

### Judith Shklar versus the International Criminal Court

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#### **Legalism**

Judith N. Shklar

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The celebrated political theorist Judith Shklar obviously never commented on the International Criminal Court. She died in 1992, precisely a decade before it came into existence. She may, however, have anticipated the most productive way of looking at the institution, since she was the rare thinker to offer a serious account of international criminal justice as a deeply and inescapably political enterprise—which it certainly is. In fact, in many respects, Shklar's *Legalism*, her underappreciated classic of 1964, stands out as the single most significant reckoning with the politics of international criminal justice ever written. Returning to its account fifty years ago could serve to develop an intellectual perspective sorely needed today.

Hannah Arendt's much more famous *Eichmann in Jerusalem*, published the year before Shklar's book, dealt more probingly with the moral issues that arise in the course of such political trials. But if the Nuremberg Trials in particular stood out (in Shklar's words) as "a great drama" in which "the most fundamental moral and political values were the real personae," *Legalism* focuses much more interestingly and excitingly on the second category of concerns (155). Shklar went so far as to claim that the Eichmann trial did "not create any new problems for legal theory," and she did not ask world-historical questions about Nazism and the nature of evil (154–55). As a matter of fact, Shklar later depreciated the achievements of *Eichmann in Jerusalem*, writing that its author "had nothing very new to say" about "some of the great puzzles raised by the trials of war criminals" because "legal theory was not her forte."<sup>1</sup> Whether or not she was right, it does seem clear that Shklar's attention to the politics of international law is now indispensable.

As charges of genocide and crimes against humanity become a regular part of the contemporary world, inquiry into how a generally stable civilization surprisingly broke down, as ordinary men stooped to outrageous offenses unique in the annals of history, must cede to a different agenda as processes of criminal accountability routinely and systematically engage a world of repetitious and almost normalized infraction. Put differently, international criminal law is close to becoming a regular—perhaps even banal—feature of global politics. Yet most theoretically inclined commentators on international criminal justice see themselves as Arendt's followers, even though she

provided no discernible account of the politics of the subject, which becomes more apparent every day. This makes it even more confusing that no one has ever seriously explored the way that Shklar mounted her account of international political trials.<sup>2</sup>

It is of course not news that there is a “politics of international law,” but it remains surprising that the now institutionalized field of international criminal law has bypassed any serious exploration of what could have been the source of a wholly different way of theorizing and studying it, a few modest citations aside.<sup>3</sup> Actually, *Legalism* might even rank among the significant works of twentieth-century jurisprudence too, since Shklar took international political trials merely as an opportunity to call for a recovery of the politics of law not simply abroad but also at home. It makes sense, therefore, to begin with her biting skepticism about the high-profile contest of naturalism and positivism in her day, since it was here than she hoped to make her greatest contribution.

But it is even more important for my purposes that Shklar applied her political account of law to international criminal law specifically, and the Nuremberg trials above all. At the same time that I welcome Shklar’s recovery of the ineliminable politics of law, I will also dispute most of her particular conclusions about whether Nuremberg mattered and why, first of all by returning to the classic trials in light of recent findings, as well as by considering the portability of her arguments to emerging institutions of international criminal justice. Both the development of the historiography of the trials Shklar studied and the unfolding of trials since are eminently relevant to conceiving the politics of international justice in her own spirit. In fact, my general conclusion is that if Shklar’s uncompromising skepticism and analytical framework are adopted now, they must lead to considerable doubts about the current forms of international criminal law. She may, indeed, stand as their foremost critic.

Shklar is celebrated as a defender of liberalism. It may seem perverse to resurrect her as an opponent of what one might consider one of liberalism’s most important contemporary global enterprises. Yet few liberals have taken up Shklar’s way of defending legalism, particularly in the realm of international criminal justice. It is illuminating that early casebooks in the construction of the field of “international criminal law” seem dedicated to the isolation of law from politics, stating rules and accumulating doctrines, much as Shklar’s critique of “legalism” might lead one to expect, and in spite of the strongly improvisational character of the field in which political constraints and possibilities for every move are plain.<sup>4</sup> If so, her insight into the inescapably political framework of law clearly remains discomfiting. It is worth bringing front and center, if only to encourage a new defense of international criminal law erected, as Shklar’s was, on avowedly political grounds.

Shklar herself came to realize that her approach could serve unsuspected theoretical agendas. Not long before her premature death, Shklar wrote that her “unmasking” of liberal justice for liberal ends may simply have been too controversial, too direct and honest, to be taken up by the very liberals she meant to assist. When she wrote a new preface to *Legalism* twenty years after its initial publication, she acknowledged that her brilliant attack on the nonpolitical pretensions of law—though in the international sphere they were too glaring to proceed otherwise—came unexpectedly and dangerously close to the project of critical legal studies that had appeared and surged in the

meantime.<sup>5</sup> I agree. In fact, if there is no prominent critical legal theory of international criminal justice, Judith Shklar's forgotten book may be the place to begin building one.

### **Beyond Naturalism and Positivism**

The fact that Shklar—like Arendt—was a Jewish refugee from Europe conditioned her perspective from beginning to end. Though she ended up a professor of government at Harvard University, her itinerary from Riga, through Tokyo, to Montreal before she came to Cambridge gave her an intense sense of the fragility of liberalism, which drove her overemphatic fear for its collapse.<sup>6</sup> But this same anxiety bred a realism that led her, rather pioneeringly, to doubt existing theories of liberalism and, in her self-proclaimed “favorite” book, to expose the deep confusions of lawyers and philosophers of law about the political role that rule-following plays in the maintenance of a decent political order.<sup>7</sup> Shklar's central project in her book is to save legalism for liberal politics by showing central liberal ideas like the rule of law to be useful ideologies.

She defined legalism as “the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules” (1). Legalism was shared by naturalism and positivism in her day, though they diverged utterly about where to locate the source of the rules. Naturalism had in fact surged in her time, becoming dominant in European legal theory after World War II and with its traditionally Catholic votaries ascending in visibility across the legal field. Shklar's basic response to naturalism was not new, though the details and zest of her formulations were. For Shklar, naturalists did not possess the nature they claimed was the sole alternative to nihilism. And the millennial battle of naturalists against each other to locate determinate content was better proof than their opponents could supply that no such thing existed. “One of the delights of those who do not happen to be partial to natural law theory,” Shklar commented acidly, “was to sit back and observe the diversity and inconsistency among the various schools of natural law, each one insisting on its preferences as the only truly universally valid ones” (68). Failing to secure through insight into nature the required truths, naturalists fell back on the argument that, in the absence of the ideology of agreement they proffered, the heavens would fall. (Leo Strauss, she observed bitinglly in a footnote, had presented a theory of naturalism “with no specified content, but as a dire need nonetheless” [230 n. 36].) In the post-totalitarian circumstances in which she was writing, Shklar understood why naturalism had such appeal. But it was nonetheless confused even for those who endorsed naturalism strategically, for example as a psychological tonic for those trying to justify resistance.

In this view, natural law offers indispensable rules of conduct that alone can encourage men to shirk otherwise applicable rules (consider naturalist Martin Luther King Jr.'s explanation for his disobedience that unjust laws are simply not applicable rules to be broken). But it was very revealing, Shklar responded, that such naturalists conceived of morality as a kind of higher legality in the first place. After all, many moral systems within and outside the West have consciously avoided formulation as rules. So the opposition of natural to positive law in fact proved a sibling rivalry

(56–62). Moreover, it was unclear what moral opposition grounded in some other sort of law than the sovereign's added to the fearful decision to resist, except for those confused into thinking only another law could override an apparently applicable law. Historical reasons explained why some—famous German Lutherans, for example—felt this way. “A higher law is needed to justify resistance [because of] the subject-ruler relationship of our monarchical past, in which authority was sanctified and resistance required more than a merely pragmatic justification” (71). But this historical detail did not amount to a general claim in favor of natural law, even on strategic grounds. Instead, Shklar argued, “What is needed is a critical and independent attitude among citizens in general” (72). And even in Germany, where jurists had withheld their support from the Weimar Republic in spite of their legalism, and where positivism was later invoked simply to “rationalize” their enthusiasm for National Socialism, it was unclear that the positivist myth that conduct requires rules was the true obstacle that naturalism would clear. “Is it really a matter of supreme importance,” she wondered, “whether men decide to disobey because they can say, ‘This is non-law, for it is incompatible with the law of nature,’ or because they prefer to say, ‘This is law, but I regard it as thoroughly bad and mischievous in its likely results?’” Shklar's response was: “It does not matter much” (71).

She applied this skepticism to the famous *Harvard Law Review* debate between Lon Fuller and H. L. A. Hart concerning the grudge informer. Shklar had good reason to side with Fuller, but she could not follow his view that choosing to rank some values higher than fidelity to law was itself a form of fidelity to law, as if departure from law had ultimately to be seen as allegiance to it. “The odd thing,” Shklar wrote, “is that for some reason Professor Fuller feels that these values are immanent in the law as such and that law is not law unless they are present. Now this definitional self-insurance is not really necessary for his position. In fact, it destroys it. It is quite enough to say that the possibility of formal justice itself is not independent of other political values, and that it cannot prevail under all political conditions” (108). In short, liberalism is prior to legalism, and it alone justifies legalism, which also means that liberal values are not supported simply by insisting that they are equivalent to following rules—even the rules of some higher law of nature.

For such reasons, Shklar didn't take rights seriously.<sup>8</sup> Already in her time, naturalism was “often called by another name” to avoid association with past theoretical embarrassments (65). Later, she unhesitatingly classified Ronald Dworkin together with Lon Fuller as “America's two most representative legal theorists,” given Dworkin's providential finding that morally grounded rights were not only available to thought but already immanent in case law.<sup>9</sup> In *Legalism*, Shklar recognized that appeals to natural rights were a historically special version of naturalism. Like other forms of legalism, naturalism normally had politically conservative implications; eighteenth-century legal thought, by contrast, had briefly been radical in turning to natural rights theory—albeit mainly, Shklar thought, because a stupid aristocracy had gone so far as to alienate law's custodians from their characteristic investment in defense of the standing order (14–15). Before and since, other forms of naturalism, especially Catholic varieties, had specifically not been propounded to advance political liberalism. Even at midcentury, in the wake of horror, naturalism usually provided

grounds for a broad moral response to unprecedented totalitarianism rather than a specifically liberal one (76–77). Natural rights, she acknowledged, sometimes provided an appealing basis for limiting the state in an era of hypertrophied states. And insofar as they do, she acknowledged, “what liberal does not sooner or later yearn for them?” Yet efforts to insist on their natural grounding rather than political utility ultimately “remain open to all the criticisms that have been raised against natural law theory in general” (65).

But at least the defender of natural law or natural rights admitted that his rules were value-laden and even ideological, reflecting allegiance to the one true ideology of nature. “It is, indeed, the greatest merit of natural law theory,” Shklar wrote, “that it assumes that law must be examined as part of a comprehensive political theory. It is the nature of such political theory which is really at stake” (67; cf. 36). By contrast, it was the essence of positivism to deny its own ideological character, which troubled Shklar even more than a mostly superannuated naturalism. Where naturalists generally served conservatism and in any case opposed the social diversity central to Shklar’s brand of liberalism (even when they propounded natural rights), positivists historically supported a liberalism that strangely dared not speak its name (65). She wanted to do so for honesty’s sake—and liberalism’s.

Shklar focused on Hans Kelsen, since Hart was basically Kelsen’s “spiritual heir” (136). On one level, positivists volunteered to theorize the lawyer’s age-old conviction to be doing something other than ideologically laden politics. The fact remained, however, that “the deliberate isolation of the legal system—the treatment of law as a neutral social entity—is itself a refined political ideology, the expression of a preference” (34).<sup>10</sup> Much of *Legalism* is written in a tone, sometimes ironic and sometimes irritated, indicating that Shklar could not understand why smart people avoided such an obvious fact. The idea of the law as a self-contained body of rules had tracked the invention of the modern state beginning with Thomas Hobbes, and it continued to presuppose this rather rare political technology in human affairs (53). Later versions of positivism were evidently born as responses to attempts by fervent moralizing forces to capture the modern state. Positivism offered fictitious claims to soar above the ideological fray. It was no accident that Kelsen, like Sigmund Freud or Ludwig Wittgenstein with their very similar intellectual projects, had developed his views in “a veritable caldron of religious, social, and ideological conflict” (41). The fact remained, however, that the goal of de-ideologizing law by immunizing it from contentious politics was itself an ideological politics: liberalism. From this perspective, positivism had begun as pure strategy: to avoid open moral conflict with moral opponents sometimes more powerful than they were, liberals started presenting the modern liberal state as independent of morality.

Whether or not the strategy had worked, it had fooled too many theorists of law. Twentieth-century positivism therefore made itself inexplicable, denying its political origins and relevance, and hiding the obvious moralizing of its “counter-ideology” even though its polemical embrace of moralizing naturalism was unlikely ever to be undone (36). (“Long-standing enmity is, after all, an intimate human relationship,” Shklar commented charmingly of naturalists and positivists [30].) In particular, positivists offered as an actual description of legal systems what was in fact a political ideal,

namely, of separation between the liberal norms governing the public realm and the more questionable norms they hoped to confine, as a matter of definitional fiat, to private “morality.” “There is nothing to object to,” Shklar observed, “in these efforts to protect the private life of every individual against the absolutism of those moralists who would employ the force of government to impose their preferences upon others. It does not, however, follow that, because this is desirable, it is also logically necessary or conceptually possible to separate law and morals” (42; cf. 56). In a way, Fuller’s reply to Hart—which insisted on the inseparability of law and morals only by way of a morality internal to law—neglected the proper riposte, which was that the rationale for adopting law flowed from an inseparable external morality called liberalism. “If [Fuller] had said that . . . law as an historical institution contributes to a morally superior society, he would have been intelligible” (109). But that would have been to defend fidelity to law as a result of a much larger and nakedly ideological inquiry into political values (as well as of a much larger and empirically controversial assessment of political outcomes).

Shklar sometimes supposed that there was more of an elective affinity between legalism and liberalism than there is, though other passages suggested she knew better. That legalism can serve liberalism does not mean it can’t serve other things. Liberals prize diversity and hate repression, whereas legalists merely prize regularity and hate caprice. “If they fear tyranny,” Shklar commented of legalists, “it is because it tends to be arbitrary, not because it is repressive” (15). Even as she overstated the anti-legalism of so-called totalitarian governments, Shklar was absolutely right about “the ease with which German lawyers accepted ‘Adolf Légalité’s’ pretensions to legitimacy” (17). Her main purpose, however, was not so much to disentangle what she admitted were “complex relations between legalism and liberalism” as to subordinate the one to the other (20). Liberalism could not be defended by reducing it to legalism, and legalism could not be defended outside the larger framework of liberalism. “To say that [legalism] is an ideology,” she wrote, “is to criticize only those of its traditional adherents who, in their determination to preserve law from politics, fail to recognize that they too have made a choice among political values . . . It is liberal theory that needs to free itself from the illusions of the ‘rule of law’ ideologists” (8, 142). Shklar’s ultimate position, therefore, was that legalism generally served liberalism well and that this was the instrumental justification for having people around, including the entirety of the bar and bench, who adopted legalism as their credo. Her book on legalism was a vindication of legalism by way of a critique of its traditional defenses.

That Shklar built this historical and political case for the rule of law as an ideology useful for liberalism, however, made her, more than she realized, into another philosopher of the “noble lie.” True, she sometimes argued as if it would be best for all concerned if the cat were out of the bag, as when she suggested that “open discussion” of ideological reasons to support legalism, making whether to adopt it “an open question of political preference,” would serve better than naturalist and positivist mystification (42, 63).<sup>11</sup> But from another viewpoint, the very legalist ideology she hoped to justify as politically useful seems to depend on large numbers of people following the rules laid down as more than simply a matter of political preference. She supposed that she understood better than legalism’s most fervent adherents its

true rationale in contributing to decent social arrangements. But, like the audience for the Platonic myth of metals, their role seems clearly to depend on their continuing confusion about it. Lawyers are not supposed to adopt legalism only in cases in which it promotes liberalism. And so it is almost unavoidable to conclude that, according to her own defense of it, the legalistic ethic has to be taken up naively—as if it were not an ideology—precisely in order for it to have the beneficial consequences she prized. “If we did not think of ideology as a gross form of irrationality, we would be less anxious to repress it and our self-consciousness would be correspondingly greater,” she wrote (4–5). But greater self-consciousness would have interfered with the practice it was more self-conscious about.

Greeks, to put it differently, believe in their myths, and legalists must too.<sup>12</sup> Years later, Roberto Unger reported that, after the academic collapse brought about by legal realism and his own movement in the belief that the law is there to be applied neutrally and apolitically, many people today vexingly take up their legalistic duties in a state of skeptical knowingness and “half-belief.” Legalism, on this account, remains strong as a matter of justification in public and norms in the profession, in spite of pervasive awareness in private that law is ineradicably political; agents within the legal system not only could in theory but do in practice leave behind even some minimal commitment to the truth of the legalist myths, even as they nevertheless uphold the conduct those myths require.<sup>13</sup> Perhaps Shklar would have welcomed this outcome that Unger regards as a disaster, yet one wonders how many people his hypothesis could or does actually describe. How could the percolation of widespread private insight into the thoroughly political nature of law occur without affecting its public justification as a neutral mechanism? To suppose it could seriously permeate social life, even just among lawyers, is to imagine society self-consciously enacted as a massive charade, with people knowing one thing about what they are doing and saying something entirely different. In any event, even though Shklar’s justification of legalism is that law is no more than politics by other means, she could not have flirted with Unger’s cynical addendum that everyone knows it. Judith Shklar—before Roberto Unger—knew it. But for Shklar, at least, the beneficial consequences of the social practice of legalism would almost certainly be undermined by widespread acceptance of this rationale for it, even if that knowledge were hypothetically possible to achieve without undermining the practice it interprets.

Shklar did not get this far in considering whether her own insight into the productive liberal consequences of legalism might need to be kept from those who ensure those very consequences (just as in the case of the Platonic lie). Instead, she moved on to Nuremberg to take up a case where the need to defend legalism on political grounds seemed glaringly inevitable if there were to be any defense at all. But in the international sphere, the conclusion that her revelation of the illusions of legalism would need to be held close to the vest is redoubled in force. Had not only those imposing but also those supposed to learn from the proceedings of post–World War II justice been convinced the Germans on trial were simply objects of legalist reeducation in liberalism, as she argued, it would presumably have obviated precisely those liberal consequences of their legalism on which Shklar’s defense of the proceedings rested. And even today, it cannot be an accident that internal actors and

external analysts of contemporary international criminal law almost unanimously either refuse to see or refuse to say that their work is a political enterprise, and that they therefore have not moved to view or defend it in those terms. But let us first consider how Shklar analyzed and defended international criminal law.

### **Legalism at Nuremberg**

“Political trials,” Shklar contended, “reveal the intellectual rigidities and unrealities of legalism as no other occasion can.” International criminal law, in particular, characteristically neglects its own “social functions, both in their greatness and limitations” (112). With this approach, she was surprisingly hard on international criminal law as misguided or useless, but on one point she defended the International Military Tribunal at Nuremberg and so ultimately gave it a highly qualified endorsement. She elevated her case for the political efficacy of legalism to the international stage, arguing that the legitimacy of victor’s justice in political trials depended on what instrumentally followed from them. Yet she poured cold water on Nuremberg’s central charge of crimes against peace, and even its secondary concern with conventional war crimes. She ingeniously explained that its selectivity—in particular its skirting of Allied conduct—was not fatal, in order to reach her conclusion that the tertiary charge of crimes against humanity made the trials worthwhile on political grounds.

In reviewing her argument, however, it is important to be clear at the start that the sorts of beneficial liberal consequences legalism is supposed to promote at home could not be the same as those it might have abroad. Domestic criminal law presupposes the very institutional history of the liberal state that Shklar claimed positivists took for granted, while, at least to date, international criminal law is highly episodic. At best it remains in the early stages of establishing the long-term regularities of liberal theory and practice that typically go without saying municipally. While the international sphere thus presents exemplary cases for the critique of legalism, Shklar’s defense of it on new grounds had to take a form completely different from her defense of it for its historical linkage to decent liberal societies. (She acknowledged as much by appending a section on domestic political trials, where her main goal was to reassure that her defense of political trials abroad did not justify McCarthyism at home, which in any event, she stressed, had barely affected American constitutional law [209–20].)

Shklar treated the program of international criminal law as the grandiose announcement of norms, declared already “there” as a matter of natural or positive law, with even more pronounced contempt than she did domestic legalist confusion. Her discussion of—indeed attack on—the Tokyo trial (the proceedings around the same time as Nuremberg to hold Japanese war criminals to account) turned on what she felt was the bizarre imposition of natural law on a wholly foreign culture. She berated the chief prosecutor, the American lawyer Joseph B. Keenan, at length. Instead of the resurrection, or more accurately the importation, of liberalism for a conquered enemy, “metaphysics and the future of international law were his preoccupations” (181). He took positivism as his target, rather than specific people, and neglected the short-range agenda. In his public disquisitions on natural law, it did not occur to him, even when he invoked the Judeo-Christian tradition as its source, that it could only seem



“at best, . . . [an] alien moral tradition—at worst, the nationalistic ideology of the victors” (183).<sup>14</sup>

Meanwhile, Shklar queried why it was that contemporary positivists were so frequently partisans of international law. The historical affinity of positivism had always been with the liberal state. Yet unlike his forebears, such as John Austin, who doubted that it was law, or Jeremy Bentham, who had treated its creation as a constructive project of utilitarian reform, Kelsen—who one might have expected simply to oppose the persistent naturalism of most international thought—declared the valid existence of law beyond the state in a breathtaking act of faith in the power of definition. Even more clearly than at home, positivism’s unacknowledged liberal politics shone in and through its surprising internationalism. Its globalist stance was new, mainly in its blithe extension of formal legality to the international realm, where it could no longer offer a formalized and idealized abstraction of some prior political achievements. That so little institutionalization and implementation existed for the allegedly secure formalities of the international system, indeed for what positivists saw as their occupation of the previously anarchic space of international politics, in fact made “the modern theory of positive international law . . . the most striking manifestation of legalistic ideology . . . It is a program and little else” (129).

In place of this grandiosity, Shklar sought to defend international legalism in terms of a few workable changes to the enduring contest of nation-states. Her basic move was to contend, just as at home, that only the promotion of political liberalism would justify international trials, and this would occur situationally, in Nuremberg’s case through re-propagation of legalism among the Germans who had been defeated. “To think of either the immediate political needs or the ideological impact of the Trial on Germany would have been to descend to mere politics. Nevertheless, it was these and these alone that justified the Trial” (147). Was the adoption of political trials for the sake of emergent political outcomes—law as a means to an end—ultimately the adoption of show trials for the cause of liberalism? Certainly: it might be hard to face facts, but what made trials sponsored by liberals in the international realm defensible was not that they weren’t show trials but that they were liberal ones: “There are occasions when political trials may actually serve liberal ends, where they promote legalistic values in such a way as to contribute to constitutional politics and to a decent political system” (145). Shklar thus had no problem with the fact that international criminal law is victor’s justice. It was not Shklar who coined the phrase “liberal show trial.” (Mark Osiel did in a classic study.) But she did insist that Nuremberg was “a farce . . . from beginning to end” (157). Especially given the principle *nullum crimen sine lege*, only a legalist totally out of touch with reality would fail to conclude rapidly that Nuremberg was “simply unjust” (157).<sup>15</sup> It was simply that “strict justice is not everything” (160).

Shklar didn’t find it very interesting to defend the trial as the lesser evil. She did grant that trials were preferable to the “perfect bloodbath” that she thought would have ensued had nothing been done (158). (A more extreme version of this debatable proposition was later taken up at great length by her student Gary Bass.<sup>16</sup>) Evidently, a seriously defective justice might well be worth choosing over generalized violence, especially if trials helped re-establish liberal values in the bargain. Yet there is actually

very little reason to believe that generalized vengeance was a threat (or option) after World War II—certainly for the most grievously injured group, which was in no position to exact it. The victors considered unleashing extrajudicial revenge themselves, simply killing those they caught, and it was a near thing that they didn't in all cases. But given the superficiality of Nuremberg's attempt to reckon with the past, postwar history better proves that vengeance need not follow from inaction than that only trying the perpetrators forestalls blood. And in any case it is well known that—as post-World War II history also proves—a binary choice between trials and vengeance is false, given a continuum of available political techniques. Shklar herself admitted as much: “If the only two alternatives had been a trial or uninhibited redress by the injured, nothing more need be said in favor of a trial. These two were not, however, the only possibilities” (159).<sup>17</sup> Had Shklar defended trials mainly as the lesser evil, her argument would have lacked theoretical interest by her own lights, since “the political advantages of a trial that replaces the anarchic cycle of vengeance need hardly be belabored; they have been well-known since the days of Aeschylus” (159).

Shklar's response to the common allegation of selectivity—charging the Germans and Japanese for their crimes but not the Allies for their destruction of German and Japanese cities—was provocative. Shklar claimed that the fact that the Allies had specifically avoided charges when they had committed similar crimes, and that the court had let off German admiral Karl Dönitz because the Americans had not been above the unrestricted submarine warfare he ordered, solved the problem. By contrast, the Nazis had perpetrated crimes that “none of the Western Allies ever committed,” and so the response of *tu quoque* did not apply to a trial holding them accountable for those horrendous acts (163). It was in part for this reason that Shklar concluded that what attention Nuremberg gave to crimes against humanity offered the surest ground for defending the entire enterprise, since conventional war crimes had been committed by all sides, putting the Allies in a “relatively weak” position with respect to them (162). That there was no reason to prefer the allegation of conventional war crimes simply because it was older than the charge of crimes against humanity supported the same conclusion, in spite of the legalist worry that the one involved settled legal rules where the other did not. (“Did anyone but Nazis doubt the wrongness of crimes against humanity?” Shklar asked. “If so, did they doubt it because these crimes were *more* horrible even than those that had already been declared intolerable?” [163].)

Yet Shklar's isolation of crimes against humanity as the sole basis on which to defend Nuremberg as a political matter did not fit terribly well with the tradition of political trials up to that point. She was particularly bitter toward the charge of crimes against peace or aggressive warfare, though it had been at the forefront of both the abortive attempt to try Kaiser Wilhelm II at the conclusion of World War I and, because it was Robert Jackson's *idée fixe*, utterly dominated Nuremberg after World War II. As a matter of fact, her critique of the charge of aggression for its murkiness, though perhaps now widely agreeable, dangerously threatened to undermine any possible defense of Nuremberg, since Jackson had so thoroughly tilted it toward that charge in hopes of outlawing warfare for good (170–79). Shklar perhaps went too far in isolating crimes against humanity to bear the weight of her argument; for though

the charge of aggression certainly later became marginal in international legal consciousness, modest present-day efforts for the ICC to take it up notwithstanding, its uses were not so sterile as Shklar thought, and its force was certainly not spent, as the history of the Vietnam War was soon to show.<sup>18</sup> But apparently Shklar felt that dreaming of a distant millennium by targeting crimes against peace made Nuremberg too close to totalitarian show trials, unfailingly justified in terms of a radiant communist future. In what seems like an ironic passage now, she even commented, “No trial, not even a spectacular one such as the Nuremberg Trial, can achieve such enormous consequences by itself. There is no international criminal court yet, and nothing effective along these lines is even imaginable at present. The Trial could do something for Germany. To demand more was unreasonable, an extravagance of the legalistic imagination” (177).

It was most of all the enormity of crimes against humanity itself that made the belief in “progress” implicit in the aggressive war scheme unbelievable; in a world that had witnessed such depravity, Jackson’s belief in the possibility that law could abolish warfare was “at best . . . a testimony to legal optimism—and blindness to history” (167). Shklar must have thought that the charges united by the Nuremberg Charter actually testified to very different and ultimately incompatible strands of liberalism, with the aggression charge a remnant of the Pollyannish creed that, as the war itself had made clear, had to give way to a dystopian “liberalism of fear.” And so, in spite of the Nuremberg tribunal’s interpretation of its authorizing charter to restrict the scope of “crimes against humanity” to acts committed after World War II had begun (a legalistic mistake she understandably deplored), Shklar affirmed that “the entire Trial can only be justified by what it revealed and said about crimes against humanity. For it was this alone that did, and could, help Germany toward a decent political future” (165).<sup>19</sup> True, the separate commitment to a fair trial according to announced procedures played some role in reeducating German lawyers in particular. But what really mattered was that crimes against humanity were presented to “German officialdom” in ways that “the political elite could not shrug off. It could and did illustrate what happens when Nazi ideology replaces legalism” (168–69).

All the same, it is striking that Shklar wasn’t even sure that the introduction of crimes against humanity at Nuremberg had had the effect of promoting short-term liberal ends; it “probably” did, she reported, and hoped (145). Yet troublingly, it now seems that Nuremberg failed precisely in the respect that Shklar identified as the only way it could have succeeded. Shklar was fully aware, as many today are not, that though crimes against humanity may have formed “the moral center” of the Nuremberg proceedings, they were marginal in every other way to its prosecutorial focus and actual unfolding (170). But, relying on slim evidence, Shklar nevertheless assumed that the independent force of (what she felt should have been) the powerful and shocking revelations of the trials did the work she held necessary for them to have any legitimacy at all. To be fair, Shklar put the most stock in the terrible evidence of crimes against humanity on account of a surprisingly limited effect that she nonetheless believed made the crucial difference: its capacity to “boggle” the mind (169, 239 n.72). “Certainly total re-education of millions was not feasible,” she acknowledged. “That [a few] men should be shaken was the best, perhaps the only, political

reform that the Allies could instigate” (169). It now seems seriously dubious, however, to claim the effects of the marginalized evidence of crimes against humanity, even on just a few men, as a distinctively important factor—and to rest the defense of the entire event upon it.

A teenager in Canada at the time of the trials, Shklar read the transcripts in the Harvard Law School Library and relied on secondary sources to gauge the political effects of the proceedings.<sup>20</sup> But in a literature that has evolved substantially, few historians now maintain that the Nuremberg trials had much if any positive effect on the conquered German people. As experts know, the Holocaust was largely omitted from the trial proceedings, due to the priority of the aggression charge and the conspiracy theory through which it was pursued, as well as profound misunderstandings by lawyers and judges about what exactly had occurred in Europe during the war.<sup>21</sup> As a result, Shklar’s judgment that what little was said about the Holocaust constitutes the saving grace of the trial as a whole seems wishful, perhaps revealing mainly that very particular substantive crimes mattered to her beyond the instrumentalist rationale she crafted for their indictment. And it is certainly possible that the prosecutors at Nuremberg could still have boggled the mind even in marginalizing the truly mind-boggling events of the war. Yet the main responses to Nuremberg in postwar Germany—still occupied, of course—were anger and boredom. In spite of trying, recent historians have not been able to discover any reason to believe that Germans, even German lawyers, were reeducated by it. Stunningly, the best authority now concludes that it was in *resisting* the novel charge of crimes against humanity as a flagrant violation of the norm against non-retroactive criminal laws that German lawyers, in forgotten local proceedings in the zones of occupation, re-honed their legalism. As for the so-called successor trials that the Allies began after the International Military Tribunal, they may actually have made things worse by stimulating revanchism.<sup>22</sup>

Evidently, Germans were eventually “reeducated,” though there remains substantial debate about how to describe and explain this transformation. The point is that the specific causal factor of Nuremberg, not least its crimes against humanity charge, now seems negligible (if not counterproductive) in the process.<sup>23</sup> And if so, then we are in an uncomfortable place. If all of the above is persuasive, then Shklar’s critique of legalism as applied to Nuremberg actually leads to a conclusion exactly the reverse of the one she reached. That Shklar, after undermining other possibilities all along, left the edifice of Nuremberg standing on a single pylon has the result of toppling it. But this conclusion also leaves her insight into the political and ideological framework for the conceptualization of international trials open to a range of other ends than she herself adopted. Her singular rationale for Nuremberg having proven so flimsy, her critical rather than reconstructive intention emerges as the more durable one. And this leads one to ask what other contributions—inadvertently, as it were—she might have made along the way as steps toward a political theory of international criminal law.

### **The Colonial and Postcolonial Worlds**

A skeptic, Shklar never hesitated to be honest about the world as she saw it, even if her observations did not serve liberalism at all or her preferred “barebones” version of

it (5). Her own moral and political perspective was presumably different from the naturalistic assertion of norms because it was rooted in experience and memory, the hard-won wisdom of liberals (notably Jews and other “permanent minorities” among them) who developed a stripped-down conception of what conceivable purposes politics could and should serve (6, 225). But this basis for judging events and ideologies—understandable but ungeneralizable—meant she sometimes sympathized with those whose historical experience led them to prioritize a different agenda for the world in general and international criminal law in particular. In this regard, her various comments on the relationship between “the West” and the rest of the globe—still typically colonized in the Nuremberg era—remain particularly interesting.

As noted above, Shklar contended that the Tokyo prosecutor’s naturalism, which differed profoundly from Nuremberg’s official positivism, opened him up to severe criticism. But then she went even further in crediting Indian Justice Radhabinod Pal’s “long and minutely reasoned dissenting opinion” to the majority’s judgment at Tokyo as “the most serious and profound discussion of all the issues involved in these Trials”—at least, prior to her book (156, 186). This admiring statement is entirely remarkable. Today Pal’s views are typically ignored with embarrassed silence, not least because the Japanese right wing has since erected him as an idol.<sup>24</sup> But Shklar’s esteem for his controversial work, reflected in her close reading and serial citation of it, shows that her honesty forbade her from failing to recognize a fellow traveler across the divide between liberalism and anticolonialism. For like her, Pal at his most interesting and insightful focused precisely on how political trials threw the relationship between “ideology and international law” into relief.<sup>25</sup>

Famously, Pal’s dissent is a full-spectrum criticism of the emergence of international criminal law, with the disconcerting result that he would have let off scot-free all the Class-A war criminals in the Far East. Assuming the mantle of a positivist, he systematically doubted the applicability of any pre-existing rules, including the Hague Conventions that had already been considered customary international law, and thus meditated at length—his opinion approaches one thousand pages—on how the Americans at Nuremberg had presented a naturalistic schema out of whole cloth, as if it were a matter of settled rules. Dropping his strategic positivism, however, Pal went on to announce his own political ideology in a subaltern critique of Western international law, not for its cultural arrogance but for its colonialism and neocolonialism. It was this perspective that recast the jurisprudential insult of the aggressive war charge at Tokyo as the political injury of ratifying a world order in which colonialism remained the rule across the globe.

One reason for her critique of naturalism, it is worth noting in passing, was Shklar’s long since confirmed outrage about the idea of “the West,” of which she had begun to disabuse readers in her first book on Cold War political thought.<sup>26</sup> Joseph Keenan, who had invoked against the Japanese the entirely new notion of “Judeo-Christian” values, earned her scorn not simply for invoking the West against the East but for pretending the West was a lot older than it actually was. “Even if we assume that Christians and Jews share an ethic, which is a debatable proposition, why should their values be binding on the Japanese?” she asked (183). Elsewhere in the book she made a converse point, criticizing the mythmaking of the then widespread attempt to

forget or suppress the ethical diversity of the transatlantic zone—even though much of it had gone reactionary in living memory—in order to present legalism as a long-term value at the core of “Western” identity: “It is as part of the current preoccupation with ‘*the* political tradition of the West’ that law has now become a major item of ideological discourse” (20).<sup>27</sup> To be sure, there were precedents for stabilizing “the West” around a long-term legalism, as the examples of Montesquieu and Max Weber suggest. But it was nevertheless the case that “the conspicuous concentration on ‘*the* West’ is clearly a response to the Cold War and to the political organization of ex-colonial, non-European societies which now challenge the European world . . . The result is the search for an identity, for a positive and uniquely Western tradition” (21). That anyone would have the effrontery to invent such a tradition, not to mention place law at the center of it, confronted an insuperable obstacle: “It flies in the face of the most obvious facts of history. There is no *one* Western tradition. It is a tradition of traditions. [And] political freedom has been the exception, a rarity, in Europe’s past, remote and recent” (22). To claim otherwise was nothing more than “ideological abuse” (22).

Evidently Shklar’s main impulse here was to be unforgiving as a liberal toward a “West” prone more frequently to illiberalism, and as a Jew toward a Christian world whose record contradicted the notion of “Judeo-Christian civilization.” Liberalism could not rest on the laurels of stable tradition, nor could it assume a long-range legalism entrenched against forces like a globalizing revolutionary nationalism that “the West” had been mainly responsible for inventing. These same perspectives made her amenable to Pal’s own protest against international criminal law, and Shklar signed on to many of Pal’s arguments; indeed, she provided a nuanced defense of him that contrasts very starkly with the opprobrium since attached to his name. Most important, she agreed, or at least did not disagree, with Pal’s claim that to criminalize aggressive war is in effect to freeze history, ratifying the conduct that had created the extraordinarily unjust distribution of wealth and power over hundreds of years of colonialism and then ruling out attempts to change it. “Only nations which benefit from the *status quo* can think of peace in such static terms,” Shklar summarized, adding a new reason for doubts about the obsession with crimes against peace in the era. “The American idea of aggressive war as a crime allows the dominant Western powers ‘to repent of their violence and permanently profit by it’ at one and the same time” (187, citing Pal’s dissent, though Pal in turn owed the phrase to Arnold Toynbee).

Does this mean Shklar felt the Tokyo trial shouldn’t have happened at all? She specifically doubted the very reeducational value of the trials that she singled out in the German case: “What could a trial teach the Japanese? What political traditions could it restore? None” (180).<sup>28</sup> To be sure, Japanese war crimes were unforgivable, even if Pal himself wavered on this point. It is interesting that Shklar chose not to repeat in the Tokyo context her doubts about the basis that conventional war crimes provided for the postwar trials, an especially important matter, given that the Far East tribunal did not target any crimes against humanity that were not conventional war crimes. But she most definitely committed herself openly to the claim that the charge of aggression miscarried at Tokyo even worse than it had in the West. The Eastern

war, in a region of much less well-established international order and shared norms, seemed too complex to criminalize, especially given the past of pervasive Western incursion in Asia that no one should forget. Surely it was plausible to condemn Nazi racism uncompromisingly. But that Japanese “aggression” had been unleashed in part by Western racism Shklar called a “point well taken, when one remembers the result of the exclusion of Chinese and Japanese immigrants by the United States” (187).<sup>29</sup>

Shklar signaled that she did not intend—and did not believe Pal intended—to give *carte blanche* to warmongers, since he indicted the Nazis and usually apologized for the Japanese on the narrow grounds of their pan-Asianism and understandable revolt against colonialism. (To the extent he didn’t, Shklar recorded, he was wrong [188–90].) Her affection for Pal went far enough, however, as to lead her to view the rationale she articulated for Nuremberg as unlikely to be applicable elsewhere. Actually she went much further: it might never be applicable again. “Nazism happened to fit the liberal demonology,” Shklar concluded. “It is questionable whether past wars [did] or any future ones will” (180; cf. 171–72). That last contention is bold to the point of near-scandal, not to mention highly relevant to international criminal law today. It brashly and expressly doubts the possibility that, after the Nazis, any wars could fit the simple dichotomy of good against evil around which international criminal law was originally devised.

The concentration of international criminal law on *jus in bello* rather than aggression in recent decades might at first seem a neat response to worries that there is no way to bracket politics in the domain of *jus ad bellum*. Yet Shklar’s provocative certainty that all future wars would have arguable causes still provides much food for thought in a world of complex geopolitical struggle. I say this not so much because the ICC continues to flirt with the criminalization of aggressive war itself but because the postcolonial wars it has already targeted are almost definitionally brutal. In particular, civil wars of the contemporary African sort (indeed those of any place and time) are never fought humanely, and if so, then the optic of crimes of war easily becomes a surrogate for the optic of the crime of aggression, especially when only one side of the violence is charged, as in the ICC’s Côte d’Ivoire litigation so far.<sup>30</sup> For this reason, the kinds of arguments that Pal made—and that Shklar emphatically endorsed—should still cause discomfort with international law today: one reason that, aside from his celebration by Japanese rightists, Pal has sometimes been an icon for the “third-world approaches in international law” movement.

Shklar followed Pal in asking: is international criminal law ultimately about the ratification of a historically accreted and highly debatable world order? That “universal human rights” surged after Europeans had lost their empires (and Americans had lost in Vietnam) remains too convenient not to instill sobriety, while the institutionalization of international criminal law from scratch after the Cold War had been won—with sometimes extreme means across formerly colonial spaces—should inspire anxiety. For now, my main conclusion, which Shklar clearly accepted, is that international criminal law cannot assume an environment in which the political struggles of the postcolonial world are easy to classify in moral terms, though faraway humanitarians may often feel otherwise. Whatever one thinks of the contemporary African cases with which the ICC has exclusively dealt so far, it is as obvious today as when

Shklar wrote that the world of post- and neocolonial relationships is still one in which actors sometimes believe “they have more to gain by war than to lose by it” (187).<sup>31</sup> In such a world, a persuasively applied international criminal law cannot be content to bracket the political context of its deployment (including its selective deployment); instead, it would need a political defense of its legalism from case to case.<sup>32</sup>

### **Police versus Armies**

An international criminal trial only begins when the accused is arrested, an event for which entirely different political conditions apply than in domestic criminal enforcement. In the Moscow Declaration of late 1943, the Allies made clear that war criminals would be punished. The elements were there for the now familiar dilemma of peace versus justice—exactly the same as some invoked when it came to Bashir al-Assad or Moammar Qaddafi in recent cases. But if it was (and is) easy to overlook that in World War II only the complete and decisive circumstances of victory West and East permitted international justice to be imposed, this fact doesn’t hold much theoretical significance. The Allies announced at Casablanca, almost a year before the Moscow Declaration, that they would stop at nothing short of unconditional surrender. They would have pursued that conclusion regardless of their evolving plans for postwar accountability. So while it may be true that staying the hand of vengeance presupposed prior violence in winning the war, and that such legalist generosity requires antagonistic politics even to get started, in the case of World War II some of the critical political conditions had already been guaranteed by independent policy decisions.

Not so today—even when, as in the case of the Qaddafi indictment, the prospect of international criminal justice enters as a political element in the course of hostilities. Like domestic police forces, the international community occasionally faces the trouble of locating the accused, as the recent case of former Serb general Ratko Mladic suggests at first glance. But the usual conditions for an international trial differ more radically from those at home, since apprehending the accused ranges from difficult to impossible and doesn’t depend (or doesn’t only depend) on the local constable. Israel took extraordinary risks, and caused a considerable stir, in apprehending Adolf Eichmann. Laurent Gbagbo of Côte d’Ivoire is in the dock because the French deemed it feasible and worthwhile to assist his enemies militarily. If he hadn’t been summarily executed first, the world would have owed the capture of Qaddafi to the French warplane and American drone that intercepted his convoy. It took sixteen years for Mladic to be apprehended, not simply because he was off the grid but mainly because he had friends in high places and outsiders could not swoop in without ruffling feathers or provoking violence. To hold Bashir to account, it would first be necessary to capture him, which currently means defeating his armies, which the international community hasn’t yet chosen to do, as in the cases of Gbagbo or (perhaps soon) Joseph Kony of the Lord’s Resistance Army. The history of war crimes trials show that few nations are willing to take great risks and sacrifice many troops to make trials possible. (It is illuminating that the first time the world came close to staging an international criminal trial, the difficulty of arresting Kaiser Wilhelm II in his Dutch refuge was one factor in the failure of the project.)



The ICC today doesn't have a police force—and it certainly doesn't have an army.<sup>33</sup> This apparently minor point could remain minor if it were just in the service of a complaint about selective and delayed prosecution in the international sphere. But it provokes consideration of how far international criminal law still is from presupposing the shape, and therefore earning the justification, of domestic legalism. If the deployment of legalism is justifiable in the international sphere, it still faces the objection that exactly who is eligible for trial, and who is tried, depends on how much power (and how many guns) they have. To be sure, even liberal polities tolerate extraordinary disparities in the operations of criminal law at home, disparities that evidently follow from how wealth and power are distributed too. But because the state enjoys a longstanding development and a territorial monopoly of legitimate violence, there is no one who in principle will never be charged with a crime and no one whom the police cannot capture if they know where he is. The same is not true in the international sphere. Bluntly, then, if one has to lose a political struggle at home or a violent war in the international arena to face the music of international criminal law, then a lot of politics is presupposed in deciding who faces it.

Indeed, where it is relatively easier to arrange the indictment and even apprehension of some actors, for others it seems impossible. Outside the United States, George W. Bush is widely seen as a war criminal who will never stand trial. Today, the United States is not a party to the ICC and has reached a series of bilateral agreements to foreclose exposure of its nationals to the court's jurisdiction. Absent United Nations Security Council referral, even more unimaginable than American ratification of the ICC treaty, no American could be charged in, let alone be captured for, the court's proceedings. Indeed, when the Security Council paves the way for U.S. intervention in global affairs, it specifically exempts Americans and others intervening from the threat of any criminal liability.<sup>34</sup> Interestingly, however, the United States sometimes assists the ICC in trying to arrange the political conditions for its trials. In 2009 Barack Obama signed the Lord's Resistance Army Disarmament and Northern Uganda Recovery Act, and very recently he announced that he is sending military "advisers" to central Africa. No fool would declare war against the United States for the sake of international justice; however, defensibly or not, the United States assists counterinsurgency in its service.

Now, admittedly, Shklar provides less help in making theoretical sense of this situation. She was interpreting a postwar scene in which total victory in an uncontroversial war furnished the unusual factual complement to her political judgments about its aftermath—for even in the Far East, who saw anything but a morally clean prior success in World War II (even if a very few worried that it had been achieved in occasionally immoral ways)? It is true that Shklar, ever the subversive, suggested that the real reason Justice Jackson cared so much about the aggression charge at Nuremberg was because he wanted to provide even more support for American interventionism retroactively and prospectively.<sup>35</sup> But she didn't take this point so far as to doubt the legitimacy of the intervention herself, even if she was alive—more so than many later observers—to how controversial it had once been to demand that Americans enter the fray.

Shklar did, however, insist on how fundamentally politics must inevitably and

therefore analytically intrude on the moral road to trial, as if anticipating a world in which the clear-cut circumstances that the Allies enjoyed in World War II would not always obtain. And one of the worst illusions bred by positivism in international criminal law, Shklar wrote, was that, since the rules were presumed to be already “there,” it presented their applicability not as a matter of transforming the world politically but of simply letting them shine forth over time. Where positivism had emerged at home after the fact, to rationalize a long process of institution-building to protect the state, when deployed abroad it anticipated processes whose realization was still to come. In this way, positivism either forsook or disguised the agency needed to actually bring its applicable justice about, and thus it shirked conscious political deliberation about what specific actions this would involve (including necessary costs and potential tradeoffs): “The inevitable requires only that we adjust our minds to it,” Shklar wrote. “It does not demand political decision or action. That may be left to history, a history in which principles replace men” (139).

A genuinely political theory of international law, by contrast, would have to explain and justify a history of men and women who have to win a (sometimes military) victory in order for law to step in. Shklar did not develop any such theory. But there is food for thought in the following passage, in which she answered the anxiety that Nuremberg would create a dangerous precedent for future statesmen and generals (and in which she also cast aspersions on those who felt that Nuremberg immediately set up a durable legal regime).<sup>36</sup> “Each [episode of war and peace] is new and different,” she wrote.

If the [Nuremberg] Trial had been part of an established legal order, it might have been a legal precedent, for better or worse. [But] the Trial was not, and could not be, a precedent, except by way of vague analogy, for the future. The danger to future statesmen and military officers comes not from the Trial, but from the sort of war that brought it about. It is ideological war fought to the bitter end by both sides that makes the elimination of the defeated leaders inevitable. This conditions both the manner the war is pursued and its consequences. The leaders of nations defeated in future wars will be lucky if they get a trial as fair as that at Nuremberg, indeed if they get any trial at all. It is not the Trial itself that is the dangerous precedent, but Nazism, and the total war and politics it brought to Europe. (160–61)

In this passage, she was reassuring liberals that their leaders wouldn’t be tried: they would never bring total war to the world and thus make their capture necessary. And she was simultaneously warning them that if an ideological foe like a communist regime ever tried them, it would not be because they had foolishly organized Nuremberg but because they had regrettably lost a war. (And even then, they would get a fair trial only if they were lucky. She is right at least that the Nazis’ successors as the enemies of liberals have not always gotten Nuremberg’s legalism: consider Osama bin Laden’s fate.)

But Shklar’s deeper premise in this analysis is that the availability and character of postwar justice is inextricable from the nature and conclusion of the prior war that leads to it. In short, international criminal justice presupposes a political—and most

often military—victory that it does not itself provide and that its theorists do not consider, but that nevertheless seems an essential part of the calculus of what its legalism could or does contribute overall. Justice after force of arms, with all the contingencies that come into play in the course of achieving it, is not problematic in itself, simply because it occurs in an inevitably political context—assuming the liberals are the ones who turn out to have better guns, and do in fact go on to export their domestic norms in peacemaking by holding politically obnoxious foes to criminal account. But from case to case, the way the political and military preconditions of international criminal justice are secured surely has a bearing on what difference criminal prosecution might make, as men bearing guns stand aside while principle deals the enemies defeated by these guns their ultimate fate.

### **From Episodic to Permanent Court**

In her justification of postwar trials, one might wish Shklar had simply not gone to extremes in her claim that short-range results are the only relevant ones. In the long run, after all, didn't Nuremberg make the then unimaginable ICC, or at least a step toward it, possible? B. V. A. Röling, a prominent international lawyer from the Netherlands, put this case best. Writing a quarter-century after his service as a Tokyo judge (where he also dissented), Röling insisted that Nuremberg's "worth is determined by its value for the future . . . New legal thoughts often find strange ways to realization."<sup>37</sup> But Shklar had her reasons for skepticism about such defenses. Scandalized by French existentialists like Maurice Merleau-Ponty who offered this same defense of communism, Shklar insisted that speculative future outcomes cannot authorize conduct now.<sup>38</sup>

Indeed, Shklar dismissed the rationale that political justice in show trials would serve humanity in the long run as simply "a comforting belief for troubled Marxists." Merleau-Ponty's theory of history concluded that acts in furtherance of a better future justified their necessary immorality now. But this claim amounted to little more than "an excuse for the killing of so many people . . . Only an ideologized metaphysician could see the remote future as a substitute for the rule of law" (203–4). It also followed that the defense of show trials in the name of their potential future did not work even retroactively, no more than the lucky break that a wager on history paid off made it a sensible choice after the fact. No one would claim an "accurate guess" (as Shklar termed it) about the better future an immoral deed might bring about would somehow make that deed moral (203). If so, then how could the fact that Nuremberg now seems to have opened the door to the contemporary world of institutionalization provide any sort of rationale for it? That claim works no better than it did for communists who said it turned out to be a good thing that Josef Stalin repressed his opponents in the 1930s so that he could put Hitler down in the 1940s. That the Soviet Union deployed show trials demonstrated conclusively "how relatively limited are the ends that law can serve," and presumably Shklar could not have changed her mind about Nuremberg having lived into the age of international criminal justice (208).

But what about justifying international criminal justice now? The ICC is a going concern, it covers much of the globe, and above all it is a regime of positive treaty law, so much so as to portend a very different calculus about how political justice

today might, beyond promoting short-term liberalism, fairly proceed as if international criminal law boasted exactly the same legalist rationale as domestic criminal law. To consider this question, more detail is needed as to how Shklar proposed that legalism work at home. She considered it “hopeless” to try to “squeeze” Nuremberg “into the pattern of trials held under a continuous, regular system of adjudication and law enforcement”—but perhaps the ICC just might fit (157). Even if my specific case above about apprehending evildoers, and the difference between armies and police, is persuasive, the ICC might well proceed from that point to an adjudicative legalism earning the sort of political rationale Shklar could not find it in herself to award the Nuremberg proceedings.

Much depends, in short, on how legalism functions in making liberal societies decent. “Law as a political instrument,” Shklar wrote in her core statement of what makes domestic legalism valuable, “can play its most significant part in societies in which open group conflicts are accepted and which are sufficiently stable to be able to absorb and settle them in terms of rules” (144). Legalism instrumentally serves liberalism because in liberal societies people have agreed, in part because their ideological and practical conflicts are comparatively minor, to allow a legal system dispose of some of them. To an extent, the world is already such a society, since states have used other treaties, in a history of interstate coordination that began in the nineteenth century and has approached “a new world order” governing trade and regulation now.<sup>39</sup> There is no reason to think that states could not use treaties to create a robust international regime of criminal justice; in fact, while it may not be in a position to capture evil heads of state and put down rebel insurgencies, Interpol began as one of the pioneering ventures in building internationalist governance.<sup>40</sup>

Unfortunately, this line of thought does little to explain how the ICC so far functions in relation to global conflict. Even if it is becoming an embedded feature of world affairs, international criminal law is not interested in ordinary governance, but only in episodes in which specific places are too unstable, and open group conflicts are not accepted and devolve into intra- and interstate war. Those referred by local parties to the Court’s attention—all Central African cases, including the Lord’s Republican Army investigation—typically reflect weak sovereigns not in control of their state territory internationalizing domestic politics (or, more accurately, further internationalizing them). The Security Council’s referrals of situations in Darfur and Libya led to the ICC indictment of heads of state. Finally, acting on his *proprio motu* authority, the prosecutor issued indictments for crimes in post-election violence in Kenya, and he has more recently done the same for similar events in Côte d’Ivoire. All of the scenarios with which the ICC is starting off its institutional life are clearly very complicated. But it seems doubtful that they reflect the sort of prior stability that Shklar thought made legalism a defensible political mechanism for managing disputes. The complementarity regime around which the court is built is indeed precisely about having its scrutiny kick in when stable judicial processes *fail*—assuming they exist in the first place. Just as troublingly, the ICC’s substantive jurisdiction—war crimes, crimes against humanity, and genocide (along with aggression, once it is satisfactorily defined)—seems to signify the breakdown of the very stability that Shklar thought alone provided the political rationale for domestic legalism. Stated more bluntly, the

very fact that legalism has to be brought from far away means it cannot possibly play the same role Shklar believed justified it at home. Once again, then, if there is to be a political justification for international criminal law, it is not obvious what it is.

### Concluding Thoughts

The reception of Shklar's book in the legal academy has been basically nugatory, though it was the most directly legal of anything she ever wrote by far.<sup>41</sup> In international law, it fell on especially deaf ears: it was not reviewed in the *American Journal of International Law* and in fact has garnered one lone citation in that central organ in the nearly five decades since the book's publication. As for Shklar's attempt to theorize the value of law in international relations and politics more broadly, it simply came too early, at a time of wary opposition on the part of formalists in law schools to "realists" in political science departments. The one partial exception to the standoff, the New Haven school of international law, Shklar plausibly rejected for offering what amounted to a naturalism in disguise; as for Hans Morgenthau and other realists, Shklar tartly criticized them too—on the rather interesting grounds that their punctilious insulation of politics from other domains paralleled and even mimicked the positivist insulation of law from morality (92–93, 99, 123–26).<sup>42</sup>

Loneliness is the fate of the loner: it seems simple to chalk the fate of *Legalism* up to an originally botched reception in the academic field of its time, in which Shklar staked out an original position in part by dripping scorn on everyone else. In the long run, the supersession of its general perspective by critical legal studies did not help; meanwhile, once international criminal law became a going concern in the last twenty years, and in spite of having been made up from scratch, it rapidly assumed the sort of doctrinalism of other fields of law—a doctrinalism that forbade Shklar's book much impact, even had people remembered it. (In the now decade-old *Journal of International Criminal Justice*, the book has likewise been cited once.) If *Legalism* is sometimes acknowledged as a "classic," it is because it is beloved by an underground cult rather than because the book ever went mainstream, not least with respect to the field of international criminal justice in which it might otherwise be taken as a founding and canonical text.<sup>43</sup>

But there are reasons to revive it. I have tried to write this essay somewhat in Shklar's own style, which she acknowledged in her later preface to be controversial because of its "confrontation in the vocabulary of political theory, which is neither abstract nor specialized" (x–xi).<sup>44</sup> She insisted, in her original preface, that while "a polemical and opinionated book" for sure, *Legalism* was "not meant to be destructive" (vii). But she also claimed in conclusion that political theory "should not strive for novelty," or at least that her book merely hoped to be "evocative" (224). The "demand for 'positive' ideas for prescription and action," she added, in an amusing moment few others could sustain, "expresses only the inner needs of those who find the doubting spirit and the tentative mode intolerable" (222). She simply meant her book to offer "honest criticism" as part of "a shared enterprise of argument and counter-argument . . . It cannot, therefore, end on a categorical note or with a rhetorical flourish" (222).

For my part, I have not argued that it is impossible to justify the International

Criminal Court or some present or future form of international criminal law, only that Shklar's book fails to provide resources for that project and may in fact make such justification appear rather daunting. But just as the ICC's future is open, so its justifiability will continue to be debated in a changing political reality—including by partisans willing to take it up more openly as a political enterprise. And Shklar may simply have omitted some crucial concerns. Her celebrated and profoundly moral commitment to recognizing “cruelty as the worst thing we do” led her to focus on the maintenance of a stable liberal polity whose collapse leads to disaster and whose erection she hoped the charge of crimes against humanity would abet.<sup>45</sup> But it did not lead her to demand justice for the victims of crimes against humanity, in the absence of such beneficial but instrumental results. Yet this demand, albeit typically in complete disregard for the political context of international justice, seems to be what most matters to partisans of international criminal law. If so, other avenues of justification for the venture surely beckon.

But instead of concluding by cataloging Shklar's omissions, I would like to return to one implication of her critique of legalism that I claimed eluded her—and that she *a fortiori* did not conceptualize at the level of international politics. Legalism, I suggested, not only does work but must work as a noble lie: philosophers, and perhaps associated guardians, know it is false but allow its many votaries to proceed as if it were true because only the myth makes their conduct possible. In the international realm, Shklar's failure to draw this inference from her own argument seems especially glaring. How could a society suffering from an excessively political interpretation of law under the Nazis switch to a more humane and liberal politics by adopting a legalism they simultaneously knew was a myth but adopted purely and self-consciously as a matter of its political utility? It would serve them far better to accept that the rule of law is not only possible but crucial as a bulwark against catastrophe. To tell them the truth—that legalism is not a matter of the natural law that in fact pervaded German thought after the war, but rather a noble lie valuable for its political consequences—might well destroy the very bulwark against evil its propagation as a myth is meant to achieve. Of course, it is a somewhat academic point: as I have suggested, Shklar was wrong to think Nuremberg's legalism fostered the desirable changes she claimed for it.

Today, the International Criminal Court, and international criminal law more generally, stand as some of the more aspirational projects there are in a dreary world. Along with international human rights, they successfully elicit the enthusiasm of many lawyers in academia and practice, as well as law students seeking an idealistic outlet for their professional training. Aside from conservatives who stand in a long tradition of hostility toward internationalist endeavors, along with a few empirical political scientists, no one approaches international criminal law as a political enterprise. Its supporters, almost to a man and woman, appear to believe that the best way to advance it is to deny its political essence, as if talking about international criminal law exclusively as extant law would by itself convert passionately held ideals into generally observed realities. So long as no one interested in the topic openly discusses international criminal law as a political matter, assesses its feasible political results, and

compares it to actual and possible political alternatives, the project will lack plausibility, especially in the academic world, where even socially valuable lies are not supposed to be tolerated.

One difficulty with legalist myths—whether it is fatal or not is a matter of dispute—is that the people will get wind of the truth. Another, however, is that the mythmakers will not manage to step outside their own storytelling. Judith Shklar's greatest value for international criminal law, going on fifty years after her book on the subject and more than ten years after her death, is to reckon with “the great paradox” of legalism: it “is an ideology . . . too inflexible to recognize the enormous potentialities of legalism as a creative policy, but exhausts itself in intoning traditional pieties and principles which are incapable of realization” (112). At least international criminal law's guardians should reckon with that paradox. If they showed what legalism, in its internationalist versions, can do, they would provide a more convincing case for it. And if they acknowledged what it cannot, they might well decide to put it in its place, in order to make room for other things.

## NOTES

1. In an obituary, Shklar didn't even mention *Eichmann in Jerusalem*: Judith Shklar, “Hannah Arendt,” *New Republic*, December 27, 1975. The citation about it is from Shklar, “Hannah Arendt as Pariah,” *Partisan Review* 50, no. 1 (1983): 64–77, repr. in Shklar, *Political Thought and Political Thinkers*, ed. Stanley Hoffmann (Chicago: University of Chicago Press, 1998), 372.

2. See, e.g., David Luban, “A Theory of Crimes against Humanity,” *Yale Journal of International Law* 29 (2004): 142–43; or “Hannah Arendt as a Theorist of International Criminal Law,” *International Criminal Law Review* 11, no. 3 (2011): 621–41. By contrast, Shklar's book goes not only unexcerpted but essentially unmentioned in the compendious Guénaél Mettraux, ed., *Perspectives on the Nuremberg Trials* (Oxford: Oxford University Press, 2008), which collects major statements over a half-century.

3. See, e.g., Christian Reus-Smit, ed., *The Politics of International Law* (Cambridge: Cambridge University Press, 2004), which includes David Wippmann's chapter on the Rome statute's negotiation. Shklar's deservedly best known follower in international criminal law is Mark J. Osiel, *Mass Atrocity, Collective Memory, and the Law* (New Brunswick, N.J.: Transaction Books, 1997); she also surfaces episodically in Gerry Simpson, *Law, War, and Crime: War Crimes Trials and the Reinvention of International Law* (Cambridge: Polity, 2007), and recently in Sarah M. H. Nouwen and Wouter G. Werner, “Doing Justice to the Political: The International Criminal Court in Uganda and Sudan,” *European Journal of International Law* 21, no. 4 (2010): 941–65, though this last piece relies more heavily on Carl Schmitt, advancing a theory that the politics of the ICC is to produce friends and enemies in the international order. After drafting this essay, I discovered Bronwyn Anne Leebaw's pathbreaking new book *Judging State-Sponsored Violence, Imagining Political Change* (Cambridge: Cambridge University Press, 2011), which goes further with Shklar than anyone so far.

4. See, e.g., David Luban et al., eds., *International and Transnational Criminal Law* (Aspen, Col.: West Publishers, 2009).

5. See Judith N. Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge, Mass.: Harvard University Press, 1986), xi–xii.

6. The viability of this (over)emphasis is almost the sole topic in what one might style “Shklar

studies.” See the essays by Bruce Ackerman, Seyla Benhabib, and Michael Walzer in Bernard Yack, ed., *Liberalism without Illusions: Essays on Liberal Theory and the Political Vision of Judith N. Shklar* (Chicago: University of Chicago Press, 1996); and, for a different view, Katrina Forrester, “Hope and Memory in the Thought of Judith Shklar,” *Modern Intellectual History* 8, no. 3 (2011): 591–620.

7. For the “favorite” comment, see Shklar, “A Life of Learning” (Charles Homer Haskins Lecture 1989, American Council of Learned Societies Occasional Paper No. 9), repr. in Yack, ed., *Liberalism without Illusions*, 275.

8. Shklar did not mention “human rights” in her consideration of naturalism or even her discussion of Nuremberg—not surprisingly, since international criminal law had not yet been connected to international human rights. Cf. my *The Last Utopia: Human Rights in History* (Cambridge, Mass.: Harvard University Press, 2010), 82.

9. Shklar, “Political Theory and the Rule of Law,” in *The Rule of Law: Ideal or Ideology?* ed. Allan C. Hutchinson and Patrick Monahan (Toronto: Carswell, 1987), repr. in Shklar, *Political Thought and Political Thinkers*, 32.

10. Shklar evidently inherited her theoretical focus on ideology not from the usual sources but from her McGill University teacher Frederick M. Watkins, himself a student of Carl Friedrich, as she also became. See Watkins, *The Age of Ideology: Political Thought, 1750 to the Present* (Englewood Cliffs: Prentice-Hall, 1964); and Shklar, ed., *Political Theory and Ideology* (New York: Macmillan, 1966).

11. She was even clearer on this point in a follow-up piece, evidently written to allay the misunderstanding of those who were fooled by her indiscriminate scorn into thinking she had come to bury not to praise legalism: “Far from debunking legal values, [my] reappraisal of legalism is designed to reveal it as a civilized political ideology which, in spite of some absurdities, must claim the loyalty of all those who care about decent government . . . A greater degree of social self-awareness will make legalism a more effective social force, a more intelligible and defensible political ideology and a more useful concept in social theory.” Shklar, “In Defense of Legalism,” *Journal of Legal Education* 19 (1966): 51, 58.

12. Cf. Paul Veyne, *Did the Greeks Believe in Their Myths? An Essay on the Constitutive Imagination*, trans. Paula Wissing (Chicago: University of Chicago Press, 1988).

13. Unger writes of contemporary legal consciousness (though I have no reason to think he had Shklar in mind) that it is legalism “with an ironic proviso: that although the assumptions of the method may not be literally believable they serve a vital goal. The subtlety in this conversion of vision into vocabulary and of vocabulary into strategy is that the strategic imperative requires the agent to continue speaking the vocabulary of the vision in which he has ceased to believe.” Roberto Mangabeira Unger, *What Should Legal Analysis Become?* (London: Verso, 1996), 51. He goes on to posit that the strategy has high costs when social change is desperately needed—but then Shklar ranked stability first of all imperatives, on the grounds that “in the record of our century the collapse of liberalism has in no case come to anything but an extremity of horror. There is no warrant for expecting any other outcome.” For her part, Shklar emphasized this precise divergence from Unger, implicitly in a withering critique in the new preface to *Legalism* just cited (xii) and explicitly in her contemporaneous “Political Theory and the Rule of Law,” 29–31.

14. Compare more recently Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (Oxford: Oxford University Press, 2008), chap. 10.

15. Compare Carl Schmitt, “The International Crime of the War of Aggression and the Principle *Nullum Crimen, Nulla Poena Sine Lege*,” in *Writings on War*, ed. and trans. Timothy Nunan



(Cambridge: Polity, 2011), 125–97, which interestingly accepts the legality of the charge of crimes against humanity (contrary to many German lawyers at the time) but bridles at the Allied prioritization of aggression because of the obvious conflict of that charge with the norm against *ex post facto* laws.

16. Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of International War Crimes Tribunals* (Princeton, N.J.: Princeton University Press, 2000), esp. epilogue.

17. For convenience in a large literature on the 1940s, see István Deák et al., eds., *The Politics of Retribution in Europe: World War II and Its Aftermath* (Princeton, N.J.: Princeton University Press, 2000). Given the larger numbers national trials processed, they may deserve a less unforgiving verdict. For a famous study of various alternative modes of reckoning, see Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1999). Shklar did not, however, recognize alternative modalities of post-conviction punishment. Mark A. Drumbl's important *Atrocity, Punishment, and International Law* (Cambridge: Cambridge University Press, 2007) pursues a pluralistic comparison of such matters.

18. See my "From Antiwar Politics to Antitorture Politics," in *Law and War*, ed. Lawrence Douglas and Austin Sarat (Stanford, Calif.: Stanford University Press, 2014), which chronicles the priority of concern about aggression over concern about atrocity in the invocation of international law in American debates of the Vietnam era. On aggression, Shklar confessed (237 n. 41) her debt to Julius Stone, *Aggression and World Order* (Berkeley: University of California Press, 1958).

19. Besides this statement, Shklar didn't appeal to an epistemological (as opposed to a political) rationale for international criminal law, and it is rather remarkable that she did not. Many would now defend trials for their capacities to discover the truth about past conduct. The epistemological rationale, however, neglects that trials may not be very good at producing truth not already obvious, are profoundly influenced by short-term political circumstance in their selection and presentation of evidence, and almost unfailingly result in bad history. Cf. Richard Ashby Wilson, *Writing History in International Criminal Trials* (Cambridge: Cambridge University Press, 2011).

20. Her sources were August von Knierim, *The Nuremberg Trials*, trans. E. D. Schmitt (Chicago: University of Chicago Press, 1954); W. E. Benton and Georg Grimm, eds., *Nuremberg: German Views of the War Trials* (Dallas: Southern Methodist University Press, 1955); and J. D. Montgomery, *Forced to be Free: The Artificial Revolution in Germany and Japan* (Chicago: University of Chicago Press, 1957).

21. The main errors, as Donald Bloxham has best shown, were the confusion about the death camps, the representation of Auschwitz as a "concentration camp" much like Western sites familiar from American and British liberations, and the exclusion of the Aktion Reinhard facilities (Treblinka most emblematically) from consideration. Donald Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* (Oxford: Oxford University Press, 2001), esp. 63–91, 101–28; as well as Bloxham, "Milestones and Mythologies: The Impact of Nuremberg," in *Atrocities on Trial: Historical Perspectives on the Politics of Prosecuting War Crimes*, ed. Patricia Heberer and Jürgen Matthäus (Lincoln: University of Nebraska Press, 2008), 263–82. That one justification of the Eichmann trial had been to right these wrongs Shklar presumably knew, even though she concluded it introduced nothing new jurisprudentially, since Nuremberg had coined the concept of crimes against humanity even if it had then mostly failed to attend to Jewish death. Meanwhile, very cannily, she reported that to justify the Eichmann inquest as a

political event was first to decide whether one concurred with the vision of and for the Israeli polity it was instrumentally serving (154–55).

22. See Devin O. Pendas, “Retroactive Law and Proactive Justice: Debating Crimes against Humanity in Germany, 1945–50,” *Central European History* 43, no. 3 (2010): 428–63. For the successor trials, see Pendas, “The Fate of Nuremberg: The Legacy and Impact of the Subsequent Nuremberg Trials in Postwar Germany,” in *Reassessing the Nuremberg Military Tribunals: Transitional Justice, Trial Narratives, and Historiography*, ed. Kim C. Priemel and Alexa Stiller (New York: Berghahn, 2012). I am grateful to Devin Pendas for sharing this piece and other advice. For doctrinal innovation, see Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford: Oxford University Press, 2011).

23. Consider Konrad H. Jarausch, *After Hitler: Recivilizing Germans, 1945–1955* (Oxford: Oxford University Press, 2008), for the best overall survey in English of the various factors, with almost no mention (let alone promotion) of Nuremberg or other postwar trials in the mix. See also Bloxham, *Genocide*, chap. 4; and Norbert Frei, *Adenauer’s Germany and the Nazi Past*, trans. Joel Golb (New York: Columbia University Press, 2002), esp. pt. 2. Ironically, it may have been the natural law theory that Shklar despised that helped German lawyers back to liberalism. Raphael Gross, “Der Führer als Betrüger: Moral und Antipositivismus in Deutschland 1945/46 am Beispiel Fritz von Hippels,” in *NS-Unrecht vor Kölner Gerichten nach 1945*, ed. Anne Klein and Jürgen Wilhelm (Cologne: Greven, 2003), 23–34.

24. For details, see Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II* (Cambridge, Mass.: Harvard University Press, 2008), chap. 9.

25. Elizabeth S. Kopelman, “Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Tribunal,” *New York University Journal of International Law and Policy* 23 (1990–91): 373–442.

26. Judith N. Shklar, *After Utopia: The Decline of Political Faith* (Princeton, N.J.: Princeton University Press, 1958). At the end of her life, similarly, she inveighed against the notion of “Judeo-Christianity” as “a symptom of the uneasiness of those Christians who wonder whether they might not have involuntarily contributed to the most recent extermination of the Jews.” Judith N. Shklar, “Torturers,” *London Review of Books*, October 9, 1986.

27. Note that here, in alluding to his book, she was criticizing her teacher Frederick Watkins for his civilizational essentialism. See Frederick M. Watkins, *The Political Tradition of the West: A Study in the Development of Modern Liberalism* (Cambridge, Mass.: Harvard University Press, 1948).

28. Shklar believed the Japanese to be actuated by a “situational ethics” which made legalism of any kind (and not just natural law) alien, and she relied on what remains to this day a much less developed literature than in the corresponding German case on how Japanese society responded to the trials. See Kazuo Kawai, *Japan’s American Interlude* (Chicago: University of Chicago Press, 1960), which she cited, and for a recent account John W. Dower, *Embracing Defeat: Japan in the Wake of World War II* (New York: Norton, 1999), chap. 15.

29. She cited Harvard colleague (and at the time of her book U.S. ambassador to Japan) Edwin Reischauer’s *The United States and Japan* (Cambridge, Mass.: Harvard University Press, 1957), 16–17, 23, where the relation of Japan’s interwar and wartime history to the racism of American immigration policy is discussed.

30. For the apparently necessary atrocity of civil war, the most useful book is Arno J. Mayer, *The Furies: Violence and Terror in the French and Russian Revolutions* (Princeton, N.J.: Princeton

University Press, 2000); see also Stathis N. Kalyvas, *The Logic of Violence in Civil Wars* (Cambridge: Cambridge University Press, 2006).

31. See Phil Clark and Nicholas Waddell, eds., *Courting Conflict? Justice, Peace, and the ICC in Africa* (London: Royal African Society, 2008); and Clark, ed., *Debating International Justice in Africa* (Oxford: Oxford Transitional Justice Research, 2010).

32. Cf. Robert C. Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge: Cambridge University Press, 2005); or Aaron Fichtelberg, "The International Criminal Court and the Ethics of Selective Justice," in *The Nuremberg War Crimes Trial and Its Policy Consequences Today*, ed. Beth A. Griech-Poelle (Baden-Baden: Nomos, 2009), 115–30.

33. Of all the topics in this essay, Arendt came close to thematizing the distinctive political context of arrest in international criminal law in *Eichmann in Jerusalem: A Report on the Banality of Evil*, rev. ed. (New York: Viking, 1964), 209–10. See also Emily Hencken Ritter and Scott Wofford, "Pre-Arrest Bargaining and the Effectiveness of International Criminal Regimes," *Journal of Theoretical Politics* (forthcoming).

34. See, e.g., UNSC Res. 1970 (2011).

35. "His main preoccupation was to vindicate his own . . . position on the Neutrality Act and Lend Lease before America had entered the war," she wrote, adding that he also hoped to stave off the return of isolationism by convincing fellow citizens through a dramatic trial how critical it was for America to ensure a world beyond aggressive war (174–75).

36. For anxiety, she cited Montgomery Belgion, *Victor's Justice* (Hinsdale, Ill.: Henry Regnery, 1949); and Lord Maurice Hankey, *Politics, Trials, and Errors* (London: Henry Regnery, 1960). For unreasonable hope, she cited Quincy Wright, "The Law of the Nuremberg Trial," *American Journal of International Law* 41, no. 1 (1947): 38–72.

37. B. V. A. Röling, "The Nuremberg and the Tokyo Trials in Retrospect," in *A Treatise on International Criminal Law*, ed. M. Cherif Bassiouni and Ved P. Nanda, 2 vols. (Springfield, Ill.: Thomas, 1973), repr. in Mettraux, ed., *Perspectives*, 470. As Röling noted, Otto Kranzbühler, Dönitz's defense attorney, had formulated this claim earliest: "Nuremberg is a revolution, and it appears to me to be of little significance to measure a revolution by the standards of the situation which has been overthrown by it or was meant to be overthrown by it. In a revolution one will always have to accept violence and injustice in the existing conditions. Its worth or worthlessness is determined by what it contains for the future." Kranzbühler, "Nürnberg als Rechtsproblem," in *Um Recht und Gerechtigkeit: Festgabe für Erich Kaufmann zu seinem 70. Geburtstage 21. September 1950, überreicht von Freunden, Verehrern und Schülern* (Stuttgart: Kohlhammer, 1950), 219; repr. in English as "Nuremberg as a Legal Problem," in Benton and Grimm, eds., *Nuremberg*, 107. Kranzbühler, however, rejected his early view even as Röling adopted it: Kranzbühler, "Nuremberg Eighteen Years Afterwards," *DePaul Law Review* 14, no. 2 (1965): 333–47, repr. in Mettraux, ed., *Perspectives*, 433–44.

38. Maurice Merleau-Ponty, *Humanisme et terreur: Essai sur le problème communiste* (Paris: Gallimard, 1947).

39. For one optimistic picture of what this portends, see Anne-Marie Slaughter, *A New World Order* (Princeton, N.J.: Princeton University Press, 2004).

40. See, e.g., Madeleine Herren, "Governmental Internationalism and the Beginning of a New World Order in the Late Nineteenth Century," in *The Mechanics of Internationalism: Culture,*

*Society and Politics from the 1840s to the First World War*, ed. Martin Geyer and Johannes Paulmann (Cambridge: Cambridge University Press, 2001), 121–44.

41. This generalization most definitely includes her later Storrs Lectures at Yale Law School for 1988, published as Judith N. Shklar, *The Faces of Injustice* (New Haven, Conn.: Yale University Press, 1990).

42. “The formalism of juristic thought has taken root even among its professed opponents. The latter have simply applied the same type of arguments that legal theorists have used in separating law from morality to the task of preserving politics from both law and morality” (126). Incidentally, she was well aware that Carl Schmitt stood behind American international relations theory, citing the earliest English translation of *The Concept of the Political*, but she generously concluded of this dependence that “American realists are anything but fascists in the making. They are, in fact, despairing liberals all. They may long for a central, essential concept of politics, but not at the full price” (125). For Schmitt, see his “The Concept of ‘the Political,’” *Modern Political Thought: The Great Issues*, ed. William Ebenstein, 2nd ed. (New York: Holt, Rinehart and Winston, 1960), 360–62. For Shklar as a different kind of realist, see Andrew Sabl, “History and Reality: Idealist Pathologies and ‘Harvard School’ Remedies,” in *Political Philosophy versus History? Contextualism and Real Politics in Contemporary Political Thought*, ed. Jonathan Floyd and Marc Stears (Cambridge: Cambridge University Press, 2011), 151–76.

43. It was reviewed in the *Harvard Law Review* by Lloyd Weinreb (not yet on the Harvard faculty), who understandably focused on its most general jurisprudential implications and barely mentioned that it dealt with international criminal law. Weinreb, review of Judith N. Shklar, *Harvard Law Review* 78, no. 7 (1965): 1494–1500. In recent years, Leslie Green cites it as a “classic,” but no one in the legal academy aside from Robin West (whose concerns are not in international criminal law) has ever devoted serious attention to it. Green, “Positivism and the Inseparability of Law and Morals,” *New York University Law Review* 83, no. 4 (2008): 1058n; West, “Reconsidering Legalism,” *University of Minnesota Law Review* 88 (2003): 119–58.

44. “In this respect,” she added, in an observation that still seems correct today, “political theory has differed all along from the style of moral philosophy to which much contemporary legal theory has resorted. That there is a natural affinity between these two highly structured modes of social theorizing is undeniable, but I am not persuaded that it is altogether wholesome, for it only confirms legalism in its disposition to think of itself as an extrapolitical, isolable mode of thought.”

45. On cruelty, see Judith N. Shklar, *Ordinary Vices* (Cambridge, Mass.: Harvard University Press, 1984), chap. 1; for Richard Rorty’s well-known mobilization of the phrase, see Rorty, *Continuity, Irony, and Solidarity* (Cambridge: Cambridge University Press, 1989), chaps. 7–8.