence of jurisdiction as the speech that institutes law and jurisdiction as what the instituted law speaks is rendered explicit, there is hardly any constative masquerade in sight. Yet jurisdictional challenge can have a similar effect of exposing the performativity of law in other (political) trials where the concurrence may not necessarily be so clear from the outset.

Leora Bilsky (2010) discusses jurisdictional objection in political trials in relation to the problem of what she terms ‘boundary drawing’, that is ‘identifying how criminal law actually participates in delineating the boundaries of citizenship, of who belongs and who does not belong to a political community of discourse’ (99). She suggests that this function of law is most apparent in constitutional cases, whereas modern criminal law presumes the boundaries as given, and is not necessarily engineered to accommodate debates concerning the delineation of political community. Criminal law ‘presupposes the existence of a political community over which it has authority’ and ‘assumes that the issue of effective sovereignty has been settled’ (ibid). The authority of the court can be challenged technically during the preliminary jurisdiction stage of the hearings, but then it is generally assumed that law has sufficient built-in provisions to handle such challenges (ibid). Kirchheimer is characteristically astute on this issue when he writes that jurisdictional objections ‘give the trial an air of legal finesse and propriety without ever putting the regime that is staging the trial in any untoward danger. The rejection of the jurisdictional objection is a foregone conclusion’ (1961: 332n44). Paradoxically, most political trials adjudicate actions that involve a challenge to such foreclosure of the political. The criminalisation (and therefore the attempted depoliticisation) of these political challenges thus doubles the political foreclosure on the scene of the trial. Emiliios Christodoulidis (2004) formulates this in terms of ‘the objection that cannot be heard’. In Christodoulidis’ account, the

circumscription of the political by the court, its limitation of the political to constitutional processes means that there isn't a genuine communicative or dialogic space of articulation available in the trial as some theorists of trials propose (cf. Duff 1986; Burns 1999).

The strategy of rupture developed by the French-Vietnamese lawyer Jacques Vergès, for example, is about sustaining the jurisdictional challenge throughout the trial, rather than limiting it to the jurisdiction stage proper in which a 'division between participation and legitimation can be made' (Bilsky 2010: 103). The refusal to enter into dialogue with the court about the facts of the case or the points of law is meant to convey a defiance of the socio-political order, which can be understood as an attempt to expose the performative violence that institutes and preserves law. The *tu quoque* objection, often encountered in political trials, has a similar effect and can be conceived as boiling down to a jurisdictional challenge as well:

If the State that calls to account those who commit such crimes (against humanity) is also their perpetrator, its legitimacy to judge them is withdrawn and its attempt to monopolise them can be nothing but a political-ideological move. (Christodoulidis 2009: 8)

The 'who are you to judge' allows an exposure of the founding violence of the jurisdiction that claims authority over those it brings to its justice. Thus while 'every trial explicitly or implicitly addresses the power of the court to judge' (Douzinas 2007: 27), this structure is particularly pronounced in political trials.

A perspective that draws on theories of performativity for studying trials will afford an analysis of ordinary, everyday criminal trials as not only reinscribing and reinventing the legal system, but also continuously promising it. As Felman's discussion of Molière's *Don Juan* alongside J. L. Austin's theory of performative speech acts, *The Scandal of The Speaking Body*, shows, the act of promising is not only one performative act among many, but in fact the very quintessence of performativity,²⁰ as every promise is a promise of the constative, a pledge of congruity between the now-speech and the act-to-come, in a perverse relation to

²⁰ Cf. Cavell (2003) who suggests even further that for Austin promising was the fact of speech itself, 'as if an "I promise" implicitly lines every act of speech, of intelligibility as it were a condition of speech as such' (xiii).

temporality. In Felman's words, 'every promise promises *constancy* above all, that is, promises consistency, continuity in time between the act of commitment and the future action' (2003: 20). The performativity of a criminal trial is in one sense the promise, or possibly, the threat of consistency and continuity, two key principles of modern law. Thus each trial can be said to performatively postulate a pledge of noninterruption of the legal system, a postulation that further assists in the operation of law-preserving violence as if it were fate.

3

sovereign infelicities

In the previous chapter, I offered one way of interpreting conventional trial performance in relation to performativity within a more general account of the relevance of theories of performativity for law and trials. Taking my cues from a number of dynamics that are particularly well exposed in political trials, I proposed that the hyper-conventionality of trial performance assists in the masquerade whereby law's performatives pass as constatives. In this chapter, I further engage with performative theory to conceptualise the vagaries of what may be referred to as 'sovereign performatives' and explore the significance of this conceptualisation for studying trials. Part of this chapter is taken up with the scrutiny of the status of sovereign agency in J.L. Austin, Jacques Derrida, Judith Butler and Shoshana Felman's theories of performativity. My understanding is that these theories crucially imply a critique of sovereignty: the very grammar of performativity necessarily poses a challenge to the idea of an unfettered, absolute sovereignty. This is due to two key conditions of performativity: conventionality (or iterability) and performance (embodied practice). The analysis of performativity allows the conceptualisation of the 'political' in political trials beyond its overdetermination in terms of expediency or sovereign agency, that is, beyond its 'intentional' and 'willed' status. I offer the groundwork for this analysis and its relevance for studying political trials in this chapter with reference to three cases, before going on to offer more detailed case studies in Chapters 4 and 5.

three scenes

Let me begin, then, with scenes from three unrelated political trials to which I will return at the end of this chapter.

The first is relatively well known: The 1969-1970 Chicago Conspiracy Trial¹ was the trial of eight activists charged with the conspiracy to cross state lines to incite a riot.² In effect, it was an extension of the government's 'law and order' response to the massive protests in Chicago in August 1968, organised to coincide with the Democratic National Convention, and brutally repressed by the Chicago police. The defendants included local organisers, student organisers, a Christian pacifist, 'Yippies' Abbie Hoffman and Jerry Rubin, and most famously, the co-founder and chairman of the Black Panther Party (BPP), Bobby Seale. Represented by radical lawyers such as William Kunstler and Leonard Weinglass, the defendants opted for a spectacularly disruptive approach to the proceedings. The anti-authoritarian Yippies were already well known for guerrilla theatre, and Hoffman and Rubin took the trial as an occasion to improvise. In addition to staging several acts during the trial, they generally played havoc with courtroom conventions, and their co-defendants played along: they refused to rise with the comings and goings of the judge, shouted insults at him, refused to address him with the usual 'Your Honour', cracked jokes, laughed out loud, and so on.

Bobby Seale had other reasons to be disruptive: from the beginning of the trial he insisted that none of the defence attorneys present represented him. He would either be represented by the BPP lawyer Charles R. Garry, or represent himself. Garry was initially the chief attorney on the defence team, but had to go through a surgery that coincided with the beginning of the trial. Judge Julius J. Hoffman refused to allow a six-week delay to accommodate this, and Garry had to leave the team, passing the lead to Kunstler. Seale refused to acknowledge Kunstler as his attorney, and demanded his constitutional right to represent himself. Judge Hoffman denied him the right on the basis of a technicality. Kunstler respected Seale's decision and did not attempt to represent him. This left Seale in direct confrontation with the judge. During the first few weeks of the trial Seale

¹ United States v. Dellinger et al., Criminal No. 69-180 (N.D.Ill.)

² This was an offence under the 1968 Federal Anti-Riot Act, passed in April of that year as a response to inner city race riots of the mid-1960s.

continuously disrupted the proceedings with the demand to represent himself and attempts to cross-examine the witnesses. By the fifth week of the trial, with the antics of the other defendants in the background, the confrontation between Judge Hoffman and Seale escalated to the point where the judge ordered Seale to be bound and gagged. This was initially on a simple folding chair with handcuffs and a towel gag, and when that proved ineffective, he was bound on a wooden ‘throne’ chair with heavier straps, a massive gag and adhesive tape. For two days, on the 30th and 31st of October 1969, the hearings proceeded with the only black defendant on trial bound and gagged in the courtroom, struggling with the straps and his speech muffled by the gag.³

The second scene is a small moment from the early days of Saddam Hussein’s 2005 Dujail trial at the Iraqi Special Tribunal. Presiding over the proceedings was Rizgar Mohammed Amin, who would later be replaced due to his perceived lack of authority. The following exchange took place between Hussein and Amin, and it was recorded on video:⁴

HUSSEIN: I only say this so that the defendant-

JUDGE: [quietly] He's the prosecutor, not the defendant.

HUSSEIN: Excuse me?

VOICES IN COURT: The prosecutor.

HUSSEIN: The prosecutor, eh [makes head gesture]... The prosecutor and the witness should listen...

Saddam Hussein makes a slip of the tongue, and refers to the ‘defendant’ during a hearing where he is the chief defendant. But he means neither himself, nor a co-defendant, he’s referring to someone else. The judge interrupts to correct him and says somewhat sheepishly, ‘he’s the prosecutor, not the defendant’. For a split second Hussein does not understand why he has been interrupted, then does, the shadow of a smile crosses his face, and makes a gesture with his head as if to say ‘whatever, same difference’. The footage cuts to the judge who inexplicably returns the smile before Hussein continues to speak.

³ For detailed accounts of the trial, see Schultz (2009), Lahav (2004) and Hoffman (2000: 186-209).

⁴ ‘Saddam Hussein on Trial: Saddam Hussein Is Too Great to Be Defended Even by Saddam Hussein; I Was Beaten by the Americans’, *Memri TV* video, 9:34, archived 27 May 2013, broadcast by *Al-Jazeera TV* in 2005, <http://www.memritv.org/clip/en/976.htm>.

The third one is also a brief moment, from a trial that concluded in March 2013 at Woolwich Crown Court in the United Kingdom. This was the third trial of two students, Alfie Meadows and Zak King, who had been involved in the 2010 protests against the austerity programme and extortionate tuition fee hikes introduced by the government. Meadows had made the news at the time, as he had to undergo emergency brain surgery after being hit on the head with a police baton while kettled during the 9 December 2010 protest in London's Parliament Square. The chances were slim, but he miraculously survived without brain damage and was subsequently charged with violent disorder. There seemed to be a cynical calculation at work: a conviction would secure the police against misconduct charges, and in any case, a prosecution would delay any civil action against the force. Meadows and King were in the criminal justice system for a while, because their first trial ended with a hung jury in April 2012, with three other co-defendants acquitted. Their retrial in November 2012 was aborted due to insufficient time scheduled for the hearings.

As in the previous two trials, in the third and final trial the prosecution brought to the witness stand several police officers on duty that day at the demonstration. In his cross-examination of the first two police witnesses, one of the defence attorneys established that yes, the batons must be used only as a last resort; no, they should not be used to hit people on the head; yes, the police receives extensive training to this effect, because hitting someone on the head with a police baton can cause death. The third police witness was Superintendent Woods who had served as Bronze Commander on the day of the protest.⁵ He was cross-examined in a similar vein, which seemed to irritate him. When asked whether he considered baton strikes an absolute last resort, he answered 'The absolute last resort is getting a machine gun out.' As he said this, he was pointing an imaginary machine gun directly at the jury members and pretending to shoot.

⁵ This is part of the Gold (strategic) – Silver (tactical) – Bronze (operational) command structure created by the Metropolitan Police Service following the Broadwater Farm Riot in 1985. Though the command structure was created for emergencies and has been taken up by other emergency services, the police now uses it mainly proactively for policing public events.

sovereign spectacles

In his vivid discussion in the opening chapters of *Discipline and Punish*, Michel Foucault (1979) inquires into the gradual disappearance of punishment from public view. For Foucault, this disappearance signifies a historical shift in the modality of power, namely, a passage from predominantly sovereign to predominantly disciplinary power. He comments in passing, however, that the judicial spectacle, once so powerfully staged by the sensational public torture and execution of the condemned, is now transferred onto the post-Revolutionary public trial. Although this is a specifically French genealogy (in common law, criminal trials were always public), the insight is valid across modern law: sovereign power, associated with pomp and circumstance, is still operative in the courtroom, in the very spectacle of the trial, albeit bound up with a more recent mode, disciplinary power, which corresponds to an all-surveying gaze that aims at the knowledge of the criminal through expert testimony and the like.

That the courtroom remains a privileged stage for the spectacle of sovereignty is particularly conspicuous in political trials. The dynamics of national sovereignty that were played out in Adolf Eichmann's trial, discussed in some detail in the first chapter of this thesis, serve as a lucid example. Further, the idea of the trial as sovereign spectacle is something of a commonplace in writings on political trials. Otto Kirchheimer's (1961) discussion of a regime's recourse to the image-making capacity of a trial captures the importance of legal spectacle for claims to sovereignty. In her article on 'terror' trials that involve political perspectives of radical difference, Leora Bilsky (2010: 108) writes that it is unlikely that national courts will relinquish such cases to be tried by international courts, as these trials 'are often viewed as the very symbol of their sovereignty (the right to adjudicate those who claim unrestricted "war" against the state and its citizens)'. While similar remarks are found across the various genres of writing on political trials, the same dynamic can be discerned in 'ordinary' criminal trials as well, at least in principle. Here it is pertinent to note that the modern, liberal democratic rationale for the publicity of trials draws not only on the defendant's right to a fair trial, but also on

the public's right to know (Radin 1932; Mueller 1961).⁶ In other words, the principle of publicity is formulated partly in terms of popular sovereignty and the public's interest in seeing justice done in its name. Trials are thus conventionally figured as spaces where sovereignty plays itself out to itself.

This, in turn, corresponds to an aspect of the shift of sovereign spectacle from public punishment to the public trial that Foucault writes about. In Foucault's account, the juridico-political function of the spectacle of public execution was to reconstitute a momentarily injured sovereignty (1979: 48). Since law emanates directly from the sovereign, a crime, besides its immediate victim, is an attack on the will and the body of the sovereign himself. The public spectacle of punishment was meant to redress that injury. In the passage from absolute monarchy to popular sovereignty, the form of this operation is preserved via the general theory of the contract: law is the bond, the contract of society; a crime is a breach of this pact; hence besides its immediate victim, the crime is an injury to the body politic whose law is breached. Trials and punishments are meant to redress this injury to the community at large rather than avenge the victim. We have seen the effects of this modern (albeit traditional) conceptualisation of criminal justice in Arendt's understanding of crimes against humanity.

Yet a further aspect of interest in Foucault's discussion of the spectacle of sovereignty is its very ambiguity:

the terror of the public execution created centres of illegality: on execution days, work stopped, the taverns were full, the authorities were abused,

⁶ While the institution of public trials in France in 1791 was very much a product of the revolutionary zeitgeist of rights and popular sovereignty, the twofold rationale does not seem to have the same historical purchase in common law. According to Max Radin's (1932) work on the genealogy of the principle of publicity, the earliest rationalisations of the public character of English trials are found in Thomas Smith's 1565 treatise *De Republica Anglorum*, with particular emphasis neither on the defendant nor the public audience, but rather on the witnesses and the need for testimony to be public. This is fleshed out further by Matthew Hale circa 1670, and later by Blackstone citing Hale, preserving the emphasis on witnesses – the idea being that false accusations are more likely to be made in private than in public. So during the period when the majority of criminal prosecutions were brought by private persons rather than public authorities, the openness of courts was understood not necessarily to guarantee a fair trial to the defendant (who, as Radin details, was otherwise greatly disadvantaged by the procedure) or to fulfil a public function, but rather to immunise criminal procedure from its abuse by private persons (calumniators). This finds contemporary resonance in the idea that publicity protects criminal procedure from its abuse by the administration or the judiciary.

insults or stones were thrown at the executioner, the guards and the soldiers; attempts were made to seize the condemned man, either to save him or to kill him more surely; fights broke out, and there was no better prey for thieves than the curious throng around the scaffold. (63)

Foucault further discusses the political risk that this ambiguity created through its consolidation in social solidarity among the spectators, against the sovereign. He writes, ‘out of that uncertain festival in which violence was instantaneously reversible, it was this solidarity much more than the sovereign power that was likely to emerge with redoubled strength’ (ibid). In noting that the spectacle of power is transferred onto the public trial, Foucault does not go into much detail, but we know from political trials that this ambiguity too is partly transferred on to the public trial. Kirchheimer captures this well in his discussion of the ‘irreducible risk’ whereby the image-creating capacity of the legal procedure can be usurped to create effective ‘counter-images’. In other words, the sovereign spectacle can turn on itself.

However, Kirchheimer’s account of this ambiguity in trials is premised on a particular conceptualisation of agency. We see this in the various reasons that he gives for the irreducible risk: political commitments of witnesses who may not play along with the prosecution’s vision for the trial; the interpretation of defendants who may successfully hijack the proceedings to make counter-images, and ‘the judicial space’, that is, the freedom of the judge or jury in deciding a case based on their own interpretation and evaluation, with relative independence from the sovereign agency of the state (1961: 118). Thus potentially pitted against the sovereign who wills the spectacle of the trial are various participants of the trial also figured as sovereign agents who are fully present to themselves, and whose acts perfectly coincide with their wills and intentions. While the analysis has some merit for trials involving particularly self-conscious political conflicts between prosecution and defence, it is important to be attuned to the subtler, unintentional, accidental, spectral, unconscious ways in which the sovereign spectacle can unravel in the trial. This would then call for an alternative formulation of the political in political trials beyond its overdetermination in terms of the intentions and designs of the parties. Since the idealised coincidence of spectator and sovereign in the modern criminal trial does not allow as clear a crystallisation of parties to the

conflict as Foucault describes with regards to public punishment, such an attunement may be helpful in discerning the politics of seemingly ordinary trials as well. Here performative theory's problematisation of the notion of 'sovereign performatives' will be of assistance in conceptualising the potential ambiguity of legal proceedings.

sovereign performatives?

Butler coins the phrase 'sovereign performatives' in one of her essays in *Excitable Speech*, as part of her critique of certain jurisprudential writings on hate speech which turn to theories of performativity to argue how some forms of speech must be seen as injurious conduct. She identifies in these theories the attribution of a certain efficacy to individual acts of speech, an efficacy that is 'modelled on the speech of a sovereign state, understood as a sovereign speech act, a speech act with the power to do what it says' (1997: 77). Interestingly, this kind of sovereign speech is fantasised by those writing on hate speech precisely when contemporary power is no longer primarily sovereign in character. Thus, Butler pits the Foucauldian analysis of waning sovereignty up against the recourse to theories of performativity in conjuring this figure of the sovereign utterer of hate speech, who is understood to be invested with the 'power of absolute and efficacious agency, performativity and transitivity at once (it does what it says and it does what it says it will do to the one addressed by the speech)' (77). Butler then questions whether we have in these theories something like a nostalgia for sovereign power, a fantasy of its return:

The emphasis on the performative phantasmatically resurrects the performative in language, establishing language as a displaced site of politics and specifying that displacement as driven by a wish to return to a simpler and more reassuring map of power, one in which the assumption of sovereignty remains secure. (78)

Butler proposes instead a departure from the conceptual model of sovereignty in reformulating performativity, and rethinking agency and resistance from a non-state-centred perspective. However, in doing so, she seems to preserve a version of the notion of 'sovereign performatives' to describe 'the performative power of state-sanctioned legal language' (81). She retains this notion in order to distinguish

from it the (hate) speech of citizens. Legal language, therefore, is preserved as a field where ‘one has the power to make happen what one says’ and the example she appends to this is predictable: ‘as a judge backed by law in a relatively stable political order has the power to do’ (82).⁷

In her introduction to the same collection, Butler provides a critical account of Althusser’s theory of interpellation, especially taking issue with the examples he uses to elaborate his theory. According to Butler, the analogy that Althusser formulates between his example of the policeman who hails ‘Hey, you there!’ and his other example of God naming Peter and thereby transforming him into a subject, models his theory of interpellation on the figure of the divine voice: ‘In claiming that social ideology operates in an analogous way to the divine voice, Althusser inadvertently assimilates social interpellation to the divine performative’ (31). Butler argues for an account of ideology that does away with this figure of the divine voice. The divine power of naming must be dissociated from the otherwise useful notion of interpellation, because:

the voice is implicated in a notion of *sovereign* power, power figured as emanating from a subject, activated in a voice, whose effects appear to be the magical effects of that voice. In other words, power is understood on the model of the divine power of naming, where to utter is to create the effect uttered. Human speech rarely mimes that divine effect except in the cases where the speech is backed by state power, that of a judge, the immigration authority, or the police, and even then there does sometimes exist recourse to refute that power. (32)

She does not go on to theoretically address the ‘recourse to refute that power’. Nor does she seem interested in offering a deconstruction of this notion of the ‘sovereign performative’. Instead she counters it again with its historicised outside, i.e. with the Foucauldian critique, and thus pursues the question of conceptualising interpellation ‘after the diffusion of sovereign power’ (34). In a way, ‘sovereign performative’ can be said to remain a thing in her theory, at least instrumental as a term, to signify speech backed by state-power, typically the speech of a judge. She does, however, gesture towards a deconstruction of this notion in a brief aside that follows her discussion of Althusser, by suggesting that even the speech of the

⁷ Cf. J.L. Austin (1975: 88): ‘If you are a judge and say “I hold that...” then to say you hold is to hold; with less official persons it is not so clearly so’.

policeman who hails the person on the street is governed by conventionality. That is, his ostensibly sovereign speech is effective only due to its citational dimension, a ‘historicity of [linguistic] convention that exceeds and enables the moment of its enunciation’ (33). This is an allusion to Derrida’s discussion of performative speech acts in ‘Signature Event Context’, even though Butler does not go on to fully unpack the allusion at this moment in the text.

It would be stretching the argument to propose that Butler leaves untouched the notion of a sovereign performative. However, I find it interesting that the term remains somewhat operative even in her work, if only to reveal something about a fantasy of power, though nevertheless used to refer to the performative speech of, say, ‘a judge backed by law in a relatively stable political order’. There is something ever so slightly reminiscent here of Austin’s gestures towards legal language to highlight that which is not ideally efficacious in ordinary language, the so many ways in which the latter can fail, implying the former won’t ever really do so.⁸ And while Butler is justified in conjuring this image of a judge whose speech can indeed be said to amount to conduct leading to injury (as hate speech is fantasised to be), unleashing the force of law on the body of the addressee of his or her speech act, we may want to explore the structural potential of fissure even within such ostensibly fully sovereign performatives. Thus, in addition to wanting to sully Austin’s fetish, I want to extend the implications of Butler’s work on the performative to question the very possibility of a ‘sovereign performative’ other than as fantasy – even in that most efficacious site of performativity, the trial.

The intrinsic challenge that the idea of performativity poses to the notion of sovereignty is closely linked to two issues: the question of conventionality (or what Derrida refers to in terms of ‘iterability’); and the simple fact that performatives are performed. With regards to the latter, it seems wise to take Austin at his word when he writes ‘a word never –well, hardly ever– shakes off its etymology and its formation’ (1970: 201) or, indeed, when he states specifically with reference to his coinage of ‘performative’ that ‘its etymology is not irrelevant’ (1975: 7). The etymological relevance he had in mind was perhaps simply a wish to emphasise that performatives ‘perform’, but it seems crucial to be attuned to the fact that they

⁸ See my discussion in Chapter 2 on the status of legal language in Austin’s work.

are also performed. Thus, an understanding of performativity that takes into account the question of performance is key here, and it is not unrelated to the question of iterability. Ironically, precisely such an attempt to think the performance of performativity and the performativity of performance (Judith Butler's work) seems to have incited in its uptakes an uncritical conflation of the two notions, that is, the use of the term performativity in referring primarily to forms of theatricality. In the following sections, I first explore the theoretical implications of this conflation in terms of an inability to grasp the critique of sovereign agency that the conceptualisation of performativity involves. Then I trace this critique back to Austin's work by challenging Derrida's reading of Austin with the help of Stanley Cavell and Shoshana Felman. I then explore the further elaborations of this critique in Derrida, Felman and Butler's works, before moving on to consider the implications of all this for rethinking the politics of political trials. This I do by returning to the three scenes I have sketched at the beginning of this chapter.

(mis)reading the performative: the theatrical turn

The use of 'performative' to refer to forms of theatricality is understandably quite widespread in performance studies publications from the 1980s onward. Yet the conflation encountered in critical thought should perhaps be traced back to Judith Butler's reconfiguration of the term in *Gender Trouble*, its reception and, to some extent, misinterpretation. Notably, in this work, Butler formulates gender performativity without a single reference to J. L. Austin or his speech act theory.⁹ And yet framed in terms of signs, discourse and even 'inscriptions' on the surface of the body, the idea of gender performativity is clearly not divorced from the order of language and signification. In other words, gendered corporeality is partially linguisticised in this work, in the sense that it is thought through in terms of

⁹ Nor is Austin to be found in a 1990 essay she published soon after *Gender Trouble*, though here she provides an intriguing and itinerant genealogy to the notion of performativity, mentioning John Searle in passim, but drawing mainly on the phenomenological theory of acts (Merleau-Ponty, Husserl) and its feminist uptake by Simone de Beauvoir (Butler 1990b). Austin gets a brief mention in a short comment piece published the same year (Butler 1990a), and finally surfaces in Butler's oeuvre more fully, first towards the end of *Bodies that Matter* (1993), and later more extensively in *Excitable Speech* (1997).

discursive functions maintaining the truth-effects of the categories of gender and sex (Sedgwick 2003: 8). So although there are no references to speech act theory in *Gender Trouble*, certain affinities and common concerns are not difficult to find. Further, it is possible to read Austin into Butler's book at the very least in terms of a common spirit of playful inquiry, given the two authors' recourse to performativity in a shared inclination to bedevil the fetishes of truth/falsity and fact/value. *Gender Trouble's* version of gender performativity is hardly bereft of linguistic significations of the term, but even more importantly, by paying close attention to gendered acts and gestures, and suggesting that such corporeal performance has the effect of reifying an ontology of gender, the work initiates a unique way to link the linguistic and theatrical connotations of 'performative'. For Butler, gender performance is performative not only in that it is theatrical, but also in the sense that it operates in the same mode as a performative utterance: masquerading as constative, purporting to represent a truth to gender that is external or prior to it; while in effect enacting and fabricating that truth through its very performance.

While Butler thus offered us, in her early work on gender, one significant way in which the performativity of corporeal performance can be thought as separate but related terms, a common misreading of her proposal turns precisely on a conflation of the two terms. This confusion could perhaps be attributed to Butler's discussion of drag, clearly introduced as a *marginal* example of gender performativity, but often misread as *paradigmatic*. In Butler's discussion, through its amplifications and exaggerations, that is, by the very means of its avowed artifice, drag can shed light on quotidian, normalised versions of gendered enactments which disavow their artifice. It is as a limit case of sorts that drag helps us understand the performativity of gender, the function by which certain 'ordinary' and 'obvious' bodily performances reify an ontology of gender. Instead, *Gender Trouble* has been widely interpreted to offer drag as the very measure and standard of gender performativity, leading many a commentator to dismiss her reconfiguration of performativity as a manifesto on the subversive power of crossdressing. And because a certain degree of theatrical excess is integral to drag,

Butler's notion of 'gender performativity' has often been reduced in its reception to 'gender performance', thus deprived of its philosophical connotations.

It is interesting to watch what happens to the question of the subject in this reduction of performativity to theatricality. Some readers have envisioned Butler's scene as a puppet show of sorts, a complete debunking of agency, with 'discourse' as a mystified matrix of power pulling the strings. For instance, in an early response to Butler's work, Seyla Benhabib wrote: 'If we are no more than the sum total of the gendered expressions we perform, is there ever any chance to stop the performance for a while, to pull the curtain down, and let it rise only if one can have a say in the production of the play itself?' (1995a: 21).¹⁰ Then again, others who read gender performativity solely in terms of theatrical performance understand it to involve an absolutely voluntaristic notion of agency. This was a common reading in the early 1990s, but it oddly persists to this day. A recent analysis in this vein is offered in passing by Susie Orbach (2009), who writes with specific reference to *Gender Trouble*:

It has become a feature of postmodernist thought to ... see embodiment, like femininity and masculinity, as something we achieve through performing or enacting the body we want to have. In this kind of theorising, it is believed that the body can be anything we want it to be (74)

The much celebrated American literary critic J. Hillis Miller takes all this to a new level, magically combining these two types of theatrical misreadings into a caricature of sorts:

'Performativity,' it now appears, means, among other things, the assumption that human beings have no innate selfhood or subjectivity but become what they are through more or less forced repetition of a certain role... It is an exhilarating theory because, apparently, it blows the gaff on the familial, social, ideological, and political forces that have made me what I now think I am by forcing me to repetitive performances of that role. Once I understand that, the way is open to change society so I can be different, or even, so it appears, to take my identity into my own hands and 'perform' myself into becoming some other person, some other gender, or some mixture of genders, or one person or gender today and another person or gender tomorrow. (2007: 225)

¹⁰ In a later essay included in the same volume, Benhabib admits to having overlooked the speech act theory signification of Butler's usage of performativity (1995b: 109).

Miller is well aware of speech act theory in this article, dedicating a significant portion of it to Austin. But he not only claims that Butler's notion of performativity has nothing to do with Austin's (227), but attributes it to 'performance theory'. It may be helpful here to bear in mind that Miller admits to depending on the Wikipedia entry for this 'reading' of *Gender Trouble*.

Needless to say that neither of these forms of theatrical reductionism, that is, neither the puppet show nor the scene of spontaneously-willed and absolutely-intentional play-acting, nor even a fanciful combination of the two, can properly stage Butler's crucial reconfiguration of performativity. In the former misreading, some phantasmic notion of 'discourse' is afforded sovereign status, as the inexorable and invincible puller of strings (as fate, perhaps); in the latter, sovereignty is bestowed upon the subject as the power to turn every whimsical desire into reality. When the two are combined, as in Miller's version, the scene becomes one of a tug-of-war between discrete sovereignties. The theatrical misreadings notably correspond to either the eradication of the political or its overdetermination.

derrida's austin: sovereign pretensions

It turns out that theatrical reductionism is not the only route towards a voluntaristic (mis)reading that bestows the subject of performativity with absolute sovereignty. Such an account could persist even after the recognition of the term's origins in speech act theory, especially if one read Austin as Derrida does in his essay 'Signature Event Context' (1988: 1-23). This fascinating essay concisely weaves much that seems disparate together into an illuminating whole, and Derrida's extremely influential musings on Austin actually take up less than a third of the entire piece. Central to the essay is the notion that iterability introduces into language, as its very condition of possibility, a 'logic that ties repetition to alterity' (7). One of Derrida's key movements here is to carry the predicates that constitute the classical concept of writing over to speech. In other words, certain characteristics of writing that are deemed distinctive, such as the potential non-presence of the subject who has produced the writing, or the force of rupture that severs the writing from its context (from its milieu of production and from the

intentional investments of its author) while allowing it to continue functioning, are made to bear on speech itself. Thus Derrida turns to Austin's speech act theory to trace in what ways presence and intention are always already compromised in speech, and how the parasitism classically attributed to writing is the very condition of language, even in its spoken form.

Characteristically, Derrida hones in on two exclusions that Austin explicitly acknowledges: the exclusion of the general infelicities that afflict all actions and the exclusion of citational uses of language. Both of these appear as provisional exclusions in Austin, who says 'some very general high-level doctrine might embrace' the first subject of exclusion, and also that the second 'might be brought into a more general account' (1975: 21-22). Derrida finds Austin's deferral of such a general theory 'highly significant' (1988: 16). But he seems to take one hasty step: he interprets the first exclusion as Austin's failure to perceive the possible infelicity of a performative as a structural possibility. For Derrida, it will not suffice to grant an accidental status to the infelicities that Austin discusses under the two main headings of 'Misfires' (utterance of a performative without the requisite conventional procedure, or by a person without the requisite authority, or in circumstances inappropriate to the conventional procedure, or without executing the procedure correctly, or without executing it completely) and 'Abuses' (insincere performative utterances). Instead 'the value of risk or exposure to infelicity' should be 'interrogated as an essential predicate or as a *law*' (15) of performative utterances. While Derrida's suggestion that failure is integral to the structure of the performative and thus the theory should take it into account as such is intriguing, it is actually not so clear that Austin refuses to do so. Derrida's mistake is to quote Austin's first exclusion as evidence of his refusal to think infelicity as a structural possibility. This then allows him to claim that by virtue of the former exclusion, Austin retains the speaking subject's intention as the organising centre in his scheme of the performative utterance: 'a free consciousness present to the totality of the operation' of the felicitous performative utterance, and 'an absolutely meaningful speech [*vouloir-dire*] master of itself' (15).

However, this reading of Austin as centralising intention in his account of performative utterances has been ably contested by Stanley Cavell (1994: 85-88),

who points out that the first exclusion is not an exclusion of infelicity as a necessary condition of performatives, but the exclusion of a different, a more general kind of unhappiness that afflicts all actions, including but not limited to speech acts. To understand what Cavell means when he suggests that Derrida did not fully understand Austin on this point, it will be useful here to quote in full the passage where Austin announces his first exclusion:

Well, the first thing to remember is that, since, in uttering our performatives we are undoubtedly in a sound enough sense ‘performing actions’, then, as actions, these will be subject to certain whole dimensions of unsatisfactoriness to which all actions are subject but which are distinct –or distinguishable– from what we have chosen to discuss as infelicities. I mean that actions in general (not all) are liable, for example, to be done under duress, or by accident, or owing to this or that variety of mistake, say, or otherwise unintentionally. In many such cases we are certainly unwilling to say of some such act simply that it was done or that he did it. I am not going into the general doctrine here: in many such cases we may even say that the act was ‘void’ (or voidable for duress or undue influence) and so forth. Now I suppose some very general high-level doctrine might embrace both what we have called infelicities *and* these other ‘unhappy’ features of the doing of actions –in our case actions containing a performative utterance– in a single doctrine: but we are not including this kind of unhappiness – we must just remember, though, that features of this sort can and do constantly obtrude into any particular case we are discussing. (21)

Austin makes a clear distinction here between the various ways in which human action can fail on the one hand, and the specific infelicities that afflict performatives (i.e., Misfires and Abuses) on the other. He says his theory embraces the latter, though not the former. Derrida’s account, however, collapses this distinction, flagging this passage as evidence of Austin’s disavowal of infelicity as the very structural possibility of the performative. Thus, according to Derrida, Austin’s procedure

consists in recognising that the possibility of the negative (in this case, of infelicities) is in fact a structural possibility, that failure is an essential risk of the operations under consideration; then in a move which is almost *immediately simultaneous*, in the name of a kind of ideal regulation, it excludes that risk as accidental, exterior, one which teaches us nothing about the linguistic phenomenon being considered. (15)

Derrida is not very convincing on this point, especially given Austin's outright prioritisation of infelicities in his discussion of the performative to the extent that the book can be read 'as an amusing catalogue of such failed performatives' (Butler 1997: 16). Indeed, the performative attains its very definition through its countless failures in Austin, whose humorous rhetoric only reinforces this sense of the performative as a perpetual comedy of errors. A reading in this vein is offered by Shoshana Felman (2003) who draws attention to the performativity of Austin's theorising itself, his humorous exposure of his own failure to provide a solid ground for the notion of the 'performative'. This 'self-subversion, this self-transgressive character of the Austinian performance' (43), according to Felman, only goes to show that 'for Austin, the capacity for failure is situated not outside but *inside* the performative, both as speech act and as theoretical instrument. Infelicity, or failure, is not for Austin an *accident* of the performative, it is inherent in it, essential to it' (45).¹¹

Concerning the exclusion of the more general unhappinesses that afflict all human actions (the exclusion that Austin *does* admit to in this passage) Cavell has suggested that this is not an exclusion in Derrida's sense, i.e. a constitutive outside to his theory of performativity, but rather a reference to elsewhere where he does discuss it in detail. In other words, it is not that Austin 'rejects and defers' (Derrida: 16) the question by saying 'I am not going into the general doctrine here', but rather means 'I have discussed it elsewhere and it must be born in mind'. Indeed, for anyone familiar with Austin's 'A Plea for Excuses', this reference should be obvious. In this essay, Austin proposes to imagine the variety of situations in which we make excuses, that is, the myriad ways in which intentionality falters, fails, or is altogether absent: 'If we have a lively imagination, together perhaps with an ample experience of dereliction, we shall go far, only we need system: I do not know how many of you keep a list of the kinds of fool you make of yourselves' (1970: 186).

Derrida's charge that Austin's ordinary language philosophy involves 'pass[ing] off as ordinary an ethical and teleological determination' of which 'the transparency of intentions' of the speaking subject is a key element (17), and his

¹¹ For Felman's astute discussion of Austin's critics' failure to take his constant joking seriously, also see pp. 94-96.

diagnosis to the effect that Austin's discussion of infelicities delineates the 'teleological jurisdiction of an entire field whose organising centre remains *intention*' (15) seem to be undermined also by the very status of intention in *How To Do Things With Words*. One significant moment is Austin's discussion of the type of infelicities that he refers to as Abuses, the subcategories of which are insincerities and infractions or breaches. These infelicities arise when the procedure is 'designed for use by persons having certain thoughts, feelings, or intentions, or for the inauguration of certain consequential conduct on the part of any participant' (15) and the persons invoking the procedure in fact do not have such thoughts, feelings or intentions (i.e. I say 'I congratulate you on your performance' while thinking it was a flop), or they do not intend to carry on with the necessary consequential conduct (i.e. I say 'I promise I'll be there' while having no intention to go), or even if they had the necessary thoughts, feelings intentions at the time and for consequential conduct, they fail to conduct themselves subsequently (I say 'I bet you sixpence it'll rain tomorrow', I sincerely think it will, and I intend to claim my sixpence from you if it does or pay you if it doesn't, but it doesn't rain tomorrow and I fail to give you the sixpence). Even with this category of Abuses, the crux of which seems to be the intentions of the speaker, it would be a mistake to conclude that intentionality is centralised in Austin's account. Significantly, when discussing Abuses, Austin repeatedly emphasises that such infelicities do not render the act void, so that I have still congratulated you, promised you, and entered a bet with you, regardless of my thoughts, feelings, intentions or future conduct. This is precisely why the constative model falls short of capturing performative utterances – 'I congratulate you on your performance' is *not* the description of an inward spiritual act of me congratulating you, it may indeed be anything but. Austin's classical example for this key failure of the constative model is derived from Hippolytus' utterance in Euripides' play, 'my tongue swore to, but my heart did not'. Austin writes:

It is gratifying to observe in this very example how excess of profundity, or rather solemnity, at once paves the way for immortality. For one who says 'promising is not merely a matter of uttering words! It is an inward and spiritual act!' is apt to appear as a solid moralist standing out against a generation of superficial theorists: we see him as he sees himself, surveying the invisible depths of ethical space, with all the distinction of a

specialist in the *sui generis*. Yet he provides Hippolytus with a let-out, the bigamist with an excuse for his ‘I do’ and the welsher with a defence for his ‘I bet’. Accuracy and morality alike are on the side of the plain saying that *our word is our bond*. (10)

Thus rather than centralising intentionality, Austin’s theory of the performative emphasises its irrelevance in key scenarios.

To Cavell’s suggestion that Derrida did not read Austin’s work on excuses, I would add my own suspicion that Derrida’s reading of *How To Do Things With Words* was distorted by French linguist Emile Benveniste’s rigidifying revision of Austin’s notion of the performative in a 1963 paper, where Benveniste disapproves of Austin for ‘[setting] up a distinction and then immediately [going] about watering down and weakening it to the point of making one doubt its existence’ (Benveniste 1971: 234). He thus took it upon himself to resuscitate the performative, in the meantime rendering it somewhat unrecognisable.¹² Notably, it was Benveniste who adopted and popularised Austin’s notion of the performative in French thought (Cassin 2009: 349), soon after Austin introduced his coinage into French (as ‘*performatif*’) at a colloquium held at Royaumont (Austin 1963). While there is no explicit reference to Benveniste’s paper in ‘Signature Event Context’, the influence of his rendition can be traced in Derrida’s employment of certain phrases, as well as the key focus of his inquiry around ‘citationality’. The challenge that Derrida poses to conceiving of the performative in terms of the ‘pure singularity of the event’ (Derrida 1988: 17), and to its description as a ‘singular and original event utterance’ (18), or as ‘the most “event-ridden” utterance there is’ (19) is less an argument against Austin than against Benveniste’s version of Austin. In fact, the word ‘event’ is never once used in Austin’s lectures as part of a description of the performative. While Austin continuously emphasises the conventionality, the ritual or ceremonial character of performative utterances, it is Benveniste who reduces the performative to its presumed singularity, uniqueness, eventness and unrepeatability, when he writes, for example,

The performative utterance, being an act, has the property of being *unique*.
... in short it is an event because it creates the event. Being an individual
and historical act, a performative utterance cannot be repeated. (236)

¹² For a succinct and thorough account of Benveniste’s revision of Austin, see Felman 2003: 9–11.

Benveniste further proposes that utterances that have become cliché cannot be considered performative, thus potentially excluding many of Austin's paradigmatic examples.

Significantly, Benveniste also refuses to take into account the theory of infelicities, which forms the very crux of Austin's discussion: 'we shall neither examine the considerations of the logical "unhappinesses" which can overtake and render inoperative either type of utterance, nor the conclusions Austin was led to by them' (234). Thus the exclusion that Derrida attributes to Austin, the allegation that Austin excludes the risk of infelicity 'as accidental, exterior, one which teaches us nothing about the linguistic phenomenon being considered' (Derrida 1988: 15) much more appropriately describes Benveniste's move here. In fact, Benveniste even ends up arguing that failed performatives are not performatives at all – that, for example, a performative uttered by a person without the requisite authority is in fact not a performative:

anybody can shout in the public square, "I decree a general mobilisation," and as it cannot be an *act* because the requisite authority is lacking, such an utterance is no more than *words*; it reduces itself to futile clamour, childishness or lunacy. A performative utterance that is not an act does not exist. (Benveniste 1971: 236)

If failed performatives are not performatives, what could they be? Futile clamour, childishness or lunacy, all of which in turn can apparently be said not to exist. By rending the performative from its context of conventionality and excluding the theory of infelicities in this curious manual for how to do all or nothing with words, Benveniste effectively attributes an absolute presence, absolute intentionality and absolute sovereignty to s/he who utters performatives. Indeed, without these absolutes, the performative is not one according to Benveniste. My sense is that Austin would have argued against this rendition, and not only because it is absolutely devoid of humour. In this sense the presuppositions that Derrida criticises in Austin (absolute intentionality, absolute presence and uniqueness) would be more appropriately directed to Benveniste's explicitly 'corrective' reading of Austin.

reintegrating the theatrical

Even if Derrida's charge against Austin concerning the centrality of intentionality is something of a misfire itself, his proposal for 'decentring intentionality' in Austin's theory is interesting for other reasons, as it involves the reintegration of the excluded 'citational' into the conceptual framework of the performative. Focusing on Austin's second exclusion, namely his passage on the 'not serious', 'parasitic' uses and thus 'etiolations' of language (i.e. utterances by an actor on stage, introduced in a poem or spoken in soliloquy) Derrida suggests that this quality of being a quotation, this citationality is not only a possibility available to every act of utterance, but in fact the necessary condition of all language. Language is conditioned by a structural iterability. Allowing a general theory of what Derrida calls 'this structural parasitism' of all language will help construct a differential typology of forms of iterability whereby 'we will be dealing with different kinds of marks or chains of iterable marks and not with an opposition between citational utterances, on the one hand, and singular and original event-utterances, on the other' (1988: 18). Thus, Austin's excluded parasite (practices that involve recitation) is to be brought in as part and parcel of a general scheme. The interesting move here is that such an inclusion comes to have bearing on Austin's first exclusion as well, at least in the way Derrida reads the first exclusion as centralising intentionality. In such a differential typology that embraces the fully citational utterance, the category of intention, according to Derrida, 'will not disappear; it will have its place, but from that place it will no longer be able to govern the entire scene and system of utterance' (ibid). Notably, an absolute intentionality, one which is thoroughly present to itself and to the utterance it animates cannot be part of this typology. The very iterability necessarily conditioning language disallows, or rather, renders impossible this kind of full saturation. Indeed the iterability of language serves as a structural unconscious that is present to each and every utterance, placing it beyond the utterer's intention, full consciousness or ultimate control. So Derrida is flagging the impossibility of such 'singular and original event-utterances', while proposing to include Austin's excluded citational as part of the differential typology. This typology that would range between the two also exposes their impossibility and the impossibility of

their ultimate opposition: there are neither fully citational utterances, nor singular and original event-utterances –neither the puppet show, nor sovereign play-acting, as it were– but only gradations therein.

Judith Butler’s notion of performativity shares with Derrida this differential understanding of intentionality, as an element that neither fully disappears from the scene, nor fully governs it. In an illuminating study that does much to clarify the often misread relationship between linguisticity and materiality in Butler’s work, Elena Loizidou (2007) suggests that Derrida fails to dislocate intentionality as the organiser of iteration, whereas Butler ‘breaks this attachment with the “I” (or intention)’ (34-35). It seems to me, however, that Butler and Derrida are in agreement concerning the status of intention in their respective understandings of performativity. Derrida’s theory of the general iterability of all language does indeed displace intentionality as the sovereign organiser of speech (something he mistakenly attributes to Austin), by introducing a ‘structural unconscious’ that governs every utterance. Butler, in turn, follows Derrida quite closely on this, as she explicitly acknowledges her debt to Derrida’s reformulation of intentionality vis-à-vis performativity in her essay ‘For a Careful Reading’, quoting and then closely echoing Derrida: ‘The category of “intention”, indeed, the notion of “the doer” will have its place, but this place will no longer be “behind” the deed as its enabling source’ (Butler 1995: 134).¹³

The key difference between Butler and Derrida in their respective appropriations of the notion of the performative has to do with the body. While Derrida in his account of the performative argues against Austin’s exclusion of the theatrical, it is not bodily performance that he wishes to bring into the scene, but rather the general condition of citationality. This is actually very faithful to the structure of Austin’s exclusion, since as I’ve highlighted in Chapter 2, the latter excludes the theatrical on the basis of its citationality rather than its materiality or status as bodily performance, while not giving much thought to the latter dimension. Thus in Derrida’s appropriation, the performative remains linguistic, and in self-conscious irony, the closest he comes to the question of materiality is

¹³ Cf. Derrida ‘the category of intention will not disappear; it will have its place, but from that place it will no longer be able to govern the entire scene and system of utterance’ (1988: 18).

through the figure of the signature. In contrast, Butler, as explained above, addresses performativity in relation to bodily gestures, signs, and signification practices. While this may be obvious as an essential movement for her account of the performativity of gender, it is crucial to note that she retains the significance of the bodily even when she directly addresses and problematises speech acts as such. Hence much of *Excitable Speech* is dedicated to thinking through ‘the speech act itself as a nexus of bodily and psychic forces’ (1997: 141) in various aspects and several different contemporary contexts.¹⁴

Derrida’s exclusion of the bodily is especially striking when we note that the emphasis on citationality is an occasion for him to introduce a concept of the unconscious. Significantly, in ‘Signature Event Context’ this is not an embodied unconscious of fears, desires and instincts, but rather a ‘structural unconscious’ that derives from the necessary citationality of all language. Thus the historical sedimentations that language carries by virtue of its citationality do not ever allow the subject of speech to fully consciously instrumentalise language. Rather, in each utterance, something of the structural unconscious of language speaks beyond the conscious intentions of the speaker. An implied conclusion would be that perhaps in each utterance, language speaks something of the subject’s unconscious. But this latter conclusion is not quite tangible in ‘Signature Event Context’, and even if it is implied, it is certainly not explored. Granted, in ‘Limited Inc a b c...’, his polemical rejoinder to John R. Searle’s unfortunate response to ‘Signature Event Context’, Derrida personalises this ‘structural unconscious’ as part of his rhetoric of ridicule (1988: 75). But compared to the status of the unconscious in Shoshana Felman’s (2003) contribution to speech act theory, Derrida’s gesture here seems to be towards a more disembodied (‘structural’) sense of the unconscious.

Felman, on the other hand, directly addresses the question of the role of the body in speech act theory in her book *The Scandal of the Speaking Body*, where she stages a dazzling encounter between Molière’s *Don Juan*, J. L. Austin’s speech act theory, and psychoanalysis. For Felman, it is crucial to be attuned to the fact that the speech act is both linguistic and bodily at once, thus obliterating the distinction between the two:

¹⁴ See especially her Introduction and Chapter 4.

The act, an enigmatic and problematic production of the *speaking body*, destroys from its inception the metaphysical dichotomy between the domain of the 'mental' and the domain of the 'physical', breaks down the opposition between body and spirit, between matter and language. 'A body,' Lacan says, 'is speech arising as such'. (Felman 2003: 65)

It is by its very virtue of being a bodily act that speech always brings the unconscious into play, which in turn poses an irreducible risk to the felicity of any and every speech act.¹⁵ This is what Felman refers to as the 'scandal' of the speaking body, which 'consists in the fact that the act cannot *know what it is doing*' (67). Thus, compared to Derrida's more circuitous route to the role of the unconscious in the theory of the performative utterance, Felman identifies it as already evident in the very phraseology of speech act theory itself.

The notion of a 'sovereign performative' is untenable in both Judith Butler's and Shoshana Felman's schemes, precisely because a performative speech act is performed. As bodily performance, something of the sovereign status of speech is always already undone. This undoing of sovereign speech is also found in Jacques Derrida's treatment of the performative, although it is not occasioned by the body as such. Instead the impossibility, strictly speaking, of a 'sovereign performative' in Derrida's treatment is an effect of iterability as the necessary condition of any and all language – so it is not this or that particular body's desires, fears or anxieties as such that undermines sovereign speech, but rather how language works as language, how it structurally lends itself to the unconscious of the speaker. The distinction may seem slight, but it is crucial. Butler's work on performativity is further intriguing because it not only addresses the speech act as bodily (Felman), and the necessary citationality of linguisticity (Derrida), but also bridges these two insights to explore the citationality of bodily practices.

undoing sovereignty

As the foregoing discussion suggests, the conceptualisation of performativity involves a particular model of (political) agency as well as a challenge to the possibility of an unhampered sovereignty. Derrida, Felman and Butler, following

¹⁵ Similarly for Stanley Cavell (1994: 87), the endless failures to which human action is exposed has to do with the body.

Austin, formulate this challenge as arising out of two conditions of performatives: conventionality (iterability) and performance (the performative as speech *act*). In an initial attempt to explore the significance of this vein of analysis for studying trials, I would like to return to the three political trial scenes that I have described at the beginning of this chapter, with more detailed case studies of other trials following in the next two chapters.

The episode I described from the Chicago Conspiracy Trial serves as a particularly lucid example of the challenge posed to sovereign performativity by iterability or conventionality. Recall that in Chapter 2, I discussed the significance of conventions for legal proceedings. Admittedly, the conventionality of a trial is in one sense what promises its justice: along with strict rules of procedure, courtroom etiquette has evolved partly with a view to the doing of justice. In a criminal trial, justice is owed to the accused as much as to the victim, thus conventions are ideally meant to protect subjects from the arbitrary imposition of punishment as a form of sovereign violence. In a political trial, although these same conventions may be followed, they may well serve to undo the sovereign will at work in the proceedings. This applies first and foremost to the most classical type of political trial where authorities take recourse to legal proceedings to eliminate their foes – ostensibly a sovereign performative *par excellence*. As I have discussed earlier in this chapter, Otto Kirchheimer (1961: 118) identifies a number of ways in which the sovereign performative is risked in the political trial, having to do with the political commitments, intentions and wills of participants other than the prosecutor. I had suggested that this formulation of risk is one that bestows sovereign agency not only to the will behind the proceedings but also to the contenders for sovereign performativity, and I sought recourse to theories of performativity for alternative conceptualisations of agency. Notably, however, there is another reason Kirchheimer identifies for the ‘irreducible risk’ and this is not premised on a notion of sovereign agency: uncertainties stemming from legal procedure itself. In Kirchheimer’s account, if allowed to follow its own course, a trial’s outcome, how it eventually plays out may be determined by the strict conventionality required procedurally. Thus conventionality, a defining feature of any legal proceeding, lodges an unpredictability at the heart of the trial. Just as it

may serve to unravel sovereign claims in the trial, this unpredictability is also the trial's structural promise of justice, no matter what the political will behind the effort is.

A common dynamic linked to this uncertainty in political trials is the mobilisation of the legal conventions by persons, often defendants, who are unauthorised to do so. Thus the 'irreducible risk' of the political trial becomes the risk of untethering the court's conventions from the sovereign agency of the state, allocating the force of the performative outside its control. The fact that conventions can be wielded by various participants in the trial beyond the intentions of the political will subtending the proceedings is nothing exceptional if the counter-mobilisation remains within the boundaries of what would be considered an 'effective defence'. But another dynamic is at work in a trial like the Chicago Conspiracy Trial where conventions were taken up beyond the limits of authorised conduct to the point of effective subversion of the entire proceedings. The resultant image could not be reduced to any participant's intentions or strategy, but instead can be understood as a revelation of law's structural unconscious.

In his repeated attempts to exercise his right to represent himself, Bobby Seale ventured, for example, to cross-examine all witnesses for the prosecution. He would thus strategically disrupt the proceedings, but crucially, he would speak *only* when he would have been allowed to speak had he been granted the right to defend himself. This careful deployment of convention lent his unauthorised speech a veritable authority. As Judith Butler suggests, 'being authorised to speak' and 'speaking with authority' are not necessarily equivalent, and further 'it is precisely the *expropriability* of the dominant, "authorised" discourse that constitutes one potential site of its subversive resignification' (1997: 157). That Seale spoke with authority in the courtroom was indeed corroborated by another scene: As the conflict between Seale and Judge Hoffman mounted, the spectator seats were filled with increasing numbers of young Black Panthers. When Judge Hoffman cautioned the audience, Seale told him that 'they would not take orders from "racist judges" but he could convey the orders' (Schultz 2009: 58). Surprisingly, Seale was taken up on his offer on the following day, when the marshals asked him, in the name of

the judge and themselves, to caution the Panthers in the audience, and Seale agreed to do so (61).

Increasingly frustrated with the progress of the trial, Seale also began directly usurping the judge's speech:

THE COURT: Let the record show that the defendant Seale has refused to be quiet in the face of the admonition and direction of the court.

MR. SEALE: Let the record show that Bobby Seale speaks out in behalf of his constitutional rights, his right to defend himself, his right to speak in behalf of himself in this courtroom.

THE COURT: Again let the record show that he has disobeyed the order of the court. Bring in the jury, Mr. Marshal.

MR. SEALE: Please do

(...)

THE COURT: Ladies and gentlemen of the jury, good morning.

MR. SEALE: Good morning, ladies and gentlemen of the jury.¹⁶

Then, later:

THE COURT: Let the record show that the defendant --

MR. SEALE: Let the record show you violated that and a black man cannot be discriminated against in relation to his legal defense and that is exactly what you have done. You know you have. Let the record show that.

THE COURT: The record shows exactly to the contrary.

MR. SEALE: The record shows that you are violating, that you violated my constitutional rights. I want to cross examine the witness. I want to cross examine the witness.

THE COURT: ... I admonish you, sir, that you have a lot of contemptuous conduct against you.

MR. SEALE: Admonish you. You are in contempt of people's constitutional rights. You are in contempt of the constitutional rights of the mass of the people of the United States. You are the one in contempt of people's constitutional rights. I am not in contempt of nothing. You are the one who is in contempt. The people of America need to admonish you and the whole Nixon administration. (381)

These instances, later cited at length by the trial judge as part of specifications for contempt charges, were allowed precisely by the citationality of legal procedure as its inherent possibility. By mimicking, and indeed parasitising conventional legal speech, Seale revealed and deployed its structural infelicity. The unauthorised usurpation of the speech of authority worked to destabilise authority. Responding to

¹⁶ United States v. Seale, 461 F.2d 345, 378 (7th Cir. 1972), LexisNexis.

Bourdieu's emphasis on the decisive factor of social power in determining the efficacy of a speech act, Butler questions whether the context of legitimacy must be figured as necessarily immovable:

is there a sure way of distinguishing between the imposter and the real authority? And are there moments in which the utterance forces a blurring between the two, where the utterance calls into question the established grounds of legitimacy, where the utterance, in fact, performatively produces a shift in the terms of legitimacy as an *effect* of the utterance itself? (146)

The performativity of Seale's speech in the trial can be understood to precisely reconfigure the terms of legitimacy.

In this respect, the culmination of this entire affair in the binding and gagging of Seale is extremely revealing: Judge Hoffman had already intimated during the previous day that he may take recourse to such a measure on the basis of a recent precedent.¹⁷ On the day, Seale continued insisting on his right to cross-examine the witnesses, and when denied, pointed to the portraits hanging on the courtroom wall behind the judge and said 'You have George Washington and Benjamin Franklin sitting in a picture behind you, and they was slave owners. That's what they were. They owned slaves. You are acting in the same manner, denying me my constitutional rights being able to cross examine this witness' (*US v. Seale*, 383). When the judge reminded Seale of what 'might happen to you', Seale responded: 'Happen to me? What can happen to me more than what Benjamin Franklin and George Washington did to black people in slavery? What can happen to me more than that?' (*ibid*). The binding and gagging took place very soon after this exchange, revealing and re-enacting some aspect of the foundational violence of slavery in the trial. The locus of this re-enactment was the very body of the defendant who spoke of the continuity between law-instituting and law-preserving violence, and the re-enactment was triggered by his speech. In this sense, although he was the victim of what William Kunstler called out as 'this medieval torture'

¹⁷ *United States ex re. Allen v. State of Illinois*, 413 F.2d 232 (7th Cir. 1969), LexisNexis. Here the Court of Appeals had ruled that despite his 'disruptive and disrespectful conduct' the defendant should not have been excluded from the courtroom, but that the 'proper course for the trial judge was to have restrained the defendant by whatever means necessary, even if those means included his being shackled and gagged' (235).

(385), Seale's performatives were among the most felicitous in that courtroom. Moments after he spoke of the legacies of constitutive violence, it materialised before everyone's eyes. This is of course not to say that he *intentionally* brought it onto himself, but precisely the unauthorised mobilisation of conventionality destabilised the spectacle of sovereignty to reveal the performative violence instituting and perpetuating that conventionality. In other words, what surfaced in the spectacle of a black man bound and gagged in a US district court in the second half of the twentieth century was the very structural unconscious of law.

If the Chicago Conspiracy Trial thus visibly stages the structural infelicity that stems from the conventionality of trial performance, the other two scenes I introduced at the beginning of this chapter are illustrative of the exposure of sovereign performatives to infelicity due to the vagaries of embodied performance. Saddam Hussein's Al Dujail trial was, by all means, a classic political trial: a former head of state tried by fiat of the successor regime. It was meant to institute law retrospectively, to recast as crime what had passed as legitimate under dictatorial prerogative. Hussein, like most defendants in classic political trials, chose to play havoc with the very conventions of the trial, and the fact that this was a 'special' tribunal facilitated his performance. His aim, a classic political defence strategy, was to advance his own counter-images so as to challenge the legitimacy of the trial and its performative outcomes. But perhaps we find the most succinct exposure or unravelling of the trial's sovereign performativity in that scene of the slip of the tongue as a result of which the distinctions between the positions of witness, prosecutor and defendant became muddled in a particularly telling way. This happens beyond the intentions of Hussein himself, in an unconscious lapsus, which is then addressed by the judge first in a significantly tentative way: in offering a corrective, Amin speaks quietly, hesitantly, as if not entirely certain himself, or as if he doesn't want to overemphasise the point. The judge assumes that when Hussein spoke of the 'defendant', he was referring to the prosecutor – but we don't know, Hussein may have been referring to the witness. This would render the judge's corrective even more interesting, making him the unwitting author of the complete reversal of positions. Simultaneously as Hussein masters his slip, he also discerns the humour in it, he is amused by his own mistake. Then he moves on

to capitalise on the amusing moment to suggest with his head gesture, ‘whatever’. Whatever indeed, the prosecutor and/or the witness who testified against him would have been ‘defendants’ under his authority – the judge smiles back, sharing in the humour of the situation. Saddam Hussein’s slip of the tongue cuts through the spectacular conflict of sovereign claims in the courtroom to reveal just how thin a façade the trial constitutes.

Finally, the trial of the UK student protesters was an attempt by the Metropolitan Police to legitimise having caused near-fatal injury to a protester. Unlike the other two trials I have discussed here, the trial of Meadows and King did not have much of a public life as a political trial, except in certain limited circles. The hung jury in the first trial meant that the police were close to securing a retroactive authorisation of their violence. But when Superintendent Woods shot at the jury with an imaginary machine gun as a ‘last resort’, he re-enacted something of the sovereign violence to which the police seemed to feel entitled in the 2010 demonstrations. The performance disrupted and unravelled the performativity at work in the trial. The playacted shooting of the jury was further the enactment of a threat on the members of the jury – an unconscious threat that perhaps was registered by the jury also unconsciously at some level. This inadvertent performance entirely reconfigured the scene so that the respective positions in the trial were redistributed to effect a sea change in the dynamics of performativity: the witness became perpetrator, defendant became victim, and jury members became witnesses as well as potential victims. The sovereign performative initially at work was thereby undermined, to give way to an entirely different truth-effect. No wonder, then, that the trial resulted in a unanimous acquittal.

As privileged sites both for staging sovereign spectacles and for exposing (and sometimes thereby undermining) law’s performativity, political trials provide an important occasion for reconsidering the relation between performativity and performance. The double-edged nature of trial performance whereby it can make or break the sovereign spectacle cannot ultimately be fully attributed to the political designs, intentions, and strategies of participants. The disturbance of sovereign spectacle should be identified as transpiring also in subtler ways in trials, beyond the intentions and designs of the parties, though nevertheless revealing much about

the political at stake. In the brief examples above, I have tried to tease out the undecideability lodged in legal proceedings not only by their very conventions, but also by the involvement of bodies that ‘arise as such’ in speech, with their desires, fears, fantasies, anxieties.¹⁸ In the following two chapters, I offer more detailed case studies to further explore the vagaries of the political in political trials. Chapter 4 is a close reading of a ‘haunted’ trial in 1921 Berlin, held in the aftermath of the Armenian genocide. The felicitous performatives that are enacted by, literally, a ghost in the trial provide an occasion to consider the spectral operations of the political. Here, beyond all the political calculations of the participants, we witness an inadvertent politicisation of the trial whereby the political emerges as something like a sharing of ghosts. The Berlin trial connects, intimately but spectrally, to two contemporary unconcluded ‘deep state’ trials from Turkey: the Ergenekon trial and the Hrant Dink murder trial. In Chapter 5, I turn to these two trials to explore the performative functions of fantasy and disavowal in the courtroom, particularly as they interact to produce a fetish of the state.

¹⁸ Cf. “‘A body,’” Lacan says, “‘is speech arising as such’” (Felman 2003: 65).

4

ghosts in the courtroom the trial of soghomon tehlirian

On 15 March 1921, a young Armenian man named Soghomon Tehlirian assassinated Talât Pasha, the Ottoman statesman who devised and ordered the mass deportations that led to the annihilation of a great majority of the empire's Armenian citizens. Tehlirian killed Talât on the sidewalk of a busy street in Berlin's Charlottenburg district, in broad daylight, with a single bullet to the back of his head. When the assassin was captured on the spot by a somewhat violent citizens' arrest, he said to his captors in broken German, 'I am an Armenian. He is a Turk. It is no loss to Germany' (*The Case of Soghomon Tehlirian* 1985: 33).¹ He received an injury to his head during the commotion,² and was eventually delivered to the police. Although he suffered from loss of blood and a high fever during the night, he was interrogated by the police the next morning and testified. In this preliminary investigation, Tehlirian stated that his only reason for coming to Germany was to assassinate Talât in an act of vengeance, and that his conscience

¹ Hereafter *ST*, referring to the English translation of the original stenographic record of the trial (Der Prozess Talaat Pascha, C.J. 22/21, LG Berlin 1921) by the Armenian Revolutionary Federation (Dashnaksutyun).

² A 22cm-long cut running from the crown of his head to his jaw, according to a newspaper report: 'Die Ermordung Talaat Paschas', *Deutsche Tageszeitung*, 16 March 1921.

was clear.³ His trial lasted two days, over 2-3 June 1921, in a Berlin District Court, and resulted in acquittal.

Technically, the acquittal was secured by the figure of a ghost – the apparition of Tehlirian’s mother who had perished in the death marches, understood in the trial as having haunted his capacity for voluntary action. In turn, the invocation of this singular ghost brought thousands of others into the courtroom, haunting the trial in myriad ways. Tehlirian’s is a curious one among political trials: it remained politicised despite the efforts of the prosecutor, the presiding judge, and the defendant himself to play down the political significance of the crime and the proceedings. Ironically, this inadvertent politicisation was effected by the ghost that was initially introduced by the defendant as a way to depoliticise the crime. Thus the trial is a case study in the logic and temporalities of haunting as a political category, revealing the reach of the political beyond considerations of expediency, interest, calculation and other such states of sovereign willing. Instead, the political in this political trial partially takes shape as a shared sense of haunting, a state of having ghosts in common. While the transcript provides a partial record of the ghosts that flocked into the courtroom following the introduction of the singular ghost, a historical contextualisation of the trial, namely, an inquiry into the processes that came to haunt the trial, and the processes that the trial came to haunt, illustrates the spectral operations of the political through legal procedure.

talât

The victim of the assassination, Ottoman politician Mehmet Talât, had come to prominence with the 1908 Young Turk Revolution which reinstated constitutional rule in the Ottoman Empire⁴ and installed the Committee of Union and Progress (CUP, *İttihat ve Terakki Cemiyeti*) in government. Although initially only a CUP deputy, Talât was among the professional committee organisers who from early on ‘held the real power and indeed became more influential than cabinet ministers or even grand viziers’ (Hanioglu 2001: 280). He became Minister of Interior in 1912. Following a brief interlude of several months out of government, he achieved full

³ ‘Das Geständnis Des Mörders Talaat Paschas: Vernehmung im Polizeipräsidium’, *Berliner Tageblatt*, 16 March 1921.

⁴ A constitution was first adopted in 1876, only to be shelved by Sultan Abdülhamid in 1878.

power in the bloody coup d'état of 26 January 1913, as one of the triumvirate along with Enver and Cemal Pashas, both of whom were military officers unlike Talât, a civilian. Still, Talât is considered to have been the 'most important single member of the Committee, giving it much of its character' (Ahmad 2010: 214), indeed 'the Big Boss of Turkey', as Henry Morgenthau (1918), American Ambassador to the Ottoman Empire from 1913 to 1916, referred to him in his memoirs. During World War I, the Ottomans sided with Germany, and Talât's role in this alliance was acknowledged by the Kaiser with the highest honour, the Order of the Black Eagle, in March 1917.⁵ It was also in 1917 that he became Grand Vizier, leading the cabinet until its resignation in October 1918. On 30 October 1918 the Ottoman Empire's defeat was confirmed by an armistice agreement signed with the Allies. The following day, on 1 November 1918, Talât and six others of the CUP inner circle fled the country with the help of the German military. Talât then settled in Berlin under the pseudonym Ali Salih Bey.

It has been suggested that Talât's own reasons for his escape included his culpability for wartime atrocities against Armenians (Dadrian and Akçam 2011: 24; Akçam 2007: 269). Historian Vahakn N. Dadrian derives this from the first person accounts of Midhat Şükrü, the Secretary-General of the CUP, who relayed an intimate conversation between himself and Talât where the latter spoke of 'the burden of responsibility' with regards to the Armenian massacres only hours before his flight. Talât's public statements do not corroborate it, but if there is any truth to the suggestion that he was indeed haunted by the massacres in this way, his assassination by a man who lost family members in the massacres acquires a particularly striking figurative force.

It is not a matter of historical contestation that Talât and Enver Pashas conceived of, engineered, and ordered the mass deportations of the Armenian civilian population. Rather, the debate turns on whether the deportations were ordered with the 'intent to destroy' this population 'in whole or in part', as provided post-facto by Article II of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide 1948. As the Ottoman Empire's successor state, the Republic of Turkey's official position is that the deportations were a

⁵ 'Die Ermordung Talaat Paschas', *Kölnische Volkszeitung*, 16 March 1921.

matter of military necessity – they were wartime measures taken against a rebellious population and thus justified. Relying on exaggerated accounts of atrocities perpetrated by Armenian militia groups prior to the deportations, this ‘provocation thesis’ forms the basis of Turkey’s official denial of genocide and significantly downplays the extent and magnitude of the deportations, the resultant atrocities (the brutal assaults on and the mass murder of the deportees by the gendarmes, soldiers and gangs), as well as the ensuing appropriation of the deportees’ wealth by local governments. More crucially, it denies any link of intentionality between the deportation orders and these consequences.

However, this was not always the official Turkish stance on the issue. Following the dismantling of the CUP and the flight of its leaders at the end of World War I, the Ottoman parliament was dominated by an assortment of anti-CUP politicians. This allowed the unleashing of widespread and unequivocal condemnations of CUP leaders for their responsibility and role in the genocide, across print media and in parliament (Aktar 2007; Akçam 2007: 257-302; Dadrian and Akçam 2011: 23-52).⁶ Indeed, the post-war Ottoman government initiated a series of prosecutions concerning crimes committed during the war, and CUP party leaders and functionaries were tried in Extraordinary Military Tribunals (*Divan-ı Harbi Örfi*). Mostly held in Istanbul, these trials were conducted from 1919 until 1922, when they were truncated due to the Turkish war of independence and the ensuing regime change, the establishment of today’s republic. At least 63 of these trials directly involved crimes committed against the Armenians (Dadrian and Akçam 2011: 202). Talât was tried in absentia, along with other the leading CUP members and wartime cabinet ministers as a ‘perpetrator of the crimes of

⁶ However, we also encounter early incarnations of the current official Turkish arguments in the parliamentary debates (Aktar 2007) and publications of that era. One such primary source in English is a pamphlet published by The National Congress of Turkey in 1919, entitled *The Turco-Armenian Question: The Turkish Point of View*. Written essentially as a plea to the Entente not to punish the entire Turkish population for the Armenian massacres, the pamphlet takes recourse to a now familiar story of unreasonable territorial claims of ungrateful Armenian revolutionaries and their treasonous war-time conduct. However, what is unusual compared to the current official stance is that this story is offered not as a defence of necessity (justification) but rather as an articulation of mitigating circumstances. More significantly, the fact of the genocide (mass murder as state policy) is not contested. The pamphlet states: ‘The guilt of the Unionist organisation [CUP] which conceived and deliberately carried out this infernal policy of extermination and robbery is patent. Its leaders rank among the greatest criminals of humanity’ (83).

massacres'. Drawing on witness testimonies, memoranda, coded telegrams, letters and other written documents, the indictment claimed that the massacres of Armenians subjected to deportation were 'carried out under the [express] orders and with the knowledge of Talât, Enver and Cemal Beys'. On 5 July 1919, Talât was sentenced to death in absentia, for crimes that would later be formulated in terms of genocide.

The Ottoman tribunals are significant in various ways, though their legacy has not been explored exhaustively. They were obviously political trials, more specifically 'trials by fiat of the successor regime' (Kirchheimer 1961), meant to provide legitimacy to the new regime through an incrimination of the previous regime's policies. The importance of this tactical aspect has to be appreciated within the trials' immediate political context: they were instigated at a time when the Ottoman Empire was anxious to placate the victors of the war in the midst of negotiations that were underway from January 1919 for a peace agreement. Thus to some extent, the trials can be seen as part of Ottoman authorities' attempt to distance themselves from their predecessors so as to gain legitimacy vis-à-vis the Entente and secure leniency. It would, however, be misguided to overemphasise the international realpolitik dynamics at the expense of recognising the genuine outrage at the Armenian massacres and concern for retributive justice found among Ottoman politicians and intellectuals at the time.⁷ In this sense, they are interesting to consider as pre-Nuremberg genocide trials (Dadrian 1997; Bass 2000). In contemporary Turkish nationalist historiography, the trials are often dismissed as farcical, cruel exercises in political justice imposed and orchestrated by the Entente

⁷ One account that risks such a misrecognition is Bass (2000: 106-146). His discussion is valuable for placing the 'Constantinople' trials within a historical context of attempted and actual war crimes tribunals from St. Helena to The Hague, thus revising the Nuremberg-centred narrative. However, because Bass chooses to frame the Ottoman trials mainly as an issue for British politics, reconstructing the history principally through British military and diplomatic exchanges, he makes a number of conclusions that end up sharing in the self-centred confusions of British imperialism at that time. For example, Bass claims that the Ottoman court martial was 'created under massive British pressure' (106) and dates the beginning of this pressure to January 1919 (119), which of course, fails to explain the existence of two Ottoman parliamentary commissions investigating the Armenian massacres from as early on as November 1918, a fact that Bass himself notes (*ibid*). Bass also blames the failure of the Ottoman tribunals and the frustration of the later international tribunal attempts at Malta on British 'legalism' (107) – cf. Akçam (2007: 415-424) for a much more nuanced discussion that instead highlights the role of British colonialism in this failure.

(e.g. Ata 2005). However, a close study of the procedure employed suggests that the evidentiary standard that the tribunal upheld was significantly high, producing a record that proves to be of value for historians (Dadrian and Akçam 2011). This ties in with the tribunals' legacy in relation to the Tehlirian trial: the specific evidence against Talât in the Ottoman court martial indicated not only that he had knowledge and awareness of the extent of atrocities that were going on around the deportations, but also that he had personally ordered the annihilation of the deportees. While the latter incrimination was based on witness testimonies, the evidentiary basis for the former was documentary.⁸ Thus Talât's trial in the Ottoman tribunal proves a significant node in considering the ways in which the Tehlirian trial came to be haunted: the earlier trial had not only publicised a body of evidence directly incriminating Talât vis-à-vis the Armenian deportations and massacres, but also convicted him and sentenced him to death.

Would the sentence be carried out had the post-war Ottoman authorities gotten hold of Talât, we will never know. An extradition request made by the Turkish Ambassador to Germany on 11 November 1918, only ten days after Talât's flight, was refused by the Berlin government on 16 November 1918 (Dadrian and Akçam 2011: 71n24). Germany's then Foreign Minister Wilhelm Solf stated, 'Talât stuck with us faithfully, and our country remains open to him' (qtd. *ibid*: 25). Later, Article 228 of the Treaty of Versailles, signed in June 1919 between Germany and the Allies, required Germany to hand over 'all persons accused of having committed an act in violation of the laws and customs of war', and even though Talât was one such accused, he was never extradited. When the assassinated 'Ali Salih Bey' was identified as Talât, Germany's official position was that the authorities had no idea that he was resident in their territory.⁹ This is of course highly unlikely (cf. Hofmann 1989: 44). In Berlin, Talât seems to have had an active social life, and lived with his wife in luxury. Upon his death, the New York Times relayed hearsay to the effect 'that the Deutsche Bank has [Talât's] fortune of

⁸ An English translation of the full text of the Key Indictment in the trial against the leading CUP members and wartime cabinet ministers is printed in Dadrian and Akçam 2011: 271-290. A summary of the documentary evidence against Talât can be found in Akçam 2007: 182.

⁹ 'Die Ermordung Talaat Paschas: Die Tat Eines Armeniers', *Vossische Zeitung*, 16 March 1921.

more than 10,000,000 marks in safekeeping'.¹⁰ On the morning of 15 March 1921, Talât was taking his usual morning stroll in his well-to-do neighbourhood in West Berlin, walking on Hardenbergstrasse towards the zoo.

tehlirian

We glean one version of the biography of the 24-year-old assassin Soghomon Tehlirian from his own statements at the beginning of his trial. We owe this detailed autobiographical account both to a structural element of German criminal trials in which key emphasis is placed on the defendant's account of events, and to a particular decision made by the panel of judges in Tehlirian's case. Section 243 of the 1877 German Code of Criminal Procedure requires¹¹ that after the case is called up and the judge has ascertained that participants are present, the witnesses leave the courtroom and the proceedings begin with an initial examination of the defendant by the presiding judge as to his/her personal circumstances. Then the indictment is read, and the defendant is informed that s/he may, but is not required to, respond to the charges. This option is constructed in section 136(2) of the Code of Criminal Procedure in terms of presenting the accused an opportunity to remove the grounds for suspicion existing against him/her and to present the facts which are favourable to him/her. If the defendant chooses to make use of this opportunity, s/he is further examined by the judge on the charges.¹² While the examination of the defendant as to his/her personal circumstances at the very beginning is often limited and the main part of the initial interview is this latter examination on the specific charges after the indictment is read; in Tehlirian's case, the panel of judges decided on hearing Tehlirian's account of the massacres before the charges were put to him, despite the prosecutor's objection.

During his interview Tehlirian related the following: He was born in a village near Erzincan, an eastern Anatolian province of the Ottoman Empire. In June 1915, when Tehlirian was 18 years old, an order was issued for Armenian inhabitants of

¹⁰ 'Talaat is Mourned as Germany's Friend', *New York Times*, 16 March 1921.

¹¹ Section 243 is still in force today in its original form except for the addition of one subsection which is not relevant to the discussion here.

¹² As during the rest of the proceedings, the role of the judge here is not that of an umpire between prosecution and defence, but is inquisitorial in character: the judge has to actively conduct and participate in the trial with an independent obligation to seek and elicit the truth (Morris 2005: 208).

Erzincan to leave the city. Three days later, people were taken out of the city, divided into groups and marched off in caravans (*ST 6*). Tehlirian was in a group with his family, travelling on foot. Gendarmes, cavalry and other soldiers guarded the convoy on the sides so that no one would escape. Once they were at a distance from the city, they were attacked by the gendarmes (*ST 7*) and mobs. He witnessed his sister being taken away, raped and killed, his younger brother's skull being cracked open with an axe, and his mother shut down with a bullet (*ST 8*). Then he was struck on the head, went unconscious and was probably taken for dead. He regained consciousness a few days later and had to climb out from under his older brother's corpse. He then found his way to a mountain village in the Kurdish town of Dersim where he was taken care of by an old woman and her family for about two months (*ST 9*). When his injuries were sufficiently healed, he set out for Iran, and eventually found his way to Berlin after a circuitous route covering Tbilisi, Erzincan, then back to Tbilisi, Istanbul, Thessaloniki, Serbia, then back to Thessaloniki, Paris and Geneva (*ST 10-16*). He did not find a trace of any family members (*ST 9*).

The indictment was read to Tehlirian following this account. Unlike his statement during the preliminary interrogation to the effect that he only came to Berlin to assassinate Talât, in his trial testimony Tehlirian stated that he moved to Berlin to study engineering (*ST 15*). In this version of his story, it wasn't that he hunted Talât down, but rather a chance encounter with Talât on the streets of Berlin provided the twist of fate that led to the assassination. As he was going on with his life in Berlin as a student of mechanical engineering and trying to improve his German through private tuition, one day he chanced upon a group of three or four men speaking Turkish among themselves, on a street near the zoo. One was addressed by the others as 'Pasha', and when Tehlirian looked carefully, he recognised Talât from the pictures he had seen in newspapers (*ST 17, 25*). Tehlirian claimed in the trial that his mother's ghost appeared to him following this chance encounter with Talât.

enter ghost

HAMLET: Speak, I am bound to hear.

GHOST: So art thou to revenge when thou shalt hear.

(Shakespeare, Hamlet, 1.5.7-8)

In the trial, the ghost is invoked soon after the indictment is read to Tehlirian: he is accused of killing with intention and premeditation under Article 211 of the 1871 German Penal Code. Tehlirian pleads not guilty. His counsel requests that the judge ask the defendant why he does not consider himself guilty, the judge relays the question. Tehlirian answers:

DEFENDANT: I do not consider myself guilty because my conscience is clear.

PRESIDING JUSTICE: Why is your conscience clear?

DEFENDANT: I have killed a man. But I am not a murderer. (ST 14)

The judge then tries to ascertain whether Tehlirian is objecting to a key element of the charge, and begins to inquire whether the killing was ‘premeditated’.¹³ This must have been because intentional killing without premeditation was a different charge under Article 212, and incurred a considerably lighter sentence (a minimum of 5 years imprisonment) than an Article 211 conviction which called for death by decapitation. The judge asks:

PRESIDING JUSTICE: When did the idea first occur to you to kill Talât?

DEFENDANT: Approximately two weeks before the incident. I was feeling very bad. I kept seeing over and over again the scenes of the massacres. I saw my mother’s corpse. The corpse just stood up before me and told me, ‘You know Talât is here and yet you do not seem to be concerned. You are no longer my son.’

PRESIDING JUSTICE: *(repeats those words to the jury)* (ST 15)

Here, between the parentheses, we see the ghost making an immediate impression upon its first mention: Tehlirian recounts his encounter with his mother’s ghost in Armenian, his interpreter repeats the account of the encounter in German, then the judge repeats these German words to the jury once again. The ghost story echoes in

¹³ Although Tehlirian had admitted to premeditation in his initial interrogation by the police, he had the right at this stage to contradict his earlier confession. See, however, Section 254 (still in effect) of the German Code of Criminal Procedure which allows for transcript of police interrogation to be read during the trial when there is a contradiction between statements made to the police and trial testimony. See also Schmidt (1965: 14), for a brief discussion of how a judge should handle such a contradiction.

the courtroom. After Tehlirian's harrowing account of the massacres, it probably resonates, too. Newspaper reports of the trial mention attendance in great numbers by the Armenian community of Berlin.¹⁴ Given that the trial took place soon after the war, we can surmise that many others present either as participants or spectators were living with ghosts of their own. Since the record is restricted to the legally authorised speech that takes place in the hearings, we can only conjecture the full range of resonances, but the transcript itself does allow some insight into the various levels of haunting, especially in retrospect.

A little while after the entry of the ghost into the courtroom, the judge's seeming absorption by this figure is evidenced once more as he continues his examination of the defendant:

PRESIDING JUSTICE: How did it come about that you committed this homicide?

DEFENDANT: It was because of what my mother told me. I was thinking about that and on March 15th I saw Talât.

PRESIDING JUSTICE: Where did you see him?

DEFENDANT: While I was walking around in my room, I was reading and I saw Talât leave his house. (...) When he stepped out of the house, my mother came to my mind. I again saw her before me. Then, I also saw Talât, the man who was responsible for the deaths of my parents, my brothers, and my sisters.

PRESIDING JUSTICE: You also saw your relatives before your eyes and thought that Talât Pasha was responsible not only for their deaths but also for the deaths of your fellow nationals. (*ST* 21)

Here the judge feels the need to intervene to supplement the defendant's story, seemingly so captivated by it that he cannot stop himself from participating in its telling. It is pertinent that whereas in Tehlirian's account the business of the ghost is strictly a family affair, in the supplement that the judge offers, its significance is generalised to include vengeance for sake of 'fellow nationals' – this is a generalisation that is at once a politicisation, as a narrative of kinship is

¹⁴ According to one particularly embellished account published as the trial was underway: 'This is the trial of tortured Armenian people and the gates of the courtroom are besieged by beautifully dark people who stand by the killer with burning hopes' ('Die Ermordung Talaat Paschas', *Vossische Zeitung*, 2 June 1921).

reconfigured into one about ethnic belonging.¹⁵ So already at this early stage of the trial, the ghost is politicised by the judge's interpretation. This is but one instance of the gradual politicisation of the trial by the ghost. The process mainly unfolds through the testimonies of witnesses introduced by the defence. As a significant part of the two day trial is flooded by the horrific stories of the genocide, the singular ghost of Tehlirian's mother is recast as one of the many ghosts of the Armenian genocide.

A key figure effecting this ghostly pluralisation was Christine Terzibashian who, along with her husband and brother, seems to have been a close friend to Tehlirian in Berlin. Herself a survivor of the genocide, Terzibashian testified through an interpreter about her own experience of the death marches. She spoke of being forced to march over the bodies of deportees who had recently been killed, of her legs being covered with the blood of the corpses she stepped on, of some 500 youths being tied together in groups and pushed into the wild currents of a river, of gendarmes crushing the pelvic bones of pregnant women to tear out the foetuses (*ST* 73-74). Her account caused several commotions of outrage and incredulity in the courtroom, prompting the judge to ask:

PRESIDING JUSTICE: Is all this really true? You are not imagining it?

WITNESS: What I have said is the truth. In reality, it was much more horrible than it is possible for me to relate. (*ST* 75)

At the end of her testimony the judge broached the question of responsibility, signalling a key shift in the focus of the hearings:

PRESIDING JUSTICE: At the time, who was thought to be the person responsible for this terror?

WITNESS: Enver Pasha¹⁶ was the one who gave the orders and the soldiers forced us to kneel and cry out 'Long live the Pasha,' because the Pasha had permitted us to live. (*Commotion*) (ibid.)

¹⁵ Note that the judge's supplement does not function as a suggestion that is meant to trap Tehlirian into admitting a political motive in addition to a personal vendetta. According to the transcript, he does not wait for Tehlirian's response to his supplement before going on to ask another question.

¹⁶ The English translation of the transcript, the Armenian Revolutionary Federation edition, has 'Talât' in place of 'Enver' in this passage. Even though that may be dramaturgically more desirable, Terzibashian says 'Enver' according to the original German transcript.

From this point in the trial, the question of responsibility for Talât's death became temporarily engulfed by the question of responsibility for the plight of the Ottoman Armenians, further discussed by the following witnesses, including very prominent ones.

One such prominent figure was Dr. Johannes Lepsius, a German missionary who had written books and articles on the Armenian massacres and was considered to be the foremost expert on the subject in Germany at the time.¹⁷ In affect, Lepsius' testimony was contrapuntal to Terzibashian's, and in content, it lent the latter some leverage by providing a more general, historico-political perspective. He suggested that there are over a hundred eyewitness accounts published in German and English, and that these accounts are similar in content to Tehlirian's and Terzibashian's (*ST 77*). He proposed that Talât, among other Young Turk leaders, was directly responsible for the annihilation of Ottoman Armenians, and that he could verify this by official written proof based on German and Turkish documents (*ST 81*). Lepsius also broached the question of how these events came to take place, a question that many scholars have shied away from until recently, due to the fear that the attempt to explain the causes of the genocide will amount to an attempt to justify it, in a landscape of historical research polarised and distorted by Turkey's official denial (Suny 2011).

The second celebrity witness was Liman von Sanders, a German General who was sent to Constantinople in 1913 for modernising and reorganising the Ottoman Army, and had remained there through the war, heading various campaigns. Liman's position on the question of high-level responsibility for the massacres was characteristic of the German military stance. He suggested that while the deportation orders were indeed given by the government, the responsibility for the ensuing atrocities should be attributed to the lower echelons and mobs. He vaguely indicated that he saw some incriminating official orders issued by Enver, but then dismissed these as 'incomprehensible', 'impracticable' and 'nonsensical', without going into any substantial detail (*ST 84*). Further, he emphatically denied having

¹⁷ Lepsius established the German Oriental mission in 1895, had been in the Ottoman Empire through the 1895-96 Armenian massacres, and had raised funds to build orphanages for children who had lost their parents. He went again in 1915 to investigate the Armenian situation on behalf of German missionary interests.

witnessed anything that incriminated Talât (*ST* 85). However, his testimony was followed and countered by another key witness, Bishop Grigoris Balakian, one of the very few survivors of the initial wave of deportations and massacres that targeted Istanbul's Armenian intellectual elite on 24 April 1915. Balakian knew Talât personally, and testified to having seen what Liman claimed he had not, an incriminating telegram signed by Talât.

Floating in the air from the very beginning of the trial, the question of CUP leadership's direct responsibility for the massacres found a dramatic if somewhat unthinkable shape in Terzibashian's testimony, then was recast by Lepsius, and entirely structured the testimonies of the following two witnesses, Liman and Balakian. Through these 'eyewitness' testimonies (not of Talât's assassination, but of the Armenian massacres) the defence successfully reversed the positions of victim and defendant – a common strategy in political trials. In this spirit, following Balakian's testimony, the defence further proposed to introduce as evidence five telegrams from the vice-governor of Aleppo that they claimed proved 'that Talât personally gave the orders to massacre all the Armenians including women and children' (*ST* 92). Prosecution objected, and finally attempted to bring to a halt the victim-defendant reversal that had taken place:

DISTRICT ATTORNEY: I feel that the motion should be denied. Even though great latitude was granted to discuss this subject, nevertheless, it is not the purpose of this body, nor is it within its competence, to come to a historic decision pertaining to the guilt or innocence of Talât and the extent of his involvement in the massacre of the Armenians. The essential point is that the defendant believed that Talât was the responsible party and thus the motive becomes fully clear. (*ibid.*)

The prosecutor's appreciation of the limitations of a trial as a site for exercises in historiography is notable, a point eloquently articulated later by scholars such as Hannah Arendt ([1963] 1994), Carlo Ginzburg (1999) and Costas Douzinas (2012). The curious aspect of the prosecutor's objection is that it is at once a significant concession to the defence, as he acknowledges the genuineness of Tehlirian's belief in Talât's responsibility for the massacres and suggests that this suffices for the truth-seeking function of the trial. The judge condones the prosecutor's position, while the defence recognises its worth, withdraws the motion, and introduces no more witnesses after this point.

Thus what counts in the end is not an absolute certainty vis-à-vis Talât's responsibility, but rather the defendant's belief in Talât's responsibility. While this would not be news for criminal lawyers who will often find themselves trading in fine but crucial distinctions between 'genuine' and 'reasonable' even if 'mistaken' beliefs, it is nevertheless important to note that history itself acquires a ghostly status here: the law withholds judgment on historical fact, but nevertheless allows it to hold over the proceedings as subjective vision. In attempting to limit the effects of the classical victim-defendant reversal on the trial, the prosecutor ascribes the historical question of the Armenian Genocide which threatens to flood the proceedings, to the defendant's own beliefs and opinions. While this attempted 'containment' seems to have had the desired effect of bringing the 'digression' or the reversal to an end in the actual proceedings, it was clearly a failure in terms of containing the ghosts that had been unleashed into the courtroom through the accounts of the genocide. In receiving no conclusive judgment which the trial participants could accept or reject but at least have as a tangible point of reference, history itself became 'there but not there', like a ghost. Thus the restless spirits invoked by the witness testimonies must have enthralled their audience to an unthinkable history, through what Avery Gordon refers to as a 'haunting recognition' (2008: 63). Another effect of the attempted containment was, of course, to bring Tehlirian back in focus, as it was his state of mind that was said to matter in the end – how convincing he seemed in his convictions was key.

the haunted haunter

In the trial, Tehlirian does indeed come across as a genuinely haunted man. A definitive moment occurred at the very beginning of the trial, during his initial interview by the judge. When he was prompted to recount his experience of the massacres, Tehlirian dramatically broke down in the telling:

DEFENDANT: While we were being plundered, they started firing on us from the front of the caravan. At that time, one of the gendarmes pulled my sister out and took her with him. My mother cried out, 'May I go blind!' ... I cannot remember that day any longer. I do not want to be reminded of that day. It is better for me to die than describe the events of that black day.

PRESIDING JUSTICE: (...) it is very important that we hear of these events from you. You are the only one that can give us information about those events. Try to pull yourself together and not lose control.

DEFENDANT: I cannot say everything. Every time I relive those events ... They took everyone away ... and they struck me. (ST 7)

A rather ornate account in a German newspaper relates this moment in the following words: ‘Tehlirian lifts his small hand on his white forehead – he does not want to be reminded of those days of horror. It takes some time to convince him of the need for accurate depiction.’¹⁸ The New York Times correspondent is less forgiving: ‘As Teilirian [*sic.*] was narrating, through an Armenian interpreter, the Turkish atrocities in Armenia, his Oriental temperament got the better of him and he shrieked, “Rather will I die than again live through the black days”’.¹⁹ Notably, Tehlirian’s breakdown occurs as soon as he embodies his mother’s voice (‘My mother cried “May I go blind!”’), as an initial hint of the haunting that later comes to dominate the proceedings.

The character portrait drawn by witnesses corroborates something of Tehlirian’s hauntedness. His first landlady who has ‘only good things to say about him’, confesses that she could hear everything that went on in his room: ‘At night he seemed to have nightmares. ... he always played his mandolin. ... he used to sing very melancholy tunes. ... many times he would talk out loud to himself, making me think that there was someone with him’ (39-41). His second landlady testifies: ‘On the morning of March 15th, the day the incident occurred, the maid came in to tell me that the defendant was in his room crying’ (43). His German teacher: ‘It was easy to see that he had an emotional trauma. He always looked sad’ (47); then, an acquaintance: ‘He was always dejected and had a vacant stare’ (64). Reporting on his examination of Tehlirian, the court physician Dr. Robert Störmer says, ‘Whenever the defendant spoke of the massacres, I had the impression that what he said came straight from the heart’ (95).

This sad, visibly haunted figure also appears as a ghostly, haunting figure himself. He is described by the doctors at the trial as a very sick young man, weak, trembling, thin, fragile. An earlier report by a medical officer filed during

¹⁸ ‘Die Ermordung Talaat Paschas’, *Vossische Zeitung*, 2 June 1921.

¹⁹ ‘Says Mother’s Ghost Ordered Him to Kill’, *New York Times*, 2 June 1921.

Tehirian's preliminary investigation described him as 'malnourished' and 'inconspicuous' (Hofmann: 43). In the trial, it gradually emerged that Tehirian developed epilepsy following the traumatic events. As the inquiry turned from the historical record to the subjective, Tehirian's epilepsy became a focal point for the proceedings, especially in the testimonies of five expert witnesses – two neuropsychiatrists, two neurologists and a physician. The psych-experts, testifying one after the other, were particularly invested in understanding the link between Tehirian's epileptic seizures and his memories of the massacres.

People with epilepsy are known to experience the hallucination of a pungent odour just before a seizure. In Tehirian's case the hallucinated odour was understood to be related to the stench of the corpses. The physician Dr. Störmer explained: 'He remained for three days under corpses; he lost consciousness, coming to only because of the horrible stench arising from the corpses – a stench which has remained ingrained in his mind forever. He tells me that any time he reads anything horrifying or whenever he recalls the massacres, the stench from the corpses penetrates his olfactories and he cannot seem to overcome it' (94). Except for Dr. Störmer who diagnosed Tehirian with epilepsy, all other experts concluded that Tehirian was suffering from 'affective epilepsy' rather than 'real' epilepsy. Though coined in the early 20th century by German neurologists Bratz and Falkenburg to designate a slightly different phenomenon (Horst 1953: 25), the term *Affekt-Epilepsie* seems to have been used in the trial to denote seizures that were psychological in origin rather than organic.²⁰

The extended discussion of Tehirian's epilepsy and detailed descriptions of his seizures must have imparted to him further mystique. In his famous essay 'The Uncanny', published only two years before Tehirian's trial, Sigmund Freud discusses the work of Ernst Jentsch, who writes about instances in which there are 'doubts whether an apparently animate being is really alive; or conversely, whether a lifeless object might not be in fact animate' as having an uncanny effect (qtd. in

²⁰ In this sense the trial experts' distinction between real epilepsy and affective epilepsy is very similar to the distinction Freud made in his 1928 essay on Dostoevsky: 'It is therefore quite right to distinguish between an organic and an 'affective' epilepsy. The practical significance of this is that a person who suffers from the first kind has a disease of the brain, while a person who suffers from the second kind is a neurotic' (Freud 1928: 181). However, the trial experts identify Tehirian as a psychotic rather than a neurotic.

Freud 1919: 226). For Jentsch epileptic seizures have this effect because they ‘excite in the spectator the impression of automatic, mechanical processes at work behind the ordinary appearance of mental activity’ (ibid.). Freud adds to this that the ordinary person sees in epileptic seizures the ‘workings of forces hitherto unsuspected in his fellow-men, but at the same time he is dimly aware of them in remote corners of his own being. The Middle Ages quite consistently ascribed all such maladies to the influence of demons, and in this their psychology was almost correct’ (243). Elsewhere Freud calls this ‘uncanny disease with its incalculable, apparently unprovoked convulsive attacks’ by its old name: ‘*morbus sacer*’, the sacred disease (Freud 1928: 179).

Such associations around epilepsy have particularly strong resonations in the figure of Soghomon Tehlirian. According to what emerges of/as his past in the trial, Tehlirian has quite literally arisen from the dead, from beneath the corpses. He is sickly and weak, and yet he demonstrates a steely, almost mechanical, automated determination to avenge the dead. The stories of his epileptic seizures bestow him with an almost netherworldly quality – at the onset of each seizure, his sense of smell returns him to the scene of carnage, the scene of his own death from which he was miraculously revived. If the classic ghost story plot dictates that the ghost must return to seek vengeance for past injustice, the *telos* for Tehlirian’s return from the dead is only too obvious. As he is animated by forces beyond his limited physical strength to avenge the dead, his epileptic seizures serve in the narrative universe of the trial as the all too tangible sign of Tehlirian’s rapport with the world of the dead. Tehlirian himself acquires an uncanny, ghostly presence as the revenant: haunted and haunting, possessed and captivating, all at once.

The question of whether the defence outlined in Article 51 of the German Penal Code applied to the defendant becomes particularly interesting when read in this light. Article 51 states ‘If the offender at the time of the committal of an offence was in a state of unconsciousness or derangement of the intellect due to illness by which the free exercise of his will was prevented, the act is not punishable’. In Tehlirian’s trial, all expert witnesses were asked to consider whether Article 51 applied to the defendant, in other words, whether his free will was totally absent or not at the time of the act of killing. The experts’ answers

arrived in a gradual scale from no to yes. First expert, Dr. Störmer, court's examining physician, said no, his free will was not totally absent. Second expert, neuropsychiatrist Dr. Liepmann also said no, but added that Tehlirian's condition was very close to falling within the purview of Article 51, as at the time of the act, he was under the influence of an 'over-valued idea'.²¹ Liepmann also expressed regret that a doctrine of diminished responsibility had not yet been introduced into German criminal law, suggesting that such mitigation rather than a full defence would be more appropriate in this case. Expert witness number 3, Dr. Richard Cassirer, also suggested that Article 51 did not apply, that Tehlirian's free will was not totally absent at the time of the incident, but similarly added that the provision came very close to applying. The fourth expert, Dr. Edmund Forster²² was also on the fence, but leaning towards yes. He expressed uncertainty as to how his medical judgments translate into a legal opinion, but said that Tehlirian's status comes very close to Article 51, and added 'I am even inclined to say that free will was totally absent' (*ST* 108). The final expert Dr. Bruno Haake, in his very brief testimony, univocally stated yes, Article 51 did apply to Tehlirian.

In effect, this collection of testimonies functioned as so many attempts to translate the haunting into a medico-scientific language. And yet, the translation, rather than explaining the ghost away or secularising it, instead seems to have reified the haunting to a significant extent. This was especially the case with the 'over-valued idea' formulation, advanced by Dr. Liepmann and backed by the other neuropsychiatrist, Dr. Forster. In Liepmann's explanation, the recollection of a profound psychological shock 'dominates the personality; it is always present; it always comes out, forcing the person to submit to its authority. ... Tehlirian was under the influence of such a compulsive precept and he was unable to free himself from the memory of the severe shock he had endured' (*ST* 99). Considering that the German psychiatric profession maintained a generally hostile attitude towards psychoanalysis at the time (Wetzell 2000: 143), it is not entirely surprising that we

²¹ In the English trial transcript this is inaccurately translated as 'compulsive precept'. Liepmann had served as an assistant to Carl Wernicke, the originator of this doctrine of 'over-valued ideas'. The doctrine still seems to have currency in psychiatric discourse. See Veale (2002: 384-386), for a comparison between its early European and contemporary American definitions.

²² Edmund Forster also happened to be the neuropsychiatrist who cured Adolf Hitler of his 'hysterical blindness' at the front during World War I, see Lewis (2003).

have here what reads as a clumsy theory of trauma. The concept of ‘over-valued idea’ comes across at best as a gross misnomer for recurrent and haunting memories of a massacre. It presumes the existence of a standard gauge, a measure for how much such past experiences should normally be valued; and it bestows the neuropsychiatrist with a claim to authority over that measure. On the other hand, the language of psychoanalysis may have allowed a better grasp of the workings of trauma, even back in 1921,²³ as well as possibly a more self-reflexive approach on the part of the doctors, some of whom were clearly haunted by Tehlirian and his ghost.²⁴ By utilising the ‘over-valued idea’ doctrine, Liepmann seems to have in fact lent further purchase to the figure of the ghost: ‘the entire recollection of the calamity ... appeared in physical form – seeing his mother’ (ST 100-101). Thus the ghost becomes in this account the very physical manifestation of every recollection Tehlirian has of the traumatic events, the memory of which has imprisoned him. And this, the good doctor says, gives us ‘the singular creation of “over-valued idea” ... His vision of his mother was an all-powerful force, thus making any further argument pointless.’ (101, translation modified).

The inevitable force of the demands of the ghost was thus melded with accounts of Tehlirian’s ‘affective epilepsy’ to yield a pseudoscientific account of his intentionality, but it was pseudo, precisely because everything that was uncanny about the haunting and the seizures was retained in an odd form of scientific reification. Although the majority of the experts actually claimed the non-applicability of Article 51, their testimonies in effect reinforced the sense that Tehlirian’s volition was haunted at the time of his act. Their attempts to secularise the ghost and exorcise it failed, as evidenced in the closing statements that followed the expert testimonies. The ghostly retained its hold on the proceedings as one of the defence attorneys in his summation drew on its force. After recounting Tehlirian’s entire story and his encounter with his mother’s ghost in properly dramatised form, the defence counsel said:

²³ Freud’s ground-breaking *Beyond the Pleasure Principle* was published in 1920.

²⁴ Dr. Störmer, for example, says about the ghost ‘I certainly had to ask myself if this was not a delusion of the senses. But after a detailed cross-examination, I was able to verify that what the defendant experienced was not a delusion of the senses, but a living mental picture. He does actually see his mother in her physical form. He not only sees her in his dreams but even while he is awake.’ (ST 96)

It is quite evident that such visions play an altogether different role in the lives of spirited Easterners than they do in the lives of us Westerners, who look upon such things from a philosophical and medical point of view. I remind you of the passage from the Holy Bible which reads: 'And the angel appeared to him in his dream.' A similar apparition or corporeal vision is what had the decisive effect on Tehlirian.

The double move here is noteworthy: disowning the ghost as 'us Westerners', but then drawing on its persuasive force nevertheless; allocating 'such things' to their proper Western site of philosophy and medicine, but then invoking the Holy Bible and its angels. The jury, in returning a verdict of not guilty, seems to have agreed with this analysis of Tehlirian's volition being haunted by the ghost, whatever its proper place in the 'Western' imagination.²⁵

the many lives of tehlirian

As I have suggested, the positions of the victim and the defendant were temporarily reversed in Tehlirian's trial, as the ghosts of history congregated in the courtroom to reconstruct history as ghostly. The trial was first transformed from a truth-seeking effort regarding responsibility for Talât's murder to an inconclusive truth-seeking effort regarding responsibility for the Great Catastrophe, then began revolving around the inner world of the haunted, haunting defendant. This trajectory had the key effect of disappearing from the scene of the trial the various doubts and unresolved questions concerning the facts of Talât's assassination. For example, even though early on in the investigation the police had expressed that they strongly suspected Tehlirian had accomplices,²⁶ in the trial that question entirely vanished, not even surfacing during Tehlirian's examination. More significantly, questions raised by the contradictions between Tehlirian's initial confessions to the police and his trial testimony, especially with regards to premeditation, were dematerialised with a fascinating slight of hand. This one was a translator's coup: Kevork Kalustian was Tehlirian's interpreter during the police

²⁵ The verdict was not accompanied by any explanation as to why they decided to relieve Tehlirian of any responsibility for his act, as such justification was not required by German criminal procedure.

²⁶ 'Das Geständnis des Mörders Talaat Paschas: Vernehmung im Polizeipräsidium', *Berliner Tageblatt*, 16 March 1921.

interrogation, and later at the trial, as well as a witness. In both instances, Kevorkian openly admitted his admiration of Tehlirian for the deed he committed. It emerged during his trial testimony that he purposely did not sign the transcript of the police interrogation ‘for the simple reason that the defendant was in no condition to be interrogated’ (*ST* 66). The absence of his signature on the transcript absolved Tehlirian of his self-incrimination, prompting the presiding judge to conclude: ‘There is grave doubt as to the validity of the contents of this transcript in terms of its acceptability as evidence’ (*ST* 67).

The questions as to accomplices and premeditation thus vanished from the scene of the trial. In retrospect, especially in light of various later retellings of Soghomon Tehlirian’s story, these prove to be highly significant disappearance acts. The versions of the retellings vary, but the assassination provides the organising centre to all. There is a volume of Tehlirian’s memoirs as recorded and published by his friend Vahan Minakhorian (Tehlirian 1956) in Cairo, which incorporates the original trial transcript. This volume is in Western Armenian and has never been fully translated into English, though an adaptation can be found in Atamian (1960-61). Then there is Tehlirian’s ‘memoirs’ as told by Lindy V. Avakian (1989), published in English almost three decades after Tehlirian’s death. The structure of the narrative is strange: Avakian inhabits Tehlirian’s voice and appropriates his ‘I’ in the retelling, while intervening in the narrative with what seem like editorial, disinterested and ostensibly objective ‘(COMMENT)’s that are highlighted as such in capital letters and parentheses, usually including dry ‘historical facts’. The effect thereby created is a split in the authorial voice, which is probably meant to authenticate the ‘I’ as that of Tehlirian, and Avakian as the historian that the jacket proclaims him to be. While the book contains some privileged information with regards to Tehlirian’s life,²⁷ its historical accuracy is

²⁷ In the ‘Introduction’, the only part of the book where Avakian inhabits his own voice, he explains that his father, a figure in the Dashnak community of the US, had befriended Tehlirian, thus: ‘My recollections are deeply etched with the inspiring memory of countless discussions with or about Tehlirian, held in the old-fashioned parlor of our home at 422 South Fulton Street in Fresno by representatives of the Armenian Revolutionary Federation and my father’ (1989: 12).

highly suspect as can be discerned from the complete rewriting of the trial that has precious little to do with the transcript.²⁸

Another account is by Edward Alexander (2000), a retired American diplomat of Armenian descent, who, in a much more conscientious attempt to reconstruct the story, draws on the trial transcript and newspaper reports, as well as Tehlirian's 1956 memoirs, though glossing over some key conflicts between the latter and the former. Additionally there's a volume by French political thriller-writer Jacques Derogy (1990), who was commissioned to write the story of Operation Nemesis, Armenian Revolutionary Federation's (ARF) covert vengeance campaign which aimed to 'bring justice' to those deemed responsible for the massacres. In addition to various secondary sources, Derogy draws on memoirs, archival documents and oral history for the arduous task of reconstructing the story of a series of assassinations. Notably, Tehlirian is featured in the narrative as a Nemesis agent.

Indeed, according to all retellings, including Tehlirian's own, Tehlirian was assigned the task of assassinating Talât by Armen Garo²⁹ during a visit to the ARF headquarters in Boston in late 1920. Nor was Talât the first man he assassinated: in his memoirs Tehlirian admits to having killed Harootiun Mugerditchian in 1919 in Istanbul,³⁰ a detail that is featured in the other retellings as well.³¹ Mugerditchian's assassin remained officially unknown, and it is no surprise that Tehlirian did not volunteer this information during his 1921 police interrogation or trial testimony in Berlin, as that would have depicted him as a professional hit-man. It is also understandable why Tehlirian did not admit to having accomplices in Talât's assassination, namely other Berlin-based ARF operatives that all accounts refer to.

²⁸ Avakian stretches the two-day trial over 15 days, introduces fictional witnesses and entirely new conflicts into the proceedings, jettisons Tehlirian's testimony along with every other indication that reflects on Tehlirian as less than the manly, muscular, chauvinist hero fantasised throughout the narrative. Further, in Avakian's version, the trial is recast as adversarial, which though much more suitable to the courtroom drama genre that the author was clearly after, had obviously nothing to do with the actual proceedings which were inquisitorial.

²⁹ Armen Garo was the nom de guerre of Karekin Pastermadjian, a key ARF leader.

³⁰ I am grateful to Eric Bogosian for his assistance with this reference.

³¹ Although an Armenian, Mugerditchian was considered to be a collaborator, as he was deemed responsible for facilitating the 24 April 1915 apprehension and massacre of Istanbul's Armenian leaders and intellectuals, by handing the CUP a 'black list'.

In the retellings an entirely different story of the assassination emerges: Tehlirian did have accomplices, and the murder was premeditated.

More crucially, according various accounts, including Tehlirian's own memoirs, he was never in the death marches himself. He and his brothers had left Erzincan in 1914, on the eve of the war, to join their father in Serbia, while the mother and sisters stayed behind. When the war broke out and he found out that there were Armenian volunteer forces fighting on Russia's side, he travelled to Tbilisi to join them. He was not allowed to go in the field for a while, and was tasked with organising the reception of orphans. The first time he heard of the massacres was from these orphans who had survived them. When the region was occupied by the Russians in 1916, he went to his village seeking his mother and relatives, but found no trace of them. He found his family home in ruins and had his first epileptic fit there, in the garden of his abandoned home.³²

Ellis Island records corroborate Tehlirian's fateful trip to the United States, though this is one trip that is not mentioned in the seemingly endless list of travels recounted during the trial. It is difficult to know whether the ARF connection would have been discovered if the German authorities had knowledge of Tehlirian's recent trip to the USA. A remarkable detail, however, is that there are two Tehlirians even in the Ellis Island records, according to which on 22 August 1920 a 'Salomon Telarian', aged 24, of Armenian ethnicity, resident of Paris, arrived in Ellis Island on a ship named Saint Paul, which departed from Southampton; and three days later, on 25 August 1920, another 'Solomon Telarian', aged 24, of Armenian ethnicity, resident of Paris, arrived at the island on a ship named Olympic, which departed from Cherbourg, France.³³ The glitch in the

³² The discrepancy between this account and Tehlirian's trial testimony was discovered by Turkish newspapers very belatedly, on the occasion of the publication of a book in 2005 in Germany about Operation Nemesis, and it produced headlines such as 'Armenian Murderer Told Fairy Tales' which proclaimed that Tehlirian did not actually lose his family in the death marches – see, for example, Celal Özcan, 'Katil Ermeni Masal Anlatmış', *Hürriyet*, 27 March 2005, <http://hurarsiv.hurriyet.com.tr/goster/haber.aspx?id=306974>. This is a distortion: Tehlirian's father and brothers remained in Serbia through the war, but he did lose all family members who remained behind, namely his mother, sisters, brothers-in-law, nieces and nephews.

³³ All other items on the arrival registry (height, complexion, colour of hair, colour of eyes, 'whether going to join a relative or friend, and if so, his name and complete address', 'the name and complete address of nearest relative or friend in country whence alien came', etc.) also match between the two records. The arrival records are available on <http://www.ellisland.org>.

archives fascinatingly reproduces the doubling that seems to have characterised Tehlirian's life at the time.

It is admittedly quite difficult to reconcile this later version of Tehlirian's story with the figure he cuts in the trial as a man who seems genuinely haunted by memories of a massacre of which he was the only survivor. One wonders about the source of the story of deportation and massacre he told as his own during the trial. Did he make it up, or did he borrow it? Was it entirely his imagination, or could it be a story that he heard from someone else, say, one of the orphans he received during his service in Russia? Could it be that he was haunted by the testimonies of these orphaned children to the extent that he adopted their stories and adapted them to his own loss? Bearing witness to the testimony of others, being the immediate receiver of the testimony of survivors is 'actually participat[ing] in the reliving and reexperiencing of the event' (Laub 1992: 76). Writing of his experience of working on the Video Archive for Holocaust Testimonies at Yale, psychoanalyst Dori Laub suggests that 'the listener (or the interviewer) becomes the Holocaust witness *before* the narrator does' in this reoccurrence of the event (85), as the encounter between listener and survivor 'makes possible something like a repossession of the act of witnessing' (ibid). But in being the primary witness to the event through witnessing its reoccurrence and reliving, the listener also becomes 'part of the struggle to go beyond the event and not be submerged and lost in it' (76). This is not to say that one will necessarily manage to prevail over that struggle.

While there is a veritable disjuncture between how convincing Tehlirian was deemed in his trial and the fact that his story was otherwise, it is not entirely possible to explain this disjuncture away by attributing it to his cunning or theatrical skills. If we are to take into account the loss that he did suffer, we might ask what it may mean for one's relatives to disappear without a trace in a series of events later relayed by survivors in unthinkable narrations. This line of inquiry may begin to bridge the disjuncture between Tehlirian's credibility at the trial and his other story, and afford a new perspective on the haunting itself. As Avery Gordon suggests, 'disappearance is an exemplary instance in which the boundaries of rational and irrational, fact and fiction, subjectivity and objectivity, person and

system, force and effect, conscious and unconscious, knowing and not knowing are constitutively unstable' (2008: 97).

The epistemological instability effected by loss as disappearance is a liminal experience that is akin to the structure and operation of haunting. This combination of loss as disappearance, and witnessing as listening (as the immediate receiver of survivor testimonies) may provide an insight to Tehlirian's haunting that was deemed credible in his trial by character witnesses, experts and, finally, the jury. In the trial, just as the character witnesses and psych-experts testified to Tehlirian's haunting through their statements, the members of the jury did the same by returning a not guilty verdict. In exploring the politics of this particular political trial, the key question is not so much whether Tehlirian's haunting was genuine or not, but what it meant for other trial participants to share Tehlirian's ghosts, by verifying the haunting, and thus partaking in it.

politics of haunting

Writing on another, indeed the proverbial drama of the parental ghost appearing to the son to demand vengeance, Ross Poole addresses the nuance between the political and the personal significations of the ghost in Shakespeare's play *Hamlet*. He indicates that due weight is rarely given to the political meaning of the play in its stage productions (Poole 2009: 146n13), or its theoretical interpretations (129). In its first few appearances, the ghost in *Hamlet* is 'a public existence, and not a private experience' (ibid.), it appears as the warrior king clad in combat armour, and it is visible not only to Prince Hamlet but also to the sentinels and Horatio. Contesting Hegel's reading of the play in *Aesthetics*, Poole suggests that the ghost in its early appearances 'is not *just* "an objective form of Hamlet's inner presentiment,"' it is also 'an "objective form" of the presentiments of those others to whom it appears' (130). This significance shifts dramatically in Act III during the bedroom scene between Hamlet and Gertrude – in this final appearance of the ghost, it is only visible to Hamlet, not to Gertrude, and this time it is clad in night attire. Hamlet is trapped in an Oedipal return. Poole concludes 'a political story has been reduced to a domestic drama' (133).

Following Poole's reading of *Hamlet*, we could propose that the political is, to a certain extent, a sharing of ghosts. The politicisation of the Tehlirian trial was precisely an effect of a ghostly convergence: the singular ghost of Tehlirian's mother came to represent and ushered into the courtroom the many ghosts of the Armenian genocide, and very possibly other ghosts, too, in the aftermath of the war. In 'The "Uncanny"', published also in the wake of World War I, Sigmund Freud ruminates on the swift uptake of ghosts, and of the belief that 'the dead can become visible as spirits', even in a 'supposedly educated' milieu, including by some of 'the most able and penetrating minds among our men of science' (Freud 1919: 242). Freud explains this modern inclination to be haunted in terms of a primitive remainder, the entrenchment of old beliefs and the primitive fear of the dead that is 'still so strong within us and always ready to come to the surface on any provocation' (ibid), and 'ready to seize upon any confirmation' (247). While Freud's analysis is based on a civilised/primitive dualism which he holds on to even as he problematises it, contemporary theorists of ghosts point out that we are prone to hauntings precisely because 'indignities and damages continue under cover of civilisation' (Dayan 2011: 9); and 'deep "wounds in civilisation" are in haunting evidence' (Gordon 2008: 207). The shared haunting in Tehlirian's trial perhaps has to do with the recognition of the unthinkable, that this kind of collective violence is humanly possible. The spectre gives a form to what is 'really real' (Aretxaga 2005: 227), the ghost becomes a figure that contains the impossible recognition of political violence. It is this recognition that then undoes the violence of Tehlirian's act. In this sense, the most felicitous performative is enacted by the ghost in the trial, resulting in an acquittal. The traumas that people have brought into the courtroom seem to combine to create a scene that is beyond any (individual or stately) sovereign decisions or damage limitation exercises.

The key irony is that although the ghost played a central role in politicising the proceedings, it was initially introduced in an attempt to depoliticise the crime. The discrepancy between Tehlirian's admissions during his police interrogation and his trial testimony³⁴ is of significance here: during his police interrogation Tehlirian

³⁴ In her study of the pre-trial records of Tehlirian's case (four files that resurfaced in East German archives containing case records created by the German police, the state prosecutor, the Ministry of

admitted to intentional killing with vengeful premeditation, whereas in the trial he introduced the figure of his mother's ghost as a way to indirectly deny premeditation. Tehlirian later gave his own explanation for his change of testimony. According to his memoirs, it had to do with his encounter with a fellow prisoner after his police interrogation, who explained to him that murder committed with political motivations will incur the death sentence, whereas killing for personal reasons would be treated with much more leniency in German courts (Atamian 1961: 19-21; Alexander 2000: 20, 28). I have not found any indicators of such a legal distinction between political and personal motivations,³⁵ and perhaps the issue had more to do with the question of premeditation – likely assumed to exist in a 'political' crime, whereas not necessarily in a personal 'crime of passion'. It is nevertheless interesting to entertain this differentiation between the political and the personal that Tehlirian himself says he heeded. In an attempt to shift the focus from the political to the personal, Tehlirian speaks of his mother's ghost. The quintessential 'political crime', the assassination of a (former) statesman by someone who is a stranger to him, was to become personalised through the figure of a ghost, who establishes an intimacy, a link of private vengeance between the assassin and his victim. Tehlirian's trial appearance was very much in line with this strategy of keeping it personal, as he limited his account of the Armenian deportations and massacres to the sufferings of his family.

Justice and the German Foreign Office) Osik Moses (2012) identifies that this shift of testimony occurred on 26 March 1921, 11 days after the assassination and more than two months before the trial. On this date, the investigating judge conducted the last hearing of the preliminary investigation, during which Tehlirian gave the version of his story that he reiterated in his trial, even though it contradicted his initial confessions to the police.

³⁵ Even during the troubled early years of the Weimar Republic where political assassinations were rife, the largest category of death sentences passed between 1919 and 1925 involved the murder of victims closely related to the offender (Evans 1996: 525). One possibility is that the fellow prisoner who advised Tehlirian at the time might have had in mind the political make up of the German judiciary. Remnants of the previous monarchical regime, judges of the Weimar Republic were famously conservative as they had been selected under Wilhelm II for their political reliability. Statistician Emil Gumbel's study of the adjudication of political crimes between late 1918 and the summer of 1922 revealed that 54 murders committed by rightists resulted in no death sentences, 1 life sentence, a total of 90 years and 2 months in prison and 326 unpunished perpetrators; whereas 22 murders committed by leftists in this period resulted in 10 death sentences, 3 life sentences, a total of 248 years and 9 months in prison, and 4 unpunished perpetrators (Morris 2005: 1). This kind of pervasive judicial right-wing bias could have resulted in a harsh condemnation of the assassin of Talât, an ally of the Kaiser, but that might be an argument stretched too thin.

Interestingly, Tehlirian's commitment to keep politics out of the trial was shared by the prosecution and the presiding judge, according to historical records. Tessa Hofmann (1989) provides an account of the prosecutorial strategy and the position of the judge by drawing on previously unearthed case records and files documenting the correspondence between the Foreign Office, the Ministry of Justice, the Attorney General, the chief public prosecutor, and the trial prosecutor regarding how the Tehlirian case should be handled. In a plea to the Ministry of Justice written about a week before the beginning of the trial, the chief public prosecutor expresses the worries of the Foreign Office with regards to the approaching trial. The escalation of the trial into a 'mammoth political case' could create disturbances on the public front 'as well as in German-Turkish relations' (qtd. in Hofmann 1989: 44). The correspondence expresses fear that the defence may question the stance of the German government on the Armenian atrocities, and suggests that this would be undesirable especially at a time when Germany was busy trying to suppress the Polish insurrection in Upper Silesia (44-45). The chief prosecutor adds 'Of even greater concern from the political point of view is a line of inquiry during the trial, which would consider (Talât) Pasha's general political role and his German connections' (45). Representatives of the Foreign Office met the trial prosecutor Gollnick one day before the trial to discuss these concerns (ibid.) and the presiding judge was similarly briefed according to Hofmann's research (46). The authorities initially entertained the idea of excluding the public from the trial to keep its politics under control, but then decided that this strategy might backfire. Instead they tried to contain the trial by restricting the time and the facts: 'Only subjective and medical questions were to be raised' (46).

Hofmann's conclusion is that the prosecutor and the presiding judge indeed handled the case extremely tactfully, to render it 'conspicuously unpolitical' (49). She concludes, 'it was no true victory for political justice, but rather just a first and involuntary step in the right direction' (50). Note that Hoffman writes this in the Dashnak-supported journal *Armenian Review*, to break the perhaps unwelcome news that the Tehlirian trial was not exactly the idealised moment of rupture that later Armenian nationalist mythologising held it out to be: the legal recognition of the plight of Armenians on the world stage, justice done and justice seen.

According to Hoffman's account, there were other, more parochial political considerations at work, ones that required the depoliticisation of the proceedings. However, my sense is that the trial is politically significant precisely because its politicisation was 'involuntary' as Hoffman puts it. Its significance exceeded the political designs and strategies of the parties involved.

This is not to say that there were no felicitous performatives of expediency: the fact that the German authorities planned to play down the political significance of the trial did not prevent them from capitalising on it for their own political ends. The transcript specifically betrays an attempt to absolve Germany of any liability for the Armenian deportations and massacres. Historians differ on the question of Germany's complicity in the plight of the Armenians (Weitz 2011: 176-77), some accord a decisive level of responsibility, while others limit it to quiet complicity at the top echelons. Certainly at the time of Tehlirian's trial, Germany was widely seen as blameworthy, largely due to Entente propaganda campaigns to this effect (Bloxham 2005: 129-30). Thus, the need to emphasise Germany's innocence emerged then and again in the Tehlirian trial. Notably, it was flagged at the very beginning of the trial by the defence counsel, who, when arguing for the necessity to introduce testimony on the Armenian massacres, said 'Believe me, gentlemen, it is in the interests of the German government that nothing be left out' (*ST* 4). Concerning the interests of the German government, it seems, the defence and the prosecuting authorities were very much in agreement.

Germany's innocence provided a point of consensus even for witnesses otherwise entirely in disagreement with one another. It united, for example, the testimonies of Liman von Sanders and Johannes Lepsius, though they contradicted one another on nearly every other issue.³⁶ But the issue came to the fore most crucially during the closing speech of one of the defence counsel. After congratulating himself and his team for not turning the trial into a political trial, Kurt Niemeyer made this argument on behalf of acquitting Tehlirian:

During the war, German military and other establishments, both in this country and beyond its borders, passed over in silence and then tried to

³⁶ Lepsius was in fact the perfect candidate for helping prove Germany's innocence, as he had already done much to absolve Germany of complicity. As Moses (2012: 16) puts it 'the renowned Armenophile ... was first and foremost a German nationalist'.

cover up the atrocities committed against the Armenians. This was done in such a manner as to imply that our German government actually condoned these atrocities. Certainly, up to a point, individual Germans tried to put an end to the atrocities, but to the Turks the implications were clear. They thought, 'It is impossible for these events to take place without the consent of the Germans. After all, we are their allies and they are so much stronger than us.' Therefore, in the East and all over the world, we Germans have been held responsible with the Turks for the crimes committed against the Armenians. There is a wealth of literature in the United States, Great Britain, and France whose purpose is to show that the Germans were really the Talaats in Turkey. If a German court were to find Soghomon Tehlirian not guilty, this would put an end to the misconception that the world has of us. The world would welcome such a decision as one serving the highest principles of justice. (162)

We do not know whether this argument played a role in the jury decision. We can, however, surmise that in responding to the proceedings with a not guilty verdict, the jury, composed of average Berliners, may have sought to dissociate from the harrowing atrocities they had listened to. The decision, which functions as a condemnation of Talât's responsibility in the genocide, may be interpreted as a collective attempt to put (at least some of the) ghosts to rest.

the fore- & afterlives of a trial

We may locate the Tehlirian trial within a history of political trials by seeking its 'cross-legal' connections, in Shoshana Felman's formulation, considering the ways in which it references or 'recapitulates the memory' of, 'repeats and reenacts' (Felman 2002: 61) but also, crucially, pre-enacts other trials. In a veritable sense, the Tehlirian trial is haunted by the 1919 judgment in Istanbul that sentenced Talât to death for his responsibility in the Armenian deportations and massacres. But it is also haunted by the trial that never was. On 24 May 1915, exactly one month after the beginning of the genocide, Great Britain, France and Russia issued a joint declaration stating,

In view of these new crimes of Turkey against humanity and civilisation, the Allied governments will hold personally responsible all the members of the Turkish Government, as well as all officials who have participated in these massacres. (qtd. in Akçam 2007: 2)

The reference to the ‘new crimes’ against humanity and civilisation here was without precedent, but the Allied governments were clearly conjuring a future judicial process in their emphasis on personal accountability. Indeed, the idea of prosecuting state leaders for war crimes was quite prevalent already at the beginning of World War I. After the war, it was brought to the table at the Paris Peace Conference, one of the consequences of which was Article 227 of Treaty of Versailles, pertaining to bringing the German Emperor before an international tribunal. As for Ottoman authorities, we can look at Article 230 of the Treaty of Sevres which stipulates the establishment of an international tribunal for the ‘massacres committed’ in Ottoman territory during the war. The said tribunal was never formed, and eventually the Treaty of Lausanne covered the perpetrators with the shield of amnesty. It is in this sense that the trial that never was haunts the Berlin trial, possessing it, and turning a murder trial into a trial about the genocide.

Further, the Tehlirian trial can also be said to haunt, in advance, the trial to come. In hindsight, it is difficult not to note in astonishment that this is a trial about a genocide, held in Germany more than two decades before the Nuremberg trials. It is now known that Raphael Lemkin, the jurist who coined the word ‘genocide’ in 1944, was captivated by the Tehlirian trial as a young student of law. In his draft autobiography published posthumously, he identifies it as one of the key events that shaped his thinking around mass atrocity and international law.³⁷ Another among the young law students watching the trial was Robert Kempner who later was on the US prosecutorial team of the Nuremberg trials. In a 1980 article he wrote of the Tehlirian trial’s legal historical significance in somewhat exaggerated terms:

For the first time in legal history, it was recognised that other countries could legitimately combat gross human rights violations caused by a government, especially genocide, without committing unauthorised intervention in the internal affairs of another country. (qtd. in Hoffman 1989: 51)

³⁷ ‘Tehlirian, who upheld the moral order of mankind, was classified as insane, incapable of discerning the moral nature of his act. He had acted as the self-appointed legal officer for the conscience of mankind. But can a man appoint himself to mete out justice? Will not passion sway such a form of justice and make a travesty of it? At that moment, my worries about the murder of the innocent became more meaningful to me. I didn’t know all the answers but I felt that a law against this type of racial or religious murder must be adopted by the world.’ (Lemkin 2013: 20).

Kempner thus monumentalises the Tehlirian trial as something it never was. Perhaps more crucially, while the men of law attempt to mould the Tehlirian trial into a triumphant legal history of international justice, various traditions of political violence have proven much more hospitable to the revenants of this trial.

In his multivalent discussion in *Spectres of Marx*, Jacques Derrida proposes that the spectre of the past and the spectre of the future cannot be differentiated once and for all (2006: 48). ‘The question of the event as a question of the ghost’ (10) brings together repetition and the novelty of the first – since the first time a ghost appears is always already a return. Derrida writes ‘One cannot control its comings and goings because it begins by coming back’ (11). In the aftermath of Talât’s assassination, German newspapers featured debates about what happened in 1915. Two moments are notable in this range of publications: In trying to justify Talât and the deportations, one Middle East correspondent held up the spectre of what the British did in the Boer War, namely an early use of concentration camps, and argued that the Armenian deportations were similarly justified out of military necessity.³⁸ The second is an article written after the trial by the former German chief of General Staff of the Ottoman army, Baron von Schellendorf, in testament to Talât’s genius as a statesman. Outraged by the decision of Tehlirian’s acquittal, which he seems to read as an incrimination of Talât, von Schellendorf also argues the primacy of military necessary, but not with reference to past events such as the Boer War: imagine, he suggests instead, if in today’s Germany all Polish insurgents were removed from Upper Silesia and placed in concentration camps, or, he says, if all communists were deported from Germany, would not, he asks ‘a storm of applause roar through the whole of Germany?’³⁹ As these two moments indicate, the logic of haunting, this inability to distinguish the ghosts of the future from those of the past, has a particularly strong purchase on the question of political violence.

The spectre of Tehlirian’s trial continues to roam around. Like every ghost, the ghost of this trial that we encounter today is an impoverished and distorted version of the life, the live event it once was, inflected through various chauvinisms, or various modalities of resentment, enmity, frustration, grief, longing

³⁸ ‘Zum Tode Talaat Paschas’, *Kölnische Zeitung*, 16 March 1921.

³⁹ Fritz Bronsart von Schellendorf, ‘Ein Zeugnis Für Talaat Pascha’, *Deutsche Allgemeine Zeitung*, 24 July 1921.

and desire. This is easily traced in the fictionalised retellings of the trial: In a novel⁴⁰ by Turkish writer Mim Kemal Öke (2012) who depicts almost all Armenians as ungrateful, back-stabbing bandits and all Turks as magnanimous, tolerant peace-seekers, Tehlirian's mother appears towards the end of the trial, not as ghost but in flesh and blood, and explains to the court that he has long disowned his son Soghomon because he killed his own older brother who refused to collaborate with the Dashnak fighters against the Ottoman Army. The melodramatic narrative has it that Soghomon then testified against a Turkish soldier for his brother's murder in a hearing held by Talât himself, who had sensed he was lying but, being a man of justice, would honour a Christian's word as much as a Muslim's, and therefore sentenced the Turkish soldier to death. Soghomon then felt he had to kill Talât because his piercing and accusing gaze had become the stuff of his nightmares. In Armenian-American writer Lindy Avakian's similarly imaginative reconstruction,⁴¹ Tehlirian is portrayed as nothing less than a superhero – vigorous, muscular and ultra-virile. He doesn't say much in his trial except protesting when the judge identifies his country of origin as 'Turkey': '*No, Sir!*'. There is consternation in the court until his counsel leaps to his feet: 'If it please the court, I believe I can explain my client's answer. As an Armenian he recognises neither Soviet nor Turkish domination of his country. He was born in Erzinga, Armenia. The defence respectfully asks the court to recognise the defendant's birthplace as Erzinga, Armenia, rather than Turkey' (Avakian 1989: 125). The fictional retellings involve a whole range of fantasising about sovereignty and sovereign agency in the trial.

The same can be said for the ways in which the trial is understood in retrospect. In the Turkish nationalist imaginary, the acquittal of Talât's killer in Berlin serves as proof of the old ally Germany's betrayal, hypocrisy and injustice. For example, when Angela Merkel and the Christian Democrats submitted a motion in 2005 to the German Parliament that called for Turkey to apologise to Armenians, Oktay Ekşi, a senior columnist in the popular daily *Hürriyet*, suggested that perhaps Merkel should apologise to the Turks on behalf of German judges for the injustice

⁴⁰ This was originally the script for a TV series broadcast on Turkish national television in the mid-1980s.

⁴¹ See *supra* fn. 29.

that was perpetrated in Tehlirian's trial.⁴² This kind of rhetoric about the trial is often thrown around, with parochial historical vision (i.e. as if Tehlirian's acquittal was the only problem with Weimar courts) and without regard to certain key facts (i.e. that it was a jury trial). In the Armenian nationalist imaginary, Tehlirian's acquittal is a triumph of truth and a victory for justice: as a momentary recognition on the world stage of the catastrophic injustices of 1915, it is a memory that is held dear. But this acquittal seems to also serve as vindication for acts of political violence that are legitimised in terms of retribution for 1915. Tehlirian must have been a source of inspiration for the Justice Commandos of the Armenian Genocide (JCOAG) and Armenian Secret Army for the Liberation of Armenia (ASALA) killings of Turkish diplomats from mid-1970s to mid 1980s,⁴³ assassinations through which, in the words of Fatma Müge Göçek, 'The unexamined past thus suddenly and unexpectedly came to *haunt* the present' (2011: 52, my emphasis).

The timing of the publication of the Armenian Revolutionary Federation's English edition of the Tehlirian trial transcript, the year 1985, is significant in this sense and the foreword to the publication actually highlights this link between Tehlirian and ASALA/JCOAG assassinations. Signed by 'Armenian Revolutionary Federation, Varantian Gomideh, Los Angeles', the foreword mentions the 'recent trials of Armenian political prisoners around the world who have, as Tehlirian did in 1921, forced the Armenian Cause onto the streets and courts of world capitals'. Tehlirian's trial, it is suggested, was the first case during which the horrors of 1915 were 'introduced as evidence to justify political violence in the face of neglect by world governments' and concludes: 'Over six decades later, those same facts – compounded by Turkish denials– have motivated a new generation of survivors to use a variety of means in seeking justice and retribution for the Armenian people' (*ST* vii). This formulation of 'a new generation of survivors' is a nod towards the

⁴² Oktay Ekşi, 'Berlin'de hakim var mı?', *Hürriyet*, 1 March 2005, <http://webarsiv.hurriyet.com.tr/2005/03/01/606954.asp>.

⁴³ The timing of the publication of the Armenian Revolutionary Federation's English edition of the transcript of Tehlirian's trial, the year 1985, is significant in this sense. Indeed, the foreword, signed by 'ARF, Varantian Gomideh, Los Angeles' mentions the 'recent trials of Armenian political prisoners around the world who have, as Tehlirian did in 1921, forced the Armenian Cause onto the streets and courts of world capitals' (*ST*, vii).

new assassins is noteworthy, as it evokes a heritage of haunting, a lineage of haunted hunters.

An even more sinister return of the 1921 Berlin drama may have been the assassination of Armenian-Turkish journalist Hrant Dink in 2007. Fethiye Çetin, the lawyer representing Dink's family in the murder trial, noticed in the case file that Yasin Hayal, an ultranationalist young man arrested soon after the killing and eventually convicted of soliciting Dink's murder, had been obsessed with the assassination of Talât and the acquittal of his killer. Several dark figures who were implicated in Dink's assassination were all founding members of a certain Talât Pasha Association according to the case file of another trial.⁴⁴ Dink was murdered close to his office on the sidewalk of a busy, central street in Istanbul, in broad daylight, shot at the back of his head – just like Talât. Such parallels and resonances between the two killings have been noted in the Turkish print media, including by historian Taner Akçam, who suggests that Dink's murder was vendetta for Talât's assassination.⁴⁵ Without a grasp of the political background of Dink's assassination, this suggestion rings, at best, absurd: Why should an Armenian-Turkish journalist, human rights defender, indefatigable peacemaker be assassinated in vengeance for the killing of an Ottoman statesman 86 years before? What kind of trans-historical will could carry out such a mission? Would it not require a conspiracy of fantastic proportions and reach, a trans-generational commitment to hostility, an omnipresent consciousness and tenacity of feud and enmity? Either that, or more likely, it would take a more modest orchestration of hauntings, a conjuration of ghosts for maximal symbolic effect. Indeed, the suggestion that the two assassinations are linked only rings true in relation to the suspected 'deep state' involvement in Dink's murder – something I explore in detail in the next chapter.

On the day of his funeral, Hrant Dink was commemorated by hundreds of thousands of people. Some had pinned on their chests a funeral badge that seemed standard at first glance: a portrait of the deceased with his dates of birth and death.

⁴⁴ Most prominent among these people were lawyer Kemal Kerinçsiz and retired brigadier general Veli Küçük who were later tried and convicted in the Ergenekon trial for other offences (see Chapter 5). They had led the campaign of persecution against Dink prior to his assassination by a 17-year-old.

⁴⁵ Taner Akçam and Neşe Düzel, 'Ermeni olayında Atatürk'ü izleyelim', *Taraf*, 14 March 2012.

On second take, one realised that the badges were not so standard: the span of Dink's life was represented as '1954-1915'. This particularly powerful utilisation of the rhetorical device of *hysteron proteron*, the inversion of ordinary temporal order, combined with the depiction of now as then is exemplary of the strange logic and temporality of haunting. The time of haunting is time out of joint, as Jacques Derrida reminds us with reference to *Hamlet*. For Derrida, haunting helps us see through the 'doubtful contemporaneity of the present to itself'. What he calls the 'spectrality effect', 'consists in undoing this opposition, or even this dialectic, between actual, effective presence and its other' (2006: 48). The temporal rupture that was depicted on those funeral badges had various immediate resonances, ranging from the recognition of the state-sponsored nature of the killing to the understanding that Dink had been eliminated for threatening to destabilise the official version of history.

In the *Spectres of Marx*, Derrida puns on ontology to propose 'hauntology' as a way of knowing that involves, but is more than, and is indeed the condition for the possibility of ontology. He refers to this concept almost as if in jest, without spelling it out as a methodology in detail, though he writes of the necessity of introducing 'haunting into the very construction of a concept. Of every concept' (202). And yet, his book as a whole can be read as an exercise in hauntology – a rethinking of the notion of inheritance, a deconstruction of (Marxist) ontology and its determinations of the political by pursuing the logic of spectrality. Thus the foregoing could be read as a modest attempt to trace something like a hauntology of political violence as they are conjured and perpetrated in trials. I continue with this effort in the following chapter, exploring some of the methodological difficulties around addressing political violence, both legally and conceptually. If hauntology is to some extent a particular attunement to ghosts that assists us in formulating a sense of 'how the past lives indirectly in the present, inchoately suffusing and shaping rather than determining it' (Brown 2001: 145), then the law is a particularly blunt instrument for such an effort, as I hope to show with my discussion of two contemporary political trials from Turkey, the Hrant Dink murder trial and the Ergenekon trial. In studying political trials where the crimes under concern have been perpetrated by the state itself, we can both diagnose the failures

of the legal imagination in grasping political violence, but also understand something about the ‘magic of the state’ (Taussig 1997). If hauntology is required ‘to account for the processes and effects of ... metaphysicalisation, abstraction, idealisation, ideologisation and fetishisation’ (Derrida 1999: 244-45), then perhaps the study of the ghosting of the political that we encounter in political trials, especially those concerning state crimes, may afford privileged insight into what may be understood as the fetish of the state.

5

the state of conspiracy turkey's deep state trials

In Turkish popular parlance, the phrase 'deep state' refers to powers operating with impunity through and beyond the official state structure. The deep state is considered to be a state within the state, a network of illegitimate alliances crisscrossing the military, the police force, the bureaucracy, the political establishment, the intelligence agencies, mafia organisations and beyond; lurking menacingly behind the innumerable assassinations, disappearances, provocations, death threats, disinformation campaigns, psychological operations, and shady deals of the past several decades. The currency of such a phrase points to a public consensus around the existence of non-democratic leadership, state-sponsored extralegal activities, state protection and perpetuation of particular forms of political violence, and more generally corruption within state institutions.

Recently, a number of criminal trials brought the deep state into Turkey's courtrooms. This chapter focuses on two of these: the Ergenekon trial of 2008-2013 and the ongoing trial concerning the assassination of Armenian-Turkish journalist Hrant Dink in 2007.¹ The former is a political trial by choice and for expediency, a 'classic political trial' in Otto Kirchheimer's taxonomy, as it proved to be the

¹ At the time of writing, both of these trials are still in progress. The Ergenekon case is at the appeals stage. The Dink murder case is currently being retried, after the verdict of the first trial was appealed. My reading in this chapter is based on the case files of the first (pre-appeal) trials in both cases.

government's explicit attempt to eliminate its political foes. The latter involves a common crime committed for political purposes and corresponds to what Otto Kirchheimer defines as a 'political trial by necessity': several agents behind Dink's assassination, including the hitman, were apprehended by security forces and therefore had to be prosecuted. These differences between the two trials are in some ways analogous to the different ways in which each implicates the deep state. Although the deep state seems to be inscribed all over Dink's assassination and the ensuing criminal process, the trial is only accidentally, not officially a 'deep state trial'. To the contrary, the entire process has been structured by its disavowal. The Ergenekon trial, on the other hand, purports to grab the deep state by the horns: the indictment and the judgment explicitly claim that the object of prosecution, the 'Ergenekon Terrorist Organisation', is synonymous with what has come to be known as the 'deep state' in the popular imaginary. Although officially unacknowledged, there are important links between the two trials, including clusters of evidence and certain key figures.²

My reading of these two cases revolve around two related themes: the performative production of the state in trials involving state crimes, and the problem of producing knowledge about something as vague as the deep state. The latter is as much a problem for critical thought as it is for the law. While the phrase certainly has an exchange value in *vox populi*, 'deep state' operates as a known unknown or unknown known of Turkish political life.³ It communicates something, its utterers and hearers often seem to have a loose consensus as to what it may signify, and yet it is extremely difficult to pin down what exactly it is. The Dink murder case and the Ergenekon trial demonstrate that criminal trial has its own way of reifying this notion, in a bizarre amalgam of fact, fiction, fantasy, and disavowal. What yields the performative production of the state in the scene of the trial is

² These crossovers are quite significant, so much so that the lawyers representing the Dink family have advocated for several years, albeit unsuccessfully, for the Dink murder case to be integrated into the Ergenekon prosecution.

³ Similar terms seem to be in use elsewhere. I am told that 'para-state' signifies comparable structures of non-transparency in Greece. Since Hosni Mubarak's fall in February 2011, and more frequently since the military coup of July 2013, English language reports have been referring to Egypt's 'deep state'. Occasional references to Russia's 'deep state' are also found in political analyses and commentaries.

neither the accuracy of the inquisitorial process, nor an efficacious distribution of liability, but rather the failure of the legal machinery and imaginary to satisfactorily address the deep state. At times engineered and highly convenient, these failures crystallise the conscious and unconscious legal investments into an idea of the state. The political, then, emerges in these trials as an amalgam of expediency and fantasy, convenience and fetish.

The chapter begins with a brief and inevitably incomplete institutional history of the deep state, in an initial attempt to orientate the reader to its specifically Turkish connotations. Political theory provides a number of conceptual frameworks for locating and explaining the dynamics invoked by such a phrase. However, anthropologists of state have emphasised that these frameworks are incomplete without a consideration of the affective investments in the notion of the state (Navaro-Yashin 2002; Aretxaga 2003). I take this suggestion seriously in my reading of the two trials and try to identify the governmental rationalities as well as the irrationalities that combine to enact the state through the legal procedure. The concern with the problem of knowledge production pertaining to the deep state permeates the entire chapter, based on the premise that ways of knowing the political are intimately tied to ways of reifying it (Abrams 1988). In Pierre Bourdieu's words, the state 'thinks itself through those who attempt to think it' (1994:1). In this sense, the coincidence of the constative (cognitive) and the performative takes on a distinct significance vis-à-vis 'knowledge' of the (deep) state. I find that 'conspiracy' proves a suitable name for this coincidence in the phenomena and the trials under consideration here. The relevance of the notion of conspiracy will, I hope, become clearer as my discussion in this chapter progresses, but to foreshadow the connections: the attempt to produce knowledge of the deep state is to necessarily risk engaging in conspiracy theorising, while the way in which such knowledge is produced or disavowed (or both) in the two trials I discuss here can be understood as amounting to a conspiracy or complicity with the deep state. This is why I conclude the chapter with a consideration of some of the ways in which one can attempt to know otherwise, so as to effect a rupture in the melding of the performative and the constative, through counter-mobilising law's archive in a counter-conspiracy that disinvests from stately fantasies of sovereignty.

four units and an accident: a brief history of turkey's deep state

The obscure notion of the deep state has served and continues to serve as occasion for myriad conspiracy theories. When divorced from an institutional and historical analysis, the very concept sounds less than credible. The kind of activities and alliances it refers to has to be understood against the background of Turkey's extended history of military tutelage (Söyler 2013), its military coup tradition (Ünver 2009) and the special privileges of unaccountability and impunity that the army has enjoyed throughout the republic's history, up until very recently.⁴ The military has traditionally been regarded as the central command of the Turkish deep state. In turn, the military coups that have marked the country's history are often interpreted as periods during which the state became synonymous with the deep state through the suspension of the veneer of parliamentary democracy. The paradigmatic example is the September 1980 coup d'état which resulted in the adoption of a new, entirely state-security centred constitution that is still in effect; but the interpretation is also relevant for the military coups of May 1960 and March 1971, the so-called postmodern coup of February 1997, the e-coup attempt of April 2007, and the 'judicial coup' attempt of 2008.

⁴ Arguably, the last years of the current Justice and Development Party (AKP) government have witnessed the consolidation of an appearance of representative democracy, owing to a series of 'purges' aimed at tackling military tutelage, which in turn is often understood to be the sole source of the wide range of phenomena evoked with the phrase 'deep state'. And yet, as I propose in this chapter, the deep state should be understood not as a field of measurable deviance, the gradual elimination of which will lead to democratisation (cf. Söyler 2013), but rather as a particular amalgam of governmental rationality and fantasy that perpetuates a state tradition. Unlike various recent analyses that focus on the military as the one and only source of the problem of the deep state, my approach is able to address the recent episodes in Turkish politics whereby the phantom of 'the state within the state' continues to hover around in new guises. One such guise is the 'parallel state', formulated and vehemently denounced by Prime Minister Tayyip Erdoğan since members of the police force (allegedly part of this 'parallel state') exposed a number of governmental corruption scandals on 17 December 2013. The banal irony here is that the so-called 'parallel state' was originally instituted by the AKP government itself. The current referent of the incriminating phrase, Pennsylvania-based imam Fetullah Gülen's Hizmet movement, used to be a key constituent of the coalition that makes up the AKP. Installed and encouraged to organise within the police and the judiciary, the Gülen movement was very effective in carrying out AKP's purge of military influence over politics. The deep state is supposedly eliminated, but now that Erdoğan's old ally has turned into his arch-nemesis, long live the parallel state. Yet another new guise of the deep state can be traced in the AKP government's recent legislation of new forms of institutional non-transparency, especially its manoeuvres to restructure the intelligence agency. All of these seemingly 'new' developments can be seen as a perpetuation of politics as usual.

Against this background of military tutelage, historians, investigative journalists and commentators attempting to get a more credible hold on the nebulous concept of the deep state tend to focus on state institutions that are considered to be conducive, due to their structural non-transparency, to the continuation and prospering of such activities and alliances. Such focus on institutions rendered unaccountable by design yields a relatively long history of the Turkish deep state, stretching beyond the republican era to a unit established by the Committee of Union and Progress during Ottoman rule. This is the Special Organisation (*Teşkilat-ı Mahsusa*, SO), which has been identified as the forerunner of Turkey's contemporary deep state (Belge 1998). The unit was established sometime between 1911 and 1913 (Criss 1999: 95), and although it is often referred to as a secret service in the literature, it may be more appropriate to define it as 'an early type of unconventional warfare organisation' whose 'operations included the recruitment, training, and supervision of armed groups tasked with conducting asymmetric warfare to weaken enemy morale and fighting strength' as well as engaging in small-scale intelligence activities (Safi 2012: 89). While the military division was responsible to the Minister of War, Enver Pasha, the unit also included a civilian division that engaged mainly in ideological and propaganda activities and reported to the Minister of Interior, Talât Pasha. Notably, the SO is considered to be the key operational structure behind the Armenian Genocide, as it incorporated and mobilised criminal gangs under military direction (Akçam 2007, 2012; Dadrian 1993).⁵ The organisation's capacity for such semi-official activities facilitates the Turkish state's continuing denial of allegations of genocide.⁶

In the republican period, a key moment of the institutional history of the Turkish deep state is commonly identified as the establishment of the Special Warfare Department (*Özel Harp Dairesi*, SWD) in 1953 in line with NATO's anti-

⁵ Here we can trace yet another ghostly link between the Tehlirian trial and the Hrant Dink murder trial, another clue of the strange spectral operations of political violence.

⁶ Polat Safi (2012) provides an insightful review of the literature on the Special Organisation, focusing his attention on the significant polarisation in the field of historical research on this subject, between chauvinistic glorification of the organisation as an anti-imperialist revolutionary mission on the one hand, and accounts offered by revisionist critics of the Turkish 'state tradition' on the other hand. I'd suggest that such polarisation can be seen as a testament to the currency of the unit's ideological and political significance.

Soviet measures. This was a secret army that directly reported to the Chief of General Staff and recruited paramilitary forces. The aim of this unit, as later acknowledged by military authorities, was to build an infrastructure of civilian-military mobilisation against a possible Soviet occupation. As with similar NATO units in other countries (Ganser 2005), in practice, the activities of the SWD was not limited to an anticipated Soviet occupation but involved operations against those identified as 'internal enemies'. Around 1973-74, when social democrat Prime Minister Bülent Ecevit found out about the existence of the SWD, he spoke of 'an organisation that is within the state but acts outside the knowledge and control of the state', and expressed his suspicion of the unit's involvement in assassinations and massacres targeting communists. The visible civilian actors behind this kind of political violence were often militants from the far-right ultranationalist organisation Grey Wolves. A prosecutor, Doğan Öz, who was the first person to research into and report to the prime minister on SWD's deployment of Grey Wolves as its 'civilian elements' in such cases of political violence, was himself assassinated in early 1978. Around the same time, an MP from Ecevit's party proposed to make a motion in the parliament to enable investigation into SWD's involvement in such cases. When the party rejected the proposal, Ecevit began to deny the existence of *kontrgerilla*, and claimed not to remember ever speaking of it (Akçura 2006: 20). The culmination of political and state violence in the 1980 coup d'état effectively collapsed the distinction between the state and the deep state. Years later, in November 1990, Ecevit regained his memory and brought up the issue again in more detail during an interview, triggering public debate and renewing suspicions regarding the unit's role in various significant past instances of political violence.

These suspicions were neither confirmed nor repudiated by any official investigation, instead continuing to hover over Turkey's political life as open secrets. During the 1990s, the SWD's status, structure and alleged activities were brought before the parliament a total of 27 times, none leading to an actual parliamentary inquiry (Kılıç 2008: 299). The timing is not coincidental. It was in the 1990s, after the end of the Cold War, that most of the other NATO stay-behind units in Europe were legally purged (Ganser 2005). On the other hand, the failure

of official investigations in Turkey can be explained by two key factors. First, the Turkish secret army apparently differed from other secret NATO armies in Europe in that it was relatively autonomous vis-à-vis central NATO command.⁷ Second, the Turkish military's 'low intensity war' against the guerrillas of the Kurdistan Workers' Party (PKK) would prove to greatly benefit from an obscure structure that can operate without accountability. Thus, instead of a legal purge, the SWD was restructured into a military division and renamed Special Forces Command (*Özel Kuvvetler Komutanlığı*, SFC) in 1991, with the new principal task of counter-terrorism. This also helped to dispel the allegations and suspicions regarding the SWD's involvement in extralegal activities. Even though the restructured unit seems to be more integrated into the official bureaucracy of the Turkish Armed Forces, it retains its civilian constituents and perpetuates a pattern of non-transparency. The SFC has, for example, come under suspicion for the Hrant Dink assassination (Çetin 2013: 87-107; 270-74).

A unit that emerged around the same time and was, for a while, virtually synonymous with the deep state is JITEM, acronym for 'Gendarmerie Intelligence and Counterterrorism Group Command'. According to one theory, JITEM supplemented the restructured SWD by continuing to provide cover for unaccountability and impunity.⁸ This unit is alleged to be responsible for the majority of the thousands of disappearances and extrajudicial executions that peaked during the 1990s, primarily targeting Kurds in the southeast of Turkey. JITEM confessions describe having summarily arrested, tortured and executed members of the public who were suspected of supporting the PKK. There are also allegations regarding the unit's involvement in illegal arms trading and drug

⁷ Italy's former president and a self-confessed founder of the Italian NATO stay-behind unit Gladio, Francesco Cossiga, recently stated that an organisation resembling Gladio was formed in Turkey following World War II, though it remained independent from the central Gladio network in Europe, keeping NATO out of Turkey's internal affairs (Nur Batur, 'Türk Gladiosu Bağımsız Bir Konumdaydı', *Sabah*, 17 February 2009). Former Chief of General Staff Necdet Üruğ corroborates this view. In an interview he gave in 2000, Üruğ describes Gladio as 'a military unit in NATO member countries', and upon being asked whether Turkey as a NATO member country also has a Gladio unit, he answers: 'No, we don't have Gladio. We have the Special Warfare Department. It is not organised in the same way' (Düzel 2001: 203). Throughout this chapter, translations from cited Turkish sources are mine.

⁸ Ahmet İnel, 'Özel Harp Dairesi'nden Jitem'e', *Radikal İki*, 7 December 2008, http://www.radikal.com.tr/radikal2/ozel_harp_dairesinden_jiteme-911847.

trafficking in the region. Although JITEM has for many years been officially disavowed and said to have ‘never existed’, an abundance of testimonials⁹ and records in the last decade, including official payslips and parliamentary reports explicitly referring to the unit, corroborate its existence. It is a ghostly institution: there, but not there. The testimonials draw a portrait of the organisation as one that is specifically geared towards carrying out the ‘dirty work’ of the war –intelligence, interrogation and extrajudicial executions– with absolute impunity.

The very style and structure of deep state plots render them almost immediately recognisable to a public that has become all too familiar with them. However, such familiarity does not alleviate the epistemological problem concerning the deep state. Official secrets, official denials, cover-ups, suppression or outright elimination of witnesses or researchers, psych-ops, and barrages of misinformation all weave a web of opacity, casting the deep state as a wilderness of mirrors, and endless fodder for conspiracy theories. After all, conspiracy theories may be seen as so many attempts ‘to give form to, and thus exercise a certain amount of control over, a fearful, ghostly reality of violence’ (Aretxaga 2005: 197). However, there was a key moment in the mid-1990s, at the height of the dirty war against the PKK, when a justification offered itself up for a wide array of suspicions, briefly illuminating the murky depths of the Turkish state in a flash of lightning. It took the form of a car accident.

On 4 November 1996, a speeding Mercedes crashed into a lorry in the town of Susurluk. The passengers in the car included Sedat Bucak, parliamentarian and the leader of a Kurdish clan in close cooperation with the Turkish authorities in the war against the PKK, providing about 2000 of the notorious paramilitary ‘village guards’. Then there was Hüseyin Kocadağ, the director of the Istanbul Police Academy and former Deputy Police Chief of Istanbul. A third passenger was Abdullah Çatlı, who was wanted by not only the Turkish police for alleged participation in the massacre of seven members of the Turkish Labour Party in

⁹ Most importantly those of ‘confessors’ Abdülkadir Aygan and İbrahim Babat; the statement given to the Parliamentary Commission on Susurluk by gendarmerie intelligence officer Hüseyin Oğuz; and recently the statement of Ergenekon defendant Colonel Arif Doğan who admitted to having founded the unit.

1978,¹⁰ but also by Interpol for his 1982 escape from a Swiss prison where he had been held on drug smuggling charges. Of this unholy trinity of warlord parliamentarian, police chief and nationalist mafia, only the first survived, and he claimed a complete loss of memory. At the time of the accident, the mafia boss Çatlı was found to be carrying diplomatic passports and a licence to carry weapons, the latter bearing the original authorisation signature of Mehmet Ağar, the then Minister of Interior. This alone crystallised something of the essence of what the phrase ‘deep state’ tries to communicate: the documents had been forged, but the signatures were authentic. Fourteen individuals linked to the so-called ‘Susurluk gang’ were tried on charges of organised crime, though efforts to bring to light the entire set of connections and culpabilities failed spectacularly. The trial came to a conclusion in 2001, but neither addressed the full range of implications, nor satisfactorily ensured prosecution.¹¹ The Ergenekon trial picks up where the Susurluk process left off, according to its prosecutors and judges. The claim is seemingly corroborated by the incorporation of some key figures from the Susurluk process into the Ergenekon trial as defendants. To what extent the trial succeeds in illuminating the deep state is something I discuss later on in this chapter.

conceptualising the abysmal state

Institutional histories pursued along the lines I have sketched out above have been and can continue to be helpful in terms of providing us with something more or less solid to work with in addressing as vague a notion as the deep state. Perhaps their most important function is to show us what kind of bureaucratic structures allow the monopoly of violence to be distributed beyond the bureaucracy. They further elucidate something like a history of the state’s self-stylisation, as it makes and

¹⁰ At the time of the massacre, Abdullah Çatlı was a member of Grey Wolves, the ultranationalist youth organisation that was allegedly recruited by the SWD’s as its ‘civilian elements’ in acts of political violence targeting communists.

¹¹ Former Minister of Interior Mehmet Ağar and several other Susurluk gang members have recently been prosecuted again as part of an investigation concerning the extrajudicial executions of the 1990s. Currently, the trial pertains to only one execution, though it is likely that other cases will be integrated into it along the way. In the end, especially owing to the trial testimony of one of the defendants, a repentant police officer who refers to himself as a ‘murderer’, this relatively minor process may prove to be valuable in elucidating a key moment of the deep state when it was allowed to run rampant at the height of the war against the PKK.

remakes itself in the counter-image of its imagined or actual enemies. In the case of Turkey, the four units, from the Ottoman Special Organisation to the NATO stay-behind unit to Special Forces Command and JITEM, provide a clear picture of the key categories of 'internal threat' that were prioritised in different periods to such an extent as to instigate bureaucratic reorganisation in order to allow the redistribution of extralegal violence: non-Muslim minorities, communists, Kurds. Thus, institutional histories could allow us to inquire into the transformations that the identity of the state (and by implication, the law, the concept of citizenship, etc.) undergoes as it securitises itself according to its prioritised categories of enmity.

However, such an institutional focus may also create a disorientation, a misconception of the deep state as solely a unit within the state, a hub of extralegality within a larger context of constitutional operation, a rotten spot that can be carved out and discarded, isolated and thus easily purged. In the aftermath of the Susurluk incident, one of the points that the more theoretical approaches insisted on was precisely that the deep state *is* the state. The editorial preface for the critical journal *Birikim*'s 1997 special issue on 'the state in Turkey' suggested that the *état de droit* and the deep state are like the solid and liquid forms of the same matter' ('Türkiye'de Devlet' 1997: 16). In the same issue, Ömer Laçiner (1997: 18) described the deep state as not so much a special unit within the state system, which carries out and commissions criminal activities and conducts secret operations, but rather institutions and establishments that operate on the basis of the understanding that the state will inevitably engage in such activities. Tanıl Bora (1997: 53) advocated for a technical rather than moralising terminology to refer to the kind of operations exposed in the Susurluk accident, because 'although such activities are indeed "dark", "dirty" and "horrific", they are activities that are part of the nature of the modern state apparatus – therefore they are normal. In the case of our particular nation-state these natural organs are especially well developed'.

This warning against Turkish exceptionalism, repeated by other thinkers responding to the Susurluk accident (i.e. Laçiner 1997; Mutman 1997; Sancar 2000; Sabuktay 2010), is an important point to heed. The covert and extralegal functions of the Turkish state over the past several decades have to be understood as part of

both a global historical context, and a widespread, if not universal, governmental rationality. Thus, on the one hand, the period we can identify as the SWD/NATO stretch (1953-1991) cannot be divorced from the general context of the Cold War and similar extralegal formations in other European countries (cf. Ganser 2005). Turkey's 1980 coup d'état, in terms of its economic and political objectives (Ahmad 1981), finds its precursors in the Southern Cone coups of the mid-1970s (cf. Klein 2007). Likewise, the extralegal methods utilised by the Turkish state during the so-called 'low-intensity warfare' against the Kurdish insurgency are comparable to state-sponsored terror that goes under the name of anti-terror measures across the world: Britain's deployment of the Military Reaction Force against the IRA in the early 1970s (Ware 2013); Spain's grotesque tactics in the Basque conflict (Aretxaga 2000); Argentina's 'dirty war' (Suárez-Orozco 1992); state-sponsored terror in Guatemala (Afflitto 2000) and so on.

On the other hand, the governmental rationality operative in such activities can be identified very generally in terms of *raison d'état*, whereby the legitimacy of a state's activities is solely grounded in the preservation and perpetuation of the state itself. The self-referential legitimation means that according to this rationality a state's activities should not be subject to any external law – positive, natural, moral, nor divine. Offering a genealogy of *raison d'état* in his 1977-78 Collège de France lectures, Michel Foucault (2007) discusses it as a late-sixteenth century innovation that became the dominant governmental rationality in Europe in the seventeenth century through to the early eighteenth century. Foucault points out that in *raison d'état* the state serves both as the principle of intelligibility of an already existing institutional reality, and as its objective. In other words, *raison d'état* both explains the state as a given, and functions for its protection and perpetuation. Although Foucault discusses *raison d'état* in the context of a particular historical period, locating it in between pastoral power and liberalism (Foucault 2008), he emphasises that these rationalities neither exist in pure form, nor are distributed discretely and consecutively across history. Rather, in different periods and settings, we find particular combinations of the various kinds of governmental rationalities (2007: 4-12). Foucault does not provide a thorough account of how different governmental rationalities may coexist at any given

time,¹² but his characterisation of *raison d'état* as it crystallised during the particular period of its dominance is still useful.

In Foucault's account, the relationship between *raison d'état* and the sphere of legality is one that is determined according to the convenience of the former:

[*R*]aison d'État, which by its nature does not have to abide by the laws, and which in its basic functioning is exceptional in relation to public, particular, and fundamental laws, usually does respect the laws. It does not respect them in the sense of yielding to positive, moral, natural, and divine laws because they are stronger, but it yields to them and respects them insofar as, if you like, it posits them as an element of its own game. ... However, there will be times when *raison d'État* can no longer make use of these laws and due to a pressing and urgent event must of necessity free itself from them... [i]n the name of the state's salvation. It is this necessity of the state with regard to itself that, at a certain moment, will push *raison d'État* to brush aside the civil, moral, and natural laws that it had previously wanted to recognise and had incorporated into its game. (262)

So the field of legality is never a proper external limitation to *raison d'état*, but rather always already accessorial – overridden and suspended if need be.¹³

However, the question of political economy that Foucault discusses briefly in his exploration of this governmental rationality is important to keep in mind in terms of 'externality', lest we get carried away with the emphasis on self-referentiality. It was the very context of mercantilism in the 17th and 18th centuries that gave 'meaning to the problem of the state's expansion as the principle, the main theme of *raison d'État*' (292):

[the major states] assert themselves, or anyway seek to assert themselves in a space of increased extended and intensified economic exchange. They seek to assert themselves in a space of commercial competition and domination, in a space of monetary circulation, colonial conquest, and control of the seas... (291)

¹² At times it is as if Foucault is taken by the chronologic of his genealogies to such an extent as to forget his warning about combinations. This may be one reason why his formulation of 20th century exercises of the sovereign right over life and death in terms of an always already biopolitical 'state racism' (2003: 257-63) doesn't quite hit the nail on the head.

¹³ Notably, Foucault identifies the *coup d'état* as the epitome of the absolute priority of *raison d'état* vis-à-vis the field of legality. In the *coup d'état*, *raison d'état* asserts itself unequivocally. The *coup d'état* is 'the self-manifestation of the state' (ibid.) It is interesting to consider in this light the analysis one often finds in Turkish political literature to the effect that the country's relatively frequent *coups* are precisely moments when the deep state and the state become one.

The economic competition between states thus fuelled a governmental rationality geared primarily for the perpetuation and prosperity of the state as a singular unit in that field. Although Foucault does not investigate it much further, political economy can provide an analytical lens with which one may explore the question of combinations through a Foucauldian lens, that is, how *raison d'état* may continue to operate in a post-mercantilist global economy of nation-states in which (neo)liberalism is the dominant governing rationality.

When the Susurluk accident indisputably exposed an alliance between politicians, mafia and the police, and implicated a plethora of further illegitimate relations and activities, government spokespersons and representatives of certain state agencies were forced to publicly address the situation. The framework that emerged in the speeches of those in positions of power and implicated in the scandal was unmistakably one of *raison d'état*, as they spoke of the legitimate defence of the state, the necessity to secure the perpetuity of the state,¹⁴ the honour of sacrificing one's own and others' lives for the sake of the state,¹⁵ and the like. The threat posed by the Kurdish insurgency to the Turkish state ostensibly justified just about anything from the provision of official protection for a convicted drug trafficker also wanted for his role in a massacre, to extrajudicial executions. Indeed, *raison d'état* seemed to be so commonsensical as a basis of legitimation that even opposition politicians who were keen to capitalise on the implication of their rivals in the scandal reverted to it (Sabuktay 2010: 101). For example, one party leader who claimed to have documentary evidence incriminating the deputy prime minister reasoned:

The state may carry out covert operations through its secret channels of intelligence. Certain types of structures may be instituted within the intelligence service, the police, and the armed forces. This is of course understandable. However, no one has the right to carry out these secret and covert operations and use the power of the state for their private gain while claiming to protect the lofty interests of the state.¹⁶

¹⁴ Serhat Oğuz, 'Çiller'den ilginç açıklama', *Milliyet*, 9 November 1996.

¹⁵ 'Çiller: Bucak kahraman', *Milliyet*, 23 November 1996; 'Çiller: Abdullah Çatlı şerefli', *Milliyet*, 27 November 1996.

¹⁶ 'Yılmaz: Belgelerin adresini gösterdim', *Milliyet*, 14 November 1996.

Thus the problem was not the state's involvement in extralegal operations, but rather, the use of such operations for private benefit. Had drugs trafficking, arms trafficking, extrajudicial executions and other similarly illegal activities been carried out by agents of the state solely in the service of the lofty interests of the state, no one would be blamed. This is *raison d'état* pure and simple: the legitimacy of covert operations is not decided on the basis of their legality or illegality, but rather on the basis of a distinction between interests of the state versus private interests (Sancar 2000: 94-101).

Turkish political scientist Ayşegül Sabuktay (2010) reflects on the Susurluk incident from four different theoretical prisms, or four ways of conceiving of the relationship between law and politics, and compares the outcomes: rule of law (Weber, Habermas), pure theory of law (Kelsen), *raison d'état* (Machiavelli),¹⁷ and Schmitt's theories (i.e. of the exception, friend/enemy distinction, the decision and the state of emergency). Sabuktay suggests that except for Kelsen's, all these theoretical perspectives provide some way of addressing the extralegal activities of a state, even if only to identify them as illegitimate.¹⁸ Kelsen's pure theory of law allows no scope whatsoever for the state itself to operate extralegally. Sabuktay suggests that it can only explain away such activities by incriminating individual state actors. Because the state is equated with the existing system of legality in this perspective, illegal operations such as those exposed by Susurluk can only be addressed by performing a clean separation between the state and those who (purport to) act in its name. Sabuktay suggests that the criminal legal response to the Susurluk scandal, namely, the prosecution of fourteen individuals, was Kelsenian in its essence, as it was an attempt to incriminate individuals as distinct from the state. However, in a strictly Kelsenian operation, such a prosecution would have to seek to illuminate wider patterns of corruption within the state, resting

¹⁷ In identifying the *raison d'état* doctrine with Machiavelli, Sabuktay is following Friedrich Meinecke (1984). However, Foucault (2007: 242-245) argues that such identification is mistaken, as *raison d'état* proper cannot be found in Machiavelli and is often mistakenly attributed to him.

¹⁸ According to Sabuktay, in a rule of law perspective, such activities will prove illegitimate, either on the basis of Weberian formal rational legitimacy or Habermasian democratic legitimacy. In a *raison d'état* perspective, such activities may be deemed necessary if they are understood to serve 'national interest'. In a Schmittian approach, the legality or illegality of the state's extralegal activities will be based on a political decision.

satisfied only with a wholesale purge of illegality. Sabuktay's diagnosis here is therefore not fully accurate, though her emphasis on individual incrimination may assist us in beginning to formulate some of the complications involved in trials concerning state-sponsored crimes.

A trial concerning (and involving) the extra-legal activities of a state or state crimes is a particular kind of political trial. Such activities stem from certain political decisions that operate beyond the sphere of legality and override the rule of law, which is idealised in liberal democracies as the sole basis of the legitimacy of political decisions. The criminal prosecution of extra-legal activities is meant to subject the entire affair to the rule of law. This dynamic can be stage-managed to maximal effect as a grand 'return' to the rule of law in transitional justice scenarios (trials by fiat of successor regime) or in trials that involve a jurisdictional remove (e.g. international tribunals). Both scenarios allow at least the appearance of a conflict between the prosecuting authorities and the defence concerning what a state's relation to legality ought to be. Thus in a felicitous prosecution in either type of scenario, the trial may serve to performatively enact the very rule of law to which it purports to submit.

However, in the absence of either a transitional framework or jurisdictional remove that allows for a high enough definition of the line that separates the prosecutors and the prosecuted, we have a particularly complex political trial scenario. When state crimes come before the law of the very state suspected of criminal activity, the state becomes both the law and its transgression (Aretxaga 2000: 60). The blurring of the distinctions between the prosecution, the defence and the court as arbiter in trials involving the public prosecution of a state's own crimes produces a surplus that cannot be easily managed. This is both a surplus of meaning and an affective surplus. There are, of course, various typical strategies of containment: In trials of necessity (e.g. the Susurluk and the Hrant Dink murder trials) the court will likely function on a damage-limitation principle. For this, the individuals on trial will be incriminated to the minimum extent necessary to exculpate state institutions. In trials of expediency (e.g. Ergenekon) the prosecuting and judicial authorities will attempt to clearly delineate the separation between themselves and those on trial. For this, the individuals on trial will be incriminated

to the maximum extent possible to establish the legitimacy of the prosecuting and judicial authorities. But even with such common strategies of dissociation and hyperassociation, the surplus cannot be fully managed.

On a more general level, this surplus is the product of the exposure of the ultimate instability of the opposition between *raison d'état* and the rule of law. Admittedly, in doctrine, the two concepts of *raison d'état* and the rule of law seem to be diametrically opposed as bases of governmental legitimacy. This opposition is particularly pronounced in the genealogies of the two concepts.¹⁹ In its inception, the idea of the rule of law is understood as an attempt to impose external limitations on *raison d'état* by recourse to law, namely 'juridical reflection, legal rules, and legal authority' (Foucault 2008: 9). However, the history of the relationship between *raison d'état* and the rule of law may be more complicated than the doctrinal origins suggest.²⁰ Reflecting on the co-existence of and the tension between *raison d'état* and rule of law, Turkish legal scholar Mithat Sancar (1997; 2000) suggests that the two doctrines are not as incommensurable as they may seem. Sancar identifies the different ways in which a combination between the two can be brought about: In a normativist interpretation of the rule of law, *raison d'état* can be incorporated into legal norms. In an approach that may be referred to as the '*raison de l'état de droit*', *raison d'état* can be rendered the organising principle of the constitution (1997: 84-85). Sancar further proposes that the entire history of the bourgeois constitutional state can be read as the history of its marriage to the doctrine of *raison d'état* (85). While opposition is weak and the system has confidence in itself, the rule of law can be foregrounded. But in times of

¹⁹ Foucault notes that the idea of *Rechtsstaat* (the rule of law) developed in the eighteenth century in Germany very much in opposition to *Polizeistaat* (the police state) which in turn was 'the form taken by a governmental technology dominated by the principle of *raison d'état*' (2007: 318). Danilo Zolo's (2007) broader perspective arrives at a similar conclusion, comparing the different historical experiences that led to the formulation of the analogous concepts of the Rule of Law in Great Britain and North America, *Rechtsstaat* in Germany, and *état de droit* in France.

²⁰ This complication can also be traced, albeit somewhat circuitously, in Foucault's genealogy of governmental rationalities. While the emergence of the rule of law doctrine is intimately bound with the attempt to propose an external limitation on *raison d'état*, its proper appropriation within a governmental rationality occurs with liberalism, and only as a principle of internal limitation, that is, solely to do with formal interventions in the economic order. In other words, in liberalism, the rule of law is not an end in itself, but a principle defining the scope of legal interventions by the state in the economy. This shift from external limitation to internal rule regulation can be understood to take the rule of law out of an axis of opposition to *raison d'état*.

crisis or a substantial opposition, a variety of methods can be employed to render *raison d'état* operative (ibid.).²¹

Even though there isn't necessarily a strict opposition between the two principles, in certain contexts it is possible to stage the prosecution of state crimes as a heroic battle of the rule of law against *raison d'état*. However, in trials involving the prosecution of state crimes without a proper jurisdictional or ideological remove, this opposition is at a higher risk of subversion. The blurring of not only the distinction between the prosecuting authorities and the defence, but also the strict opposition between *raison d'état* and the rule of law, creates a field of slippery significations that reveal important clues concerning the legal imagination of the state and the statist imagination of the law. As I will be exploring in more detail in the rest of this chapter, in the Ergenekon trial, this takes the fascinating form of the co-production by the defendants, the prosecutors and the judges of an idea, or perhaps, a fetish of the state, through and beyond what played out as a grand conflict of 'radical difference' between the defendants on the one hand and the prosecutors and the judges on the other. Although this was not a conscious collaboration and the participants were seemingly convinced of an irreducible political conflict, the case file betrays important instances of this co-production of the (deep) state as fetish. In the Dink murder trial, the blurring of the distinctions take the form of a particularly clear exposure of the court's complicity with the very crime it is supposed to pass judgment on. The criminal state rears its head in the form of a logic of dissociation so pronounced that it speaks of precisely the continuity between the crime and the criminal justice process. Notably, 'rupture' comes from outside this enmeshed triangle of defence-prosecution-court, from those participating in the trial on behalf of the victim, in the form of an articulation that is at the same time a proposal for a way of knowing the criminal state beyond the limits of legal and conspiratorial imagination.

²¹ Sancar summarises such methods under three general headings: those that stay within the purview of legality (i.e. partial suspension or relativisation of human rights); those that blur the limits of legality (i.e. state of emergency); and those that dispense with legality altogether (i.e. counterinsurgency tactics such as extrajudicial executions).

the ergenekon trial: the conspiracy to end all conspiracies?

Ergenekon is a sprawling criminal process that began in June 2007 with the police discovery of a cache of hand-grenades in a residential building in a working-class district in Istanbul, following an anonymous tip. The investigation then expanded in myriad directions to include coup plots, bomb attacks, assassination plans, further secret arms caches and the like. The first hearing of the first Ergenekon trial began in October 2008 with 86 defendants. By the time the verdict was passed in August 2013, 23 other indictments had been integrated into this trial, raising the total number of defendants to 275.²² They included retired and active senior and junior military officials, police chiefs, civil leaders, ultranationalist militants, politicians, bureaucrats, journalists, writers, academics, lawyers, businessmen, mafia bosses and small-time gangsters. Only 21 defendants were acquitted in the August 2013 verdict, and most of the others were convicted on charges relating to leadership of, membership in, or aiding an armed terrorist organisation, referred to in the main indictment as the ‘Ergenekon Terrorist Organisation’.

Ostensibly, this is Turkey’s deep state trial. It purports to purge patterns of corruption and illegality within the state. The main indictment and the verdict of the first trial equate the Ergenekon Terrorist Organisation with the deep state. The indictment describes the organisation as ‘a key obstacle to Turkey securing the Rule of Law’, having been ‘active for many years in the country’ as ‘the dark force behind countless actions’, involved in mafia and acts of terror, such as ‘unknown assailant killings of intellectuals’ (Ergenekon Indictment 46-47). It is claimed that the Susurluk investigation shed some light on this organisation, but could not be deepened sufficiently due to the organisation’s influence and power at the time (47). The indictment and the judgment further provide partial histories of the deep state with references to the NATO stay-behind unit and the assassination of the prosecutor who initially investigated the matter. They refer to the purge of NATO-related paramilitary organisations in the early 1990s in other European countries, especially highlighting Italy’s *Mani plute* operation. The prosecutors and the judges thus present the Ergenekon trial as the belated Turkish counterpart to these Europe-

²² There are a number of ongoing trials that are products of the Ergenekon investigation. These trials were not integrated into the main Ergenekon trial for technical reasons, but are legally considered to be part of the Ergenekon case as a whole.

wide clean-up operations. Notably, in the deep state histories alluded to by the prosecutors and judges, there is no mention of the Ottoman Special Organisation.

The English-language coverage of the trial has been dubbing it a ‘conspiracy trial’. In terms of communicating the crux of the prosecution, this is a very good utilisation of the world of associations of ‘conspiracy’ in Anglo-American popular legal culture. However, it is technically incorrect, as there is no conspiracy doctrine as such in Turkish criminal law. There are various formulations in the Turkish Penal Code (TPC) that are comparable to the common law conspiracy doctrine: Listed under ‘crimes against the security of the state, the constitutional order and the functioning of this order’, Article 316/1 regulates that ‘an agreement established by material evidence between two or more persons with appropriate means to commit any of these crimes is punishable by imprisonment for three to twelve years according to the gravity of the intended crime in question’. Another formulation in the TPC that bears an affinity to conspiracy is in Article 220 which defines founding / membership to / aiding and abetting / making propaganda for ‘an organisation formed to commit crimes’. The same formulation in the context of ‘crimes against the state’ is found in Article 314. Individuals can be prosecuted for alleged association with the organisation ‘where the organisation is deemed in its structure, number of members and instruments capable of perpetrating the intended crimes’. In the Ergenekon trial, all defendants are prosecuted under Article 314, in addition to other, mostly inchoate and a few substantive charges.

The mistranslation of Ergenekon as a ‘conspiracy trial’ is a felicitous translation on various levels including but beyond the logic of the laws deployed. The trial itself is widely perceived as a government conspiracy against the secular elite. Those who are suspicious of the governing party AKP’s commitment to secularism have been concerned that Ergenekon is a witch-hunt carried out by the pro-Islam government against the deep-seated secularist establishment whose ranks include the Turkish army. Further, some of the better known defendants happen to be first rate conspiracy theorists themselves. For example, defendant Erol Mütercimler is a writer, researcher and TV figure, hosting shows called ‘Conspiracy Theory’ and ‘Behind the Mirror’. The Ergenekon verdict identifies him as ‘an expert on conspiracy theories and strategy’ (Ergenekon Judgment IIA:

166), and quotes a high profile journalist's description of him as 'one of the most important conspiracy doctors in Turkey' (167). Similarly, defendant Yalçın Küçük, once a widely respected socialist intellectual, now almost exclusively trades in conspiracy theorising, with a particular obsession about the 'Sabbatian Jewish' plot. Defendant Doğu Perinçek, the leader of the Maoist-turned-ultranationalist Workers' Party, has been publicly conspiracy theorising for decades with remarkable consistency in style, though the 'plots' of his theories have changed considerably. As his Workers' Party is known for keeping its own 'intelligence' archive, Perinçek's and other party members' prosecution meant that whole swathes of this library of conspiracy theories are incorporated into the Ergenekon case file.

More significantly, the very pillar of the prosecution is something of a conspiracy archive in itself. According to both the indictments and the judgment, a collection of documents obtained by the police from Ergenekon defendants comprise the main body of evidence concerning the very existence of a terrorist organisation called Ergenekon, as well as certain defendants' affiliation with it. The indictment refers to this collection as 'organisational documents' (*örgütsel belgeler*) and the judgment as the 'documents of the organisation' (*örgüt belgeleri*). They consist of structural guidelines, action plans, and reports on contemporary events produced by and for a secret organisation that refers to itself alternately as 'the deep state' or 'Ergenekon'. These documents have not only served as an important trail in the police operations, but also assist the prosecutors in making their case: the indictment directly quotes them in describing the overall structure, different units, as well as the functions and aims of Ergenekon. There are approximately 20 of these documents, adding up to 700-800 pages in total. They read like a mishmash of internal bureaucracy and wild conspiratorial fantasy. One entitled 'Ergenekon Analysis Restructuring Management and Development Project' is considered by the prosecution to be Ergenekon's 'constitution'. A cursory summary of the document will perhaps explain what I mean by mishmash: The document begins by stating that 'it aims to contribute to the reorganisation of Ergenekon which operates from within the Turkish Armed Forces'. The proposed restructuring is for Ergenekon to organise and incorporate influential members of the civilian public. It is indicated that Ergenekon's 'own successful JITEM

experience' must be seen as a precursor to this restructuring. Then the following suggestions are made: Ergenekon needs to establish its own non-governmental organisations and gain control over foreign-funded NGOs that are currently active in Turkey; it must secure control over the media and establish its own media outlets; it must attain ideologically desired politico-economic conditions by becoming a key player in international trade and banking; it must gain control over drugs trafficking; it should consider undertaking chemical weapons production so as to exercise control over terrorist organisations worldwide, and so on.

It is difficult to ascertain whether these documents are genuine, i.e. unwitting paper trails of a group of individuals habituated to exercising illegitimate power with impunity, to the extent that they're now on a permanent fantasy trip of world domination. Some are more fanciful than others, for example, one document recommends replacing the PKK leadership with select members of the Turkish Armed Forces so as to keep the conflict alive while securing full control over it. Yet what reads like fantasy could also be understood as a hyper-rationality of *raison d'état*, since the war against the PKK has indeed been a politically and financially profitable enterprise for the Turkish state. Further, parts of these documents seem to shed light on a few of the odd turns of events in Turkey's recent history. If genuine, these documents portray Ergenekon as a conspiracy-theory-fed conspiracy-in-progress; an unexpected network of individuals who are trying to work out the terms of their collaboration via these glorified internal memos. The documents would thus testify to the administrative machinery of a ghostly state. Then again, several defendants claimed to have downloaded these documents from open sources on the internet, while others claimed that copies of these documents were planted, thus counter-accusing the police of conspiracy.

Even though the truth concerning the production and circulation of these documents is decisive regarding individual defendants' destinies, it does not make much difference from a broader perspective. Whether fabricated or genuine (i.e. whether produced by the police force or by deep state actors), whether planted or actually circulated, the very existence of these documents and their incorporation into the case file as the crux of the evidence against the defendants convey something of the fantasies of state that are operative in the trial. Bureaucracy and

state violence is often understood as an ‘inherently unstable combination’ (Green and Ward 2009: 123), the latter requiring the distortion of the former. In the case of both the production and the incorporation into the trial as evidence of the so-called organisational documents, we have something like a bureaucratisation of fantasies of extralegal state violence. The documents comprise an archive of a phantasmal bureaucracy as they are conjured in the Ergenekon case file, framed within the texts of the indictments and the judgment. As bureaucratisation is always already ‘a phenomenon of abstraction and spectralisation’ (Derrida 1999: 245), the phantasmal archive of Ergenekon is a ghosting of ghosts unknown, a further spectralisation of the always already ghostly reality of state violence.

The ghostly operation of these documents in the case file is particularly pronounced in instances when the indictment cites them but then has to intervene in the citations themselves to disclaim any and all suggestions of institutional involvement. For example, in quoting a paragraph from the so-called constitution of Ergenekon, the prosecutors amend the quotation, intervening in the citation with parentheses, to dispel any undesirable association:

“(Supposedly) *Currently active within the Turkish Armed Forces, Ergenekon is in need of a reorganisation.*” (Ergenekon Indictment, 48)²³

The quotation is used to at once provide incriminating evidence vis-à-vis the individual defendants and to preemptively exculpate state institutions. The editorial intervention introduces doubt as to the validity of the statement contained in the organisational document, though it is nevertheless supposed to serve as valid evidence against the defendants. This is a strange complicity with these documents and the facts/fantasies embedded therein.

Indeed, the case file reveals in other instances that the prosecutors are beset by a fundamental ambivalence concerning how much state there is in the ‘deep

²³ Quotation marks, italics and bold in the original. The original reads, with the following typos and font settings “(Sözde) Türk Silahlı Kuvvetli bünyesinde faaliyet göstermekte olan ‘Ergenekon’un yeni bir yapılanmaya yönelme zorunluluğu ve gereksinimi vardır.” The use here of ‘sözde’ to doubt the validity of the statement is particularly significant. Though I’ve translated it as ‘supposedly’ in the context of this particular quote, the word literally means ‘in word’, and means ‘in words only, not reality’. One phrase that this word is very often appended to in Turkish media and official publications is the Armenian genocide – which renders it something like ‘the (so-called) Armenian Genocide’.

state'. The first indictment purports that 'it is obvious that the Ergenekon terrorist organisation has crucial contacts within state institutions' (47). But then it disavows this claim at every opportunity. In a section entitled 'Could there be such a structure as Ergenekon within the State?', the prosecutors serenely explain that they have officially written to the offices of the Chief of General Staff, the secret service and the police service, to ask 'whether there is such a formation within their organisation'. Having received negative answers from all these official bodies, the prosecutors conclude that:

The Ergenekon organisation which describes itself as the 'deep state' has no connection or relation to any official institution of the state ... [it is thus understood that] the Ergenekon organisation masquerades as the deep state ... but unlike the definition of the deep state which involves the benefit and vested interests of the state, it attempts to govern the state in accordance with its own ideological views. (54-55)

Amidst the plethora of inconsistencies that make up the Ergenekon indictment, perhaps this is the most significant one: the defendants are at once identified as 'the deep state' and as people who 'masquerade as the deep state'; while the deep state is at once described as the 'dark force behind countless bloody actions' and as the body that protects the interests of the state. Here, *raison d'état* rears its head to reveal a prosecutorial rationality that is deeply ambivalent about the rule of law, to which the Ergenekon trial is supposed to represent a return. The trial is supposed to purge the deep state, but the only way the prosecutors can bring themselves to do so is by denying that the prosecution has anything to do with the state. It is as if the purge of extralegality from within the state is magically enacted by a prosecutorial disavowal: 'Now you see it, now you don't! It never was there anyway, but we will condemn it!'

The limits of the imaginary afforded by the criminal trial is decisive in allowing this disavowal its performative operativity. There are two crucial moments to note here: The object of prosecution, the deep state, translates into criminal legal perception as a 'terrorist/criminal organisation'. In turn, the alleged crimes of the deep state translate as 'crimes against the state'. The former designation recasts the ghostly agency of the deep state in terms of a willful aggregation and co-operation

of individuals, who can be held liable collectively and separately.²⁴ The latter designation does two things at once: it indemnifies the state as perpetrator, and relegates it to the status of victim. These structural failures of the criminal legal imagination combine with the Ergenekon prosecutors' own investments into the idea of the (deep) state to render extralegal state operativity effectively uncapturable. Here again is a process of spectralisation of extralegal state activity, effected in and through the Ergenekon trial.

The present tense of the deep state is not the only ghosting that the Ergenekon case file effects. While both the indictments and the judgment constantly evoke the past deeds of the Turkish deep state, they do little to adjudicate or illuminate them. In effect, past atrocities are included in the Ergenekon trial only to be excluded as proper objects of either thorough investigation or judgment. This inclusion/exclusion of past atrocities serves different purposes for the indictments and the verdict. In the indictments, they are brought in as force without substance. Conjecture, hearsay, stories, and vague references to past events are included without being elucidated. The occasion for their inclusion is that a minority of the 275 defendants happen to be suspected of involvement in the extrajudicial executions, forced disappearances and illegal arms and drug trafficking of the 1990s, partially exposed in the Susurluk process. And yet, even these defendants are not technically accused of those past deeds. They nevertheless serve as an excuse for the prosecutors to pile together potential though unverified fragments of information gleaned from secret witnesses, tapped phone conversations and the vast cache of confiscated documents. The indictments accumulate these to create what can be best described as a bewildering amalgam of fact and fiction whereby the two cannot be told apart. Thus the indictments create a chaotic archive of conspiracy in which the conspiracy theories cannot be distinguished from actual conspiracies pertaining to the past. In this sense the indictments themselves can be said to conspire to obfuscate the truth of past atrocities. The vast case file that supposedly brings the deep state to justice illuminates barely anything of the most vicious periods of deep state activity.

²⁴ Here again are affinities with how the conspiracy doctrine tends to operate in the Anglo-American context, where more often than not it signals a misrecognition of the collective agency in question (Ertür 2011).

The judgment, on the other hand, has a different use for the inclusion/exclusion of the past deeds of the deep state. It evokes them constantly to capitalise on their rhetorical uses, it cites them explicitly to demonstrate the self-evidence of the existence of the deep state. Past atrocities further serve as instruments of self-justification: they verify not only the necessity but also the soundness of the judgment itself. However, all the cited atrocities are then fully excluded from the actual judgment. Instead the only non-inchoate or complete criminal acts that the defendants are convicted of pertain to three non-fatal bombings and the 2006 Constitutional Court shootout that resulted in the death of one judge, an incident that was belatedly integrated into the Ergenekon case.²⁵ The rest of the offences that the defendants are convicted of are either possession crimes, or inchoate offences including incitement and the Turkish anti-terror version of conspiracy offences.

As evidenced by their oddly defensive preamble to the judgment, the judges are fully aware of the glaring absence of any proper inquisitorial process concerning the past deeds of the deep state in the trial. Responding to challenges to the court to expand the purview of the trial to adjudicate the state-sponsored activities of the late 20th century, the judges suggest that such a proposal

has no standing in practice. First and foremost, a court judges the acts involved in the case before it. Further, it is also evident that it is very difficult to take into consideration events that have taken place in the distant past. Additionally, there is neither a legal nor a conscientious basis for an approach that says 'How can you judge the present if you are not judging the past'. (Ergenekon Judgment Preamble, 1n1)

Arguably, one basis for insisting otherwise is that the past deeds of the deep state were eminently more atrocious due to their efficacy and systematicity. However, by excluding past atrocities as proper objects of finding, the court effectively passes judgment on the 'failed deep state' but not on the successful deep state. Further, the inclusion/exclusion bolsters the zone of unaccountability that these deeds have traditionally occupied, by reframing it within an insufficient legal account of the past. In other words, the judgment empowers the ghostly hold of past atrocities on

²⁵ Even then, these can be considered failed actions as per the objective attributed to them in the indictments and the judgment, namely the creation of a general atmosphere of chaos to pave the way for a military coup.

the present by letting them remain apparent but not established, rousing them but not laying them to rest, conjuring them but not demystifying them.

Jacques Derrida (2006: 47-48) has drawn attention to the link between conjuration and conspiracy:

A conjuration, then, is first of all an alliance, to be sure, sometimes a political alliance, more or less secret, if not tacit, a plot or a conspiracy. (...) In the occult society of those who have sworn together [*des conjures*], certain subjects, either individual or collective, represent forces and ally themselves together in the name of common interests to combat a dreaded political adversary, that is, also to conjure it away. For to conjure means *also* to exorcise.

The conspiracy of those who have taken an oath (*con-jurare*) or breathed together (*con-spirare*) against the evil spirit has to be complicit with that spirit up until the point of exorcism. The conjurers must first take an oath not only amongst themselves, but also with the spirit, so as to be able to then out-oath (*ex-horkos*) the evil spirit. A conjuration that fails to exorcise is thus merely a conspiracy with the evil spirit. In Ergenekon, the alleged conspiracy of the defendants is conjured by means of both magic tricks and a hyper-rationality that unfolds in the form of hyper-association. The over-assertion of links between defendants, the ties between pieces of evidence, and the relation between this reified cohort of defendants and the unified body of evidence is akin to an average conspiracy theory in its 'paranoid style' (Hofstadter 1996). The men of law thus conspire with the object of their prosecution: in conspiracy theorising about the deep state, the prosecutors and the judges of the Ergenekon process performatively produce the deep state on the scene of the trial in terms of a conspiracy that they fail to either fully explain or properly conjure away.

The disingenuity of the claim that the Ergenekon trial is a wholesale purge of extralegal operativity within the state is further exposed by the concurrent trial concerning the assassination of Hrant Dink. The process that led to Dink's assassination and the spectacular, albeit convenient, failures of the criminal legal procedure in its aftermath serve as an external measure for the claims of the Ergenekon investigation and the prosecution. Dink was murdered in the midst of this supposedly ground-breaking investigation into the deep state. The criminal justice process that ensued in the aftermath of Dink's assassination managed to hide

more than it revealed, precisely at the same time as the Ergenekon trial was supposed to be shedding light on and eradicating patterns of extralegal operativity within the state.

the sneering state

Hrant Dink's assassination on 19 January 2007 was the culminating point of a persecution campaign that went on for three years and involved overt and covert threats by official bodies and belligerent individuals, a series of unmistakably political prosecutions, a scandalous conviction for 'denigrating Turkishness', ultranationalist mobs protesting outside the offices of his newspaper *Agos* and hounding him in courthouses.

It all began in February 2004 when Dink published in his newspaper *Agos*²⁶ claims to the effect that Sabiha Gökçen, the adopted daughter of Mustafa Kemal Atatürk and Turkey's first woman war pilot, was of Armenian descent, orphaned during the 1915 deportations and massacres. Two weeks later, on 21 February 2004, *Hürriyet*²⁷ ran an uncharacteristically carefully-worded story about the claims published in *Agos*. On the following day, the office of the Chief of Staff, the highest echelon of the Turkish army, made a harsh public statement repudiating the claims, and accusing those who disseminate such claims of ulterior motives against national unity and national values. Although it was unexceptional for the army to take the liberties to express its political position on contemporary issues, it was nevertheless a rare occasion for it to comment on a news article that did not feature itself (Göktaş 2009). The day after the army's statement, on 23 February, Dink was summoned to the Istanbul deputy governor's office and 'warned' by two people who were introduced to him as 'friends' of the then deputy governor. Six and a half years after this compulsory meeting, and three and a half years after the assassination, the intelligence service finally admitted that these two people were its senior operatives. Soon after the covert threats in the deputy governor's office, in early March, Dink was prosecuted on charges of 'denigrating Turkishness'. Notably, the charges were not pressed for his claims regarding Sabiha Gökçen,

²⁶ *Agos* is a bilingual Turkish-Armenian newspaper with a weekly circulation of 5,000-6,000 and its primary readership is Turkey's Armenian community.

²⁷ A major Turkish daily which then had a circulation of around 400,000-500,000.

presumably because that would have reignited public debate about Gökçen's ethnic origin and risked the legal verification of Dink's claims. Instead, the prosecution was based on a single sentence lifted out of a series of eight articles on 'Armenian Identity', an elaborate critique of its diasporic formulation, which Dink had published in his newspaper earlier in February.

A number of inexplicable things happened during this trial for 'denigrating Turkishness'. First, the court accepted third-party participation in the case. Turkish criminal procedure does allow *partie civile* participation for those who claim to have been harmed by the alleged offence, and yet the common practice for courts is to greatly restrict participation to direct victims or, in cases of homicide, their family members. In this case, the court accepted the participation of a group of ultranationalist lawyers and activists who claimed to have taken personal offence at their Turkishness being denigrated by Dink. Allowed full representation in the trial, these people then went on to create a lynch mob atmosphere in and around the courtroom.²⁸ This was not the only oddity: following the insistent demands of the defence counsel, the court commissioned an expert report on whether the said offence had been committed; but then, in another bizarre move, it went on to completely ignore the report's findings and recommendations in its decision. The detailed report written by three academics chosen by the court itself had strongly argued that the single sentence did not constitute an offence when considered within its general context, and that the indictment was based on a gross misreading of that sentence. In convicting Dink and thus ignoring the report that it itself commissioned from its own sources, the court deviated from common practice in such cases, which is to decide on the basis of expert reports where available. Another peculiar aspect of this trial was the unwarranted delays that the court effected between receiving the expert testimony and passing its judgment (Çetin 2013).

The ninth chamber of the Supreme Court of Appeal²⁹ upheld Dink's conviction despite the argument of the Public Prosecutor to the contrary. The Public

²⁸ Some of these characters were later integrated into the Ergenekon trial as defendants, though their participation in the campaign against Dink was not made a matter of investigation.

²⁹ *Yargıtay*: An alternative translation is 'Court of Cassation'. As in the two-tiered appeal process in the UK, when appealed, a criminal case is first referred to one of the chambers of *Yargıtay*. This

Prosecutor then appealed the case, but the Supreme Court of Appeal's General Council on Criminal Law dismissed the appeal in July 2006, sealing Dink's conviction and leaving no further avenues of redress other than the European Court of Human Rights. These decisions signalled, at best, a severe difficulty in reading comprehension starting right at the top of the judiciary. A less forgiving interpretation would identify ideological bias and bigotry in these decisions, if not the lack of judicial independence and impartiality. The ECHR, to which Dink applied shortly before his assassination, eventually found that not only had Dink's right to freedom of expression been breached, but also that the legal decisions 'had made him a target for extreme nationalists' (ECHR 2010).

In this first glance at the events that led to Dink's assassination, we can already discern the involvement of certain key state agencies in making Dink a target: the military, the intelligence agency, the judiciary, and the office of the governor of Istanbul. Information that surfaced in the aftermath of the assassination allows us to add the police force and the gendarmerie to this mix, and further implicates the army and the intelligence agency. This web of potential culpabilities corroborated what was an immediate and seemingly generally-shared sense of the murder as state-sponsored, much like the assassinations of left-wing and liberal activists and intellectuals in the late 70s, Kurdish businessmen and activists in the early 90s, and journalists and intellectuals throughout the past several decades. 'The murderous state will be held to account' – the traditional slogan was reutilised as early as the day of Dink's assassination³⁰ and is still chanted in memorial rallies and those held outside the courthouse where the trial is taking place. The latter context for the slogan is particularly aporetic, given the judicial complicity in Dink's assassination.

stage would correspond to a case going to the Court of Appeal in the UK system. If the director of public prosecutions (*Cumhuriyet Başsavcısı* – alternative translations include 'Attorney General', 'General Public Prosecutor of the Supreme Court of Appeal', 'Principal State Counsel') disagrees with the decision in this first stage of appeal, they can appeal to *Yargıtay Ceza Genel Kurulu* (direct translation: Supreme Court of Appeal General Council on Criminal Law). This stage would correspond to a case going to the Supreme Court in the UK. Obviously, any attempt to directly translate the process and the institutional structures inevitably fails as the two legal systems are quite different in organisation and operation.

³⁰ Within a few hours of his assassination, around ten thousand people spontaneously gathered in Istanbul's central Taksim Square and marched to the place where Dink was killed.

At the time of writing, more than seven years after the assassination, the Dink murder trial continues. It began in July 2007, an initial decision was reached by the court in January 2012, the Court of Appeal ordered a retrial in May 2013, which has been underway since September 2013. Among the reasons for the Court of Appeal's retrial decision was the inappropriateness of what had been the most controversial finding of the lower court: that the killing was not the deed of a criminal or terrorist organisation. The key significance of this initial ruling was that it denied what everybody knew: it disavowed the seemingly sprawling network around the immediate culprits and limited culpability solely to the latter, casting the assassination as the deed of a handful of misguided youth motivated by ignorance and extreme nationalism.³¹ The defendants were to be considered in isolation from their established and suspected connections with state agents and institutions, and any attempts to pursue a wider set of culpabilities would thus be pre-empted.

The finding of no organisation in the first trial was partly due to a logic of discontinuity, disconnection, dissociation and fragmentation that seemed to permeate the entire investigation and prosecution. Notably, this is in stark contrast to the Ergenekon case which proceeds on a logic of hyper-association. In the Dink case, of the police and gendarmerie officers who were implicated in the process, only a few were prosecuted, and not as part of the main trial in Istanbul concerning Dink's assassination, but in separate, isolated hearings in other cities (Çetin and Tuna 2009). Thus, rather than pursuing the connections holistically, the prosecution was broken into several parts. Further, investigating prosecutors identified a number of officers within the gendarmerie and the police force who could be held liable for negligence, abuse of office, destroying, obscuring, tampering with and fabricating evidence relating to the case, but the courts refused to proceed with their prosecution. Despite express demands by lawyers intervening in the trial on behalf of Hrant Dink's family, certain high level officials within the security and intelligence services who were implicated in terms that range from negligence to

³¹ Recently, before stepping into his new role as President of Turkey, Prime Minister Tayyip Erdoğan reiterated this view, thus explicitly aligning himself with the deep state on Hrant Dink's assassination ('Erdoğan: Dink Davası Kişisel Bir Dava, Yazılarını Kabullemeyenler Yaptı', *T24*, 28 July 2014, <http://t24.com.tr/haber/erdogan-basbug-pasanin-dedigi-oldu-ben-de-ona-fuat-yilmazeri-soyledim,265821>).

complicity, were not even summoned to court as witnesses, let alone interrogated as suspects. The logic of discontinuity and dissociation was also quite stark in how the evidence was handled: key CCTV footage of the incident was seized by the Istanbul police and went missing under their watch; the gunman's communications on his mobile and over the internet immediately before and after the assassination were never properly disclosed or investigated; certain suspect figures caught by CCTV cameras at the time of the incident were not traced. The court's written requests from official bodies such as the Intelligence Service and the High Council for Telecommunications were either left unanswered, or responded to with incomplete, incorrect or entirely irrelevant information.

The lower court's refusal to identify the assassination as the work of a criminal or terrorist organisation was thus the culminating point of this general operation of dissociation. Notably, as the judges announced their finding of no organisation on the last day of the hearings, they forgot to pass verdict on one of the eighteen defendants. This *lapsus memoriae*, slip of the memory, served as a clearly recognisable symptom of the court's disavowal of what everybody knew. Something was indeed missing in the verdict, and this was the role of the state in the assassination. The lapsus, performed by the court at the most crucial and highly publicised moment of the trial, literalised the glaring absence by displacing it. It too knew that something was missing. In turn, the performative disavowal of the deep state served as a perverse avowal of the tradition of state-sponsored killings.

When the decision was announced, Fethiye Çetin, the lawyer representing the Dink family, said in a statement to the press: 'They have been mocking us all along. And today, we saw that they saved the punch line for the end'.³² The experience of the murder trial by the victim's family primarily as a mockery rather than, for example, either a process of mystification or serial frustration, provides a significant insight into the performativity of the proceedings. The trial's dissociative operations were experienced not as a genuine difficulty or inability to pursue the connections and culpabilities, but rather as derision, a contemptuous and willing refusal to offer justice. Thus the 'state effect' produced in the trial is one

³² 'Fethiye Çetin: "Biten dosya, dava değil"', *Bianet*, 17 January 2012, <http://www.bianet.org/bianet/toplum/135511-biten-dosya-dava-degil>.

that murders then mocks its victims behind an impenetrable shield of impunity. Although the formal promise of the trial was an inquisitorial exercise whereby a truth was to be arrived at as part of the doing of justice, in practice the Hrant Dink murder trial only delivered a smoke and mirrors show, the sole legible truth of which was that the state will remain beyond the reach of accountability. In this way the trial became the site through which the state ridiculed its victims and piled insults upon the injury.

While such may be the face of the state that appears and makes itself felt in the trial, the sneer of the state here is much like the grin without the cat insofar as it is difficult to precisely pinpoint the political agency behind the sneer. The logic of dissociation and fragmentation that permeated the trial was in part owing to the fact that the investigation and the prosecution required the cooperation of a number of key state institutions, and specifically of those whose agents would likely be incriminated in the process. But there was no political pressure on the various implicated state institutions to fully comply and cooperate with the judicial process. Thus, it may have been the absence of a political will that allowed the more systemic and structural patterns of corruption to nevertheless produce the sneering state on the scene of the trial. This would be a departure from the common view of most political trials where the legal procedure is understood to be manipulated or hijacked by a sovereign will that weighs in on the trial to produce its desired outcome.

singular will & state tradition

However, in a submission to the local court prior to its verdict, the Dink family and its lawyers claimed otherwise. They expressed their suspicion that the injustices they had faced in the trial until then were due to a central power orchestrating the trial process, 'a powerful will' operating to obscure and frustrate the investigation and the prosecution (Dink, et al. 2011).³³ In this very important document, which is first and foremost a call on the court to extend and deepen the scope of its inquiry, the Dink family and their lawyers attempt to work against the logic of dissociation.

³³ This 100 page document was submitted to the court on 5 December 2011 on behalf of the Dink family by its lawyers, who took turns to read it to the court in its entirety on that day.

They do so by providing a detailed account of the persecution campaign that culminated in Dink's assassination, flagging the involvement of state institutions, agents, as well as the role of the various key figures on trial in the Ergenekon case but not integrated into the Dink murder case. The document also serves as a meticulous record of all of the procedural breaches and errors involved in the investigation and the prosecution of the murder, including the numerous failings of the court to which it is submitted. The submission thus implicates the court, in no uncertain terms, in the overall design of injustice that the family perceives, whereby the criminal justice process is understood to operate as an extension of the crime itself. We read in this submission that the trial unfolded before the family as if it were a scripted play (48), fully proofed to ensure that impunity remained the rule and that even the accidental cracks were swiftly covered over by the various official bodies (52).

Then again, even in this 'singular will' analysis, the suspected machination is not as straightforward as in most other political trials that are evidently stage-managed by a recognisable political authority. The singular will here is not so easily identifiable. Indeed, a notable tension emerges in the Dink family's submission to the court between on the one hand the 'suspicion', 'concern' and 'sense' (57) that both the assassination and the judicial process have been stage-managed by a powerful will according to a pre-written script, and the claim, on the other hand, that something like a tradition and mentality has been at work to produce the murder and the injustices of the trial. In other words, the submission's singular will analysis seems to give way to a theory of mentalities and state traditions.

If we were to trace the reasoning that leads to this theory, it begins from a global analysis of what the family has faced in the lead up to and the aftermath of the assassination. According to the submission:

There is significant congruity and ideological consensus displayed by the institutions and mechanisms involved in the preparation and execution of the assassination, the concealment and obscuring of evidence in the aftermath of the assassination, the covering up of the truth, the setting of boundaries and a framework for the judicial process and the strict compliance with those boundaries. This congruity and consensus

corresponds to the existence of a strong mechanism and mentality that not only legitimises the assassination but also secures its impunity. (57)

The submission further claims that 'it is not possible to explain this strong mechanism in terms of an illegal structure that has penetrated the state' but that it is the 'establishment, the state itself' and the 'ideology and politics of the state' (58) with all of its institutions. This analysis resonates with the critical debates that emerged in the aftermath of the exposure at Susurluk concerning the so-called 'deep' state. It also provides an important counterpoint to, and perhaps an indirect criticism of the simultaneously ongoing Ergenekon trial's 'purge' of the deep state. The earlier singular will thus get transferred onto 'the state' itself, which can no longer remain singular as such. But, what does it mean to identify the culprit as 'the state itself' in a criminal court of the very state that is being accused? How can such a suggestion compute within the logic of criminal procedure? How can a court register the claim that the state is not only the law, but also its transgression? Or how can the state be identified as a subject capable of criminal agency in a language that can be assimilated by a criminal court? Engineered for apportioning individual liability, the criminal law can best recognise either discrete individual wills, or an aggregation of individual wills that is rarely more or less than the sum of its parts. How can the state be articulated as culpable within such parameters?

The scandal of the submission does not end there. After suggesting that the culpable party is the state itself, it then goes on to explain this claim. The submission proposes that Hrant Dink's murder is located at the intersection of Turkey's two entrenched state traditions: the tradition of political assassinations and that of Armenophobia (59-72). The former is elaborated with a chronological account from the late-Ottoman rule of Committee of Union and Progress up until the present, covering many instances of political killings, so-called 'unknown assailant' (but evidently state-sponsored) assassinations and massacres of the past decades. The latter, Armenophobia, is explained by a genealogical account that begins with its reconsolidation in the aftermath of the Russo-Ottoman War of 1877-78, incorporates the genocide, and traces its reconfigurations in the official ideology and legality of the new republic. The explicit reference to the genocide (spelt out as such in the document and thus read out to the court) is introduced in

passing, calmly and without fanfare, as if it is a non-controversial issue on which there is general consensus. The genocide is further contextualised as one moment in an endless storm of Armenophobia.

This extended discussion of the two state traditions in the family's submission brings to mind Hannah Arendt's objection to the prosecution's contextualisation of Eichmann's culpability in the Final Solution within an age-old history of anti-Semitism as entirely counterproductive: 'perhaps he was only an innocent executor of some mysteriously foreordained destiny' ([1963] 1994: 19). As we have seen in Chapter 1, Arendt insisted on the importance of individual culpability for legal procedure: 'in a courtroom there is no system on trial, no History or historical trend, no ism, anti-Semitism for instance, but a person' (2003: 30). Reading the Dink family's submission in light of Arendt's position on the Eichmann trial, we may question the wisdom of invoking 'state traditions' as a way to contextualise Dink's assassination. On the other hand, the two cases and the respective positions of the parties who take recourse to this kind of contextualising rhetoric could not differ more. The differences need not be elaborated in detail here, the point being that the Israeli prosecutor's contextualisation of the crime in the Eichmann trial and the family's contextualisation of the crime in the Dink murder trial emerge out of very different political concerns and serve very different political purposes. The latter is many things at once: defiance of the corrupt criminal justice process, diagnosis of the causes of corruption, and a challenge to the court to break with criminal state traditions – what Marianne Constable (2014) would perhaps identify as a 'passionate utterance' after Stanley Cavell (1994). Presumably, had the trial been going somewhere, uncovering the involvement of state actors in the crime, there would have been no need for a submission in this vein. The contextualisation of the crime that the submission offers is in this sense both necessary and irreducibly incommensurable with legal procedure. Indeed, at times, the submission reads as if it has no concern for whether it is registerable by the court. Here, then, is an unusual rupture strategy, not on behalf of the defence, but on behalf of the victim of the offence. The submission serves as an 'objection that cannot be heard' (Christodoulidis 2004) not because it challenges the foreclosure of the political by the court, but because it goes to the heart of law-

instituting violence and identifies its legacies, including in the court itself. Against the trial's operations of discontinuity and dissociation, it presents a counter-memory, a careful tracing of continuities of state violence.

This exercise in counter-memory inevitably skirts along, but ultimately diverges from the hyper-association of conspiracy theorising, which, as we have seen in the Ergenekon trial, involves the performative production of the state as fetish. The seeming contradiction between the submission's claim that a singular will orchestrated the process (which is precisely when it touches conspiracy thinking) on the one hand, and its suggestion that two state traditions are at work on the other, is a product of the difficulty, if not the impossibility, of addressing the so-called deep state within a criminal court. The Dink family's submission to the court reveals not only the aporia of demanding accountability for state crimes in a criminal legal setting, but also the difficulty of pinpointing a state that manifests itself not in its institutions and services, nor in its legitimised forms of violence, but in its extra-legal activities and illegitimate violence. In this sense, it is in the very tension between the singular will analysis and the chronological and genealogical accounts of state mentalities and traditions that the ghostly character of state violence can be said to be located. Then again, as I explore in the remainder of this chapter, the Dink case occasions another kind of knowledge pertaining to the deep state, one that engages in a counter-conspiracy with the case files and draws on what historian Carlo Ginzburg (1990) has identified as a 'conjectural paradigm'. This may well signal a way of knowing that disinvests from the fantasies of sovereignty that sustain the (deep) state.

knowledge of the unknown

The proposal that a 'powerful will' manufactured both the assassination and the trial process appears in the Dink family's submission to the court as the consequence of a number of conjectural leaps. The first of these pertains to the conclusion that the assassination was 'managed from a single centre and in accordance with a plan' (Dink et. al. 2011: 36). This conclusion is offered on the basis of the observation that a wide range of state and civil actors seemed to act in concert towards the same aim. The second conjectural leap concerns the murder

trial itself, the proposal that it has been masterminded by a singular will is based on the accumulative effect of various suspicious turns in the proceedings (57). The third leap connects both the assassination and the production of impunity in the legal process to the same 'strong mechanism' (ibid). The language of the submission around these leaps is noteworthy, as it speaks of 'suspicion', 'concern' and 'sense' of a singular will. The document's account of the assassination and its aftermath could thus be said to partake in a conjectural paradigm, whereby 'imponderable elements' such as instinct, insight and intuition provide passage from directly observed and/or experienced data to knowledge concerning what is, strictly speaking, unknowable (Ginzburg 1990).

A similar form of knowledge production is found in the family's lawyer Fethiye Çetin's (2013) book about the assassination and its aftermath. Çetin is also the unnamed author of the family's submission to the court, but a much more personal voice emerges in the book. Here she writes of frequently encountering 'traces and signs' of cover-ups in the case files: 'I had intuitions but was not able to demonstrate anything concretely' (24). Something like a methodology for producing knowledge about the deep state emerges in her writing (227):

What I knew of, lived through, saw in the case files and read in the press made me think that the truth must be sought not in what is shown and visible in the case files but rather in what is not shown, what is hidden.

Çetin thus proposes the study of the negative spaces of the case files, of the traces and signs of that which has been deleted or not presented. She reads not only the Hrant Dink murder case file, but also the Ergenekon case file closely for signs of Dink's assassination, scanning what has been left out and training her gaze on the gaps and absences. On a number of occasions, she specifically focuses on the ellipses in the Ergenekon prosecutors' quotations of the Ergenekon defendants' online chat records and wiretap transcripts, conjecturing on the basis of that which has been rendered invisible behind three dots. Here, it is as if Çetin is working against a conspiracy of case files. The documents hide rather than reveal the truth, unless one devises ways and means of deciphering them. This is both distinct from and related to the concept of 'textual conspiracies' where the unconscious elements of texts conspire against the intentions of their authors (Martel 2009). Çetin's is a

reading practice that is attuned to the unintentional for the particular purpose of a counter-conspiracy, as she attempts to mobilise the traces of that which has been left out, censored and repressed, against the conspiring case files.

Thus in Çetin's book, again, are important resonances with Ginzburg's 'conjectural' or 'presumptive' paradigm: the importance of direct observation, experiential knowledge, intuition, insight, and the focus on traces and signs. Ginzburg formulates the conjectural paradigm in his famous essay on historical method, 'Clues: Roots of an Evidential Paradigm' (1990), departing from a consideration of the similarity of methods in the works of the art connoisseur Giovanni Morelli, Sigmund Freud's psychoanalysis and the detective-work of Sherlock Holmes in Arthur Conan Doyle's novels. Ginzburg suggests that it is the key significance of minor details in their methodology that bring these figures together: 'In each case, infinitesimal traces permit the comprehension of a deeper, otherwise unattainable reality' (101). Noting that Morelli, Freud and Doyle were all physicians, Ginzburg connects the conjectural paradigm to traditional medical semiotics whereby the analysis, classification and interpretation of directly observed symptoms lead to hypotheses about underlying causes. Though he understands this form of knowledge to have emerged in the humanities sometime around the late 19th and early 20th century, he suggests that its roots may be traced back to the kind of knowledge practiced by the hunter, who had to be attuned to traces, smells, and minute signs such as clusters of hair, excrement and broken branches in the chase of the prey. Pitting the conjectural paradigm against a natural scientific paradigm of knowledge that is anti-anthropocentric, anti-anthropomorphic and quantitative, Ginzburg describes it as a form of sentient knowing that draws on our animalistic properties of senses, instincts, intuitions.

The objects of knowledge that Ginzburg and Çetin are concerned with, history and the deep state respectively, are admittedly quite different. They pose different challenges to knowability. Unlike Ginzburg's object of knowledge, the deep state is by definition secretive and non-transparent. It jealously guards evidences of itself, and presumably mobilises the entire state apparatus to do so. And yet, Ginzburg's main examples for the conjectural paradigm notably pertain to similarly resistant objects of knowledge: Morelli's was a technique developed to

distinguish original artworks from their copies which strove to pass for the original. Sherlock Holmes attunes himself to details that are imperceptible to most in seeking authors of crimes, who were clearly invested in covering over their tracks. Sigmund Freud attempted formulate a methodology for 'divin[ing] secret and concealed things from unconsidered or unnoticed details, from the rubbish heap, as it were, of our observations' (quoted in Ginzburg, 1990: 99), despite and against what he identified as a complex psychic apparatus of repression. Further, in all scenarios the clues are revealed when the sovereign agency of the 'authors' falter: the art historian looks for the unimportant details that the copyist paints inattentively, Holmes and Freud seek clues where in details that escapes intentional control. Thus it is as if Ginzburg's 'conjectural paradigm' is formulated precisely for vanishing objects of knowledge that are actively resistant to capture, but attuned to the moments of failure in that resistance – a definition that is ultimately well-suited for knowledge of the deep state.

Dink family's submission to the court and Fethiye Çetin's book thus both read as counter-conspiracies attempting to work against the dissociative logic employed by the criminal justice system in tending to Dink's assassination. For this they utilise an associative reasoning that is sustained by various conjectural leaps and a form of knowing that is not necessarily formalisable but is based on accumulated experience and a (counter-)memory of state violence. As in Ginzburg's models, they seek their clues precisely in those details where sovereign intentionality discernibly falters.

While conspiracy theories, too, claim to connect the dots, explain the unexplained, unmask the disguise and uncover what lies behind the world of directly observable phenomena, there are significant ways in which a 'conjectural paradigm' for producing knowledge of the deep state differs from conspiracy thinking about the deep state. In a short essay on the relationship between conspiracies, conspiracy thinking and other forms of knowledge, Ferhat Taylan (2011) engages with the question of how Ginzburg's conjectural paradigm differs from conspiratorial perception. He suggest that while the two share an emphasis on traces, signs and clues, their main difference has to do with the failure of conspiracy thinking to interpret properly:

Conspiratorial perception does not interpret traces, it contents itself with presenting them as the evidence for an unarticulated 'theory'. In this sense, it is like a child who points at the traces and shouts 'there!': traces alone enable the emergence and the verification of the so-called 'theory'. The trace, deemed to be the evidence, turns into the sole constituent of the hypothesis that is expected, in and of itself, to yield an explanation. (17)

Thus we can say that a metaphysics of presence is at work in conspiracy theorising whereby signs and traces are perceived to unambiguously stand for, and therefore reveal the content they are assumed to originate from. And more often than not, this content is the dark scheming of a group of conspiring individuals whose wills are understood as fully self-present, and their acts as absolutely felicitous.

The problem of conspiracies and conspiracy theories occupied Ginzburg himself in *The Judge and the Historian* (1999), his book about the 1988-91 trial of Adriano Sofri, a leftist leader accused and eventually convicted of ordering the murder of a policeman in the early 1970s. Ginzburg takes up the process of the trial with its multiple miscarriages of justice as an occasion not only for arguing his friend Sofri's innocence, but also for considering the similarities and differences between the judge and the historian as they professionally relate to the body of evidence in making meaning. He suggests that while the two disciplines of history and law have always been intricately and ambiguously tied (4, 12-18), the influence of the judicial model on historiography has been limited to particular periods and schools.³⁴ According to Ginzburg, the effect of the judicial model on historiography is twofold:

On the one hand, it encouraged [historians] to focus their attention on events (political, military, diplomatic events) which could be ascribed, without excessive problems, to the actions of one or more individuals; on the other hand, it led them to avoid all phenomena (history of social groups, history of mentalities and attitudes, and so on) which did not lend themselves to this explicatory network. (14)

Thus judicial historiography in Ginzburg's understanding foregrounds the wilful acts of individuals in explaining grand historical events. The event has to register as significant according to a preconceived idea of what counts as such, and the

³⁴ Ginzburg identifies the late 19th and early 20th century political historiography of the French Revolution that is eventually contested by the Annalists as especially crafted on the judicial model (15).

historian has to apportion liability, as if jury or judge in a trial, to individuals who are similarly readable as significant.

Ginzburg's analysis of conspiracy theorising is intimately related to this account of judicial historiography, but it seems that it is the very material he is contemplating that raises the question of conspiracies and conspiracy theories in the first place: the murder that Sofri was accused of ordering was an integral part of a series of acts of political violence that are understood to have launched the Italian 'Years of Lead' (*anni di piombo*), a period that could be attributed to the Italian 'deep state',³⁵ though as far as I understand there is no such formulation in circulation. In this sense, the immediate context of the trial resonates with that of the two trials discussed here. With such a labyrinthine backdrop of the trial, Ginzburg's account of it is haunted, if not driven, by his sense that the entire judicial process may be a conspiracy. In trying to make sense of the machinations involved, Ginzburg has to negotiate a potential accusation of engaging in *dietrologia*, a pejorative term coined in Italy to refer to conspiracy theorising.³⁶

While acknowledging that narratives concerning conspiracies amount to 'a vast library of foolishness, often with ruinous consequences' (64), Ginzburg notes that conspiracies do exist in the world as evidenced by the period in question. So how to make sense of conspiracies without lapsing into conspiracy theorising? Ginzburg does not rule out the latter as a form of methodology, especially in trying to decipher affairs as murky as the one under consideration. On the contrary, he suggests that an outright dismissal of '*dietrologico* attitudes' would be detrimental to the effort 'if by *dietrologia* we mean a clear-eyed interpretative scepticism, unwilling to settle for the surface explanations of events or texts' (65). However,

³⁵ Following the bomb planted in the Agricultural Bank in Milan in 1969, 'the first major event that revealed the conspiratorial character of Italian politics' (Aureli 1999) widely known as the Piazza Fontana bombing, two anarchists were arrested as suspects. One fell off the window of a police station and died, an incident which inspired Dario Fo's famous play *The Accidental Death of an Anarchist*. The window from which he fell was that of the office of the policeman whose eventual murder Sofri was accused of. The period launched by the Piazza Fontana bombing is attributed to the 'Strategy of Tension', which refers to the engineering of political instability in order to prepare the grounds for an authoritarian takeover. A series of terrorist attacks, later found to be carried out by neofascist groups (Bull 2012), were used both to create an eminently governable atmosphere of terror and to target those on the left by attributing them the responsibility for these incidents.

³⁶ *Dietrologia* literally translates as 'behindology', i.e. the science of uncovering 'what lies behind'. Ginzburg offers a number of definitions of the term in a footnote (126n45).

while Ginzburg's preferred methodology may share a spirit of inquiry with conspiracy theorising, he identifies a key flaw in conspiracy theories. This is their inability to take into account the rule of heterogeneity that presides over how wills are executed, intentions are materialised, and actions are enacted (ibid.):

every action directed towards an objective –and therefore, *a fortiori*, every conspiracy, which is an action directed towards particularly chancy objectives – enters into a system of unpredictable and heterogeneous forces. On the interior of this complex network of actions and reactions, which involve social processes that cannot easily be manipulated, the heterogeneity of objectives with respect to the initial intentions is the rule.

In this account, conspiracy theories err because they do not take account of the necessary and myriad infelicities that can interfere between the will and its execution, the intention and the action, the action and the objective it is meant to achieve. The equation of individual intentions with objectives reduces the causes behind events to individual wills. Notably, Ginzburg identifies this kind of equation posited by conspiracy theories as an 'extreme form of judicial historiography' (ibid.). The judicial model reduces the task of understanding an event to the attribution of liability to individuals. Just as a criminal trial is largely unable to account for the social, political and economic context of the act under consideration (Norrie 2001), conspiracy theories bypass rationalities and attitudes, social, economic and political conditions in their account of what (or more accurately, who) lies behind observable phenomena.

The affinity that Ginzburg flags between judicial historiography and conspiracy theories is particularly pertinent for understanding the problematic dynamics involved in political trials implicating the state itself as culpable, and concerning conspiracies that cannot be easily explained by conspiracy theories. The Ergenekon trial proves to be a particularly fascinating exercise in extreme judicial historiography. The coincidence of the judicial method with conspiracy theorising in this trial renders the prosecuting and judicial authorities complicit with their object of prosecution as they reify the deep state in terms of a conspiracy that they fail to fully capture or explain. Thus what we have in the Ergenekon trial is a highly infectious logic of conspiracy that creates a particular state-effect through extreme judicial historiography. In the attempt to enact a purge of the so-called deep state,

the trial instead reproduces it as a ghostly presence that becomes even more difficult, if not impossible, to conjure away.

The complicity involved in the Hrant Dink murder trial between the authorities and the object of prosecution is comparable but of a different kind. It takes the form of a continuity between the crime and the criminal justice process, where the latter takes recourse to operations of dissociation and discontinuity to obscure the crime. To accuse the court of such complicity is to risk engaging in conspiracy theories, and the Dink family's submission risks precisely that in conjuring a 'singular will'. But the analysis we find in the submission to the court breaks with conspiracy theorising the moment it identifies the 'singular will' as the 'state itself' and launches into an account of state traditions. Then again, this is also a moment of rupture, when the submission becomes unprocessable by the court. This talk of state traditions is ultimately neither fully formalisable, nor properly adjudicable in a court, precisely because it calls out the legacies of law-instituting violence. Further, the state continues to sneer through the façade of the murder trial because this kind of analysis cannot be legally processed. The earlier singular will analysis that we encounter in the submission, then, may be interpreted as in one sense imposed by the legal idiom. It is as if one must take recourse to the style of conspiracy theorising to speak felicitously of the extralegal activities of a state in a criminal legal setting. Then again, as we know from the Ergenekon trial, this is also to participate in the performative enactment of the public thing (*res publica*) called the state, which comes into being as a collective misrepresentation (Abrams 1988).

The paradoxes of and the tension between identifying the deep state in terms of a singular will on the one hand, and in terms of state traditions on the other is ultimately not fully resolvable. But as I have discussed here, the Dink case occasions another way of knowing the deep state. This is offered by the family lawyer Fethiye Çetin in the form of a counter-conspiracy with the legal archive. The conjectural paradigm is key for this counter-conspiracy, as it attunes itself to the mishaps and vagaries of intentionality, the inadvertent omissions in the tightly-woven plot, the heterogeneity of forces that all actions and intentions are subject to. This kind of knowing holds out a promise for a different kind of rupture in the political trial, one that does not pose a sovereign claim against the sovereign, but

rather works to undo the reification of sovereignty through the mobilisation of law's counter-archive. Thus it is a rupture strategy that undermines the sovereign spectacle of the trial not by claiming the space for an alternative spectacle, but by shunning the spectacle in search of the traces and the spectres that may well serve the undoing of sovereignty.

conclusion

The substantive work of this thesis began with a close reading of three works published in the early 1960s on political trials. I argued that the writings of Otto Kirchheimer, Hannah Arendt and Judith Shklar marked a shift in the literature on political trials, as each in their own way went beyond the classic approach that more or less sufficed with being scandalised by the combination of ‘political’ and ‘trial’. Instead, these thinkers crafted thoughtful accounts of the relationship between politics and law, and of the materialisations of this relationship in a trial. I proposed that a common element of these works was the recognition of the various ways in which legal proceedings operate performatively, and I took that as my point of departure in working out a framework for studying political trials that draws on theories of performativity. The trials that triggered Kirchheimer, Arendt and Shklar’s studies were, of course, those held in the aftermath of the Holocaust. The necessity of some kind of politico-legal response to this unprecedented form of political violence stood out against a background of various unsavoury practices in political justice, then recent and old, that had left nothing much redeemable of ‘the use of legal procedure for political ends’. This combination of necessity and controversy can be understood to account for the tangible urgency and the keen thinking of the political that are discernable in these works.

Notably, later studies that draw on Kirchheimer, Arendt and Shklar to address political trials from a liberal perspective tend to jettison this urgency and abandon

the critical thinking of politics and justice that permeates their writings.¹ What is preserved from this legacy is the recognition of the performativity of trials (albeit not always formulated in these very terms) and the acceptance of the idea that trials can have politics and that need not be an undesirable thing. But what seems to have been relinquished is that keen thinking of the political. For example, legal scholar Eric Posner (2005) cites the 1960s literature to coolly explain that while unavoidable, political trials in liberal democracies posit an institutional design and management challenge. What is at stake in a political trial according to Posner is a ‘liberty-security trade-off’: it is a matter of balancing due-process and the public’s need for security. The best way to strike the right balance between liberty and security is to make a distinction between political opponents on the one hand, and public threats on the other. The latter category in this scholar’s imaginary includes ‘anarchists, communists, Islamic terrorists’ (106). When dealing with people who can be categorised as such, concerns over security can legitimately be prioritised over due process. The 1960s’ uneasy critique of the use of legal procedure for political ends is thus mobilised for a comfortable argument advocating the use of legal procedure for fencing the political off to undesirables.

While this kind of uptake is not entirely surprising for mainstream legal scholarship, the urgency for a sharpened thinking of the political of political trials proves dispensable in the work of critical theorists as well. In her innovative study *The Juridical Unconscious*, Shoshana Felman (2002) has two chapters on the Eichmann trial throughout which she is engaged in an intimate conversation with Arendt. One of Felman’s arguments is that Arendt failed to recognise that the Eichmann trial ‘consist[ed] in a juridical and social reorganisation of [the public sphere and the private sphere] and in a restructuring of their jurisprudential and political relation to each other’ (124). According to Felman, the theme of, as well as the occasion for this restructuring of the relationship between the public and the private was victimhood. For Felman, the Eichmann trial owed its historic value to the fact that it was a victims’ trial:

[The] historically unprecedented revolution in the victim that was operated in and by the Eichmann trial is, I would suggest, the trial’s major

¹ Leora Bilsky’s work (2004, 2010) is a rare and notable exception in this regard.

contribution not only to Jews but to history, to law, to culture – to humanity at large. ... a Jewish past that formerly had meant only a crippling disability was now being reclaimed as an empowering and proudly shared political and moral identity. ... Victims were thus for the first time gaining what as victims they precisely could not have: authority, that is to say, *semantic authority* over themselves and over others. (126-7)

Felman thus acclaims the Eichmann trial as rearticulating the Israeli body politic as a nation of victims and survivors. The point is important and has been made and reiterated by others (cf. Segev 1993; Douglas 2001; Rose 2007): the trial was the first time that the stories of survivors found a public voice in Israel, where their suffering had been silenced and suppressed until then. Thus in Felman's account, we see a keen appreciation of the performative operation of the trial vis-à-vis the national public sphere. However, her appreciation of the actual politics of the performative proves extremely limited when we consider that she published this account in 2002, two years into the second Intifada. Palestinians are nowhere mentioned in her celebration of the Eichmann trial as the political event that secured a rearticulation of Israeli identity as one of empowered victimhood. Further, in her careful conversation with Arendt, Felman fails to take note of Arendt's veritable horror in the face of the monstrosity of victimhood produced by the Nazi atrocities – one of her many insights that have proved prescient:

just as inhuman as [the Nazi's] guilt is the innocence of the victims. Human beings simply can't be as innocent as they were in the face of the gas chambers (...) We are simply not equipped to deal, on a human, political level, with a guilt that is beyond crime and an innocence that is beyond goodness or virtue (...) we Jews are burdened with millions of innocents, by reason of which every Jew alive today can see himself as innocence personified. (Arendt and Jaspers 1992: 54)

Thus Felman's suggestion that Arendt failed to appreciate the reorganisation of the political that the Eichmann trial effected could at best be read as a naïve misreading that does not take heed of its own political implications.

Pertinently, Felman begins this book with reference to an address by the U.S. President George W. Bush following the attacks of 11 September 2001. Quoting Bush's 'Whether we bring our enemies to justice and bring justice to our enemies, justice will be done', Felman interprets this as the promise of a trial to come:

As a pattern inherited from the great catastrophes and the collective traumas of the twentieth century, the promised exercise of *legal* justice –of justice by trial and by law– has become civilization’s most appropriate and most essential, most ultimately meaningful response to the violence that wounds it. (3)

Felman follows this passage by a note, a disclaimer where she suggests that as thoughts articulated in the aftermath of the attacks when the U.S. had already launched a ‘war on terror’, her point here ‘is not political but analytical’ (182n7). ‘Whatever the political and moral consequences’ of the war (which she seemed to believe ‘cannot be predicted or foreseen with total certainty or with a total clarity of moral vision’) the promise by ‘America’ of ‘justice by trial and by law’ exemplifies ‘Western civilisation’s most significant and most meaningful response precisely to the loss of meaning and disempowerment occasioned by the trauma’ (ibid). The renunciation of a ‘clarity of moral vision’ vis-à-vis military war in the 21st century, and the civilisational argument in Felman’s disclaimer are indicators that the analytical and the political not only should not, but actually cannot be divorced in attending to the intersections of law and politics, despite her protestations to the contrary.

Of course, Felman cannot be faulted for failing to foresee that Bush Jr.’s ‘justice will be done’ in the aftermath of 9/11 would come full-circle with Barack Obama’s announcement that ‘justice has been done’ following the extrajudicial execution of Osama bin Laden ten years later.² Consider, however, the recourse that Roger Berkowitz, Director of the Hannah Arendt Center for Politics and Humanities at Bard College, makes to Arendt and to the spectre of a political trial that never was, in order to argue that the assassination of Osama bin Laden was legally justified. Notably the trial that Berkowitz invokes counterfactually is not that of bin Laden, but of the members of the special operations unit that killed bin Laden. It is a somewhat circuitous argument, but Berkowitz refers to Arendt’s brief discussion in *Eichmann in Jerusalem* concerning the alternative to Eichmann’s kidnapping and trial, namely, his outright assassination in Buenos Aires.³ He cites

² ‘Barack Obama’s full statement on the death of Osama bin Laden’, *Guardian*, 2 May 2011, <http://www.theguardian.com/world/2011/may/02/barack-obama-statement-bin-laden>.

³ This is Arendt responding to the argument that the outright assassination of Eichmann would have been preferable over a trial, as the latter would threaten to undermine the legal form – an argument

Arendt's discussion of the 'precedents' of Sholom Schwartzbard and Soghomon Tehlirian (the latter featured in Chapter 4 of this thesis) who assassinated perpetrators of mass atrocities and were eventually acquitted. According to Berkowitz (2011: 350), Arendt

argues that to take the law into one's own hands can promote justice, at least under particular circumstances; he who 'takes the law into his own hands,' she writes, 'will render a service to justice only if he is willing to transform the situation in such a way that the law can again operate and his act can, at least posthumously, be validated.' Revenge, in other words, can be just when done in certain ways – namely, when the avenger submits the justice or injustice of his act to the legal verdict of a jury.

So Berkowitz argues, while we should not shy away from celebrating bin Laden's (that's 'Osama' to the author) killing by 'whatever means it was accomplished' (351), perhaps it would have seemed more like the just assassination it was, had the American Navy SEALs that assassinated him, voluntarily submitted themselves to a jury trial, 'before an American jury because one cannot imagine them receiving a fair trial in Pakistan and because a trial before a judge in the Hague would lack the judgment of a jury and the possibility of jury nullification upon which the SEALs' claim of justice must rest' (349). Putting aside the glaring limitations of a legitimacy sought in an all-American jury nullification for such a case,⁴ we may note that in marshalling Arendt and her discussion of Schwartzbard and Tehlirian as potential 'precedents' to just assassinations, Berkowitz conveniently leaves out her conclusion to the contrary in *Eichmann in Jerusalem*:

it is more than doubtful that this solution would have been justifiable in Eichmann's case, and it is obvious that it would have been *altogether unjustifiable if carried out by government agents*. (Arendt [1963] 1994: 266, emphasis mine)

It is somehow difficult to imagine that this miscitation by the distinguished Arendt scholar was a mere oversight.

These are examples of scholarship that take a certain ideological hegemony for granted and address the overlap between politics and law from within that

reminiscent of the initial British preference for outright executions of Nazi perpetrators rather than bringing them before an international tribunal in the aftermath of World War II.

⁴ See Matravers (2004) and Bilsky (2010) for a discussion of the political multivalence of jury nullification.

hegemonic position. Berkowitz, for example, imagines himself as responding to ‘one discordant clang amidst the harmony of praise’ for bin Laden’s assassination (347), the clang being the objections that came from a number of Western human rights lawyers. This analysis says much about its acoustic milieu: impenetrable to those speaking from outside the empire of a hegemonic (albeit ‘liberal democratic’) consensus, and impatient with the dissonant voices that speak from within. It also teaches us that contemporary liberalism normalises its hegemony partly through the foreclosure and monopolisation of the significance of the political in the coincidence of law and politics. In this vein, one potential trajectory of future research could be to investigate the withdrawal of political justice from the trial and its re-emergence in state-sponsored assassinations and legislation, such as the draconian anti-terror laws enacted in the aftermath of 9/11 in liberal democracies around the world, engineered to depoliticise conflict. Another possible direction is to trace the various hegemonising uptakes of the 1960s critical work on political justice in contemporary transitional justice and international law literature.

Amidst this thick consensus, which creates and perpetuates forms of violence and injustice that it remains deaf to, one cannot help but wonder, whence rupture? The professional trajectory of Jacques Vergès, the trial lawyer who thought and operated in terms of rupture until his recent death, may be interesting to consider in this sense. An anti-colonialist communist activist in the late 1940s, Vergès became famous for his ‘rupture strategy’ as the lawyer of Djamila Bouhired and other Algerian National Liberation Front (FLN) fighters in 1957. In the FLN trials, the strategy had several aspects. The first was a jurisdictional objection that was raised at the beginning and sustained throughout: the French justice system could have no application to those who fought for national liberation in the colony, the defendants should be treated as enemy combatants not potential criminals (Vergès [1968] 2009: 95). Another aspect of the strategy was to make enough of a spectacle to gain media and public attention so as to take the trial outside the courtroom, that is, render it a proper public platform from which various objectives can be pursued: First, the defendants speak to their own public so that they are easily identifiable as symbols of the struggle for national liberation, people with whom other Algerians can identify. Second, the legal procedure is mobilised to expose torture, serving two

functions: nullifying the statements extracted under torture, and using this exposure as a symbol of the criminality of the colonial regime in an appeal to world public opinion (ibid).

Fast forward three decades and numerous other high-profile defendants (including the Palestinian militants who hijacked an El Al plane in Zurich in 1969, Lebanese militiaman Georges Ibrahim Abdallah who was accused of two political assassinations, Frankfurt Revolutionary Cells (RZ) militant Magdalena Kopp and others), Vergès was defending Nazi war criminal Klaus Barbie, the former chief of the Gestapo in occupied Lyon, also known as the Butcher of Lyon. Here again Vergès deployed a rupture strategy, though with a difference: accuse the accusers, but this time without even making any motions to defend the defendant as such. The rationale of his approach was a simple *tu quoque*: ‘One million Algerians were killed [by the French] ... if you want to judge Barbie, then you must also judge yourself.’⁵ Along with two colleagues, Algerian lawyer Nabil Bouaïta, and Congolese lawyer Jean-Martin M’Bemba, Vergès challenged the limited application of the notion of crimes against humanity. Here then, the strategy was to challenge the politicised and differential interpretation of crimes against humanity, and to disrupt the appropriation of the foregone conclusion of Barbie’s guilt as an exercise in self-righteous condemnation.

Before his death in August 2013, Vergès’s last high-profile defendant was Khieu Samphan, a senior leader in the Khmer Rouge regime, tried in the Extraordinary Chambers in the Courts of Cambodia on charges of crimes against humanity and genocide. Vergès made his mark on the case only in the pre-trial stage, stalling the bail hearings by the objection that most of the evidence against his client was not made available in French translation, and therefore was inaccessible to his counsel. The strategy was effective in delaying the trial, which took about four years to get going after Khieu Samphan’s arrest. It seems that once the actual trial began, Vergès was not present for most of the hearings,⁶ perhaps due to his advanced age. However he had explained in a *Spiegel* interview the defence

⁵ Martin A. Lee and Kevin Coogan, ‘Killers on the Right’, *Mother Jones*, May 1987, 46.

⁶ Defence Support Section of the Extraordinary Chambers in the Courts of Cambodia, ‘Statement on the Passing of Mr. Jacques Vergès’, 3 September 2013.

<http://www.eccc.gov.kh/en/articles/statement-passing-mr-jacques-verges>.

strategy he had devised with his client: they would argue that Khieu Samphan was at a remove from the murders and the torture as he never held a position of authority to do with the security forces, that the defendant's role was merely intellectual and technical.⁷ This is indeed what Khieu Samphan argued in his trial, albeit unsuccessfully as the 7 August 2014 verdict shows (ECCC 2014). Notably, both the translation objections, and the argument concerning Khieu Samphan's role in the regime can be identified as strategies of bureaucratic displacement, and have nothing to do with rupture. Then again, in the *Spiegel* interview, Vergès indicated the alternative perspective he held of the Khmer Rouge regime:

There was no genocide in Cambodia ... There were many murders, and some of them are unforgivable, which is something my client also says. And there was also torture, which is inexcusable. Nevertheless, it is wrong to define it as deliberate genocide. The majority of people died as a result of starvation and disease ... It was a consequence of the embargo policy of the United States. The history of Cambodia didn't begin when the Khmer Rouge came to power in 1975. There was a bloody prologue to this process: The Americans, under president Richard Nixon and the National Security Advisor Henry Kissinger, subjected Cambodia's civilian population to a brutal bombardment in the early 1970s.

This argument did not make it into the courtroom in defence of Khieu Samphan. It would presumably have very limited appeal if it had. While our understanding of the genocidal policies of the Khmer Rouge regime may indeed be enhanced by a more complicated appreciation of the role of global geopolitics, the rupture value of Vergès's position on Cambodia is no more and no less than the ethical failure of certain strands of anti-imperialism which take shelter in the convenience of empire figured as the source of all evil.

During his lifetime, Vergès managed to get a lot of press, including a well-made documentary entirely devoted to him, *Terror's Advocate* by Barbet Schroeder (2007). As in this documentary, he was often represented as a once honourable but then mostly shady character who entered unholy alliances with Nazis, dictators and other such villains, thus inspiring sanctimony in most of his commentators and interviewers. However, more telling may be the trajectory not of Vergès himself

⁷ 'Interview with Notorious Lawyer Jacques Vergès', *Spiegel*, 21 November 2008, <http://www.spiegel.de/international/world/interview-with-notorious-lawyer-jacques-verges-there-is-no-such-thing-as-absolute-evil-a-591943.html>.

but of his defence strategy over the years. The outline I have offered is admittedly not fully representative of Vergès's practice, nevertheless, we may provisionally identify something in the arc of the strategy in the trials from FLN militants to Klaus Barbie to Khieu Samphan that contrarily complements the gradual consolidation of consensus over the meaning of the political as it overlaps with law. Vergès's strategy went from claims to liberation to claims to historiography, from future-oriented performative promises to retrospective constative correctives. This of course has a lot to do with the different profiles of the defendants, from those embodying the undecidability of terrorist/freedom fighter to the really villainous villains of totalitarian rule. But if we are to read Vergès's advocacy as critical legal practice, working against the closure that a trial attempts, countering its hegemonising framework from the edges of that framework, the arc symptomises the felicitous consolidation of consensus. This is most evident when we consider the shifts of his strategy vis-à-vis political violence: from the affirmation of political violence in the FLN trials, to its relativisation in the Klaus Barbie trial, to its outright disavowal in the Khieu Samphan trial. What sustains the logic of consensus, the failure to account for its own political violence, contaminates the effort to disrupt that consensus.

The fate of the strategy of rupture as practiced by its theorist testifies to the necessity to rethink rupture today. In turn, the rethinking of rupture has to be keenly attuned to the past and future ghosts of political violence, whether it is perpetrated in killing fields or in serene courtrooms. In this sense, there is something crucial to retain of the critical acumen of the 1960s' literature on political trials, which endeavoured to take account not only of the violence of the acts that are on trial, but also the violence of the law that attempts to address those acts through the trial. This thesis has been my uptake of the 1960s' critical legacy. The attempt to pursue more rigorously its incipient formulations vis-à-vis the performativity of trials has led me to a number of considerations pertaining to the overlap between law and politics. These considerations included the ways in which a trial's performance makes and unmakes its performativity; how the sovereign performatives of a trial can be undermined by not only the unconscious fears and desires embodied by its participants, but also by law's structural unconscious; how spectres may disrupt

spectacles; how spectacular conflicts may conceal profound commonalities; and more generally, the ways in which law-preserving violence coincides with law-instituting violence in the trial. This, then, was one attempt to think the ‘political’ in political trials.

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