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Opening session remarks
Just Performance: Enacting Justice in the Wake of Violence
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INTERNATIONAL CRIMINAL JUSTICE: DO WE EXPECT TOO MUCH?

Since 2002, the International Center for Ethics, Justice, and Public Life has had the privilege of working with judges who serve on international courts and tribunals through its innovative program, the Brandeis Institute for International Judges. Among its participants have been many judges serving on international criminal courts and tribunals. We started with judges from the International Criminal Tribunals for the former Yugoslavia and Rwanda, the first institutions of their kind to be established since the Nuremberg and Tokyo war crimes tribunals that operated briefly after WWII. In more recent years, the BIIJ has hosted judges from the new international and internationalized institutions that were created in rapid succession during the first few years of the 21st century - the International Criminal Court, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia (the so-called Khmer Rouge Tribunal), and the Special Tribunal for Lebanon. All of these courts were established so that individuals accused of having committed so-called "international crimes" – war crimes, crimes against humanity, and/or genocide – could be brought to account.

During many sessions of the BIIJ, international criminal judges have had the opportunity to discuss the challenges of their work in a confidential and safe setting. These challenges include safeguarding their independence from political influence and interference, ensuring the due process rights of defendants before their courts, and effectively communicating their institutions' successes to the public.

As the long-time organizer of the Brandeis Institute, and principal chronicler of its proceedings, I follow the conversations of our participating judges closely. And this is the source of my own justice-seeking story today.

Over the past few years, criminal judges have discussed at length an important development in the procedure of some of their institutions – the participation of victims in the trials of alleged perpetrators of international crimes. Most BIIJ participants believe that victim participation is good in principle, acknowledging the need of victims to engage more directly with a proceeding that involves them intimately. Depending on the court in question, victims may be represented by counsel, submit evidence, question witnesses and the accused, and have access to documents filed by the parties. Victim compensation may range from monetary to collective and moral reparations. However, the current modalities for how victims participate in criminal trials are problematic.

Indeed, BIIJ participants have openly admitted that a truly workable model has yet to be devised.[1]

In particular, BIIJ participants have expressed concern that victim participation, if not managed properly, could compromise the fair trial rights of the accused. There are already worries that the defense counsel in international criminal tribunals operate at a disadvantage, both financially and morally, in relation to the prosecution. Might the counsel representing victims become a kind of second prosecution, acting to strengthen the case against the accused? There are other problems with victim participation too. Does it slow down criminal proceedings that already move at a ponderous pace? Does consideration of victims' needs complicate the already challenging work of international judges? Is the victim perspective better left to those who already act as witnesses for the prosecution, and thus carry out a well-established and commonly understood role in trial proceedings?

We have seen a lot of soul-searching on the part of the criminal judges who participate in our institutes. Most are clearly committed to eliminating impunity and bringing about justice in the wake of egregious crimes. Many feel that they are leaving a legacy of important jurisprudence that articulates what constitutes these crimes and that contributes to the elaboration of norms that protect individuals in the course of hostilities.

At the same time, there is a certain amount of defensiveness on the part of judges who are only too aware of public criticisms about the astronomic cost of their institutions, the inefficiency of their bureaucracies, frequent delays in the delivery of justice, and, once again, their apparent failure to satisfy fully the needs of victims.

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These criticisms bring us to a central concern of this symposium. The official narratives of many international criminal tribunals state that their trials will contribute to peace and reconciliation at both the individual and societal level. But to what extent is it possible for these institutions to play this role?

It has been noted that international criminal courts really deal with two categories of victims – those directly affected by violence, and the international community at large.[2] Institutions of international justice seem to be best suited to satisfying the needs of the latter. In fact, some of this satisfaction may come through the very articulation and development of the law that international criminal courts and tribunals do so well.

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[1] BIIJ 2010 report, http://www.brandeis.edu/ethics/internationaljustice/biij/index.html.
[2] "Satisfying Victims and Healing Societies: The Promises of Justice after Extreme Violence." Susan F. Hirsch, Institute for Conflict Analysis and Resolution, George Mason University. Working Papers in Global Studies, No. 3, October 2008.

But what about the direct victims of violence? What will best satisfy them? What mechanism will help them to restore their lives and rebuild their shattered communities? The field of transitional justice, evolving since the Latin American political transitions of the 1980's, has a lot to say about these questions, but little of it is decisive. Indeed, it has been pointed out that the field of transitional justice is currently beset by "paradigm wars," with scholars, practitioners, and victims' advocates debating the pro's and con's of various approaches to establishing justice in the wake of violence[3]:

- Should societies opt for criminal prosecutions of high-level offenders, or for more restorative means of redressing wrongs, such as truth commissions, reparations, memorialization, and apologies?
- Which should be given priority if a choice is demanded, peace or justice?
- Which kinds of responses to wrongdoing are more effective, religious or secular ones?
- How does a society decide between a Western-inspired or more local justice-seeking strategy?
- Which should receive the most attention in the post-violence phase, individual human rights violations that occurred during the conflict, or more society-wide and structural inequalities that might have given rise to the conflict in the first place?

Some believe these might well be overdrawn or even be false dichotomies. Be that as it may, these "antinomies"[4] do not even cover all the contradictions that may arise during discussions about how best to bring about justice and restore dignity in the wake of violence. If international justice-seeking strategies are eschewed in favor of something closer to home, might the result be the bolstering of questionable state-level policies, to the detriment of more local communities? The mandatory and coercive nature of *gacaca* courts in recent years, and their use by the ruling party in Rwanda to consolidate its own power and ideology, is an example.[5]

If the choice is made to privilege "traditional" justice-seeking mechanisms – a term that is already problematic as it may refer to practices that date back no further than Western

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[3] Proceedings of the International Symposium on Restorative Justice, Reconciliation, and Peacebuilding, Nov. 11-12, 2011 at NYU Law School.

[4] Opening remarks by Daniel Philpott, Kroc Institute for International Peace Studies, University of Notre Dame, at the International Symposium on Restorative Justice, Reconciliation, and Peacebuilding, Nov. 11-12, 2011 at NYU Law School.

[5] " 'Like Jews Waiting for Jesus': Posthumous Justice in Post-Genocide Rwanda," Lars Waldorf. In Localizing Transitional Justice: Interventions and Priorities after Mass Violence, Rosalind Shaw and Lars Waldorf (eds.) Stanford University Press, 2010.

colonial intrusions – might this end up reinforcing "exclusionary social hierarchies"[6] that disadvantage women in relation to men, or youth in relation to elders? It has been argued that this is the case in Sierra Leone, where reintegration for ex-combatants has often required their submission to older and powerful men, echoing a pre-conflict structural inequality that lured some of the young men into armed conflict in the first place.[7]

And what about the choice of silence by victims, in a world where transitional justice experts, both international and local, often tout the healing powers of verbally expressing trauma (despite empirical evidence that this is not always, in fact, the case) – by giving testimony in a courtroom or before a commission; by participating in a reconciliation ritual; or by otherwise telling one's story. Shouldn't victims have the choice instead to hold their experiences private and attempt to regain dignity through the small acts of everyday living that restore normality?

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This symposium will add to this nexus of issues by examining the how four different mechanisms have been used to seek justice in the wake of violence – criminal prosecutions, truth commissions, public rituals, and theater. They all clearly hold potential for bringing about some sense of justice or restoration of dignity. They also share important similarities as types of performance. Indeed, their ability to transform victims' experiences cannot be separated from their performative character. Each of these justice-seeking strategies has predictable and well-understood roles from which the actors playing them derive meaning

We all know, for example, that criminal trials are inherently dramatic – with highly recognizable speech acts such as the giving of testimony, and the examining and cross-examining of witnesses. But this drama can also create problems. It has been observed that the criminal trial of a high-profile figure – an Adolf Eichmann, Slobodan Milosevic, or Charles Taylor – has built-in risks. If the trial is to impart a coherent moral message about past wrongdoing, then it needs to be highly managed, which may include curtailing the freedom of the defendant to make of the courtroom a platform, where he can express his views and call into question the assumptions on which his indictment is based.[8] On the other hand, if the trial is essentially about the guilt or innocence of the defendant, he may be given more scope to contextualize and justify his actions, thereby undermining

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[6] "Linking Justice with Reintegration? Ex-Combatants and the Sierra Leone Experiment," Rosalind Shaw. In Localizing Transitional Justice: Interventions and Priorities after Mass Violence, Rosalind Shaw and Lars Waldorf (eds.), Stanford University Press, 2010.

[7] Ibid.

[8] See "Between Impunity and Show Trials," Martti Koskenniemi. A. Frowein and R. Wolfrum (eds.), *Max Planck Yearbook of United Nations Law*, Volume 6, 2002, 1-35. Kluwer Law International; and ""The Trial of Alberto Fujimori: Navigating the Show Trial Dilemma in Pursuit of Transitional Justice," Christina T. Prusak. *New York University Law Review*, Vol. 85:867, June 2010.

the trial's intended message and even, in some cases, leading to his acquittal. Therein lies the need to navigate carefully between "show trials" and impunity.

Other justice-seeking mechanisms are also dramatic, of course – the giving of testimony before a truth commission, where the historically disempowered sit side by side with the powerful for the first time, establishing an important symbol along with their version of events; or participation in rituals where physical encounters, speech acts, dances, and other meaningful forms are enacted in such a way to heal those wounded through conflict or to bring reconciliation between those separated through violent acts.

And then there is theater itself, not necessarily thought of by those in the legal field as a justice-seeking mechanism at all, but one which has been used so powerfully in post-conflict societies, as documented skillfully by my colleague Cindy Cohen and her collaborators on the *Acting Together* project.

Many more questions arise when we look at performative aspects of justice-seeking. For instance, are enactments of justice best performed in high-profile spaces, for example before judges and truth commissioners? Or can "just performances" be simple everyday interactions that take place between victims and perpetrators (if they can even be clearly distinguished from one another in what has been called the "moral gray zone" of many conflict situations[9]) as they attempt to reconstruct a fragile coexistence, perhaps preferring silence to a coerced or unwanted truth-telling with its attendant risks of reopening past conflicts?

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This brings me back to my justice-seeking story, my experience of seeing international criminal judges wrestle with the new procedures around victim participation in their courts. Despite the challenges presented by the role of victims and their counsel in criminal proceedings, this move toward recognition of victims' needs represents the inclusion of a restorative measure into an otherwise strictly retributive justice mechanism. Victim participation serves to remind the world that justice-seeking is not just about convictions, sentencing, and the development of a new body of law. It is also about providing various kinds of reparations and healing to those who suffered from the crimes in question.

The capacity for international criminal prosecutions to engender reconciliation and peace would seem to be exaggerated. Indeed, it has been observed that the elevated expectations attached to this form of justice-seeking are largely created by those working in the "international justice industry" itself, and who thus have a stake in the maintenance of its institutions.[10]

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[9] Ibid, footnote 6.
[10] Ibid, footnote 3.

But even the most persuaded and persuasive advocate of criminal prosecutions cannot but acknowledge that there will always be "an impunity gap." Only a small handful of perpetrators will ever be brought to trial – for want of financial and human resources as well as time, and sometimes political will – leaving the overwhelming majority of those who have committed acts of violence and human rights abuses outside the courtroom. The victims of these acts will never have the satisfaction – partial though it may be – of seeing those responsible for their suffering brought to legal account.

There will thus always remain many wrongs calling for redress through other justice-seeking mechanisms. And it is these kinds of mechanisms that we will be discussing over the next two days. By looking at how justice has been sought in three specific contexts – Peru, Cambodia, and the United States – we hope to shed light on how different post-conflict strategies, including criminal trials, can complement one another and reinforce one another. This should be done by not only identifying their particular strengths but also by recognizing their perhaps inevitable shortcomings.