

# COMMENTARIES

## VIOLENCE AND PLAY IN SADDAM'S TRIAL

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*[In the performance of Saddam's trial, which culminated in the executions of Saddam and two of his co-defendants, we find both lawmaking and law-preserving violence at work. The new Iraqi State exercised its law-preserving violence when sitting in judgment on Saddam's own acts of law-preserving violence. Yet the trial was also an affirmation of its own legitimacy on the part of the new regime, a performance designed to justify and uphold the lawmaking violence of the Iraqi war. The violences of law, the violences which found and reinforce the authority of the state, are anchored in performance. There is a symbiotic relationship between violence and play; the violence of law requires play, and hence the administration of state violence against Saddam and his co-defendants occurred in the form of the rule-bound, orderly performance of the trial. Yet other forms of play, other more spontaneous performances, can disrupt the violence of law. The defiant performances of Saddam and his co-defendants suggest that play can be a strategy for negotiating the violence of law.]*

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### I INTRODUCTION

In 2006, the first Iraqi trial<sup>1</sup> of Saddam Hussein and his seven co-defendants was undeniably the most publicised trial, the show trial, in the 'war on terror'. This trial, and the executions which followed, have been met with strong criticism from various organisations and individuals concerned about procedural flaws and unfairness, as well as from governments and groups opposed to the application of the death penalty. Critics of the trial process include Human Rights Watch, an international human rights organisation which constantly monitored the trial proceedings.<sup>2</sup> Human Rights Watch has argued that the trial process was fundamentally flawed, with significant administrative, procedural and substantive legal defects.<sup>3</sup> These defects detract from the credibility of the

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<sup>1</sup> This was followed by a second trial beginning in August 2006 before the verdict had been handed down in the first trial. In the second trial, Saddam and his co-defendants faced charges of genocide in relation to a campaign against the Kurds in 1988, which involved chemical warfare, military assaults, and the destruction of entire villages. Saddam was executed in December 2006 before the second trial ended. The trial of his co-defendants continued after his death: Human Rights Watch, *Judging Dujail: The First Trial before the Iraqi High Tribunal* (2006) 7 <<http://hrw.org/reports/2006/iraq1106/iraq1106web.pdf>> at 18 October 2007.

<sup>2</sup> Ibid 5.

<sup>3</sup> Ibid 6.

trial<sup>4</sup> and from its value as part of the historical record of human rights violations under Saddam's government.<sup>5</sup>

However, my focus is not on the defects in the trial process. I am interested, rather, in the themes of violence and play: in the extent to which multiple acts of violence surrounded, supported, justified, corroded and were judged in the trial process; and in the central role of different forms of play within this process. Play, in the form of ceremony or spectacle, is integral to the administration of state violence. Yet Saddam's trial also demonstrates the possibilities of play as an antidote to such violence, as a subversive device which can disrupt and undermine the ordered performance of law-preserving violence.

## II VIOLENCE AND PLAY

I shall explore the multiple manifestations of violence in Saddam's trial by drawing on Walter Benjamin's distinction between lawmaking violence and law-preserving violence.<sup>6</sup> Saddam's trial exemplifies the characteristic interplay between these two forms of violence, or what Benjamin describes as the 'dialectical rising and falling' in these forms of violence.<sup>7</sup> In this 'oscillation', lawmaking violence contributes to the origin of every state, which then exercises law-preserving violence in 'suppressing hostile counterviolence'.<sup>8</sup> Eventually, when 'new forces of those earlier suppressed [forms of violence] triumph over the hitherto lawmaking violence and thus found a new law',<sup>9</sup> the cycle continues.

The foundation of all states lies in acts of violence which could well be interpreted as acts of terrorism, acts of revolution or acts of rebellion by the displaced regime.<sup>10</sup> If, however, such acts are successful in achieving political revolution, they acquire a belated legitimacy. Jacques Derrida, in his influential reading of Benjamin's essay, describes the moment of the foundation of each state as the 'ungraspable revolutionary instant',<sup>11</sup> a moment in which *no* law applies.<sup>12</sup> Subsequently, each state constructs the 'proper interpretative models' to confer legitimacy upon these revolutionary acts of lawmaking violence,<sup>13</sup> and thus affirms its own legitimacy. However, the state remains fearful of similar acts of 'fundamental, founding violence' on the part of others which will, if successful, 'transform the relations of law' and 'present [that violence] as having a right to law'.<sup>14</sup>

<sup>4</sup> Ibid.

<sup>5</sup> Ibid 3.

<sup>6</sup> Walter Benjamin, 'Critique of Violence' (Edmund Jephcott trans, 1996 ed) [trans of: *Zur Kritik der Gewalt*] in Marcus Bullock and Michael Jennings (eds), *Walter Benjamin: Selected Writings, Volume 1, 1913–1926* (1996) 236, 241.

<sup>7</sup> Ibid 251.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> Robert Cover, 'Violence and the Word' (1986) 95 *Yale Law Journal* 1601, 1605.

<sup>11</sup> Jacques Derrida, 'Force of Law: The "Mystical Foundation of Authority"' (Mary Quaintance trans, 1990 ed) [trans of: *Force de loi: Le fondement mystique de l'autorité*] in Drucilla Cornell, Michel Rosenfeld and David Gray Carlson (eds), *Deconstruction and the Possibility of Justice* (1992) 3, 41.

<sup>12</sup> Ibid 13.

<sup>13</sup> Ibid 36.

<sup>14</sup> Ibid 35.

Acts of 'fundamental founding violence' differ markedly from acts of ordinary criminality. There is 'a willingness not only to die but also to kill for an understanding of the normative future that differs from that of the dominating power'.<sup>15</sup> By contrast, the acts of violence that are committed by the state in maintaining its authority through the exercise of law are acts of law-preserving violence. In Saddam's trial, such acts were judged and condemned by a new government, through a complex legal ritual which culminated in the spectacular violence of the death penalty.

Derrida contests the viability of Benjamin's distinction between lawmaking and law-preserving violence.<sup>16</sup> Indeed, Benjamin himself analyses situations in which both types of violence were simultaneously displayed. In particular, Benjamin argues that capital punishment encapsulates not merely law-preserving violence, but also its lawmaking violence; in capital punishment, 'law reaffirms itself'.<sup>17</sup> Saddam's trial can be perceived as an exercise of law-preserving violence by a new regime, but takes on an added significance as a legal performance deliberately designed to validate the revolutionary violence and ongoing bloodshed of the war in Iraq. The trial is part of what Derrida describes as 'the discourse of [the new state's] self-legitimation';<sup>18</sup> the authority of the Iraqi High Tribunal ('Tribunal') was derived from the continuing acts of violence of the war in Iraq and its aftermath, but at the same time, the trial was intended to confer legitimacy upon these acts by demonstrating the excessive criminality of the deposed leader. Thus, the trial can be seen as part of the lawmaking violence which established the new Iraqi State.

Derrida recognises the centrality of performance in lawmaking violence, and in law-preserving violence. The founding moment of law is distinguished by a 'pure performative act that would not have to answer to or before anyone';<sup>19</sup> terrorism, revolution and rebellion exemplify performance in the form of spectacular violence. Yet performance is also central to law's self-validating practices, as Derrida suggests in the concept of 'performative tautology'. This tautology

structures any foundation of the law upon which one performatively produces the conventions which guarantee the validity of the performative, thanks to which one gives oneself the means to decide between legal and illegal violence.<sup>20</sup>

The trial as a particular example of law-preserving violence has long been recognised as a form of play, performance or theatre. Trials are often described and analysed in theatrical terms.<sup>21</sup> Political playwrights and artists have exploited the trial as performance. Arthur Miller drew on the transcripts of the

<sup>15</sup> Cover, above n 10, 1605.

<sup>16</sup> Derrida, above n 11, 38.

<sup>17</sup> Benjamin, above n 6, 242–3.

<sup>18</sup> Derrida, above n 11, 36.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid 33.

<sup>21</sup> See, eg, David Schultz's discussion of the trials of Oscar Wilde as performance and theatrical spectacle: 'Redressing Oscar: Performance and the Trials of Oscar Wilde' (1996) 40 *TDR: The Drama Review* 37. See also Hannah Arendt's analysis of the theatricality of Adolf Eichmann's trial: *Eichmann in Jerusalem: A Report on the Banality of Evil* (first published 1963, 2006 ed) 4–9.

Salem witchcraft trials in his indictment of state-orchestrated witch-hunts in his play *The Crucible*.<sup>22</sup> Bertolt Brecht planned a theatre which would function like a courtroom and in which famous courtroom trials would be staged.<sup>23</sup> Dario Fo's theatre company frequently staged political trials within hours of the original hearings as 'an alternative system of judicial inquiry'.<sup>24</sup> Sometimes, these trials would pre-empt 'the more dramatic performance put on by the state the next day'.<sup>25</sup> Activists have used the performance of the mock trial to interrogate and challenge state policies and the actions of powerful politicians.<sup>26</sup> In other contexts, satirists have turned courtrooms into performance spaces, utilising their own trial as a mechanism for powerful political commentary.<sup>27</sup>

The theatrical elements of trials are self-evident. There are actors; there is live performance; there are costumes; and there is an audience which extends beyond the courtroom as a consequence of media coverage. As Foucault has demonstrated, in a world in which punishment is no longer the spectacle, 'publicity has shifted to the trial, and to the sentence'.<sup>28</sup> There is no doubt that the trial forms part of the political performances which are central to the operation of modern democracies.<sup>29</sup>

Thus play in the form of the ceremony of the trial is integral to the administration of law-preserving violence, and the state-directed performance of Saddam's trial exemplifies this form of play. Yet play, like violence, can have multiple functions. In analysing manifestations of play in Saddam's trial, I shall employ Roger Caillois' distinction between two forms of play. Caillois argued that at one end of the spectrum is rule-bound play, or *ludus*, which is distinguished by 'arbitrary, imperative and purposely tedious conventions'.<sup>30</sup> Trials and other legal performances display many of the characteristics of this form of play. At the other end of the spectrum, however, is a very different form of play, which is 'frolicsome and impulsive', 'anarchic and capricious' and distinguished by 'diversion, turbulence, free improvisation, and carefree gaiety';<sup>31</sup> Caillois calls this *paidia*. This is play as 'mockery', as 'a mimic and a tease'.<sup>32</sup> In Saddam's trial, this form of play was deployed by the defendants in response to the law-preserving violence of the state. Victor Turner contends that such play 'has the powers of the weak, an infantine audacity in the face of the strong'.<sup>33</sup> I am interested in exploring, in the context of Saddam's trial, the

<sup>22</sup> Arthur Miller, *The Crucible* (first published 1957, 2003 ed).

<sup>23</sup> Joel Schechter, *Durov's Pig: Clowns, Politics and Theatre* (1985) 191.

<sup>24</sup> Ibid 193–4.

<sup>25</sup> Ibid 193, citing Dario Fo, 'Popular Culture: A Speech by Dario Fo Translated by Tony Mitchell' (1983) 14(3) *Theater* 50, 53.

<sup>26</sup> Schechter, above n 23, 200–1, 207.

<sup>27</sup> Ibid 195–6.

<sup>28</sup> Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Alan Sheridan trans, first published 1975, 1977 ed) 9 [trans of: *Surveiller et punir: Naissance de la prison*].

<sup>29</sup> See Baz Kershaw, 'Fighting in the Streets: Dramaturgies of Popular Protest, 1968–1989' (1997) 13 *New Theatre Quarterly* 255, 257.

<sup>30</sup> Roger Caillois, *Man, Play and Games* (Meyer Barash trans, 1979 ed) 13 [trans of: *Les jeux et les hommes*].

<sup>31</sup> Ibid.

<sup>32</sup> Victor Turner, *The Anthropology of Performance* (1987) 168.

<sup>33</sup> Ibid 169.

viability of this form of play as an antidote or a mechanism to challenge the law-preserving violence of the state.

### III THE VIOLENCE OF THE TRIAL

As I have argued above, the Tribunal which tried Saddam relied for its authority on acts of founding violence, the continuing violence of the war in Iraq and its aftermath, which the trial itself was designed to legitimise. Saddam's government, however unpopular, was forcibly overthrown in an invasion carried out by the United States and its allies in 2003, and a new Iraqi Government, including the Tribunal, was established by force.<sup>34</sup> The violence was ongoing outside the heavily guarded parameters of Baghdad's Green Zone, within which the trial took place. In fact, according to one media report, an Iraqi citizen commented: 'we don't really care about the trial though, because the security situation and the massacres now are much worse than under Saddam. They make this massacre (in Dujail) look like child's play'.<sup>35</sup> By November 2006, the trial and executions were described by one commentator as 'a sideshow — unable to influence the Iraqis who have turned on each other as well as on coalition soldiers'.<sup>36</sup>

Saddam and his co-defendants consistently drew to the attention of the Tribunal the violence which established the new regime, and argued that the regime had no legitimacy. At the outset, Saddam stated, 'I reserve my constitutional rights as the President of Iraq', and went on to say, 'I don't recognise the group that gave you the authority and assigned you. Aggression is illegitimate and what is built on illegitimacy is illegitimate'.<sup>37</sup> In the course of the proceedings, he repeatedly insisted that he was the current President of Iraq<sup>38</sup> and referred to court guards as 'invaders and occupiers'.<sup>39</sup> He criticised the current Iraqi Government for failing to deal effectively with sectarian violence,<sup>40</sup> and when called to give evidence, encouraged the Iraqi people to resist 'the American-Zionist invasion' instead of engaging in civil war.<sup>41</sup> Even as the Chief Judge of the Tribunal handed down his death sentence, Saddam was still referring to the Americans as 'traitors' and 'invaders' and calling for their downfall.<sup>42</sup>

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<sup>34</sup> See Human Rights Watch, above n 1, 4.

<sup>35</sup> James Hider, 'Saddam Storms Out Leaving New Judge Presiding over Empty Court', *The Times* (London, UK) 30 January 2006, 32.

<sup>36</sup> Editorial, 'Death Penalty for a Tyrant: Justice by a Flawed Process', *The Sydney Morning Herald* (Sydney, Australia) 7 November 2006, 10.

<sup>37</sup> 'Who and What Are You?', *The Times* (London, UK) 20 October 2005, 6.

<sup>38</sup> "I Am Still the Head of State", *Guardian Unlimited* (UK) 15 March 2006 <<http://www.guardian.co.uk/Iraq/Story/0,,1731557,00.html>> at 18 October 2007.

<sup>39</sup> Simon Freeman, 'Court Hears First Evidence against Saddam', *Times Online* (UK) 28 November 2005 <<http://www.timesonline.co.uk/tol/news/world/iraq/article597499.ece>> at 18 October 2007.

<sup>40</sup> 'Saddam Admits Approving Executions of Boys', *The Sydney Morning Herald* (Australia) 7 April 2006 <<http://www.smh.com.au/news/world/saddam-admits-approving-executions-of-boys/2006/04/06/1143916656015.html>> at 18 October 2007.

<sup>41</sup> Ewen MacAskill, 'Fight the Invaders, Saddam Urges Iraqis from Dock', *The Guardian* (London, UK) 16 March 2006, 17.

<sup>42</sup> Dave Clark, 'Saddam Sentenced to Hang', *The Sydney Morning Herald* (Sydney, Australia) 6 November 2006, 1.

In questioning the authority and legitimacy of the Tribunal, and of the US invasion which installed the current government, Saddam highlighted the underlying violence of the trial process, but was nonetheless engaged in a futile attempt to contest what could not be contested in that courtroom. Repeatedly ordering Saddam to stop raising political matters when he first gave testimony,<sup>43</sup> the judge made it clear that the Tribunal was not an appropriate forum for Saddam to challenge the legitimacy of the founding acts of violence which conferred authority upon it. In refusing to acknowledge and examine these acts of founding violence, the Tribunal demonstrated the wilful inattention practised by every legal system to the violence of its origins. Drucilla Cornell has written that ‘what is “rotten” in a legal system is precisely the erasure of its own mystical foundation of authority so that the system can dress itself up as justice’.<sup>44</sup> Terry Eagleton has utilised an appealing metaphor in articulating the same view: ‘Like a hippie applying to law school, power must disown its transgressive past’.<sup>45</sup>

An international court might have provided an appropriate forum in which such questions could be raised. However, Saddam’s trial took place in Iraq, possibly because, as Gwynne Dyer has observed, trying Saddam before an international court ‘would have brought up all sorts of awkward history from the days when the US and Saddam were effectively allies’.<sup>46</sup> Instead, the Tribunal ignored acts of violence committed by Western nations in imposing sanctions and waging war on Iraq, and the support which Western nations provided for Saddam’s own acts of violence. The theatre of the Iraqi trial focused the world’s attention on the misdeeds of a few individuals. In this performance, Saddam was cast as a scapegoat, the ‘figure whom it is impossible to look upon and live ... who stands for everything that is structurally awry, alienated and exploitative in the *polis*, onto whom society projects and displaces and disavows its own crimes’.<sup>47</sup> According to Eagleton, the scapegoat is ‘the inverted image of the monarch’<sup>48</sup> — a description which aptly fits the deposed tyrant.

Saddam’s trial not only derived its legitimacy from acts of violence but, in addition, was itself part of a process which was intended to, and did, culminate in the violence of capital punishment. The Chief Prosecutor asked for this penalty against Saddam and three of his co-defendants on the basis that they were guilty of crimes against humanity.<sup>49</sup> Saddam and two of his co-defendants, Barzan Ibrahim al-Tikriti and Awad al-Bander, received death sentences and were executed in December 2006 and January 2007 respectively. The availability of the death penalty is thought to have been another factor in the decision to try Saddam in Iraq. In fact, in order to facilitate the execution, the Tribunal’s rules

<sup>43</sup> MacAskill, above n 41, 17.

<sup>44</sup> Drucilla Cornell, ‘The Violence of the Masquerade: Law Dressed Up as Justice’ (1991) 11 *Cardozo Law Review* 1047, 1061.

<sup>45</sup> Terry Eagleton, ‘Terror and the Law: Law and Transgression Are Two Sides of the Same Coin’ (2006) 83 *Arena Magazine* 42, 42.

<sup>46</sup> Gwynne Dyer, ‘Starring in a Farce, a Monster Becomes a Hero’, *The Sydney Morning Herald* (Sydney, Australia) 1 February 2006, 15.

<sup>47</sup> Eagleton, above n 45, 43.

<sup>48</sup> Ibid.

<sup>49</sup> Ned Parker, ‘Prosecutor Demands the Death Penalty for Saddam’, *The Times* (London, UK) 20 June 2006, 30.

were changed prior to the trial to lower the standard of proof required, and to require execution within 30 days of judgment. This timeframe made official intervention in the death sentence difficult.<sup>50</sup>

The defendants claimed during the course of the trial that they had already been subjected to acts of violence. In the courtroom, Saddam accused US soldiers of beating him, and Barzan Ibrahim al-Tikriti argued that denial of appropriate medical treatment was ‘indirect murder’,<sup>51</sup> claiming, ‘I am dying gradually and you are killing me’.<sup>52</sup> However, such acts of violence were overshadowed by the ultimate demonstration of state violence in the form of capital punishment. Dwight Conquergood has argued that such acts of justified state murder function as ‘a form of “poetic justice,” a “revenge tragedy” that operates on the principle of mimetic magic: the belief that only violence can cross out violence’.<sup>53</sup> Robert Cover has also described capital punishment as ‘the most plain, the most deliberate, and the most thoughtful manifestation of legal interpretation as violence’.<sup>54</sup>

Conquergood, in analysing the dramaturgy of capital punishment, has described how ‘protocols of civility’ and the ‘pretense of courtesy’ are designed to conceal ‘[t]he real violence of state killing’.<sup>55</sup> Such protocols and pretences also operate in the trial process, in which the violence of execution is not conceded or addressed by the judge or prosecution. In contrast, Saddam and his co-defendants openly alluded to their executions. In December 2005, Saddam stated: ‘I live in an iron cage covered by a tent under American democratic rule. The Americans and the Zionists want to execute Saddam Hussein’.<sup>56</sup> One of the co-defendants asked the court: ‘Why don’t you just execute us and get this over with?’<sup>57</sup> As Cover has explained, the judge and the defendant, as ‘perpetrator and victim of organised violence’, have ‘achingly disparate significant experiences’.<sup>58</sup> He continues:

for the perpetrator, the pain and fear are remote, unreal, and largely unshared. They are, therefore, almost never made a part of the interpretative artifact, such as the judicial opinion. On the other hand, for those who impose the violence the justification is important, real and carefully cultivated. Conversely, for the victim, the justification for the violence recedes in reality and significance in proportion to the overwhelming reality of the pain and fear that is suffered.<sup>59</sup>

<sup>50</sup> Bronwen Maddox, ‘Cathartic Effect Could Be More Valuable than Simple Justice’, *The Times* (London, UK) 20 October 2005, 7.

<sup>51</sup> Freeman, ‘Court Hears First Evidence against Saddam’, above n 39.

<sup>52</sup> Simon Freeman, ‘Saddam Trial Descends into Chaos’, *Times Online* (UK) 13 February 2006 <<http://www.timesonline.co.uk/tol/news/world/iraq/article730356.ece>> at 18 October 2007.

<sup>53</sup> Dwight Conquergood, ‘Lethal Theatre: Performance, Punishment and the Death Penalty’ (2002) 54 *Theatre Journal* 339, 359.

<sup>54</sup> Cover, above n 10, 1622.

<sup>55</sup> Conquergood, above n 53, 360.

<sup>56</sup> Stephen Farrell, ‘Pistol Whippings, Electric Shocks and a Virtuous Woman’s Testimony’, *The Times* (London, UK) 7 December 2005, 35.

<sup>57</sup> Stephen Farrell, ‘Courtroom Revenge of Man Who Saw Family Massacred by Saddam Henchmen’, *The Times* (London, UK) 6 December 2005, 36.

<sup>58</sup> Cover, above n 10, 1629.

<sup>59</sup> Ibid.

In delivering its verdict, the Tribunal displayed the preserving force of law. In that sense, the violence which characterised the trial process and subsequent executions is analogous to the violence under scrutiny in the courtroom, of which Saddam and his seven co-defendants were accused.

In the first trial, Saddam and his co-defendants were accused of detaining and torturing an unspecified number of people in Dujail in 1982, following an unsuccessful assassination attempt on Saddam.<sup>60</sup> Of a group of 148 of these detainees, an uncertain number who survived imprisonment and interrogation were executed after a summary trial before the Revolutionary Court.<sup>61</sup> The evidence in relation to these acts of violence was profoundly disturbing. Many witnesses, fearful of the ramifications of giving evidence, concealed their identity behind curtains and masks. The acts they described comprise only a small number of the many incidents of violence which characterised Saddam's rule as President of Iraq. There is no doubt that Saddam and his co-defendants were the perpetrators of abhorrent deeds. The human rights violations orchestrated and carried out by Saddam's Ba'athist Government amounted to international crimes, including genocide, crimes against humanity and war crimes.<sup>62</sup>

However, as Saddam argued in the courtroom, the exercise of force in Dujail can be seen as 'law preserving violence' which 'maintains, confirms, insures the permanence and enforceability of law'.<sup>63</sup> It was the retaliatory response of a government under attack. In the courtroom, Saddam asked why 'referring a defendant who opened fire at a head of state' was a crime.<sup>64</sup> He claimed responsibility as leader for the deeds of which he was accused, admitting that he signed all relevant documents in relation to the executions, and pointing out that his actions were legitimate at the time. He argued that '[t]hese people were charged according to the law, just like you charge people according to the law'.<sup>65</sup>

The executions could thus be seen as a legitimate exercise of law-preserving violence under Saddam's regime. Similarly, the trial and executions of Saddam and two of his co-defendants following the verdict of the Tribunal can also be seen as a legitimate exercise of law-preserving violence under the new regime. Eagleton argues that 'there is a collusion between those who operate the law, or embody it, and those who transgress it', in the sense that 'they both fall outside of it'.<sup>66</sup> This collusion, and the extent to which these roles are interchangeable, is apparent in the trial of Saddam. The similarities in the exercise of law-preserving violence under both regimes highlight the paramount role of all law-preserving violence in 'suppressing hostile counterviolence', even though it thus undermines 'the lawmaking violence it represents'.<sup>67</sup> This reinforces Benjamin's claim that a primary focus of the law is to maintain its 'monopoly' on violence.<sup>68</sup>

<sup>60</sup> Human Rights Watch, above n 1, 2.

<sup>61</sup> Ibid.

<sup>62</sup> Ibid 3.

<sup>63</sup> Derrida, above n 11, 31.

<sup>64</sup> Paul McGeough, 'Saddam Admits Ordering 148 Killings', *The Sydney Morning Herald* (Sydney, Australia) 3 March 2006, 10.

<sup>65</sup> Ibid.

<sup>66</sup> Eagleton, above n 45, 43.

<sup>67</sup> Benjamin, above n 6, 251.

<sup>68</sup> Ibid 239.

However, it is difficult to distinguish between lawmaking violence and law-preserving violence in the context of Saddam's trial; this conflation illustrates Derrida's argument that there is no 'pure founding violence', no 'purely conservative violence'.<sup>69</sup> Saddam's trial involved the exercise of law-preserving violence, but it was also part of the justificatory apparatus designed to validate the foundation of a new Iraqi State by conclusively demonstrating the criminality of Saddam and his co-defendants and highlighting the evils of the previous regime. Saddam's trial and execution were critical performances for the new state in asserting its supremacy over the old regime, and establishing the necessity for its violent demise. Yet it is clear from the acts of revolutionary violence which destabilised and undermined the trial that the foundation of the new Iraqi State is still violently contested. The value of the trial as part of the new state's 'discourse of ... self-legitimation',<sup>70</sup> as a legal performance which sought to validate the violent origins of the new state, is thus debatable.

These acts of revolutionary violence corroded the trial process even before the trial began. By the time the trial commenced, at least five people working in the court had been killed.<sup>71</sup> According to Dyer, seven people associated with the trial were assassinated between October 2005, when the trial began, and the end of January 2006. Two of these were defence lawyers.<sup>72</sup> In June 2006, another defence lawyer, Khamis al-Obeidi, was abducted from his house and shot.<sup>73</sup> Saddam's chief lawyer, Khalil al-Duleimi, claimed to have received multiple death threats.<sup>74</sup> Witnesses and court officials were also intimidated and murdered.<sup>75</sup> The failure on the part of the court administration to protect defence counsel was identified by Human Rights Watch as a significant flaw in the proceedings.<sup>76</sup>

This additional violence directed against participants in the trial process demonstrated a profound resistance to the exercise of law. It is analogous to both the revolutionary acts of resistance in the failed assassination attempt, and to the violence which established the new regime in Iraq and conferred authority on the Tribunal. This particular violence exposed the vulnerability of the underlying 'structure of cooperation' which Cover describes as essential to the effective imposition of a sentence in a criminal case.<sup>77</sup> This structure 'ensures, we hope, the effective domination of the present and prospective victim of state violence — the convicted defendant'.<sup>78</sup> Where this domination proves

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<sup>69</sup> Derrida, above n 11, 38.

<sup>70</sup> Ibid 36.

<sup>71</sup> Human Rights Watch, above n 1, 20.

<sup>72</sup> Dyer, above n 46, 15.

<sup>73</sup> David Fickling, 'Gummen Kill Saddam Lawyer', *Guardian Unlimited* (UK) 21 June 2006 <<http://www.guardian.co.uk/Iraq/Story/0,,1802600,00.html>> at 18 October 2007.

<sup>74</sup> Hala Jaber, 'Fearful Lawyers Threaten Boycott of Saddam Trial', *The Sunday Times* (London, UK) 23 October 2005, News 27.

<sup>75</sup> Paul McGeough, 'Hell Moves a Step Closer', *The Sydney Morning Herald* (Sydney, Australia) 6 November 2006, 14.

<sup>76</sup> Human Rights Watch, above n 1, 24.

<sup>77</sup> Cover, above n 10, 1618.

<sup>78</sup> Ibid.

ineffective, ‘the role of judge becomes dangerous’.<sup>79</sup> In fact, the initial Chief Judge stepped down from his role in January 2006.<sup>80</sup>

#### IV PLAY IN SADDAM’S TRIAL

The value of the trial and execution as legal ceremonies reinforcing the authority of the new regime was further undermined by play. In Saddam’s trial, we find both rule-bound play directed by the state and, unexpectedly, the unpredictable, arbitrary and capricious form of play which Caillois has characterised as *paidia*.<sup>81</sup>

The rule-bound orderly play of legal performance is an essential part of the administration of law-preserving violence by the state. Saddam’s trial was a necessary ceremony which was intended to differentiate Saddam’s own execution from the executions ordered and orchestrated by Saddam and his co-defendants. In reflecting on the theatrical nature of the trial, it is surely of interest that the Iraqi judges and prosecutors were supposedly trained for their roles in Britain with the use of ‘simulated’ trials, ‘fictional scenarios’ and ‘a hypothetical commander’.<sup>82</sup> Rehearsals of the trial took place well before the theatre of the trial commenced.

The theatre of Saddam’s trial was largely orchestrated by the US. In 2004, the US director of the war crimes regional office, Professor Michael Scharf, identified the role of the US in Saddam’s trial as that of ‘puppet master’.<sup>83</sup> One commentator described the courtroom during the first hearing as ‘filled with US military personnel dressed in civilian clothes’ and notes that journalists were vetted by US authorities, who also censored the sounds and images which were released to the outside world.<sup>84</sup> According to an American member of Saddam’s defence team, the US Government poured hundreds of thousands of dollars into the prosecution’s case, reviewed all materials brought into the visiting room by the defendants and their lawyers, and maintained close audio and visual surveillance of the defendants during their meetings with their lawyers.<sup>85</sup> A censored version of the trial proceedings was broadcast by a US company.<sup>86</sup>

As Conquergood has observed, ‘[t]he central performance challenge of execution rituals is to differentiate between judicial killing and murder’.<sup>87</sup> In Austin Sarat’s words, ‘[s]how, spectacle, theater ... are central to the rituals of state killing’.<sup>88</sup> Conquergood refers to ‘regular rehearsals, precise stage

<sup>79</sup> Ibid.

<sup>80</sup> Freeman, ‘Saddam Trial Descends into Chaos’, above n 52.

<sup>81</sup> Caillois, above n 30, 13.

<sup>82</sup> Richard Beeston and Francis Gibb, ‘Saddam Trial Judges Were Secretly Trained in Britain’, *The Times* (London, UK) 18 October 2005, 33.

<sup>83</sup> Anthony Scrivener, ‘Saddam in the Dock: The US Wanted a Showcase, but It’s Staging a Dangerous Farce’, *The Independent* (London, UK) 4 July 2004, 12.

<sup>84</sup> Ash Bâli, ‘Justice under Occupation: Rule of Law and the Ethics of Nation-Building in Iraq’ (2005) 30 *Yale Journal of International Law* 431, 432.

<sup>85</sup> Curtis Doebbler, ‘A Farce of Law: The Trial of Saddam Hussein’, *Jurist* (Pittsburgh, US) 24 April 2006, available from <<http://jurist.law.pitt.edu>> at 18 October 2007.

<sup>86</sup> John Simpson, ‘Saddam’s Trial Is Not a Farce’, *BBC News* (UK) 23 December 2005, <[http://news.bbc.co.uk/1/hi/world/middle\\_east/4556268.stm](http://news.bbc.co.uk/1/hi/world/middle_east/4556268.stm)> at 18 October 2007.

<sup>87</sup> Conquergood, above n 53, 360.

<sup>88</sup> Austin Sarat, *When the State Kills: Capital Punishment and the American Condition* (2001) 242.

directions, and obsessive planning and detail',<sup>89</sup> to 'protocols of civility' and the 'pretense of courtesy'.<sup>90</sup> The 'private' moments of execution are characterised by rule-bound play, as is the legal performance of the trial.

Yet the state lost partial control over the performance of Saddam's death, and the 'protocols of civility' and 'pretense of courtesy' were conspicuously absent from Saddam's execution. Prior to the execution, the Iraqi National Security Adviser, Mowaffa al-Rubaie, announced that no media would be present and that it was unlikely that the official videotape of the execution would be released.<sup>91</sup> Despite such assurances, the executions instantly became a public spectacle due to illegal footage from mobile phone cameras which was broadcast across the world. This footage demonstrated quite graphically that there was nothing civilised or decorous about the behaviour of the state representatives who witnessed and carried out Saddam's execution. Although officially released silent pictures portrayed 'a much more subdued and dignified event',<sup>92</sup> the illegal footage revealed that Saddam was publicly taunted by his hooded executioners.<sup>93</sup> The scene in the death chamber was described as one of 'sordid chaos'.<sup>94</sup> In contrast to his masked, jeering executioners, Saddam remained unhooded, composed and dignified.<sup>95</sup>

The execution attracted worldwide criticism from opponents of the death penalty,<sup>96</sup> from Islamic leaders who were critical of the decision to execute Saddam on a Muslim religious holiday,<sup>97</sup> and from those who were concerned about the failure to observe procedural fairness in the conduct of the trial and procedural niceties in the conduct of the execution.<sup>98</sup> The execution constituted part of what Foucault has described as 'the great spectacle of physical punishment', which was replaced by 'sobriety in punishment' at the beginning of the 19<sup>th</sup> century.<sup>99</sup> Although it is not the only contemporary performance in a 'resurgent theatre of death',<sup>100</sup> the Iraqi Government did not meet the 'central performance challenge' of such rituals:<sup>101</sup> it failed to create 'the illusion of order, inevitability, procedure, due process',<sup>102</sup> and inadvertently allowed images of chaos and disruption to be broadcast around the world. Images of the spectacle penetrated even the sealed walls of Guantánamo Bay where, according to the US

<sup>89</sup> Conquergood, above n 53, 362.

<sup>90</sup> Ibid 360.

<sup>91</sup> James Glanz, 'Saddam May Be Hanged Today, Says Lawyer', *The Sydney Morning Herald* (Sydney, Australia) 30 December 2006, 9.

<sup>92</sup> Paul McGeough, 'Saddam Dead, but No Relief for Bush', *The Sydney Morning Herald* (Sydney, Australia) 1 January 2007, 1, 7.

<sup>93</sup> Editorial, 'After the Hanging, What Now?', *The Sydney Morning Herald* (Sydney, Australia) 2 January 2007, 8.

<sup>94</sup> Ibid.

<sup>95</sup> Eugene Robinson, 'A Scaffold's Dark Portrait of Iraq', *The Washington Post* (Washington DC, US) 2 January 2007, A17.

<sup>96</sup> See, eg, Human Rights Watch, above n 1, 87.

<sup>97</sup> Ashraf Khalil, 'Islamic Leaders Decry Timing of Execution', *The Sydney Morning Herald* (Sydney, Australia) 1 January 2007, 7.

<sup>98</sup> McGeough, 'Hell Moves a Step Closer', above n 75, 14.

<sup>99</sup> Foucault, above n 28, 14.

<sup>100</sup> Conquergood, above n 53, 342.

<sup>101</sup> Ibid 360.

<sup>102</sup> Ibid 361.

military, they were designed for the ‘intellectual stimulation of the detainees’.<sup>103</sup> Far from being a ‘private [performance] for a small, homosocial, invitation-only audience of elites’,<sup>104</sup> in accordance with the modern rituals of execution, the execution was, as human rights lawyer Geoffrey Robertson had predicted, ‘an obscene spectacle’.<sup>105</sup>

Nor did Saddam’s trial provide a convincing legal performance. Instead, it was described by media commentators as ‘a zoo’,<sup>106</sup> ‘a French farce’,<sup>107</sup> ‘a black comedy’,<sup>108</sup> ‘a circus’,<sup>109</sup> a ‘soap opera’<sup>110</sup> and, most frequently, as theatre. One journalist argued that the trial was ‘a surreal piece of theatre’ in which Saddam was playing ‘the role expected of him each time the curtain goes up’.<sup>111</sup> Another commentator wrote that ‘[t]here is no doubt about Saddam’s guilt, but the process that confirmed it and the political and military clowns who starred throughout, are more like scenes and characters from the Barnum and Bailey circus’.<sup>112</sup>

The legal performance of the trial, the rule-bound play which was critical to the validation of the new regime, was also undermined by the defiant antics of the defendants. Here we find play in the form of *paidia*, as a response to state violence. The defendants enlivened the trial with a consistent flow of abusive and disrespectful comments. Saddam suggested to the Chief Judge, ‘[w]hy don’t you hit your own head with the hammer’,<sup>113</sup> and said, ‘God damn your moustaches’.<sup>114</sup> He commented that the Interior Minister ‘doesn’t scare my dog’.<sup>115</sup> He described the trial as a ‘game’<sup>116</sup> and a ‘comedy’,<sup>117</sup> and declared ‘[a] pox on Bush and his father’.<sup>118</sup> Saddam’s defiance was apparent when the verdict was read out in the courtroom,<sup>119</sup> and even immediately before his

<sup>103</sup> Tom Allard, ‘Pictures of Dead Saddam Used to “Stimulate” Hicks’, *The Sydney Morning Herald* (Sydney, Australia) 3 February 2007, 2.

<sup>104</sup> Conquergood, above n 53, 343.

<sup>105</sup> Scott Bevan (Reporter) and Ben Hawke (Producer), ‘Geoffrey Robertson Sees Saddam Trial as Lost Opportunity’, *The 7.30 Report*, Sydney, Australia, 27 December 2006.

<sup>106</sup> Dyer, above n 46, 15.

<sup>107</sup> Ibid.

<sup>108</sup> Ibid.

<sup>109</sup> Peter Quayle, ‘New Ringmaster Won’t Let Saddam’s Trial Be a Circus’, *The Times* (London, UK) 7 February 2006, Law 4.

<sup>110</sup> Jon Brain, ‘Saddam’s Masterful Courtroom Act’, *BBC News* (UK) 14 February 2006 <[http://news.bbc.co.uk/2/hi/middle\\_east/4714394.stm](http://news.bbc.co.uk/2/hi/middle_east/4714394.stm)> at 18 October 2007.

<sup>111</sup> Ibid.

<sup>112</sup> McGeough, ‘Hell Moves a Step Closer’, above n 75, 14.

<sup>113</sup> Brain, above n 110.

<sup>114</sup> Freeman, ‘Saddam Trial Descends into Chaos’, above n 52.

<sup>115</sup> David Fickling, ‘Saddam Links Court to “Torturing” Ministry’, *Guardian Unlimited* (UK) 5 April 2006 <<http://www.guardian.co.uk/Iraq/Story/0,,1747240,00.html>> at 18 October 2007.

<sup>116</sup> Anthony Loyd, ‘You Are Ignorant of the Law, Says Saddam to Judge’, *The Times* (London, UK) 14 February 2006, 34.

<sup>117</sup> “‘I Am Still the Head of State’”, above n 38.

<sup>118</sup> Stephen Farrell, ‘Saddam Accuses US of Lying to Get Him Out of Power’, *The Times* (London, UK) 23 December 2005, 4.

<sup>119</sup> Oliver Poole, ‘One Last Smile of Defiance’, *The Sydney Morning Herald* (Sydney, Australia) 7 November 2006, 7.

execution.<sup>120</sup> Barzan al-Tikriti was dragged from the court kicking and yelling after describing it as 'the daughter of a whore'.<sup>121</sup> The defendants repeatedly denounced the Tribunal, the judges and the US. According to Human Rights Watch, the corresponding outbursts from the presiding judge amounted to 'lapses in judicial demeanor'.<sup>122</sup> The defendants and their lawyers were evicted and, on occasion, the defendants and their lawyers walked out, leaving the trial to continue in their absence.<sup>123</sup> They were also forcibly returned to court.<sup>124</sup> The appearance of Barzan al-Tikriti in what was described in some reports as long underwear and in others as pyjamas prompted one commentator to refer to the trial as theatre with 'costume changes', 'plot twists' and 'one-liners',<sup>125</sup> and disconcertingly invoked the appearance of entertainer Michael Jackson at his own trial in 2005 in slippers and pyjamas.

In the defendants' strategy of playfulness, we find the 'infantine audacity' identified by Victor Turner.<sup>126</sup> While the US was responsible for the theatrical edifice of the trial, the defendants exposed its theatrical character with their disruptive antics and constant assertions that they did not recognise the Tribunal's authority. This suggested to the watching world that the Tribunal's authority was recognised only by those who *chose* to recognise it, and that the trial was therefore more properly characterised as spectacle backed by force. The actions of Saddam and his co-defendants deliberately disrupted the facade of order and procedure which the state had constructed. Play as *paidia* derailed the rule-bound play of legal performance and undermined its authority.

Yet how effective is this form of play as a response to state-administered violence? In 1975, members of the Baader-Meinhof group, who were accused of terrorism, employed a similar strategy. During their trial, they directed a constant flow of insults and accusations at their accusers, resorted to 'disruptive devices', and frequently left the courtroom.<sup>127</sup> The result, according to John Orr, was 'modernist melodrama, a fractured Theatre of the Absurd rather than a Hollywood spectacular'.<sup>128</sup> In his view, these tactics were 'self-defeating' in the sense that the group failed to communicate their concerns effectively to the world and remained powerless in the increasingly oppressive conditions of their imprisonment.<sup>129</sup>

In Saddam's trial, similar tactics may well have distracted the media from the many defects (procedural and otherwise) in the trial process<sup>130</sup> that may have raised real questions about the legitimacy of the trial process and the appropriateness of the verdict. The deployment of such tactics by Saddam and

<sup>120</sup> Sudarsan Raghavan, 'Saddam's Brutal Days Finally End in Fraction of a Second', *The Sydney Morning Herald* (Sydney, Australia) 1 January 2007, 7.

<sup>121</sup> 'Saddam Hussein's Chaotic Trial', *The Economist* (London, UK) 4 February 2006, 42.

<sup>122</sup> Human Rights Watch, above n 1, 66.

<sup>123</sup> Dyer, above n 46, 15.

<sup>124</sup> *Ibid.*

<sup>125</sup> Brain, above n 110.

<sup>126</sup> Turner, above n 32, 169.

<sup>127</sup> John Orr, 'Terrorism as Social Drama and Dramatic Form' in John Orr and Dragan Klaic (eds), *Terrorism and Modern Drama* (1990) 48, 51–2.

<sup>128</sup> *Ibid* 51.

<sup>129</sup> *Ibid* 52.

<sup>130</sup> Human Rights Watch, above n 1, 5–6.

his co-defendants did not prevent their ultimate execution, but perhaps more media exposure of the defects in the trial process might have done so. On the other hand, the defendants' recourse to play and their consequent disruption of the 'order, control, propriety and inevitability' of the trial, key elements in the 'dramaturgy of contemporary executions' described by Conquergood,<sup>131</sup> may well have had an unexpected outcome.

In the theatre of the courtroom, the task of the prosecutor, according to Conquergood, is to reduce the accused to 'an effigy composed of his or her worst parts and bad deeds'.<sup>132</sup> The defendant must be 'stripped of all human complexity' and reduced to 'the worst of the worst'.<sup>133</sup> Conquergood describes how '[t]hese waste parts' are 'crafted onto prefabricated figures: stereotypes of the violent criminal, cold-blooded killer, animal, beast, brute, predator, fiend, monster'.<sup>134</sup>

This should not have been a difficult task in relation to Saddam and his co-defendants: the Western media had already achieved this. Ramsey Clark, a former US Attorney-General who was part of Saddam's defence team, observed that 'the United States and the Bush administration in particular, engineered the demonization of Saddam Hussein'.<sup>135</sup> Saddam's nickname in the Western media was 'the Butcher of Baghdad', and his seemingly monstrous capacity for cold-blooded killing and torture had been well-publicised. However, in media accounts of the trial, heartbreakingly evidence of torture and murder from the prosecution witnesses was juxtaposed with the defiant, often humorous, even playful antics of Saddam and his co-defendants. Their playfulness humanised them even as their direct responsibility for multiple acts of violence became clear. This courtroom behaviour may have undone some of the 'monstrosity' achieved by the Western media. According to one commentator, the chaotic environment of the courtroom transformed Saddam into a hero.<sup>136</sup>

## V CONCLUSION

Analysis of Saddam's trial uncovers various manifestations of lawmaking and law-preserving violence, and in addition, two oppositional forms of play. Both forms of violence are expressed through play; play and violence are intertwined. The rule-bound ceremonies of the trial and execution are characteristic forms of play in the administration of law-preserving violence. They can even, as they do here, form part of lawmaking violence. However, lawmaking violence is more frequently characterised by forms of play which rely less on rules and more on spectacle.

Yet play can also be deployed as a response to violence, or even as a strategy of resistance. Confronted with a hostile court and an assured conclusion, Saddam and his co-defendants resisted the rules of legal performance with defiant playfulness of an 'anarchic and capricious nature'.<sup>137</sup> They exposed the 'struggle

<sup>131</sup> Conquergood, above n 53, 360.

<sup>132</sup> Ibid 353.

<sup>133</sup> Ibid.

<sup>134</sup> Ibid.

<sup>135</sup> Freeman, 'Court Hears First Evidence against Saddam', above n 39.

<sup>136</sup> Dyer, above n 46, 15.

<sup>137</sup> Caillois, above n 30, 13.

between two kinds of playing': one 'rule-bound, where all players accept the rules of the game and are equal before the law'; and the other an arbitrary and flexible game, 'where the gods can change the rules at any time, and therefore, where nothing is certain'.<sup>138</sup>

Saddam's trial was intended to validate the war in Iraq, and provide support for the arguments of the 'Coalition of the Willing' that the only effective way to respond to the law-preserving violence of Saddam's regime was with lawmaking violence. In the trial, the law-preserving violence of Saddam's regime encountered both the law-preserving and lawmaking violence of the new regime. Yet the trial also demonstrates that violence is not the only response to violence: Saddam and his co-defendants resorted to disruptive play in response to the legal performance of state violence.

This form of play is not associated with power; rather, it challenges the authority of the powerful. It can be dismissed as the last resort of the weak and powerless. Nevertheless, such play can disrupt, derail, interrupt and discredit orderly displays of state violence. In Saddam's trial, we find a demonstration of the 'dangerous harmlessness'<sup>139</sup> of play as a response to violence.

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<sup>138</sup> Richard Schechner, *Performance Studies: An Introduction* (2002) 82.

<sup>139</sup> Turner, above n 32, 169.