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Moot Court Competitions, Experimental Moot Courts and Documentary Role Plays

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Abstract

To be an international lawyer is to perform international law behavior. As Schechner has put it, 'Performance means: never for the first time. It means for the second to the nth time. Performance is twice-behaved behavior' (Schechner, 1985, p. 36). Moot courts are a classical way to teach students 'twice-behaved legal behavior'. In international law, moot court competitions have proliferated lately. However, the format of the moot court is copied rather uncritically, and not much attention is devoted to other, more reflexive theatrical means. In this article I try to open up space for such critical thinking beyond moot courts. I study moot courts as a form of performance, as a re-enactment. This perspective on moot courts allows me to focus on one of the core questions brought up in existing studies on re-enactments: who or what is re-enacted in such role plays? The equally main question is whether it is possible to reenact court cases differently. In order to answer this question, I will explore two alternative forms of reenactment of international law behavior: experimental moot courts and documentary role-plays. I examine what sort of behavior, what sort of character is restored in these two other forms of role-play.

Keywords: reenactment, moot courts, documentary theatre.

1 Introduction

'International law', to quote Martti Koskenniemi, 'is what international lawyers do and how they think' (Koskenniemi, 2017, p. 65). Of course, this should not be taken too literally. Not everything that international lawyers do counts as law (thankfully so…). What non-lawyers do may also count as law (just think of heads of state signing a treaty). And yet Koskenniemi's phrase captures something important about international law. It is not just a set of rules 'out there' to be captured through legal reasoning. It is also a set of social practices, manners of speech and behaviour, ways of being in the world, that go beyond the formal sources of law. To be an international lawyer is to adopt a certain role, to perform international law behaviour. As Schechner has put it, 'Performance means: never

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for the first time. It means for the second to the *n*th time. Performance is "twice-behaved behavior"' (Schechner, 1985, p. 36). Behaviour can be stored in collective memory, in scripts, audio-visuals, etc. It can be re-stored and rearranged in daily life or in specific institutional practices such as theatre, court procedures, religion or in (legal) education.[1]

Moot courts are a classical way to teach students 'twice-behaved legal behaviour'. In international law, moot courts are used at different levels and across all functional fields. They are used as small in-class exercises, as forms of exam, as separate courses and as national or international competitions. They can be found in general international law, human rights law, humanitarian law, trade and investment law, space law, the law of the sea, international criminal law – and several other fields I forgot to mention here. Moot courts have even made it into the cinema, with students starring in the documentary film *African Moot* (Seedat, 2022).

Given the prominence of moot courts in international law, it is surprising to find relatively little analytical and critical reflection on this form of legal education.[2] If academics write about moot courts at all, their focus is mostly on instrumental and strategic aspects: how to prepare well, how to behave at moot courts and, most of all, how to be successful at a moot court competition. This reinforces the existing set-up and structure of moot courts – as if this is the only model in town for teaching students how to behave like international lawyers in court. This is a pity, as a more analytical and critical approach could open up new ways of thinking about the role of role play in legal education – not necessarily to do away with moot courts, but to think beyond them, to create awareness of the different ways in which theatrical techniques could be useful in legal education.

As you may have guessed, this is exactly the aim of this article: to provide a critical and analytical lens on moot courts in order to open up space for other forms of role play. I have reflected on moot courts in some previous publications in relation to rehearsal traditions in theatre (Werner, 2019, pp. 157-173; 2022, pp. 115-133; Schwoebel-Patel & Werner, 2022). This article builds on those publications, links them to the concept of re-enactment, adds a discussion of documentary role plays and focuses more directly on the notion of the character that is acted out in educational role plays. As in previous publications, I focus initially on 'moot court competitions', specifically those in the field of international law. This does not do justice to the huge variety of forms in which the format of the moot court is used. The problem is that it is simply impossible to capture all these forms that appear at law schools across the world. However, in my defence, it is fair to say that moot court competitions do provide the format for many moot court formats used in legal education, at least in international law. It is also fair to say that moot court competitions have become huge events across different fields of

1 As Schechner puts it, 'Restored behavior is living behavior treated as a film director treats a strip of film. These strips of behavior(1) can be rearranged or reconstructed; they are independent of the causal systems (social, psychological, technological) that brought them into existence. They have a life of their own' (ibid.).

2 For counterexamples, see: Schwöbel-Patel (2020), Wouter Werner (2022, pp. 115-133).

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international law, involving tens of thousands of students (all coached by academic staff) every year. Law schools all over the world invest a lot of time, money, energy and prestige in moot court competitions. In other words, there is enough reason to scrutinize the practice of moot court competitions as models and as events in and of themselves.

I study moot courts as a form of re-enactment: the role of lawyers is performed again in an artificial, educational context. This perspective on moot courts allows me to focus on one of the core questions brought up in existing studies on re-enactments:[3] who or what is re-enacted in such role plays? To put it differently, the main question in this article is, what sort of behaviour, what sort of character is restored in moot courts? The equally main question is whether it is possible to re-enact court cases differently. In order to answer this question, I will explore two alternative forms of re-enactment of international law behaviour: experimental moot courts and documentary role plays. I will explain the nature and set-up of both in Sections 4 and 5. For now, I limit myself to presenting the equally main question of this article as follows: what sort of behaviour, what sort of character is restored in two other forms of role play, the 'experimental moot court' and documentary role play? Again, the point of these questions is not to see which of the three forms is better. Much depends on the aims of the exercise. As I will argue later, traditional moot courts are well suited for large groups and are a good way to develop the capacity for doctrinal research and reasoning. The other two forms offer more room for critical reflection on the role of law and lawyers and allow for training a broader range of skills. Yet they are unable to accommodate large groups and lack the competitive element that some may find appealing. Nor is the point to say that these three are the only possible forms of role play available in legal education. The point is more modest: to open up space for creative and critical thinking about the use of role plays in legal education. In order to do so, I will start by setting out some insights derived from existing studies on re-enactments. Based on these insights, I will discuss the three role plays identified previously: moot court competitions, experimental moot courts and documentary role play.

2 Re-enactment

What does it mean to engage in re-enactments? At first sight, the answer may seem straightforward: re-enactments are about representing something pre-given. For the purposes of this article, I treat this 'something' a bit loosely and quite broadly. It varies from an event that happened before (e.g. a court case) to already existing characters or forms of behaviour that are performed again. The reason for this lax treatment of the concept of re-enactment is that it allows me to carve out overlaps and differences between the three forms of educational role plays that are central to this article.

In the context of moot courts, for example, students are required to act as a litigation lawyer, prosecutor or defence lawyer. They are called to perform again

3 See for example: Nichols (2008, pp. 72-89), Schneider (2011), Nyongó (2009).

how lawyers supposedly already behaved (and will behave again) in court. To put it in theatrical terms, re-enactments are about *mimesis*, about imitation and representation. This is underlined by the props used in moot courts: judges often wear robes, students are dressed up or wear robes as well, the room is arranged to facilitate pleading, etc. It is also underlined by the required behaviour and modes of speech, which should be fitting for a court procedure. However, if the aim is indeed to imitate as truthfully as possible, re-enactments and moot courts are vulnerable to the Platonic critique of theatre. As Stern has argued, Plato's critique revolves around three main issues.[4] First, theatre is, so to speak, always second best at best. It offers imitations of something that will always be more real, more pure than the world of make-believe of theatre. Secondly, poets 'don't really need to know about the things they imitate' (Stern, 2014, p. 25); they can write about war without ever having been a soldier, about marriage while being single, about sailing without ever having set foot on a ship. This is related to the third issue, the risk of deceit. Poets easily mislead the audience, who thinks it has learnt something about the real thing, while it was actually only offered a surrogate. Echoes of such critiques have been voiced in relation to moot courts. In the context of US moot court practices, for example, Kozinski accused moot courts of being too 'moot' (that is, not real). The unrealistic nature of moot courts, he argued, should not come as a surprise, since they are designed by people unable or unwilling to work in real litigation practice (thus having no first-hand experience), resulting in distorted views of what litigation is about (Kozinski, 1997, pp. 178-197). In this way, Kozinski argues, moot courts mislead innocent students, who are sent off to litigation practice with unrealistic ideas about advocacy.

To a certain degree such critiques are to the point. As I will argue in the rest of this article, moot courts and other educational role plays are also about mimesis. And indeed, they should do justice to the practice that is represented in the performance and not send students home with distorted views of what it means to appear in court. However, the critique also misses a few crucial points about the nature of re-enactments and the relation between 'practice' and 'education'.

First, the critique mistakenly assumes that there is some kind of pure original, which is subsequently represented in re-enactment. In fact, the original event is already composed of restored and twice-behaved behaviour, of role play mimicking what came before. There is, in other words, no ideal original litigation behaviour that should (or could) be re-enacted without distortions. Litigation behaviour in court is already twice-behaved behaviour, behaviour that follows scripts of what it is to be a lawyer and rearranges strips of behaviour in specific contexts. This is how Rebecca Schneider puts it:

> the fact that "what was done" was already a matter of enactment of codes and performatives …— that "what was" was itself *already* composed in conversation with ancestors, in restoration and 'twice-behaved-behavior'—— should mean that to do restoration is to do what was because what was *was* already restored.[4]

4 Schneider (2011, p. 127). She adds: 'the fact that restoration renders an event different really only renders it *the same as it originally was: different*' (emphasis in original, no pun intended).

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Secondly, role plays and re-enactments are *meant* to be different from the event they represent. Students know very well that they are not involved in a real case, with real clients and real judges. The mere fact that they pay tuition fees instead of getting paid as lawyers should already alert them to this. What goes on in a moot court is *play*, a play that is deliberately constructed differently from the play that goes on in, for example, the International Court of Justice or the International Criminal Court. Moot courts are a highly structured form of play, made up of their own specific rules. Like other plays or games, they require constitutive rules that define the situation and instruct what is to be treated as 'real' for the duration of the play. In chess, for example, pieces of wood are really to be treated as king, queen, or pawn, within the context of the game. Therefore, they also contain what Goffman called 'rules of irrelevance', rules that set out what does *not* matter within the context of a game or play (Goffman, 1961, pp. 18-27). Examples are the social position of the players, the functions of props in 'real life' or one's preoccupations before the start and after the ending of the play. A game or play, in other words, creates a world unto itself, with roles and identities that do not exist outside its constitutive rules. However, what makes role plays such as moot courts more complicated is that they *also* refer to the world outside the play. They create identities within the play, but these identities are also meant to signify something that exists beyond its boundaries. Students are required to act as if they are litigation lawyers, as if they defend an accused, as if they seek to convince a real existing judge. They perform within the rules of the play, but point to a world outside of the play. In this sense, they are like the games children play when they try out roles, playing, for example, 'family', 'fire brigade', 'police', etc. These kinds of play, as Bill Nichols set out, quoting Gregory Bateson, have a complicated relationship to the outside world: 'These actions, in which we now engage, do not denote what would be denoted by those actions which these actions denote.' (Bateson, 2000, p. 180. Quoted in Nichols, 2008, p. 73).

Role play and re-enactment are thus predicated on a connection *and* difference between representation and the represented event or person (*personae*). They signify a presence and absence at the same time. They re-create a prior event or pre-given situation, but the very fact that they *re*-create it signals its absence. To quote Nichols once more:

> Objectivity desires a fixed relation to a determinate past, the type of relation that permits guilty/not guilty verdicts or other definitive answers to the question of what really happened. [Re-enactment] imposes recognition of the relentless march of a temporality that makes the dream of both a pure repetition and an omniscient perspective impossible. The very syntax of re-enactments affirms the having-been-thereness of what can never, quite, be here again. Facts remain facts, their verification possible, but the iterative effort of going through the motions of re-enacting them imbues such facts with the lived stuff of immediate and situated experience. (Nichols, 2008, p. 80)

We may add here that it is not only the 'relentless march of time' that breeds difference; it is also the fact that the represented event is presented anew in the context of a play, with constitutive rules that determine its beginning, its characters and its ending. What was is reworked within a play that is also a world unto itself.

So yes, re-enactments may fail to do justice to the event they represent. However, this is not because they are not 'like' the original event – not necessarily at least. If all behaviour is twice to *n*th-behaved behaviour, staged re-enactments are just part of an endless chain of behaviour that is performed again. Every re-enactment, therefore, also creates something new, a performance in the here and now: what went before is taken up again. To paraphrase Schechner, performance is never only 'twice or nth-behaved behavior'. It is twice-behaved to *n*th behaviour for the first time. Or, to use the words of Kierkegaard's pseudonym Constanin Constantius again:

> The dialectics of repetition is easy, for that which is repeated has been – otherwise it could not be repeated – but the fact it has been makes repetition into something new. (Kierkegaard, 1983, original from 1843, p. 146).

Doing justice to the re-enacted event or personae thus implies recognizing that the past or pre-given never emerges as such. It is reworked and produced, again and yet for the first time, just like actors rework their characters and lines for a performance. If pure representation is the aim, every re-enactment contains a mistake. However, this is not a very interesting observation. The more interesting question is what the mistake signifies, what it brings about. How and why is the mistake a problem, and what is it that 'mistake gets right, or what mistake corrects'? (Schneider, 2011, p. 17).

This question is even more pertinent in the context of educational role plays – my *third* point in response to the Platonic critique. The aim of role plays in the educational context is not just to represent what was, to bring something pre-given into the present. Their focus is equally on the future, as they seek to teach students what lies ahead: their role as prospective lawyers. If the sole aim of educational role plays were to mimic something pre-given as closely as possible, students are sent home with a tedious message: the future should be, as much as possible, like the past. However, role plays and re-enactments do not need to be like this. They could also open up space for critical distance, for probing the boundaries of behaviour that is behaved for the second to the *n*th time. After all, educational role plays deal with two absences: the pre-given and that which is yet to come. The pre-given needs to be created anew in the present; the future needs to be imaged here and now. Educational role plays, in other words, are not only about modelling the present after the past; they are also about (role) modelling the past and the future.[5]

5 In that sense, they are like restatements of the law, as laid down in, for example, reports by the International Law Commission. They too restate what is already there but in an attempt to steer future behaviour.

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3 Moot Courts: Pre-Enacting the Typical

In this section, I will focus on the best-known and biggest moot court competition in international law, the Philip C. Jessup competition (hereafter, Jessup or 'the Jessup competition').[6] The basic format of this competition has been taken up in a wide variety of other moot court competitions as well. It also often functions as the model for moot courts used within courses of international law (see also Werner, 2022, pp. 115-133). The basic idea is that students from different universities compete on the basis of a hypothetical case. For *Jessup* the case takes the form of a fictitious dispute between states appearing before the International Court of Justice. Teams of students are required to write a memorial and act as litigation lawyers in oral rounds before a panel of individuals acting as judges. The written memorials are assessed by a group of anonymous reviewers, whereas the judges assess the oral pleadings of the students. At the end of the competition, one team wins and several additional awards are handed out (e.g. for the best oralist or the best written memorial).

The fictional nature of the case implies that *Jessup* is a particular kind of re-enactment. Students do not re-enact something that took place in the past, a real case pleaded by real people, but a non-existing dispute between non-existing states. It is not the behaviour of real existing persons that is re-enacted but how lawyers in court would (supposedly) *typically* behave. In this sense, *Jessup* mirrors the re-enactment in early socially engaged documentary films of John Grierson, for example, where actors re-enacted the typical behaviour of workers at the postal service or in the coalmines (Grierson, 1928: 1931. See also the discussion in Nichols, 2008). What is re-enacted is 'typical particulars' – a typical character that is taken as representative of an entire group.[7]

There is no doubt that letting students act out the role of a typical litigation lawyer adds much to legal education. It gets them motivated, it helps them to think strategically about legal argumentation and it forces them to thoroughly research their case, because they will have to appear in court. It is also simply more fun than classical lectures and seminars (at least the ones I teach…). However, moot court competitions are not only re-enactments of how a typical lawyer behaves. They are also educational tools meant to prepare students for their possible future roles in legal practice. They are, as I argued in the previous section, re-enactments and pre-enactments at the same time. The combination of these elements is nicely captured in the concept of the 'dress rehearsal' in theatre: 'the reproduction of the first performance, yet prior to this performance' (Descombes, 1980, p. 145; as quoted by Gendron, 2008, p. 20). In moot court competitions, students similarly re-enact their future role, producing typifications of whom they could become.

Or do they? What is striking about moot court competitions in international law is how much they resemble each other. The behaviour in moot court competitions is, of course, twice-behaved behaviour, restored behaviour. However,

6 https://www.ilsa.org/about-jessup/ (Retrieved 3 June 2020).

7 See Sobchack (2004, p. 281). A good example is an animal in the zoo, which stands for a type of animal ('*This* is how a lion looks like').

this behaviour seems stored most of all in the scripts, codes and traditions of moot court competitions themselves. Time and again, *moot court behaviour* is performed and re-stored in moot court competitions. It is like the characters in a mask tradition such as *comedia dell' arte*. While the masks may stand for typical behaviour outside the context of a performance, they also, and primarily, develop their own store and script ('this is, how you should play *Capitano* or *Arlecchino*.'). They are so-called 'stock characters', personae whose behaviour is stored in tradition, in handbooks, in training and education. As Bartley set out a long time ago, stock characters tend to develop in three phases: they start out from 'realism' (referring to personae in the world outside theatre), then, through repetition and consolidation, move to 'convention' and finally end up being 'false': 'false generalities, which experience could easily deny, are in force, and facts are unwelcome unless they fit the conventional framework' (Bartley, 1942, pp. 438-439).

Moot court competition characters are a combination of the three: real, conventional and 'false'. They refer to the outside world, but most of all, they are conventional and largely immunized against new facts about actual behaviour of lawyers in the courtroom. A good example is the narration of facts. In legal practice, the presentation and narration of facts is a crucial part of the proceedings. In moot courts, however, 'facts' are given (quite literally), and teams are supposed to concentrate on doctrinal arguments. If teams start problematizing the facts of the case, it is up to the judges to cut them off. The format simply does not allow for competing versions of history, notwithstanding their pivotal role in many cases before actual courts and tribunals.

The three aspects of the moot court competition personae can be clearly witnessed in the different 'guides' to moot court competitions. Such guides set out how moot court competitions are to be prepared; how written pleadings should be researched, constructed and presented; and how oral presentations should be done. With occasional exceptions, such guides do not pay much attention to the world outside the moot court competition.[8] Instead, they contain instructions for students on how to behave, how to be an ideal contestant in a competition. Students should know not only how to research and how to write but also how to *appear*. They should behave in accordance with the rules of the competition (e.g. when to speak, how to speak, knowing when to stop speaking) but also be aware of the etiquette that makes up moot court competitions. Classic examples are instructions on how to dress (e.g. 'err on the side of caution and adopt the more conservative approach') voice (e.g. 'moderate your tone, pitch and accent') or body language (e.g. 'never fidget', 'join your hands together and place them on the edge of the table') (Kee, 2007, pp. 72, 80, 82).[9] No doubt, several of these instructions

8 Thomas and Cradduck (2019), for example, start their elaborate study on 'the art of mooting' with three pages on the overlaps and differences between advocacy and mooting, whereas the rest of their analysis focuses on how to perform best at a moot court competition, with occasional and brief references to advocacy and performance art. *The Art of Mooting*, Edward Elger. Most other guides focus solely on the competition, such as Kee (2007).

9 Note that Thomas and Cradduck (2019) acknowledge that the role of accent is different in international competitions, as students come from different parts of the world (46).

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will also be useful in advocacy practice. Thinking critically about how to dress, how to appear, how to speak makes a lot of sense outside the context of a moot court competition as well. However, the guides' main focus is on successful performance in mooting. In this context, being 'successful' can be broader than 'being a winner', as illustrated by Thomas and Cradduck's *The Art of Mooting* (Thomas & Cradduck, 2019). This book, written primarily for coaches of teams that participate in moot court competitions, sets out how to train students cognitively, psycho-motorically and affectively. Students are to be disciplined both in their research and writing skills and also in the control of their bodies (e.g. 'facial expression should be moderate in nature, reflecting the solemnity and dignity of the occasion') (Thomas & Cradduck, 2019, p. 44) and in the way they feel about the law (e.g. incorporation of professional ethics and a belief in the benefits of litigation) (Thomas & Cradduck, 2019, p. 58). Interestingly, for Thomas and Cradduck the main reason for training students along all these dimensions is not winning per se, but, most of all, the production of *elegance* (Thomas & Cradduck, 2019, pp. 52, 56). The focus on elegance reveals something of the *personae* that is to be re-enacted in moot court competitions: a well-prepared student, focused on impressing the court and audience with her argumentative skills, knowledge of the rules and etiquette of the competition, mastery of body, voice and emotions, well dressed, attentive to her colleagues and respectful to the court.

While 'winning' may thus not always be the primary aim, the competitive nature of events such as *Jessup* does have a further disciplining effect. Teams and individuals are assessed by judges, who operate inside and outside the role play: they play the role of judge, but at the same time apply score sheets to determine who performed best. While deviations from the ideal contestant personae are not forbidden in moot court competitions, they come with a significant risk: low scores based on the fixed assessment criteria handed out to the judge. Given the desire by many law schools and coaches to see their teams 'do well' (which often means: score high), it is not surprising to see that teams tend to reproduce the stock character of the ideal moot court contestant.

Of course, this still leaves room for teams to critically reflect on the personae they are supposed to perform in moot courts. Kee, for example, advises students to 'be yourself and let your own personality shine through your submission, just as you would do in a job interview' (Kee, 2007, p. 88).[10] This allows for critical reflection on how to perform the character in a moot court competition. Another example would be the reflection sessions with the coach, where students can voice possible personal or moral unease about the role play they had to perform. Within the role play, teams can also add a critical dimension, for example by using arguments based on state practice from states whose position is often neglected in international legal argumentation.[11] However, this does little to change the format and disciplining force of moot court competitions such as *Jessup*. If indeed the aim is to integrate critical insights on the role of law and lawyers, if the aim is to try out

10 I thank the anonymous reviewer for pointing out this argument by Kee.

11 This is a point made by Scott and Soirilia (2021, pp. 1095-1097).

different roles and personae, why not also experiment with the format of moot courts itself?

4 Moot Court as Try-Out: Experimental Moot Court

These questions lie at the basis of the second type of role play I will discuss in this article, the so-called 'experimental moot court'. In this context, the term 'experimental' refers to two things at the same time. First, it is 'experimental' in the sense of being relatively new and still in development. Up to now only three rounds of the experimental moot court have been held, first online (during the pandemic) and then twice in a theatre in Amsterdam with groups of students from Africa, South-America, Asia and Europe. Secondly, it is 'experimental' in the sense that students are invited to experiment, to try out different roles and styles. Just like traditional moot court competitions, the experimental moot court requires students to adopt a role and to engage in role play. They work together as a team of lawyers: they research, present and argue in character. However, unlike traditional moot court competitions, the experimental moot court is not centred on the reproduction of the ideal contestant. Instead, it creates room to try out different personae during the role and to critically reflect on these personae *during the event itself*. This is possible because the experimental moot court is not set up as a competition. Therefore, it is not necessary to have fixed, pre-given criteria that apply equally to all teams. In other words, there is no need to work with a fictitious case, made-up facts and a doctrinal puzzle. Instead, students work on a real-life case and issues that matter concretely to individuals, communities and states. They also need to re-enact something that is crucial in litigation practice: the narration of facts and history. In experimental mooting, the 'facts' are not given, but presented, represented and contested in court. Teams may try to convince the court, but they may also opt for a disruptive strategy and challenge the legitimacy or legality of the court as such. Removing the competitive set-up of moot courts also allows for a different composition of the teams. Traditionally, teams are composed of students from one university or one country who compete with teams from other universities. In experimental moot courts students from different universities are mixed. Especially when teams come from completely different parts of the world, this adds a dimension to the work of students: they have to find a common strategy among people with sometimes radically different cultural and historical backgrounds – or they may discover that, after all, the differences do not make much of a difference.

Experimental moot courts are thus somewhere in between literal, *ad verbatim* re-enactments and traditional moot courts. They share with *ad verbatim* re-enactments a connection to 'the real': a real case before a real court (see also Section 5 of this article). They deviate from *ad verbatim* theatre, as they do not literally reproduce the case. Instead, just as in traditional moot courts students are required to develop and present their own pleading or opening statement before a court. In that sense, they allow for the performance of typical behaviour rather than the behaviour of concrete specific individuals (although the latter is also

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possible, e.g. when students mimic the behaviour of the lawyers who appeared in the case). As in traditional moot courts, they get limited time to do so, so as to allow all students their 'day in court'. However, unlike traditional moot court competitions, they enjoy considerable freedom to choose what and how they will present in court. The point, after all, is not 'winning' or to be aesthetically pleasing but to present an argument for their main audiences. It may be that their main chosen audience is the judges. However, it may also be that the main audience is a different one, such as home constituencies, victim groups, global or national media, etc. The experimental moot ends with a press conference. This makes it possible for teams to make this moment the central focus of their strategy, even to use what happens in the courtroom mainly as material for the press conference at the end. In order to foreground the role of the audience, it is directly brought into the role play. In traditional moot court competitions, the audience is merely an onlooker: people watch their peers, friends or family perform as moot court contestants. In experimental moot courts, the audience is also required to adopt a role and to attend and listen in that capacity. Audience members can take on different roles such as journalist, victim and supporter of the defendant, law student, etc.

When the sessions are over, there is no score sheet to be filled in by the judges. Instead, just as in the process of theatre rehearsals, all participants come together for a reflection session, including the judges and the audience. In this sense, experimental mooting bears some family resemblance to Boal's 'Theatre of the Oppressed'. The audience in experimental moot courts acts as 'spect-actors', both spectators and actors that jointly assume responsibility for the meaning of the performance. The audience thus plays a crucial role during and after the court sessions of the experimental moot. The point of the reflection session is to discuss not who 'did best' but what the pleading did to/for the different audience members (in their roles) as well as the judges. The common reflection is meant to do the opposite of the score sheet in traditional moot court competitions. The score sheet helps to solidify typical moot court behaviour. The common reflection seeks to break it open: it is meant to discuss how different styles work out, to question the legal frames, to see how things could have been done and to discuss how and why teams opted for different strategies.[12] The reflection session is also a learning moment for the judges. They do not appear as 'assessors in robes' but as personae, as judges who have to make sense of what happens during the role play. After the reflection session, the same cycle of re-enactments and common reflection is repeated. Teams get the chance to try out new styles and content, based on the input they received or simply their desire to try out a different type of lawyer. In this way, the experimental moot court hopes to contribute to what Kierkegaard regarded the importance of theatre, especially for people in the ages of students. As Timothy Stock summarized this position, theatre 'demonstrates the plurality of persons, or at least prototypes of persons, through which one may assume responsibility for oneself' (Stock, 2015, p. 378).

The set-up of experimental moot court allows for only a limited number of participants. In 2022 we had a group of 25 students from seven countries across

12 I thank one of the anonymous reviewers for pointing this out to me. Boal (2019).

the world.[13] This is no match for traditional moot court competitions, which can, in principle, accommodate thousands of students if necessary. This is the strength and weakness of traditional moot court competitions. They include many more students than an experimental moot court ever could. They are able to do so because they work with a controlled, fixed case and a score sheet for written and oral pleadings. The downside, however, is that typical moot court behaviour is solidified rather than subjected to critique and reflection. The experimental moot seeks to do exactly this: create variation in possible roles and (thus) create space for critical reflection on what happens in and through court. It also seeks to connect the role play more directly to the outside world, through the use of real cases with their complicated histories and context. However, the link to the outside world is also limited. At the end of the day, students still adopt the role of an imagined lawyer, operating within the rules of the moot court play.

5 Documentary Role Plays

5.1 Documentary Plays and Veracity

The term 'documentary role play' has no settled meaning in the context of legal education. While the phenomenon of moot court as educational tool goes back to medieval times, there is no tradition in documentary role plays in teaching law. There is, however, a longer tradition of 'documentary theatre', also known as *ad verbatim theatre*. In a documentary theatre play,

> the words of real people are recorded or transcribed by a dramatist during an interview or research process, or are appropriated from existing records such as transcripts of an official enquiry. (Hammond & Steward, 2008, p. 9)

This 'official enquiry' may also be a court case. Several documentary plays are based on transcripts of court proceedings, which are turned into a theatrical text.

Documentary plays are used for the same purposes as documentary film: to (morally) educate an audience by showing a representation of reality. The dual nature of the term 'documentary' attests to this. A documentary play 'documents' in the sense of 'recording' reality. However, it is also a return to the origin of the verb 'to document', which means to teach or educate (still present in the word Germanic words 'dozent' or 'docent' for teacher). Take, for example, 'Crimea 5AM', a theatre performance based on interviews with political prisoners and activists in the Crimea.[14] The play 'documents' these testimonies but also seeks to educate the audience about their meaning. The education is about providing not only information but also sentimental education, teaching the audience how to feel about issues.

13 To be precise, we had teams from Suriname, Zimbabwe, Rwanda, China, Indonesia, the UK and the Netherlands.

14 Available via: https://kilntheatre.com/whats-on/crimea-5am/ (Retrieved 9 May 2023).

Documentary theatre comes with truth claims and, according to some, even with the capacity to reveal what so far has been kept from the public.[15] The use of verbatim testimony, archives, transcripts, etc. is also often used to bolster such claims to an authentic representation of reality. According to Schulze, the rising popularity of documentary theatre in the past decades should be seen as 'an expression of a culture that is in search of a reality that is not mediated, direct and tangible in a factual sense' (Schulze, 2017, p. 195). Documentary plays tap into this desire, Schulze argues, through its austere and non-theatrical staging, the use of props and method of acting, all aimed 'to minimize the distance between stage and world as far as possible' (Schulze, 2017, p. 201).[16]

However, such bold claims to truth and veracity should be treated with suspicion. While documentary plays contain text that has 'already been written or spoken by others' (191), they are part of a play that is necessarily selective and biased at several levels. Let me provide a few examples. In the first place, if documentary plays rely on archives or transcripts they necessarily reproduce the bias that is already in such texts. Not everything is stored in the archive, and what *is* stored comes with a certain perspective (typically the 'official version' of events). In court proceedings, for example, testimonies are screened, selected and geared towards the specific 'case'. Not everything and everyone gets a say in court and thus makes it into the transcripts. In addition, the archive itself may contain mistakes or 'corrections' or may be partly lost. If the documentary play relies on interviews or other records of spoken text, it is limited to exactly that: what is spoken. What is not said, who does not speak or what cannot be articulated remains outside the scope. It also remains open to interpretation how truthful and authentic these spoken words are and what they meant for whom. Just assuming they represent some form of foundational, rock-bottom 'reality' is naïve at best. Secondly, documentary plays themselves are the product of selection and editing: not everything from the archive or from spoken text makes it into the play. Moreover, the selection of material is edited and ordered in the function of a narrative with its own plot and central message. Sound, stage setting and props are added to create a theatrical re-creation of the original material. Scriptwriters, directors, costume designers, actors and many others help to reframe and re-present the words that have already been written or spoken by others.

Several documentary plays have made attempts to acknowledge their complex and problematic claims to veracity. Erwin Piscator, for example, directed *The Burning Bush* (1949), a play based on the transcripts of an 1884 court case in Hungary, which is seen as a predecessor to the Dreyfus case and a symbol of anti-Semitism, more broadly. The play combines *ad verbatim* reproduction of what was said in the case with an educational mission, 'highlighting prejudice, which played a major role in the fomentation of World War II'.[17] However, the lesson was driven home through more than an *ad verbatim* reproduction of the transcripts.

15 For a critical discussion see Schulze (2017), 192 and further.

16 Schulze adds that 'the truth claim is strongest in tribunal plays' (202).

17 'The Dramatic Workshop Digest', folder 169, Erwin Piscator Center, as quoted in: Arjomand (2018, p. 103).

The 1884 words were preceded by a prologue, a chorus and a billboard presenting a long list of 'trials of history' (Arjomand, 2018, p. 104). The audience is thus pulled in and out of the drama: pulled in through the re-enactment, pulled out through reflection and contextualization. The audience thereby comes to wonder what is being done *with* and maybe even *to* the court case. Piscator is not the only one who has used court transcripts as the basis for reflexive theatre productions. Another classical example is Bertolt Brecht, who included court transcripts in many of his plays, often to spur critical thinking about the injustice of law and court proceedings themselves.[18] As Tretyakov argued, Brecht was 'obsessed with goings-on at court' and made plans for 'establishing in Berlin a sort of panopticon-theatre, where he would stage the most interesting trials from the history of mankind' (Tretjakow, 1972, pp. 333, 336). For Brecht, there was a close connection between the role of eye-witnesses in court and his ideal of an epic actor, who distances herself from the role she performs. An epic actor 'must remain a demonstrator; he must present the person demonstrated as a stranger, he must not suppress the "he did that, he said that" element in his performance. He must not go so far as to be wholly transformed into the person demonstrated' (Brecht, 1938). An eyewitness similarly keeps a distance from what she describes: no one believes that she *was* the driver, that she *was* the victim. If she appears in court, the distance between the description and the event only grows bigger: the scripts and formalities of law ensure alienation between the event and the recounting of that event. This is important, as it allows room for critical distance, for critically questioning not only what is recounted but also what is not, who is allowed to recount and how. The audience, in other words, is encouraged to judge the judging.

In practice, however, documentary plays do not always succeed in spurring reflexive distance in the audience, in particular when it comes to the complex relation between the play and the reality it claims to represent. One reason is that audiences may, despite the use of alienation techniques, still get immersed in the story. Another reason is what Schulze has called the 'demand for closure and completion' (Schulze, 2017, p. 207). In tribunal plays, for example, the audience is presented with 'the facts' of a case and then 'put in the position of a judge and then "close the case" for themselves' (Schulze, 2017, p. 207). When using documentary theatre techniques in legal education, therefore, it is important to guard the space for critical discussion on the limits of representation. Instead of immersion and closure, documentary techniques should be used to open reflection on questions of truth telling and performances of authenticity. Just as in experimental moot courts, the common reflection sessions can be used to create such moments of reflection and distance. Just as in experimental moot courts, repeated performances of the same script in different modes can help to reveal the vulnerability and limits of claims to representation.

5.2 Presence and Absence

Normally, law schools would have neither the resources nor the time and expertise to create full artistic re-enactments of court cases. However, that does not mean

18 For a longer discussion see Arjomand (2018, pp. 56-93).

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re-enactments should be left to theatre companies alone. They can have a useful function in legal education, be it in the form of small in-class exercises or longer term projects with groups from different universities. Similarly to experimental moot courts, they offer the opportunity to let students experience different roles and the opportunity to discuss the broader context of a case and to critically engage with the role of law and lawyers in making sense of societal problems. What they add, most of all, is a 'claim to veracity' (Hammond & Steward, 2008, p. 10). and all the complex questions of representation that come with them. Reading, performing or watching a documentary play comes with the legitimate expectation that, unless indicated otherwise, the words spoken on stage (or in class) are the words spoken in the past. The claim to veracity directly affects the personae that students are supposed to perform: it is not the typical lawyer (or defendant, judge, witness, etc.) they re-enact, but a real person that really spoke these particular words. However, as I argued previously (Section 5.1), introducing documentary play in legal education should be accompanied by reflection on the very process of representation, including questions such as:

> what does it mean to rely on transcripts, who is included and excluded in official documentation, how do court cases structure and discipline stories, how has the theatrical reworking of the transcripts affected the stories that are told?

Just re-enacting a selection of material from real court cases would undo the critical potential of documentary plays. It should be accompanied by reflection sessions and the possibility for students to act out alternative versions of the court case. Here too, there is an overlap between the use of documentary role plays and the experimental moot courts described in Section 4.

Paradoxically, the claim to veracity also implies a greater *distance* to the case and the persons involved. Stock characters or typical personae do not exist in a concrete time and place outside the role play. A Jessup litigation lawyer, for example, only exists within the constitutive rules of the Jessup competition. This is different in documentary role plays. Robert Jackson, for example, appeared at a particular time in a specific building in Nuremberg to deliver his famous opening speech. When this speech is re-enacted in the documentary play *Nuremberg*, he is not only made present again. The fact that his words and personae are re-enacted also signifies his absence. As Jennifer Allen put it, 'A theatrical representation may be based on an individual's life, but this person is always already assumed to be gone. Behind every re-enactment there is a "little death" … Although no one really dies in the re-enactment, all language becomes an epitaph' (Allen, 2014, p. 19). The interplay between presence and absence, between co-presence and distance, is nicely captured in the different meanings attached to the term 'transcript'. First, a transcript is a record of the past. It contains, in written form, an edited representation of who said what and when. This means it signifies presence and absence at the same time. The voices from the past are gone, absent. All we have is the authorial voice of the text, which brings them into the present when taken up by a reader. This links up to the second meaning: the transcript functions as a

bridge between past and present, as a trans-script. It allows the reader or re-enactor to bring the past into the present, to make it present again. This then leads to the third aspect, the transcript as 'script'. In re-enactments, transcripts function like any other theatre script: they instruct readers and actors how to behave. Just like the archive seeks to secure how the future will read the past (Derrida, 1996), transcripts seek to steer how the past will be behaved-twice in the future.

Therefore, the most important difference between moot court competitions and documentary role plays is not that the latter is somehow 'more real'. While some *ad verbatim* theatre productions may have come with the pretension to show the audience 'what really happened', using documentary role plays should aim for something else: an increased awareness of our own role in the production of representations. Paradoxically, the claim to veracity may be helpful in this context, as it makes clear how past and present belong to different worlds. It creates a presence of absence, 'an awareness of the separation between the lost object and its reenactment' (Nichols, 2008, p. 80). This opens up space for critical distance, for reflection on the meaning of what happened in the past for the present and the future. Documentary role play is never merely about reproducing the past just for the sake of it. It is about creating a critical distance from the past and thus requires some kind of perspective. Re-enactments, to quote Nichols one last time,

> produce an iterability for that which belongs to the singularity of historical occurrence. They reconcile this apparent contradiction by acknowledging the adoption of a distinct perspective, point of view, or voice. (Nichols, 2008, p. 80)

The use of documentary role plays in education should thus be accompanied by a reflection on the making of the role play itself: what was selected, how the material was edited, whose voices were included – precisely the kind of questions that are seldom raised in the context of traditional moot court competitions.

6 Conclusion

In this article I examined who and what is re-enacted in moot courts and documentary role plays. In other words, I studied what sort of stored behaviour students are asked to restore in both forms of role play – and how they are supposed to do so. While this question may appear descriptive and oriented to the past, it is actually meant to steer future behaviour. Not that this article prescribes what is to be done in any detail. Far from it. However, it does hope that posing this question spurs critical, analytical and creative thinking about moot courts, a format that seems to be uncritically copied throughout international law education. Moot courts have much to add to legal education and are a great way to let large numbers of students gain some sort of experience in pleading. Yet they also come with limitations and downsides, especially in terms of imaginative and critical thinking. They train students most of all in behaving like a typical moot court contestant. One can probe the boundaries of moot courts by taking out the competitive

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element, focusing on a real case and experimenting with different roles and styles. This is done in so-called experimental moot courts, where typical lawyerly behaviour is acted out but also critically scrutinized. Unlike traditional moot court competitions, experimental moot courts cannot accommodate large numbers of students. Yet they do make up for some of the ways in which traditional moot courts reproduce stereotypical images of restored behaviour. A more radical form of experiential learning are documentary or ad verbatim role plays. Such role plays have a claim to veracity, which creates closeness and distance at the same time. It creates closeness as ad verbatim role play reproduces the exact text that was uttered in a court case in the past. It creates distance, as the link to the real shows absence and artificiality: the past is gone, the re-enactment is a recreation of the past, 'taking place "as if" for the first time, now "starring YOU"' (Schneider, 2011, p. 25). This immediately creates room for critical reflection on how the past is working its way into the present, how it is 'gotten wrong' in the re-enactment and what this means for the possible future roles in which the students may appear.

Again, the point of this article is not to dictate what should be done in legal education. Or maybe a little. I hope that my analysis has shown that adding theatrical tools and traditions to role plays may help to think beyond traditional moot court formats. I am sure there are other tools and traditions that have much to add. Just think of introducing absurd elements to moot courts, introducing more radical estrangement, involving the audience during the play – the list is endless. This article, however, is not.

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