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THEATER OF INTERNATIONAL JUSTICE

JESSIE ALLEN¹

*Legal interpretation must be capable of transforming itself into action.*²

In this essay I defend international human rights tribunals against the charge that they are not “real” courts (with sovereign force behind them) by considering the proceedings in these courts as a kind of theatrical performance. Looking at human rights courts as theater might at first seem to validate the view that they produce only an illusory “show” of justice. To the contrary, I will argue that self-consciously theatrical performances are what give these courts the potential to enact real justice. I do not mean only that the courts’ dramatic public hearings make injustice visible and bring together a community committed to building human rights, although those are certainly important effects. My claim goes more directly to the issue of enforcement. After all, no court enforces its own judgment. Nor does enforcement happen automatically or by magic. The question then is how enforcement comes about. I will argue that the performance of formal judicial process in international human rights courts enacts a version of the role-based, conventionally structured process that all courts employ to trigger enforcement of their orders by government officials. International courts of human rights do not *substitute* spectacle for enforcement. Their success *as* law courts is dependent on that spectacle. The theater of human rights courts is what makes them real courts of law.

International courts of human rights are perennially subject to the criticism that they are not really courts of law. For those who see sovereign command and violent enforcement as necessary legal attributes, the work of these courts looks questionable. Even for those of us willing to expand our definitions of law beyond strict positivist bounds, the meanings and effects of international human rights courts present a puzzle. We want to understand whether – and how – the proceedings of these courts can actually remedy rights violations, bring violators to justice, and alter the state practices that the courts have judged to imperil human rights.

These worries are sometimes articulated by comparing international human rights courts to theater. With no international

¹ Assistant Professor, University of Pittsburgh School of Law. For comments on drafts and other critical contributions of knowledge thanks are due to Elena Baylis, Deborah Brake, David Herring, Bernard Hibbitts, Charles Jalloh, Peter Rush, Frank Valdez, Sheila Velez-Martinez, Patricia Williams and Lucy Winner. I am grateful to Melbourne Law School’s Institute for International Law and the Humanities and to Lat Crit’s 2012 North-South Exchange, where the essay began.

² Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1617 (1986).

army or police force behind them, are the judgments of these tribunals just a public expression of ideas about justice? Or, worse, are their proceedings a false show of justice that distracts our attention from the real injustices perpetrated off-stage by the governments whose officials appear before those tribunals? In this essay, I argue that taking the theatrical analogy seriously can illuminate these courts' potential for effecting real change.

This essay proceeds in three parts. Part I first outlines the persistent doubts that international courts of human rights have authentic legal power, and the critique of these tribunals as a theatrical sham. Then, I focus on a hearing of the Inter-American Court of Human Rights and confirm its self-conscious emphasis on creating a formal presentation for an audience. Part II introduces the idea that the Inter-American Court's hearings can be viewed as a particular kind of performance aimed at a particular audience effect, namely, generating government enforcement. To do this, I revisit Robert Cover's famous essay, *Violence and the Word*.³ There Cover sought to reveal the necessary link between legal interpretation and government force that is forged through judicial process. Cover argued that viewing a court proceeding as a "civil event where interpretations of fact and legal concepts are tested and refined" hid the way judicial process was made to trigger government force.⁴

I see the charge that human rights courts are unreal because they lack enforcement power as the mirror image of Robert Cover's charge that domestic courts create the illusion of force-free justice. As Cover showed, in the ordinary course of justice, courts' interpretations are enforced when government officials are induced to perform institutional roles that overcome their individual resistance to committing acts of violent enforcement. In the Inter-American Court hearing, the court's desire to trigger that redressive violence is anything but hidden. In fact, the court's attempts to induce government enforcement becomes a theme of the performance.

In Part III of the essay, I analyze the Inter-American Court hearing as a performance aimed at producing the transformation Cover described. The hearing mobilizes different techniques and capabilities of performance to make visible the violence suffered by victims and to overcome the resistance of government officials to forcefully redressing that violence. Without denying the ability of judicial theater to *fake* human rights, my goal in analyzing the hearing as a performance is to see what Dwight Conquergood calls "the efficacy of theatricality," the performative potential of court rituals to *make* human rights, or at least, to make human rights a bit more real.⁵ My analysis looks to see how the Inter-American Court

³ Cover, *supra* note 2 *passim*.

⁴ *Id.* at 1607 note 17.

⁵ Dwight Conquergood, *Performance Theory, Hmong Shamans, and Cultural Politics*, in CRITICAL THEORY AND PERFORMANCE 41, 51 (Janelle G. Reinelt & Joseph R. Roach, eds., 1992) (describing Shamanic healing rituals as "performance as making, not faking", quoting VICTOR TURNER, FROM RITUAL TO THEATRE: THE HUMAN SERIOUSNESS OF PLAY 93 (1982)). *See also*

performs the characteristic business of all courts—transforming its words into deeds of governmental force.

I. International Human Rights Courts' Theatrical Justice

A. INTERNATIONAL HUMAN RIGHTS COURTS' AUTHENTICITY PROBLEM

International law today is arguably more prominent and more vexed than ever before. The last several decades have seen a remarkable flowering, especially in the area of human rights.⁶ We have new statutes, new courts, and a greatly increased volume of widely publicized practice in transnational human rights litigation.⁷ But that growth has not resolved questions about the value of adjudicating rights claims against sovereign governments in international tribunals.

The idea that some legal rights transcend sovereignty has a long history. Rights based on universal, natural or divine law were once assumed to run through Western countries' legal systems.⁸ And the basic concept that it can be lawful to intervene to prevent a government from mistreating its own citizens has been around since at least the seventeenth century.⁹ In the twentieth century, reactions to the horrors of World War II led to a renaissance of international rights concepts and institutions. The Universal Declaration of Human Rights was signed, the first formal international war crimes trials took place at Nuremberg, and new international conventions and courts developed to adjudicate human rights claims and render judicial decisions on the validity of nations' use of sovereign force.¹⁰

Despite their long timeline and recent proliferation, however, international human rights still evoke skepticism. One need not be a committed legal positivist to see official enforcement as a crucial feature of a legal system.¹¹ Indeed, in some ways, the problem of international human rights courts' legal status is just as acute for a believer in natural law. As Robin West points out, for the natural

Judith Resnik, *Bring Back Bentham: "Open Courts," "Terror Trials," and Public Sphere(s)*, 5 LAW & ETHICS HUM. RTS. 2, 7 (2011), arguing that as 18th century court spectators began to see themselves as critical observers and to interpret their role as judging the fairness of those proceedings, "Rites' turned into 'rights' as rulers lost discretion to close off their courts, to fire their judges, and to preclude all persons from rights-seeking."

⁶ See Jack Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMMENT. 261 (2002).

⁷ For example, International Convention for the Protection of All Persons from Enforced Disappearances, G.A. Res. 61/177, U.N. Doc. A/RES/61/177 (Dec. 20, 2006); Rome Statute of the International Criminal Court, July 17, 1998, 2187 UNTS 90, 37 ILM 1002; International Criminal Tribunal for Rwanda.

⁸ Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2604-10 (1997)

⁹ Grotius, Humanitarian intervention.

¹⁰ Koh, *supra* note 8, at 2614-15.

¹¹ Thus the humor in the poster I once saw with an image of an apple hitting someone in the head and the legend: "Gravity – it's not just a good idea, it's the law!"

lawyer, legal interpretation entails both “virtue and power.”¹² The natural law critique of unjust positive law is that it is force without reason. But reason without force is just as bad, or at least just as legally incomplete and incapable of producing genuine justice. The basic questions, then, are whether international human rights law is really law at all when it appears not to be backed by coercive force, and whether international adjudications of human rights can bring about the kind of regulation and transformation that counts as legal change.

From both the positivist and natural law perspectives, then, human rights courts are problematic. For positivists, courts without sovereign force are a fake – a dangerous pretense of legality.¹³ For natural lawyers, such courts are impotent – morally good, but powerless.¹⁴ For the positivist the absence of violent government coercion suggests that these courts operate instead through trickery, putting on a false show that threatens real justice, while in the natural law vision courts without sovereign force present a kind of saintly ineffectuality.¹⁵ In both views, courts without official enforcement power have no ability to really alter behavior.¹⁶ On the one hand, international law is seen as ineffective. In this view, when states accept the judgments of international human rights courts, they do so only to the extent those judgments are perceived to serve their self-interest. So, for instance, Jack Goldsmith and Eric Posner argue that governments never *really* submit to the authority of international courts.¹⁷ They simply calculate that it is sometimes in their own strategic interest to participate in international tribunals.¹⁸ On the other hand, international law is seen as harmful, because by *seeming* to constrain it provides an appearance of legality that gives states cover for pursuing their political interests. In other words, the lack of effect becomes positively harmful by giving an appearance of legality to lawless behavior. As Nicola Lacey points out, “Meeting formal criteria of legitimacy . . . by observing elaborate legal procedures . . . can provide a crucial gateway to international recognition and hence to all sorts of material benefits.”¹⁹ From this perspective, international adjudications of human rights are a tool of national governments’ dominance, rather than a restraint on that power.

¹² Robin West, *Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory*, 60 N.Y.U. L. REV. 145, 160 (1985).

¹³ Nicola Lacey, *Philosophy, Political Morality, and History: Explaining the Enduring Resonance of the Hart-Fuller Debate*, 83 N.Y.U. L. REV. 1059, 1084-85 (2008).

¹⁴ *Id.* at 1082-84.

¹⁵ *Id.* at 1084-85. Note how in each case, the lack of violent enforcement leads to a classic feminized image, one half of the virgin/whore duality.

¹⁶ See, e.g., Jack L. Goldsmith & Eric A. Posner, *THE LIMITS OF INTERNATIONAL LAW* (2005).

¹⁷ *Id.* at 13.

¹⁸ *Id.* at 225.

¹⁹ Lacey, *supra* note 13, at 1085.

Besides the overall cloak of legitimacy cast by the forms of legal process, public adjudication in international courts may give states an opportunity to rationalize particular acts of violence. Adjudication invites, indeed requires, opposing parties to construct public narratives to explain and justify their claims and conduct, and frames that conduct within a spectacle of obedience to law. In the process, governments may be able to produce an official story that acknowledges some causal responsibility and gains the seal of legal approval without accepting moral or political accountability for the events that triggered legal action in the first place. For example, Başak Çali argues that the international rights adjudications that arose from the destruction of Kurdish villages in Turkey “helped to normalize large-scale violent events.”²⁰ The Turkish government paid the compensation ordered by the European Court of Human Rights, but used the adjudication process to reframe the deaths and disappearances that gave rise to those judgments as a kind of unintentional harm.²¹

You might think that the acid test of legal power would be compliance with international court judgments. If governments do what international courts tell them to do, doesn't that mean those courts produce a real international rule of law? Perhaps, but both critics and supporters of international human rights adjudication insist the issue is more complicated.

There is general agreement that national governments do what international courts say much of the time. But the significance of that fact is deeply disputed. Skeptics argue that what looks like compliance is really just strategic self-interest. Just because governments act in accordance with court orders does not mean that they are really submitting to legal judgment. They simply may be doing what they view as beneficial to their political power. At least one pattern in government responses to international judgments seems to support that view. While governments are very likely to pay money judgments, and are sometimes willing to modify policies prospectively, they have often refused to comply with orders to investigate human rights violations and identify and punish perpetrators.²² While paying compensation is certainly not painless for governments with limited resources, and changing domestic policies can be politically costly, both are far less dangerous to governmental power than launching investigations that are likely to result in those governments having to accept public blame for atrocities.²³

²⁰ Başak Çali, *The Logics of Supranational Human Rights Litigation, Official Acknowledgement, and Human Rights Reform: the Southeast Turkey Cases Before the European Court of Human Rights, 1996-2006*, 35 LAW & SOC. INQUIRY 311, 313 (2010).

²¹ *Id.*

²² Morse H. Tan, *Upholding Human Rights in the Hemisphere: Casting Down Impunity Through the Inter-American Court of Human Rights*, 43 TEX. INT'L L.J. 243, 271-72 (2008).

²³ *Id.*

Even those who view international human rights optimistically, and emphasize the overall high rate of compliance with international law, are sensitive to the question, “Why do nations obey international law?”²⁴ Paul Berman points to the work of “legal consciousness scholars” in studying the interaction between official norms and the way individuals “deploy, transform, or subvert official legal understandings and thereby ‘construct’ law on the ground.”²⁵ These theorists are, in Harold Koh’s words, looking for “the ‘transmission belt,’ whereby norms created by international society infiltrate into domestic society.”²⁶

Often analyses from this perspective seem to give up on the idea that international human rights courts can trigger sovereign force through their own proceedings. Instead proponents of international rights institutions develop other theories that explain how international norms and adjudicative processes “permeate and influence domestic policy.”²⁷ So, for example, Berman suggests that international law “may slowly change attitudes in large populations, effecting shifts in ideas of appropriate state behavior.”²⁸ There is much analysis of what institutional structures and relationships make human rights courts effective. For instance, Laurence R. Helfer and Anne-Marie Slaughter have suggested a range of institutional factors that contribute to an international human rights court’s effectiveness.²⁹ These include a court’s composition, caseload, independent fact-finding capacity, awareness of audience, neutrality, and demonstrated autonomy from political interests.³⁰ But the performance of formal court processes is oddly absent from these analyses. Even the “awareness of audience” factor in Helfer and Slaughter’s study is discussed mainly in terms of the court’s written judgments. The question I want to consider, then, is whether human rights tribunals’ public performances are part of the “transmission belt” that makes human rights a legal reality and, if so, how.

B. INTERNATIONAL HUMAN RIGHTS ADJUDICATION AS THEATER

1. *The Performative Nature of Courts in General*

The view that an institution or event is inauthentic or ineffective is sometimes expressed by likening it to theater. International courts of human rights, are no exception.³¹ No doubt

²⁴ Koh, *supra* note 8; Paul Schiff Berman, *Seeing Beyond the Limits of International Law*, 84 TEXAS L. REV. 1265 (2006); Tan, *supra* note 22, at 272-76.

²⁵ Berman, *supra* note 24, at 1283.

²⁶ Koh, *supra* note 8, at 2651.

²⁷ Koh, *supra* note 8, at 2654.

²⁸ Berman, *supra* note 24, at 1266.

²⁹ Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L. J. 273 (1997).

³⁰ *Id.*

³¹ See, e.g., Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 STAN. J. INT’L L. 39, 46 (2007) (when international criminal law “distracts from prophylactic strategies or excuses failure to take prompt action in the face of [human rights] crises, it emerges as no more than a ‘cynical theater.’”); David Kennedy, *The International*

sometimes the comparison is simply a metaphor for superficiality or false pretenses, intended to communicate the basic criticism that these courts are unable to deliver real change. In fact the simile would hardly be worth pausing over, were it not for two facts. First, operating as they do through public performances, all courts resemble theaters, including the 'real' domestic tribunals to which the international human rights courts are being unfavorably compared. And, second, at least some human rights courts seem more centrally focused on public presentation and audience impact than most domestic courts.

From time to time, across several centuries, observers have noted courts' theatrical aspects. Jeremy Bentham's eighteenth-century critique of English common law includes the observation—the accusation, really — that the common law courts are a form of judicial theater.³² Jeremy Bentham mocked the English common law courts as a “theatre of justice.”³³ For Bentham, the courts' theatricality meant both that the performances of legal actors were insincere and that the justice they produced was illusory. For instance he described judges' expressions of sympathy for convicted defendants as “one of the common-places of judicial oratory — of judicial acting, upon the forensic theatre.”³⁴ In Bentham's view, courtroom theater was an elaborate drama of legal techniques that amounted to a false show of justice, rather than providing reasonable procedures through which citizens might vindicate their legal rights.

Other observers have a more optimistic view of the histrionic nature of courtroom process. In the early twentieth century, the American legal realist Thurman Arnold analyzed criminal trials as dramatizations of cultural values and the ideal of justice.³⁵ Arnold argued that the formal performed nature of trial process makes it a powerful shaper of cultural values. For Arnold, the performative nature of judicial process was central to courts' ability to enact justice. He believed, for example, that recognizably unfair trial process contributed to increased procedural fairness because the public performance of an unjust court “rouses persons who would be left unmoved by an ordinary nonceremonial injustice.”³⁶ Bentham's and Arnold's observations combine, then, to articulate the dual dramatic effect I am ascribing to courtroom theater -- its ability to both falsify and reconstruct the nature of justice outside the courtroom.

Human Rights Movement: Part of the Problem?, 15 HARV. HUM. RTS. J. 101, 111 (2002).

³² Jeremy Bentham, “Rationale of Judicial Evidence,” in THE WORKS OF JEREMY BENTHAM, vol. VI, 354 (John Bowring ed., 1843).

³³ Bentham, *supra* note 32.

³⁴ Jeremy Bentham, Rationale of Judicial Evidence, Book III, Chapter V, in THE WORKS OF JEREMY BENTHAM, vol. VI, 286 (Edinburgh: William Tait Bowring, ed., 1838-1843).

³⁵ THURMAN W. ARNOLD, THE SYMBOLS OF GOVERNMENT (1935).

³⁶ *Id.* at 142.

To be sure, one can also find repudiations of judicial theater: “A courtroom is not a stage; and witnesses and lawyers, and judges and juries and parties, are not players. A trial is not a drama.”³⁷ So declared Erwin Griswold, then dean of Harvard Law School. For Griswold, apparently, any concern with expression and appearance, that is, with audience, corrupted the true purpose of law. A trial held “for public delectation, or even public information” would interfere with “the solemn purpose of endeavoring to ascertain the truth.”³⁸ Griswold made these comments in opposing television cameras in U.S. courts. The introduction of broadcast media was sure to distort trial proceedings, he argued, because it would have “an inhibiting effect on some people, and an exhilarating effect on others.”³⁹ Basically, he feared that the trial’s participants would begin playing to the audience.

Upon consideration, however, the courts’ awareness of their audience seems an important, even necessary, element of any trial. Courts are quintessentially public operations shaped by their public character.⁴⁰ It is not as though the public is simply invited to peek into a courtroom to see something that would be happening in exactly the same way whether they are there or not. The action of a trial unfolds the way it does *for* public viewing. Public court hearings are not, for instance, like the work of the paleontologists at Pittsburgh’s museum of natural history, where white coated technicians labor in a lab set behind a plexiglass wall. Museum visitors watch the excavation of fossils as though their lab was one more diorama in which life goes on as usual, oblivious of our observation. Behind the glass the paleontologists go about their work apparently heedless of the onlookers. Presumably they follow the same steps they would if they were alone in the lab (at least, that is how it *appears* to viewers).

In contrast, lawyers, litigants, judges and other courtroom personnel acknowledge through their courtroom behavior, that their work has a public aspect, and that their words and actions are directed for audience effect. True, their primary audience at any

³⁷ Erwin Griswold, *The Standards of the Legal Profession: Canon 35 Should not Be Surrendered*, 48 A.B.A. J. 615, 616 (1962), quoted in Bernard J. Hibbitts, “De-scribing Law: Performance in the Constitution of Legality” 2nd Annual Performance Studies Conference, Northwestern University, Evanston, IL (March 1996). Interestingly, Dean Griswold made his anti-theatrical avowal in the context of opposing the introduction of television, radio and photography into U.S. courts. Many theater professionals, and drama critics, would be quick to point out that recording and broadcasting court proceedings would not necessarily make them more “theatrical.” Indeed, there is a strong argument that this kind of documentation and electronic dissemination waters down the dramatic power of live performance.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Resnik, *supra* note 5, *passim*; see also Judith Resnik, *Courts: In and Out of Sight, Site, and Cite*, 53 VILL. L. REV. 771, 772-73 (2008). See also *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 564-577 (1980) (tracing the development of trials as public proceedings and describing one public communal function of trials as “catharsis.” *Id.* at 571).

given time may not be the general public, but rather other trial participants, most obviously the judge and the jury. But even if no member of the general public is present to witness the action of the trial, its proceedings are consciously geared for public viewing, and for preserving a publicly available record. Courtroom architecture is designed for public participation. As Judith Resnik has pointed out, part of our very concept of a court is its openness to the public. Paleontologists in labs that are not on public view are surely still doing paleontology, but it is at least highly questionable whether a court with no public access would still qualify as a real court anymore than a theater without an audience would still remain a real theater.⁴¹

In performance theory terms, the theatrical nature of courts is not only their openness to public view. It is a function of their reliance on what Richard Schechner calls “restored behavior,” that is, acts, speech, and gestures that do not originate entirely with individuals who do and say these things.⁴² This separation of at least some aspect of the words and actions from the individuals who are speaking and acting is arguably “the main characteristic of performance,” and what separates performance from real life.⁴³ From Broadway plays to religious rituals to standard exchanges between psychoanalysts and patients, we recognize this dual form of separation or distancing, first between actor and action, speaker and speech, and then between the whole sequence of behavior or the event in which numerous sequences occur and the rest of our everyday world. And another feature of these separations, because the sequences or “strips” of behavior, are recognizably not a part of the spontaneous, naturally occurring ongoing reality, they “can be stored, transmitted, manipulated, [and] transformed.”⁴⁴

Like theatrical performances, much of courtroom hearings and trials unfolds in familiar sequences that might be actually scripted (“hear ye, hear ye,” “Raise your right hand and repeat after me . . .,” “objection”) or that might incorporate improvised particulars into well known stock bits. A trial always begins with the judge’s speech to the jury, followed by opening statements by the opposing attorneys, followed by the case in chief and the defense, closing statements, the judge’s charge to the jury, and the reading of the verdict. Judicial theater has a recognizably standard cast of characters – the judges, parties, defense attorney, prosecutor, witnesses, every bit as generic as the dramatis personae of a Broadway show’s leading man and lady, or the personnel at the local church or temple. It is also understood that within that standard

⁴¹ Resnik, *supra* note 5, at 69 (Secret military proceedings created to establish the guilt of “suspected terrorists” try to capture some of the legitimacy of public trials, without engaging in the public access that makes trials arguably constrain government power, by calling the institutions that preside over these proceedings “closed military courts.”)

⁴² Richard Schechner, *BETWEEN THEATER AND ANTHROPOLOGY* 35-55 (1985).

⁴³ *Id.* at 35.

⁴⁴ *Id.* at 36.

format, much of the particular content of any given trial has been planned in advance and often rehearsed. Attorneys work with witnesses ahead of time, for instance, and develop a planned set of questions. Opening statements and summations, or parts of them, are often written down and memorized.

At the same time, of course, theater is many things that law is not supposed to be. Theater is entertaining and playful, while law is deadly serious. Theater is designed to stir up sympathy and passion, while legal decision makers are supposed to set feelings aside, in order to render rational, rule-bound judgments. Theater is defined by artifice and acting, masks and illusion. In a legal culture that equates integrity with transparency, and defines adjudication as a search for truth, we shrink from locating courts' work in the theatrical realm where appearance and audience effect are paramount. As Bernard Hibbitts observes, "legal performance is a legal embarrassment."⁴⁵ Hibbitts has drawn attention to both the performance aspects of law and the extent to which legal performance is "marginalized and deprecated," in mainstream legal analysis and education. Law school's relentless focus on analyzing written judicial opinions, and modern litigation's focus on documents obscures courtroom theater in the "blind spot of our professional perceptions."⁴⁶

Nevertheless, there are those who celebrate the theatricality of courtroom process – and its ability to affect social attitudes because of its dramatic techniques. In the 1930s, Thurman Arnold described criminal trials as "drama" that publically aired conflicts between important social values.⁴⁷ Unlike Jeremy Bentham, Arnold saw value in judicial theater. He thought courtroom drama spurred public discussion of "all the various contradictory attitudes about crime and criminals, since these different roles are all represented by the various persons connected with the trial, with tremendous dramatic effect."⁴⁸ Half a century later, Milner Ball compared American law to theater in a style still more laudatory than Arnold's vision, contending that "it is the theatrical character of courts that makes them spaces of freedom, human places . . ." ⁴⁹ More concretely, Ball pointed out that although courts lack a stage, curtain, and footlights, "the design and appointment of the courtroom, enhanced by costuming and ceremony, do create a dramatic aura."⁵⁰ Both Arnold and Ball stressed that in addition to producing decisions that

⁴⁵ Hibbitts, *supra* note 37. Doubtless that sense of embarrassment about the contradictory values of playmaking and lawmaking is one reason we do not have more developed serious criticism of courtroom theater.

⁴⁶ Note, however, that the general public does not share that blindness, as demonstrated by the apparently endless iterations of television shows and movies that leverage courtroom drama for popular entertainment. See Naomi Mezey & Mark C. Niles, *Screening the Law: Ideology and Law in American Popular Culture*, 28 COLUM. J.L. & ARTS 91 (2005).

⁴⁷ Thurman W. Arnold, *THE SYMBOLS OF GOVERNMENT* (1935).

⁴⁸ *Id.* at 147.

⁴⁹ Milner S. Ball, *THE PROMISE OF AMERICAN LAW* 57 (1981).

⁵⁰ *Id.* at 43-44.

regulated the parties' rights, courts were in the business of manufacturing images "played to the public at large."⁵¹

Most recently, Judith Resnik has written extensively on the importance of adjudication as a public performance of justice and rights. In her view, the "odd etiquette entailed in public adjudication under democratic legal regimes imposes obligations on government and disputants to treat each other – before an observant and oftentimes critical public—as equals."⁵² Thus the courtroom performance of human dignity becomes real, at least for the duration of the performance itself.

2. *The Drama of the Inter-American Court of Human Rights*

Observing a video of a hearing of the Inter-American Court of Human Rights confirmed that the Inter-American Court is institutionally focused on presenting, preserving, and making widely available a formal performance of legal process.

The Inter-American Court was established in 1979 by the Organization of American States to interpret and enforce the American Convention on Human Rights.⁵³ The court, which consists of seven judges, sits to hear cases brought against states that have both ratified the convention and officially submitted to the Court's jurisdiction.⁵⁴ Private citizens cannot bring cases to the court. Instead, an aggrieved individual or group must lodge a complaint with the Inter-American Commission on Human Rights, an institution based in Washington, D.C. The Commission investigates and issues a recommendation to the accused state. If the Commission finds a human rights violation, *and* the state found to have violated rights fails to follow the Commission's recommendation, the Commission may file a case in the Inter-American Court. After paper briefs have been submitted, the court sets a hearing date. At the hearing, which is open to the public, representatives of the Commission present the case and representatives of the state respond. Although only the Commission has standing to prosecute the case, the court at the discretion of the court's President can also hear from victims, and their representatives.

⁵¹ Ball, *supra* note 49, at 62; Arnold, *supra* note 33, at 129.

⁵² Resnik, *supra* note 5, at 3.

⁵³ Scott Davidson, *THE INTER-AMERICAN COURT OF HUMAN RIGHTS* 1 (1992).

⁵⁴ Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela are signatories to the convention and have formally submitted to jurisdiction. The United States signed the convention but never ratified the treaty. The judges elected to six-year terms by the general assembly of the OAS. No member state may have more than one judge serving on the Court at any given time. If a member state is brought before the court when that country has no judge currently on the court, the state may appoint an ad hoc judge to join the court for that case. Currently the judges are from Peru, Argentina, Costa Rica, Jamaica, Dominican Republic, Uruguay and Chile. The Peruvian judge is the president of the court. Two of the judges are women.

After the public hearing, the court deliberates in private and eventually issues a public, written judgment. If the court finds a violation, it will often order the state to make financial reparations to the victims' families, and sometimes to investigate the circumstances of the crimes, prosecute individuals responsible, and change government policies identified as contributing to the violation. Low caseloads, and low rates of judgment have been a perennial problem for the Inter-American Court.⁵⁵ In 2008, the Inter-American Court produced nine final judgments, compared with the 1,881 judgments of the European Court of Human Rights.⁵⁶ Even by the standards of the shrinking caseload of the U.S. Supreme Court, this is extremely low.⁵⁷ The low rates of judgment may affect the significance of court hearings in complex ways. Because the power and legitimacy of the court is questioned due to the low caseload, hearings of those cases may be likewise deprecated as the work of a court with little influence. On the other hand, in a court that issues few final judgments, but sits publically to hear cases much of the time, those hearings arguably take on increased cultural significance in their own right, even if they do not lead instrumentally to more written judgments.

The court has a well-developed website (that runs in Spanish and English), on which judgments, court documents, calendars and videos of all the court's hearings are accessible.⁵⁸ I watched the hearing in the case of *Gudiel Álvarez y otros (Diario El Militar) vs. Guatemala* via video from this website. The hearing took place on April 23, 2012, during one of the court's sittings away from its home base, in Guayaquil, Ecuador. Many of the court's sittings take place "on the road" away from the court's permanent home in an upscale neighborhood in Costa Rica's capitol, San Jose. When the court travels, hearings are set up in facilities that accommodate a large audience.

The hearing I watched showed that the court is very conscious of its performance aspect, and that its procedures are designed to accommodate both the live public presentation of court hearings and documentation for future viewings on the web. The video opened with a long shot of a raised platform, set with a dais and chairs, for the court.⁵⁹ Three tables were set on another platform, on a slightly

⁵⁵ Davidson, *supra* note 53, at 3; Alexandra Huneeus, Rejecting the Inter-American Court, in *CULTURES OF LEGALITY: JUDICIALIZATION AND POLITICAL ACTIVISM IN LATIN AMERICA*, 118 (Javier A. Couso et al. eds., 2010).

⁵⁶ Huneeus, *supra* note 55, at 118.

⁵⁷ The United States Supreme Court issued 75 merits judgments in 2008. SCOTUSblog, <http://www.scotusblog.com/2009/06/end-of-term-super-stat-pack/> (last visited Nov. 15, 2012).

⁵⁸ Corte Interamericana de Derechos Humanos [Inter-American Court of Human Rights] (last visited Nov. 15, 2012) <http://www.corteidh.or.cr/index.cfm?&CFID=487586&CFTOKEN=78136649>.

⁵⁹ Corte Interamericana de Derechos Humanos [Inter-American Court of Human Rights], *Audiencia Pública. Caso Gudiel Álvarez y otros (Diario El Militar) Vs. Guatemala*. Partes 1, 2, 3 (April 7, 2012) <http://vimeo.com/41501741>.

lower level, behind which lawyers and witnesses sat facing the dais with their backs to the live public audience, facing the judges, just as lawyers would sit at council tables in a regular courtroom. In front of the platform with the bench and tables, many rows of chairs were set for a large audience. Behind the dais, a large brightly colored banner projection announced this event as “45 Periodo Extraordinario de Sesiones, Corte Interamericana de Derechos Humanos, Guayaquil-Ecuador, 23-27 abril 2012.” Very bright lights hung from a grid above the platform on which the court and advocates sat, giving it an even more stage-like quality, and creating good lighting for the video production. In fact the scene in the video looked in some ways more like a stage set for a television show than a courtroom.

It was immediately apparent that a good deal of planning and resources go into the court’s video production. There are several different cameras, and the tape available on the website switches back and forth between long shots and close ups of the judges, the advocates, witnesses and audience. The court also self-consciously accommodates other forms of documentation. At the beginning of the hearing, after the President of the court had called the court to session, there was a three-minute pause for photographers and videographers to walk around the stage and audience taking pictures.

Moreover, in a shift from other courts I have observed, public spectators –both live in the courtroom and later watchers of the video – were positioned as the recipients of the evidence that was being presented. At certain points in the hearing images were projected on screens to the side of and *behind* the judges. For instance, reproductions of the Military Journal that allegedly documents the fate of “disappeared” victims appeared on the screens facing the live audience and completely filled the frame of many parts of the video. In contrast, in many if not most, domestic courts, evidence is presented to the jury or judge in ways that are obscured from the gallery of spectators. If you are seated outside the bench and jury area, you may have trouble hearing the testimony. Finally, at least in most U.S. courts, videos of court proceedings are decidedly afterthoughts. Typically, a single camera holds a fixed long shot, that might or might not be intercut occasionally by cameras on the head and shoulders of arguing advocates. But in the Inter-American Court video, the camera followed the visual evidence in close up and lingered on the images as though presenting them to the viewer for evaluation. The cameras sometimes zoomed in on a witness, advocate or judge who was speaking, making them the focus of the shot for some time. This had the effect of giving the video audience a privileged view – in some ways more advantageous than the perspective of the live hearing audience or even the judges.

In the Inter-American Court video, the camera selects varying points of focus. This means viewers do not have to work to pick out the most important person or viewpoint in any given moment. It also means that the video of the hearing bears a strong resemblance to videos we watch for entertainment – perhaps a documentary that has had a commercial or public television release. Sometimes, as in a

video meant for entertainment, images are paired with spoken words that do not simply describe or recapitulate the visuals, but combine to create a more complex layered expression. For instance, during a lengthy – about 25 minutes long – statement by one of the attorneys for the victims, slides of pages of the Military Journal with victims' names and pictures, and black and white photos of victims and their families appeared on the courtroom screens in a continuous sequence. On the video, the cameras cut back and forth between a medium shot of the lawyer who was speaking from her table, long shots of the courtroom and close-ups of the projected photos on the screens.

The choice to spend nearly half an hour screening a series of grainy monochromatic photos of victims while a lawyer spoke about the state's failure to discover their bodies or indict their killers was obviously aimed at affecting an audience beyond the judicial decision makers. This is, after all, a case about people who *disappeared* over 30 years ago, and whose abductions and deaths were long denied by the government. Now the victims' images are appearing in a courtroom, larger than life, while their lawyer accuses the current government of Guatemala of failing to do what is necessary to identify and prosecute the people responsible for the disappearances and to locate the victims' bodies. The presence of the victims' images in the courtroom evokes both their irreversible absence in the real world and the court's power to bring the victims back to memory, if not back to life, and to make visible the crimes that were committed against them and the need for redress.

At another point, however, the hearing confronted the court's questionable power to generate the official acts needed to do more than recover images of the victims. For instance, one judge, Margarette McCauley of Jamaica, questioned a lawyer for the Guatemalan government regarding the state's readiness and will to investigate and prosecute those responsible the atrocities described by the victims who testified in court.

J. McCauley: From what is being said here it is clear the prosecutor's office does not have the resources to do this job – this very large task. . . . I don't understand the answer you gave, that the prosecutor may appoint a prosecutor or not. You are the state. You are representing the state here in this court, so with all due respect I think you have to assist us by telling us that the state can and will provide the human resources necessary to move the investigation forward. But I understand your answer to be opposite to that – could you explain for me please?

State Attorney: The government can't decide what the judicial branch can do or the legislative branch. . . . The executive branch has given the Department of Justice its own budget; it's autonomous. And it has the number of attorneys it has. If the attorney general wants to assign resources, so be it. But the executive branch has nothing to do with it. If the attorney general needs more budget, we can help

J. McCauley: Um. Interesting, that. Another question for you please. . . . in relation to the evidence of the witness that there . . . was in existence a policy not to question members of the armed forces even those who are suspects . . . I understand the state to be saying that what the witness said was incorrect and that there will be an investigation as to why the witness said this. . . . If my understanding is correct, I trust that no adverse result will fall on that witness for that evidence which must be the truth, because he took an oath to tell the truth, and there should be no adverse consequences to evidence given in this court. But I was concerned that the state was saying, well, we will investigate that, but I didn't hear any such urgency in relation to the investigation of the tragic facts that we are here dealing with today. So please help me understand your position.

State Attorney: . . . It has been thirty years. And in the judicial branch there have been proceedings, and the Attorney General's office has to promote the investigation in the judicial branch. But the executive branch – there's nothing for us to do We can't give what we don't have or can't find There's no policy to hide or destroy any information. The documents in the executive branch have been handed over. The police documents were not destroyed. Any other file, there's no policy to keep it hidden. The state is going to participate when it has to do so.

J. McCauley: Thank you Will the state then actively pursue or see that investigations are pursued by taking oral statements from person who were in the armed forces at the time to give assistance as to where these people were taken, what happened to them, whether they were buried somewhere, to find out the spots where they were buried? These have been done before in other cases, so will the state do that, because if you lack written documentary evidence, you can take oral evidence from the people who were there. So are you going to see that that is done?

State Attorney: An attorney or interested party has the right to request discovery within the process. If the district attorney compels any government representative, he can appear. . . . The government can't obstruct anyone who has been forced to appear. So the state cannot obstruct any evidence, and that is not the will of the executive branch.

J. McCauley: If the prosecutor can summon these people and get oral evidence, I did not hear from you whether anyone had been summoned from the relevant time till today Could you tell me please whether anyone has been summoned to give oral evidence in this way in order to advance what the court needs to know?

[pause]

Young Assistant State Attorney: At the moment, no one has been summoned other than the families of the victims. But the state hereby states its commitment to the internal investigation. To advance . . . rights.

J. McCauley: Uhm hm. By that I take it it's your undertaking that members of the armed forces will be called to give oral statements, and if so, thank you.⁶⁰

It seems that in this exchange, the judge has taken a considerable risk. Confronting the state directly about its failure to investigate and prosecute human rights violations makes the problem visible. The exchange thus helps fulfill the court's role in exposing the ongoing legacy of human rights violation and building community support for the victims and for redress. But in the process, the court's weakness is also exposed. Now if the state fails to respond to the judge's direct admonition to investigate, that failure gives credit to the view that the Inter-American Court is toothless and unable to bring about the results it purports to demand. Then again, the exchange between the judge and the attorney does not constitute a formal judgment or order from the court. Formally it remains a matter of representations, not a question of a legal injunction to be obeyed or ignored. And even as a matter of representation the judge leaves room for ambiguity at the end of the exchange. She first asserts her understanding that the young assistant state attorney has just committed the government to subpoena military witnesses. But at the very end she reopens the possibility that no such commitment for official state action has been made: "*if so*, thank you."

II. Performing Authentic Legal Power

The exchange between Judge McCauley and the attorneys for Guatemala points out how important it is to think practically about the role of enforcement in legal power. In particular, as Judge McCauley's questions to the state attorneys demonstrate, the question is how a court acquires and deploys the power to get government officials to enforce its orders and the role, if any, of the court's public process in that power. The question of how courts trigger enforcement was addressed from another perspective in Robert Cover's famous 1985 essay, *Violence and the Word*.⁶¹

Cover criticized analyses of legal process that focused on judicial interpretations of the law and ignored governments' violent enforcement of those interpretations.⁶² According to Cover, it was "misleading" ⁶³ to locate judicial authority in the logic or persuasiveness of the judges' legal analysis. Instead, he argued, what distinguishes authoritative judicial interpretation is its ability to trigger deeds of violence to enforce the judge's decision.⁶⁴ Ordinarily, as Cover pointed out, judges are privileged to take for granted "the structure of cooperation that ensures" that enforcement and it remains invisible.⁶⁵ The visible lack of cooperation between the Inter-American Court and the government officials who could enforce its

⁶⁰ *Id.*

⁶¹ Cover, *supra* note 2, at 1609.

⁶² *Id.* at 1601.

⁶³ *Id.* at 1602.

⁶⁴ *Id.* at 1607-08.

⁶⁵ *Id.* at 1618.

judgment is like a negative image of the link to enforcement that Cover exposed in all legal interpretation. As Cover showed, *all* courts must find a way to use the expressive, role-based, signifying techniques available to them to generate violent enforcement of their verbal judgments. The Inter-American Court's hearing process, then, can be studied as that court's public medium of the characteristic performative job of transforming judicial words into violent legal enforcement.

Cover himself recognized the performative nature of the transformation he exposed. Indeed, he characterized judges' ability to trigger violence by other officials in the legal hierarchy as "a violent mechanism through which a substantial part of [the court's] *audience* loses its capacity to think and act autonomously."⁶⁶ Turning to social psychology to flesh out the role-based process he was analyzing, Cover offered as an example the infamous Milgram experiment. There, participants were induced by instructions from the scientists to administer what they believed were painful electric shocks to individuals they believed were other experimental subjects.⁶⁷ Milgram explained the participants' willingness to commit violent acts as a reaction to the scientists' authority within the context of the experimental setting.⁶⁸ The subjects acted out of a "sense of obligation to the experimenter"⁶⁹ and "the tendency to obey those whom we perceive to be legitimate authorities."⁷⁰

Note that in both the Milgram example, and in the legal enforcement process Cover is describing, the willingness to act violently in response to authoritative commands comes about not through any threat of physical violence.⁷¹ That is, the individuals charged with carrying out the violence that enforces the experimental protocol or the court judgment fulfill their violent task not because they fear that they would suffer violence themselves if they refused to enforce the orders against others. There is no legal threat for nonperformance. True, in the legal context there is some economic pressure – enforcers who refused to use force might well lose their jobs. But Cover insisted that legal process mobilizes violent enforcement at least in part through the performance of institutional roles. Government officials must be induced to play institutional roles as agents of government force, despite their personal reservations. Courtroom marshals with normal human inhibitions against causing pain will tie a defendant to a chair and force a gag into his mouth when a judge tells them to, wardens will lead a condemned prisoner to the electric chair, because they are responding to a performance of institutional authority and performing their own institutional role. They participate in a performance in a hierarchical institutional setting that induces them to shift from

⁶⁶ *Id.* at 1615 (emphasis added).

⁶⁷ Cover, *supra* note 2, at 1614-15.

⁶⁸ Stanley Milgram, *Behavioral Study of Obedience*, 67 J. AB. & SOC. PSYCH. 371 (1963).

⁶⁹ *Id.* at 377.

⁷⁰ *Id.* at 378.

⁷¹ Milgram, *supra* note 68, at 376.

“autonomous behavior to agentic behavior cybernetically required to make hierarchies work.”⁷²

Cover’s insight is not merely that a psycho-social structure exists to carry out legal enforcement. He insists that that structural link is somehow specifically created and recreated in the performance of legal process. The practice of interpreting law within the institutional context of a legal system creates the link to violent enforcement through “considerations of word, deed, and role.”⁷³ In this light two things appear: (1) Whatever other effects are produced by the Inter-American Court hearing, the hearing must be engaged to some extent in creating this very link between the court’s judgments and government enforcement, and, (2) the performative nature of that creation does not distinguish the Inter-American Court from domestic courts that can take for granted the link to sovereign force. In other words, the self-consciously theatrical nature of the Inter-American Court does not make it any less legal or less real than domestic courts that can ignore or obscure the way they go about connecting their interpretations with enforcement. The Inter-American Court simply must expend more resources and make more obvious its efforts to generate the relationship that Cover exposed as central to all judicial process. Indeed, what was a provocative idea when Cover applied it to *all* authentic judicial interpretation seems self obviously to describe the Inter-American Court hearing. As Cover put it, “[l]egal interpretation is (1) a practical activity, (2) designed to generate credible threats and active deeds of violence, (3) in an effective way.”⁷⁴

III. Performing to Trigger Enforcement

The “trigger” for enforcement that Cover describes comes about through the response of government officials to the total effect of the judicial process, not as a conscious individual decision in response to legal argument. Cover explains that “[o]n one level judges may appear to be, and may in fact be, offering their understanding of the normative world to their intended audience.”⁷⁵ That kind of deliberative choice is not the mechanism Cover means to explain with his comparison to the Milgram experiments. He is rather concerned to explain how judges induce official enforcement through a process in which, “a substantial part of their audience loses its capacity to think and act autonomously.”⁷⁶ Such a result is not a matter of logic or even conscious persuasion, but rather the total effect of the performance of legal interpretation in the full context of the legal-governmental-judicial role hierarchy.

In performance theory terms, the phenomenon Robert Cover is describing is “emergence.” As explained by anthropologist Edward Schieffelin, the concept of emergence aims to capture the effects of

⁷² *Id.* at 1615.

⁷³ *Id.* at 1618.

⁷⁴ *Id.* at 1610.

⁷⁵ *Id.* at 1616.

⁷⁶ Cover, *supra* note 2, at 1615.

performance as a whole, “what happens *by virtue of* performance.”⁷⁷ The term describes “an irreducible change in quality of experience or situation of the participants that comes about when the performance ‘works.’”⁷⁸ In Cover’s view, official enforcement of judicial orders does not come about through the autonomous decisions of the enforcing officials or in isolation from the interpretive process. Rather, enforcement is induced *by virtue of* the performance of legal interpretation in the context of judicial hierarchy. Judges perform, and if the performance *works* the judgment is enforced. Cover criticized tendency of domestic courts and academic styles of legal interpretation to obscure the links between judicial interpretation and violent enforcement. As he pointed out, characterizing a trial as “a joint or communal civil event where interpretations of facts and legal concepts are tested and refined,” obscured the fact that “control over the defendant’s body lies at the heart of the criminal process.”⁷⁹ In the Inter-American Court hearing, however, the need for control over some as-yet-unidentified defendants’ bodies is glaringly obvious. And the court’s efforts to induce that control becomes a central theme of the entire proceeding.

To be sure, the Inter-American Court hearing has other performance themes and goals besides triggering government enforcement. On a more familiar level, the performance of the Inter-American Court succeeds if it makes visible to the public both in Guatemala and abroad the hidden violence suffered by the victims and empowers a community committed to redressing and preventing human rights violations in Guatemala. In Harold Koh’s terms, the Inter-American Court’s performance would be successful if it served as part of a process of cultural transmission “whereby norms created by international society infiltrate domestic society.”⁸⁰

Spectacle is a well-recognized mechanism for cultural transmission and empowerment. Dwight Conquergood has pointed out that the empowering effect of performance comes about through the same “relationship between gaze and power” that underwrites Bentham’s panopticon and that forms the basis for much of Michel Foucault’s work on criminal punishment.⁸¹ As Conquergood observes of performance generally, this kind of community building and empowering effect is not really about demonstrating anything, or convincing skeptics. And in the Inter-American Court context, the audience for this sort of human rights community building already believes in the reality of the violations, the suffering of the victims and the need for redress. “[I]t is not so much that seeing is believing.” Rather, watching the evidence unfold in the hearing “situates the observers in a power relationship over that which is

⁷⁷ Edward Schieffelin, *On Failure and Performance: Throwing the Medium Out of the Séance*, in *THE PERFORMANCE OF HEALING* 59, 64 (Carol Laderman & Marina Roseman, eds., 1995).

⁷⁸ *Id.*

⁷⁹ Cover, *supra* note 2, at 1607, footnote 17.

⁸⁰ Koh, *supra* note 8, at 2651.

⁸¹ Conquergood, *supra* note 5, at 45. Foucault, *DISCIPLINE AND PUNISH* (1975).

watched, inspected, surveyed.”⁸² As an advocate for the victims put it at the hearing, “The fact that [the victims and their families] can observe this proceeding is justice in itself because in Guatemala there is impunity.”

There is much more to be said about these sorts of empowering and community generating effects of performance and their role in the development of human rights norms and practices. But that is not the focus of my analysis. I am focusing on the performative effects of the Inter-American Court hearing on a specific audience, namely Guatemalan government officials. I have argued that the performance of the hearing contributes to inducing official enforcement by triggering the sort of “agentic” relationship Cover described between the court and government officials. In the remainder of this essay, I want to consider some moments, aspects and techniques of the hearing’s performance that might contribute toward making the performance effective in this second sense.

It might seem ridiculous to claim that officials of a recalcitrant government that has avoided human rights enforcement for 30 years would be moved by courtroom drama to give up that resistance and mobilize state power to bring criminals to justice. But it may not seem so absurd if we consider, as Robert Cover has shown, that a similar process is the very mechanism through which all judges everywhere trigger enforcement. In this light, the Inter-American Court’s performative methods are not essentially different from the methods domestic courts use to transform judicial words into enforcement. It is not that domestic courts rely any less on role performance to accomplish that transformation. It is simply that the political/cultural context of the Inter-American Court means that its performance has more to overcome in order to trigger official force. For one thing there is a much less clearly established chain of command between the international court and the officials of a national government. Perhaps even more significant, those officials themselves might face actual acts of violence if they were to enforce the court’s judgment. In other words, what is different is not the court’s method of triggering enforcement by virtue of performance, but rather the unusually high barriers the Inter-American Court’s performance must overcome to work, that is to successfully trigger enforcement.

Second, to the extent that the Inter-American Court’s performance can overcome these obstacles to trigger enforcement, of course that trigger does not occur because of a single hearing, but over time. Induced enforcement would come about through multiple courtroom performances in the total context of the international human rights institutional structure. Some of the government participants in the hearing I observed are probably repeat players, who appear for the state in multiple proceedings.⁸³ Certainly some state officials observe multiple hearings, in person and via the video

⁸² Conquergood, *supra* note 5, at 45.

⁸³ This was pointed out to me by Elena Baylis.

on the Internet. To understand how those officials might be affected, then, we have to think of their participation in, and observation of, multiple judicial hearing performances as part of a complex social process that unfolds over a period of years. It is in that kind of long-term process that performance develops a social transformational capacity as “practices cumulatively interact and develop through time, reconstituting agent and agency and reconfiguring context.”⁸⁴

Explaining how judges trigger enforcement, Robert Cover stresses the importance of “institutional roles.”⁸⁵ His basic theory, following Milgram, is that playing a role has the potential to change personal attitudes and overcome individual behavior. Enforcement occurs through role play, because in the context of a legal system, government officials who “occupy preexisting roles, can be expected to act, to implement, or otherwise to respond in a specified way to the judge’s interpretation.”⁸⁶ The central task of the judicial performance, then, is to induce government officials to play institutional roles. In the video I observed three aspects of the hearing that might contribute to inducing that role performance.

A. FRAMING ENFORCEMENT AS THE RESTORATION OF LOST MOTHERS

Besides the basic human inhibition on behaving violently that Cover stressed, government prosecutors of political crimes may face an additional role conflict. Victims of political crimes are often cast as social activists and revolutionaries, antagonists of the very government order that produces the prosecutor’s role. Thus a performance to move officials to redress political crimes needs to represent the victims as harmless and deserving of protection. In the hearing I watched, the individuals whose torture, kidnapping and murder were the subject of the proceedings were sometimes described as political activists. But throughout the hearing these victims were also repeatedly cast in a common alternative role as lost mothers.

The first victim-declarant to testify was a woman introduced as Wendy Santizo Mendez. As announced by the secretary of the court, she was there to testify about her mother’s disappearance when she was still a child. But one of the first questions her lawyer asked was: Do you have children? She does – a six-year-old son. In the lengthy examination that follows, Wendy (as she is called by her lawyer and the judges), will be asked to describe not only her memories of her mother and her loss of her mother but the way her mother’s absence has affected her own experience of motherhood – for instance when her mother was not there to help her learn how to breastfeed and care for her infant son.

Wendy was nine years old when her mother was kidnapped. Early in her testimony, she is asked to describe that day:

Attorney: What is your last memory of your mother?

⁸⁴ *Id.* Conquergood, *supra* note 5, at 41.

⁸⁵ Cover, *supra* note 2, at 1615.

⁸⁶ *Id.* at 1611.

Wendy: March 8, 1984 [smiling ruefully] International Day of Women. Soldiers held me and my brother while we watched them torture my mother. They took the nails off with a tool. . . . We were kidnapped with her. . . . I was raped. . . . We had electric shock to our bodies; we had to watch them torture her more. . . . Her last words to us were “be strong.”

In addition to her own horrific childhood experience of her mother’s torture, Wendy recounts the fate of her eleven-year-old brother who was kidnapped along with Wendy and her mother and who suffered a mental breakdown as a result. She describes how for months after their kidnapping and her mother’s disappearance, after she and her brother returned home, he would sit outside the house waiting, he said, for their mother to come home from shopping at the market.

Wendy also explains how she initially believed that the injuries from her rape would prevent her from having children. When that turned out not to be the case, the loss of her mother and the trauma of her attack nevertheless made it more difficult for her to mother her son in a number of ways that she details. Of course her mother’s disappearance also caused her son to lose his grandmother.

As Wendy recounts her experience of kidnapping and torture as a nine-year-old child and its later effects on her life, she appears somewhat distanced from the events she recounts. She tears up once, however, near the end of her testimony, when her lawyer asks, “What does that nine-year-old girl want to say”?

Wendy: When I was raped I had no idea that could even be done. That rape was used as a weapon of war. That girl was hopeful that I could say this to this tribunal because then I was defenseless but now I think that this court can defend me.

Note that the lawyer’s question asks Wendy the witness both to distance herself from and to represent the desires of “that nine year old girl” who was raped and lost her mother. When Wendy responds, she talks about herself in both the first and the third person. It may not be too much of a stretch to suggest that the lawyer’s question asks Wendy to perform the role of her own mother – understanding and translating the feelings and desires of her child.

In Wendy’s testimony, then, we have not just the story of one lost mother and child. In fact there is an almost dizzying multiplication of lost mothers and children who have suffered those losses. The theme of lost mothers continues with the second declarant, Efran Garcia, even though he is elderly man whose childless daughter was murdered. After he finishes his testimony, one of the judges asks him whether his daughter had children. No says the man, she was single and she died too young – she was going to university. Ah, but if she had lived, persists the judge, do you expect that she would have married and given you grandchildren – she would have had children? Oh, yes, he says.

In this way, the hearing reconstructs the characters of the victims. Recasting the disappeared victims as mothers might help to counteract official antipathy for prosecuting crimes against anti-government activists. Moreover, dramaturgically, lost mothers seem like ideal characters to trigger protective role responses in state officials. Through the shaping of the witnesses' testimony, the lawyers and judge recharacterize the enforcement action called for from prosecuting political murders to finding and restoring lost mothers.

B. MODELING THE STRUGGLE BETWEEN SELF AND ROLE

The fact that institutionalized role behavior can overtake individual impulses does not mean that performing a role is easy. In fact, as Richard Schechner points out, one thing that all sorts of performance share is a certain rigor: "Performance behavior isn't free and easy. Performance behavior is known and/or practiced behavior."⁸⁷ Because of this, the performed role never "wholly 'belongs to' the performer."⁸⁸ Individuals may experience profound conflicts between their own emotions and the behavior appropriate for the role they are expected to perform. The government attorneys who would take on the institutional role of investigating and prosecuting the crimes detailed in the Inter-American Court also need to overcome personal feelings in order to carry out that role. They might, for instance, feel skepticism about the victims' innocence and fear that they would be ostracized by social peers, or even suffer violent reprisals for exposing government complicity in the crimes. It was therefore striking that the hearing featured a 'scene' in which another attorney – one who represented the victims – struggled with and mastered personal feelings that threatened to undermine her professional role.

Near the end of the hearing, one of the attorneys for the victim-declarants gave a lengthy statement. She talked for approximately 25 minutes, about the state's failure to develop evidence and prosecute the perpetrators of the atrocities, and the desperate desire of the families to find the victims' bodies. As she began to wrap up she paused, then said:

I want to thank the families . . .

But here she began to lose her ability to speak. She appeared to be trying to stop herself from crying. Choking she spoke very softly

. . . I'm not going to be able to do it . . . I can't . . . Sorry judges, I just can't . . .

Then there was more silence and fumbling, before the lawyer continued, obviously struggling to get the words out.

⁸⁷ Schechner, *supra* note 42, at 118.

⁸⁸ *Id.*

I have one hundred twenty nine clients. I want to thank Wendy, Efran Garcia . . . and the ones at the foundation offices watching for the opportunity of being able to represent them. It has been a honor and a privilege to bring my grain of sand. I'm sorry Mr. President . .

After a pause, she began to regain her composure and asked the court for additional time for the president of the victims' foundation to speak.

Some time later, near the close of the hearing, Justice McCauley addressed the attorney, acknowledging and praising her show of feeling:

I seemed to sense that you were a little bit embarrassed by your show of emotion, and I just wanted to say to you don't be embarrassed. Wear it as a badge of honor, because when you stop being affected by these things, then you have become dehumanized. All of us, when we stop being affected we become dehumanized. So be brave, and wear it as a badge of honor.

You might think that the lawyer would be quick to take up the judge's characterization of her show of emotion as a show of humanity. This is after all a court of *human* rights. Moreover this could have been taken as an opportunity to further dramatize the horror of what her clients have suffered. But the attorney was not buying it -- at least not completely. Instead, she responded equivocally:⁸⁹

Thank you so much for those words. I do wear my emotion with a badge of honor. In addition to being a lawyer I am a professor and I have four students here with me. Emotion is part of who I am, but I don't want that to interfere with my capability of representing my clients adequately. I never want my emotions to interfere with my representation of my clients.

The lawyer's response might be read as a warning to the judge not to allow the hearing to lose its grounding in the cultural-institutional practices of law. If the court were to lose the buttoned down formality of a typical court proceeding, it might become less like a court and more like a traveling stage show -- and consequently be less able to generate the legal institutional role behavior this attorney was seeking. To be sure, such a show would be emotionally compelling, and stir sympathy for the victims and perhaps anger with the state. But without maintaining the restrictions of the classic legal form, the performance would lose some of its potential to evoke not just sympathy, but a feeling that the victims' harms could or should be vindicated legally. Even a court of human rights cannot afford to be too human without losing some of its legal authority. Moreover, the lawyer's careful reaction to the judge could be taken as

⁸⁹ (First in English, then in Spanish overlapping and repeating some phrases)

an indication of her focus on a specific audience, namely, government officials who are potential prosecutors of the human rights violations she has brought to the court. For the public at large, and perhaps for the victims and their families, her show of sympathy might well evoke humanity. But Guatemalan officials are likely to be skeptical of such a show of emotion and to read it as evidence that they are not dealing with a real legal performance but some kind of 'bleeding heart' show.

On another level, in rejecting the judge's absolution for her show of personal feeling, the attorney modeled for those prosecutors the successful dominance of the kind of "agentic" role Cover described (and the Milgram experimenters observed) over her individual emotional responses. In both struggling for self-control, and refusing to wholly accept the judge's approbation for her feelings, the lawyer modeled a triumph of institutional role behavior. Her emotional struggle dramatized her self-sacrificial acceptance of that role. At the same time, the lawyer's emotional display reflected the power of the victims' story. Like the tears of the wooden cigar store Indian, the attorney's controlled outburst signaled both that the victims' suffering is so extreme that it elicits sympathy from a figure ordinarily incapable of human feeling and that the feeling must not be allowed to dissolve the rigid role requirements. Thus the hearing enacted a struggle between personal sympathies and institutional roll requirements. Ultimately the person who fought with her individual feelings to carry out her institutional role emerged as a kind of hero whose choice to maintain her role performance was further sanctified by her refusal to fully accept the judge's sympathy. Such a performance might contribute to the hearing's capacity to induce "agentic" role performances from government prosecutors participating in or watching the hearing.

C. THREATENING ROLE REVERSAL

Finally, there was a sense in which the entire dramatic structure of the Inter-American Court hearing seemed designed to push Guatemalan government officials into institutional roles as human rights prosecutors in order to avoid being cast as human rights violators. In the absence of concrete evidence identifying the perpetrators of the offenses detailed by the victim-declarants, the focus of the hearing often shifted from investigating the 30-year-old crimes to investigating current official failure to prosecute the crimes.

As the exchange recounted in Section I between Justice McCauley and the attorneys for the Guatemalan government, the hearing sometimes involved direct confrontations that required state officials to defend their actions or inaction. The Guatemalan government attorneys were clearly not inclined to acquiesce to the judge's demands that the state become more active in its investigation. But even if they were not persuaded by the judge's direct demands, the structure of the hearing may tend to move them toward a prosecutorial role. After all it is one thing to decline an official prosecutorial role when the alternative is no role in the performance. It is quite another when the choice is between playing a prosecutor or a defendant. I am not suggesting that the Guatemalan

attorneys had any reason to anticipate being prosecuted themselves. But at the same time in the context of the performance, it must have been uncomfortable to find themselves cast in the unfamiliar roll of the accused.

IV. Conclusion

It is relatively easy to articulate the way the performance of justice in human rights courts may obscure injustice in the real world. The public performance of a government submitting to international adjudication brings the appearance of some legitimacy – no matter what government officials continue to do – or refuse to do – outside the courtroom. The spectacle of justice being done – of human rights violators being brought to justice – distracts and fools us into believing that spectacle is reality. The appearance of formal justice substitutes for the unseen reality of injustice. We see state officials deferring to the judgment of the court and treating human rights victims as equals, being made to listen to complaints from victims and relatives of victims. The victims are represented with equal dignity to the government officials, and the officials are made to contain any reaction and forced to listen and treat those individuals with respect. So we may be tricked into believing that the appearance of the officials listening, submitting, and treating individuals with respect is reality, when it is only appearance. The performance distracts us from continuing injustice and violations outside the courtroom.

It is likewise apparent that – as performance – human rights tribunals can contribute to broader public support for human rights norms. Videos available on the Internet bring dramatic public hearings to the general public in the states being called before the court, and to the world at large. The hearings feature victim declarants and expert witnesses who recount terrible acts of violence. Testimony and documentary evidence reveal acts of state violence that were effectively hidden for many years, call government officials to account, and affirm the experiences of those who suffered and their right to redress. The court performances make a record that can be used to support individual claims and provide a public focal point where victims, families of victims, and political and social reformers can come together to organize for change.

It is far less easy to conceive and describe how international court performances may help trigger government enforcement that gives human rights norms the force of law. I have tried to explore as concretely as possible some of the ways judicial process in a particular human rights tribunal may approach that institutional goal through performance. In my view the theatrical nature of the court's process is not at odds with its potential for authentic legal power. Indeed, I have argued that it is only by virtue of a performative process that any court achieves its status as an authentic legal institution. But I want to emphasize that in no sense do I mean to claim that the performance of justice in the Inter-American Court of Human Rights is devoid of illusion, or of the power

to deceive its audiences about the realities of injustice in the world. Like all performance, the theater of international justice is both a charade *and* a socially constitutive ritual, a trick and a potentially transformative experience.