Performances of Justice? Interrogating Post-genocide Adjudication

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This essay critically reflects on the possibilities and limitations of adjudicatory processes for delivering justice in the aftermath of genocide. Following Hermann (2017), I employ a holistic definition of justice to include both punishing the perpetrators (retributive elements) and meeting the needs of the victims (restorative element). I argue in favour of grassroots approaches to adjudication—as these create more possibilities for attaining both the restorative and retributive goals—over top-down state-led adjudication mechanisms, which are limited by the interests of the state and the international community, and risk constituting merely *performances of justice*.

This essay proceeds as follows. After briefly introducing the case studies informing this paper, I discuss the limitations of state-led and/or international-backed mechanisms for delivering justice, showing that they tend to be experience-distant and non-victim-centred. I then propose the notion of a *performance of justice* to describe the spectacle-like adjudicatory processes which discount victims' needs and fail to deliver justice. I argue that such performative aspect is a limitation of top-down post-genocide adjudication processes, as it can serve to legitimate state institutions and introduce political and/or economic ideologies, while concealing potential miscarriages of justice. Finally, I investigate grassroots adjudicatory mechanisms, showing that, while not without limitations, they create most possibilities for supporting victims, bringing perpetrators to justice, and aiding intra-community reconciliation.

This essay in informed by the case studies of Rwanda and Cambodia. The Cambodian genocide (1975-1979) included large-scale killing and persecution of minorities conducted primarily by the members of the Khmer Rouge regime and resulted in the deaths of approximately 1.6 million people (Meierhenrich 2014: 43-44). The Rwandan genocide (1994) occurred during the Rwandan Civil War and saw violence led by armed militias and targeted primarily against the minority Tutsi, leading to approximately 800 thousand deaths (ibid.: 49-50, Guichaoua, 2020). Both countries saw international-backed attempts at adjudication, which took the shape of the International Criminal Tribunal for Rwanda (ICTR) and the Extraordinary Chambers in the Courts of Cambodia (ECCC). While the ICTR was composed fully of international judges and sat in Tanzania, the ECCC, located in Cambodia, was based on a hybrid model where international prosecutors and judges were paired with Cambodian counterparts (Peck, 2018). Additionally, Rwanda employed the Gacaca court system, which comprised over 12,000 community-based courts (HRW, 2011). Jointly, these case studies allow for investigating the opportunities and limitations of post-genocide adjudicatory processes, focusing on the differences between top-down and grassroots approaches, and the role of multiple stakeholders—including international, state, and local actors—in such processes.

Justice as an illusory goal: The structural limitations of post-genocide adjudication

Both Rwanda's ICTR and Cambodia's ECCC expose the limitations of top-down and international-backed efforts at delivering justice in post-genocide settings. While political and administrative obstacles prevented these tribunals from punishing the perpetrators of atrocities, their experience-distant and non-victim-centred approaches limited their abilities to meet the needs of the genocides' victims. Before addressing these limitations, however, it is worth noting the potential advantages of such adjudicatory efforts. Most notably, national and international tribunals have the adequate skills as well as the financial and technical resources to bring the most high-profile perpetrators to justice.

They can help (re-)tell the stories and experiences of genocide's victims, while providing them with adequate protection and psychological support. Through allocating financial compensation, they can also help meet the socio-economic needs of the victims, whose livelihoods are often destroyed during the genocide.

Yet, the ECCC and ICTR failed to achieve these goals. First, the tribunals delivered a relatively low number of convictions—just 3 in the case of the ECCC and 61 in the case of the ICTR (Peck, 2018; Cascais and Ehl, 2019; UN News, 2015). Due to the influence of the present regimes in Cambodia and Rwanda on the courts' structures and proceedings, neither tried suspects linked to the current governments (HRW, 2015; Cascais and Ehl, 2019; Un, 2013). In the case of ECCC, the court's refusal to put more suspects on trial—due to an administratively-determined definition of "high-ranking officials" as well as the court's self-perception as a high-profile institution—drew condemnation (AFP, 2017). The ECCC also suffered from allegations of corruption and politicisation, which further reduced its legitimacy (Campbell, 2014).

At the same time, both courts largely failed to address the needs of the victims or adequately engage them in the proceedings. Despite victims' often dire financial situation, the courts' mandates did not permit them to allocate reparations or adequate socio-economic support (HRW 2015, Open Society, 2013; Zegveld, 2019). Moreover, although most Cambodians and Rwandans were affected by the genocides, the countries' populations remained little aware of the ongoing trials at the ECCC and ICTR, not to mention understanding the specifics of their "work, proceedings, or results" (Pham et al., 2009: 3; Abe, 2013: 9; Uvin and Mironko, 2003: 221). The ICTR, in particular, was criticised for insufficient engagement with the victims and their "instrumentalisation" (Baumgartner, 2008: 433; Majola, 2014: 9). Indeed, victims' rights organisations have raised multiple concerns with the ICTR treatment of the victims, and some chose to cut cooperation with the court (Trumbull, 2008: 787; IFHR, 2002).

The structural constraints of such top-down adjudicatory processes explain these weaknesses of the ECCC and ICTR. The legalism and strict structures of such bodies mean that they allow for little engagement of the victims—beyond giving testimony or participating in consultations, should these take place— not to mention influencing the shape of the legal process. According to Robins (2017: 58), such "structural limitations of the dominant mechanisms of trials and truth commissions accommodate victims only as nominal or instrumental actors." As he further notes, while "such institutions require victims, … the benefits to victims of their role appear limited" (ibid.). Unable to account for the perspectives of victims and/or domestic populations, such institutions remain experience-distant and detached from local communities. Their structures and adherence to stringent international legal standards also make them ill-equipped to consider local values and conceptions of justice (Wielenga, 2018). Given these limitations to achieving restorative and retributive justice, the emphasis on attaining justice and reconciliation through such high-level tribunals is often misguided, as it both directs attention away from victims' often most imminent needs—be these psychological or socio-economic ones—and creates high expectations which, when unmet, may be a source of further distress for the victims.

Post-genocide adjudication as a performance of justice

The limitations and narrow results of the adjudication mechanisms discussed above stand in stark contrast with the high aspirations of such bodies as well as the attention and resources they tend to attract. Conceptualising these adjudicatory processes as *performances of justice* allows for explaining this tension and understanding its implications for delivering justice. Such a lens was originally suggested by Hannah Arendt (1951), who observed the theatrical features of the Eichmann trial, drawing attention to its highly public nature and structural characteristics, e.g., the presence of an audience, theatre-like courtroom architecture. In highlighting these elements, Arendt focused primarily on the performative elements of court proceedings internal to the courtroom (Bilsky, 1996).

I propose, however, that it is possible to refer the broader process of adjudication—from the commencement of relevant tribunals to the delivery of their verdicts—as a *performance of justice*, to describe the spectacle-like adjudicatory process, which largely fails to deliver justice and discounts the needs of the victims. This interpretation is informed by several key features of the ICTR and ECCC proceedings. First, the fact that their deliberations were expensive (with estimated costs at, respectively, $300 million and $2 billion), lengthy (lasted over a decade each), and (self-)described as high-profile created a surrounding atmosphere of grandiosity, importance, and inaccessibility

(Mydans, 2017; Leithead, 2015; Beech, 2018; AFP, 2017; Schense at al., 2017: 114, 439; OHCHR 2015). Such sense of exclusivity was further exacerbated by the courts' detachment from ordinary Cambodians and Rwandans, matched by their close relationships with high-ranking officials, including the UN Secretary General and heads of state. Second, given the international attention and acclaim received by both courts, it is possible to see the international community, rather than domestic populations, as the primary audience of the performance. Indeed, UN sources praise ICTR's "substantial contribution[s]" and its "major role in fight against impunity" and recount ECCC's "successes" and "unique achievements" which—we learn from Ban Ki-Moon's speech—were "vital in the world's fight against impunity" (UN News, 2015; Ki-Moon, 2010; UNAKRT, 2014). Finally, as noted above, neither the courts' high aspirations not the resources and attention they consumed were matched by the outcomes of their deliberations. These adjudication mechanisms therefore constituted little more than performances.

Such performative nature acts a major limitation for delivering justice. It conceals the non-results of the trials as such grand spectacles can create an impression that the "genocide chapter" of country's history is "closed", whereas in fact the needs of the victims remain unmet and justice undelivered. It also masks the underlying power structures and processes at play, which might have long-term implications for the domestic populations of the countries affected by genocides, including their victims.

It is worth further investigating this latter limitation. Knowing that post-genocide adjudicatory processes often fail to deliver justice, we should be asking what's happening—to use Hinton's (2018) term—behind such "justice façades." Analysing the role and interests of the actors—both national and international—involved in the project of post-genocide adjudication helps answer this question. At the national level, a performance of justice can serve several purposes. Given the destructive impacts of genocide on states' structures and legitimacy, it legitimises the state and aids the state-building process (Robins, 2017: 43). It also gives legitimacy to the new government and protects its reputation, by sheltering government officials from justice. Indeed, neither the ECCC not the ICTR put on trial any of the officials linked to the present ruling regimes despite evidence of their involvement in genocidal violence. Finally, the process of defining the categories of victims and perpetrators has profound political implications. According to Bowsher, "the antagonistic striations of race and class … are smoothed over and effaced by narratives organised around victims and perpetrators of physical violence" (Bowsher, 2018A: 97; 2018B). These categories are also deeply depoliticising and make the victims more easily "governable" (ibid.). At the same time, at the global level, international-backed adjudicatory processes may allow the major actors and ideologies to permeate and/or dominate local settings (see Bowsher, 2018A; Robins, 2017; Hinton, 2018). Engaging institutions such as the United Nations in post-genocide adjudication efforts gives them considerable leverage and allows them to shape countries' post-conflict future, which risks further undermining the agency of the local actors. Moreover, while such institutions might support the goals of justice and reconciliation, they define these goals in relation to the political and economic ideas—such as support for liberal democracy or neoliberal globalisation—embedded to their structures and operations (Bowsher, 2018A; Hinton, 2018). This is exemplified by a 1992 UN report, "An Agenda for Peace," which makes a connection between transitional justice and hopes for achieving "more open forms of economic policy" (Bouros-Ghali, 1992: 5 in Hinton, 2018). Post-genocide adjudicatory processes might therefore act as entry points for political and economic actors and ideas, while simultaneously disguising them behind the performances of justice.

Possibilities for delivering justice: Lessons from Rwanda's Gacaca

Grassroots justice schemes—through allowing for local and victim-driven approaches to justice—offer possibilities for overcoming many of the obstacles of top-down adjudicatory processes discussed above. The lessons from Rwanda's Gacaca, a community-based court system, can help inform such approaches. First, Gacaca's structure and approach were largely victim-centred. Gacaca allowed for high levels of victims' engagement at different stages of the processes, from electing Gacaca judges to participating in the locally-held trials (Brouwer and Ruvebana, 2013: 940-941). Victims and community members were able to share their experiences (should they wish to do so) and contribute to the understanding of the genocide and shaping the narratives around it. Moreover, encouragement of perpetrators' confessions allowed the survivors to learn of what happened to their loved ones and of their burial places—which some victims described as "'medicine' which aided their healing" (Thibodeau, 2020: 23)—and created room for "ordinary killers to regain their humanness" (Reuchamps, 2008: 11). Indeed, both victims and perpetrators reported truth-telling to be amongst the largest benefits of Gacaca (Thibodeau, 2020: 23). Through 469

interviews with Gacaca participants, Clark (2010: 3) shows that the process contributed to "reconciliation and social reconstruction." Moreover, the local nature of Gacaca ensured that it accounted for local values and understandings of justice. Gacaca also allocated compensation in the shape of community service and/or financial aid which, although often described as insufficient, went beyond the "moral reparations" or ECCC and ICTR (Reuchamps, 2008: 11; HRW, 2011, Open Society, 2013). Finally, the scale of Gacaca—over 12,000 courts tried over 1,200,000 cases—allowed for bringing justice, albeit imperfect, to large numbers of victims in a relatively short period of time (UN, 2012).

It is key to note that such grassroots systems are not without limitations. In the case of Gacaca, Human Rights Watch (2011) has documented instances of corruption, procedural irregularities, violations of defendants' rights and insufficient protection of victims. More broadly, grassroots justice systems have been dismissed as gender-biased, patriarchal, not "truly" participatory and serving to exacerbate existing cleavages and inequalities (see Allen and Macdonald, 2013; Haider, 2016; Waldorf, 2006: 77; Huyse and Salter, 2008).

This essay does *not* propose Gacaca, in its original shape, as a template for post-genocide adjudicatory processes. Rather, given that it overcomes multiple structural obstacles of top-down systems, it should serve as an inspiration for building truly grassroots, actor-oriented, and victim-driven post-genocide justice schemes. Notably, there is significant room to mitigate some of Gacaca's weaknesses. For instance, HRW's 2011 highly critical report tied most of its weaknesses to the lack of renumeration and insufficient training of judges, a limitation that could (relatively) easily be overcome. Similarly, while Gacaca is alleged to have been used to "assert the power of the government" (Longdman, 2009: 304, 2010), widespread participation in such processes can create room for checking power and disrupting governments' hidden agendas. Thus, while Gacaca was a largely victim-driven and bottom-up process—which facilitated the delivery of justice—the possibilities of grassroots justice systems extend *beyond* the benefits offered by Gacaca.

Conclusion

Concluding, grassroots justice schemes are better equipped to deliver justice in the aftermath of genocide than top-down state-led adjudication mechanisms. The latter are severely constrained by the interests of the state and international actors and their legalistic and non-victim-centred approach. These limitations mean that, in practice, (inter)national-backed courts often constitute little more than *performances of justice*. Grassroots systems, on the other hand, while not without limitations, allow for overcoming the structural weaknesses of top-down mechanisms. Through their bottom-up, actor-oriented, victim-driven approach, they create possibilities for both punishing the perpetrators and meeting the needs of the victims—thereby supporting both the retributive and restorative justice goals—while awarding agency to the victims and local communities, inviting diverse stakeholders to shape the narratives of genocide, and paving the way for intra-community reconciliation.

Bibliography

Abe, Toshihiro. "Perceptions of the Khmer Rouge Tribunal among Cambodians: Implications of the Proceedings of Public Forums Held by a Local NGO." *Southeast Asia Research* 21, no. 1 (2013): 5–26. https://www.jstor.org/stable/23752584.

AFP News. "Top Khmer Rouge Leader Denies Genocide at Close of UN-Backed Trial." *JusticeInfo.Net* (blog), 2017. https://www.justiceinfo.net/en/33669-top-khmer-rouge-leader-denies-genocide-at-close-of-un-backed-trial-2.html.

Allen, Tim, and Anna Macdonald. "Post-Conflict Traditional Justice: A Critical Overview," 2013. https://core.ac.uk/display/20050781?utm_source=pdf&utm_medium=banner&utm_campaign=pdf-decoration-v1.

Arendt, Hannah. *The Origins of Totalitarianism*. New ed. A Harvest Book HB244. New York: Harcourt Brace Jovanovich, 1951 [1973].

Baumgartner, Elisabeth. "Aspects of Victim Participation in the Proceedings of the International Criminal Court."

International Review of the Red Cross 90, no. 870 (2008): 409–40.

Beech, Hannah. "Khmer Rouge's Slaughter in Cambodia Is Ruled a Genocide." *The New York Times*, 2018, sec. World. https://www.nytimes.com/2018/11/15/world/asia/khmer-rouge-cambodia-genocide.html.

Bilsky, Leora Y. "When Actor and Spectator Meet in the Courtroom: Reflections on Hannah Arendt's Concept of Judgment." *History and Memory* 8, no. 2 (1996): 137–73. https://www.jstor.org/stable/25618708.

Bowsher, Josh. "Law & Critique: Transitional Justice as 'Omnus et Singulatim.'" *Critical Legal Thinking* (blog), 2018. https://criticallegalthinking.com/2018/06/07/law-critique-transitional-justice-as-omnus-et-singulatim/.

Bowsher, Josh. "'Omnus et Singulatim': Establishing the Relationship Between Transitional Justice and Neoliberalism." *Law and Critique* 29, no. 1 (2018): 83–106. https://doi.org/10.1007/s10978-017-9198-3.

Brouwer, Anne-Marie, and Etienne Ruvebana. "The Legacy of the Gacaca Courts in Rwanda: Survivors' Views." *International Criminal Law Review* 13, no. 5 (2013): 937–76. https://doi.org/10.1163/15718123-01305001.

Cascais, Antonio, and David Ehl. "ICTR: A Tribunal That Failed Rwandan Genocide Victims and Survivors | DW | 08.11.2019." DW.com, 2019. https://www.dw.com/en/ictr-a-tribunal-that-failed-rwandan-genocide-victims-and-survivors/a-51156220.

Clark, Philip. *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda: Justice without Lawyers* . Cambridge Studies in Law and Society. Cambridge ; New York: Cambridge University Press, 2010.

Guichaoua, André. "Counting the Rwandan Victims of War and Genocide: Concluding Reflections." *Journal of Genocide Research* 2020, no. 1 (2020): 125–41. https://doi.org/10.1080/14623528.2019.1703329.

Haider, Huma. *Transitional Justice: Topic Guide*. GSDRC, 2016.

Hermann, Donald. "Restorative Justice and Retributive Justice: An Opportunity for Cooperation or an Occasion for Conflict in the Search for Justice." *Seattle Journal for Social Justice* 16, no. 1 (December 19, 2017). https://digitalcommons.law.seattleu.edu/sjsj/vol16/iss1/11.

Hinton, Alexander. "Introduction: The Transitional Justice Imaginary." In *The Justice Facade: Trials of Transition in Cambodia*, 2018. https://oxford.universitypressscholarship.com/view/10.1093/oso/9780198820949.001.0001/oso-9780198820949-chapter-1.

Human Rights Watch (HRW). "Justice Compromised: The Legacy of Rwanda's Community-Based Gacaca Courts." Human Rights Watch, 2011. https://www.hrw.org/report/2011/05/31/justice-compromised/legacy-rwandas-community-based-gacaca-courts.

Human Rights Watch (HRW). "Rwanda: International Tribunal Closing Its Doors." Human Rights Watch, 2015. https://www.hrw.org/news/2015/12/23/rwanda-international-tribunal-closing-its-doors.

Huyse, Lucien, and Mark Salter, eds. *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences*. Stockholm: International Idea, 2008.

International Federation for Human Rights (IFHR). "Victims in the Balance: Challenges Ahead for the ICTR," 2002. http://www.iccnow.org/documents/FIDHrwVictimsBalanceNov2003.pdf.

Ki-Moon, Ban. "Secretary-General's Remarks at Extraordinary Chambers in the Courts of Cambodia." United Nations Secretary-General, 2010. https://www.un.org/sg/en/content/sg/statement/2010-10-27/secretary-generals-remarks-extraordinary-chambers-courts-cambodia.

Leithead, Alastair. “Rwanda Genocide: International Criminal Tribunal Closes.” *BBC News*, 2015, sec. Africa. https://www.bbc.com/news/world-africa-35070220.

Longman, Timothy. “An Assessment of Rwanda’s *Gacaca* Courts.” *Peace Review* 21, no. 3 (2009): 304–12. https://doi.org/10.1080/10402650903099369.

Longman, Timothy. “Trying Times for Rwanda: Re-evaluating Gacaca Courts in Post-Genocide Reconciliation.” *Harvard International Law Review* 32, no. 2 (2010): 48–52. http://restorativejustice.org/rj-library/trying-times-for-rwanda-reevaluating-gacaca-courts-in-post-genocide-reconciliation/9950/.

Majola, Bongani. “Speech of The ICTR Registrar, Mr. Bongani Majola on the Occasion of The Commemoration of the 20th Anniversary of The Establishment of the ICTR.” 2014. https://unictr.irmct.org/sites/unictr.org/files/publications/compendium-documents/i-20th-anniversary-speech-registrar-majola_1.pdf.

Meierhenrich, Jens, ed. *Genocide: A Reader*. Oxford: Oxford University Press, 2014.

Mydans, Seth. “11 Years, $300 Million and 3 Convictions. Was the Khmer Rouge Tribunal Worth It?”*The New York Times*, 2017, sec. World. https://www.nytimes.com/2017/04/10/world/asia/cambodia-khmer-rouge-united-nations-tribunal.html.

Open Society. “The Funding Challenge for Reparations in Cambodia.” Open Society Justice Initiative, 2013. https://www.justiceinitiative.org/publications/funding-challenge-reparations-cambodia.

Peck, Grant. “Experts on Cambodia’s Khmer Rouge Tribunal: ‘A Complete Failure.’” CTVNews, 2018. https://www.ctvnews.ca/world/experts-on-cambodia-s-khmer-rouge-tribunal-a-complete-failure-1.4181422.

Pham, Phuong N., Patrick Vinck, Sokhom Hean, and Eric Stover. “So We Will Never Forget: A Population-Based Survey On Attitudes About Social Reconstruction and the Extraordinary Chambers in the Courts of Cambodia,” 2009. https://escholarship.org/uc/item/74x685xm.

Reuchamps, Min. “What Justice for Rwanda? Gacaca versus Truth Commission?” *Working Papers in African Studies Series* 256 (2008). https://orbi.uliege.be/handle/2268/418.

Robins, Simon. “Failing Victims? The Limits of Transitional Justice in Addressing the Needs of Victims of Violations.” *Human Rights and International Legal Discourse*, 2017, 41–58. https://eprints.whiterose.ac.uk/122438/.

Schense, Jennifer, Linda E. Carter, and International Nuremberg Principles Academy, eds.*Two Steps Forward, One Step Back: The Deterrent Effect of International Criminal Tribunals*. Nuremberg Academy Series, no. 1 (2017). Brussels [Belgium]: Torkel Opsahl Academic EPublisher, 2017.

Thibodeau, Mary. “Analyzing the Social Impact of Gacaca Courts in the Reconciliation Process in Rwanda.” *Independent Study Project (ISP) Collection*, 2020. https://digitalcollections.sit.edu/isp_collection/3376.

Trumbull, Charles. “The Victims of Victim Participation in International Criminal Proceedings.” *Michigan Journal of International Law* 29, no. 4 (2008): 777–826. https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1156&context=mjil.

Un, Kheang. “The Khmer Rouge Tribunal: A Politically Compromised Search for Justice.” *The Journal of Asian Studies* 72, no. 4 (2013): 783–92. https://doi.org/10.1017/S0021911813001101.

UN Human Rights Office of the High Commissioner (OHCHR). “Promotion of ECCC Legacy | OHCHR,” 2015. https://cambodia.ohchr.org/en/rule-of-law/promotion-eccc-legacy.

UN News. “UN Tribunal on Rwandan Genocide Formally Closes – Major Role in Fight against Impunity.” UN News, 2015. https://news.un.org/en/story/2015/12/519212-un-tribunal-rwandan-genocide-formally-closes-major-role-fight-against-impunity.

United Nations (UN). “The Justice and Reconciliation Process in Rwanda.” Outreach Programme on The Rwanda Genocide, 2012. https://www.un.org/en/preventgenocide/rwanda/pdf/bgjustice.pdf.

United Nations Assistance to the Khmer Rouge Trials (UNAKRT). “UN Staff Assist Khmer Rouge Tribunal Reach Historic Verdict.” Permanent Missions, 2014. https://www.un.int/news/un-staff-assist-khmer-rouge-tribunal-reach-historic-verdict.

Uvin, Peter, and Charles Mironko. “Western and Local Approaches to Justice in Rwanda.” *Global Governance* 9, no. 2 (2003): 219–31. https://www.jstor.org/stable/27800476.

Waldorf, Lars. “Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice.” *Temple Law Review* 79, no. 1 (2006).

Wielenga, Cori. “What Is ‘the Local’? Exploring Grassroots Justice Systems as a Means of Understanding the Local.” *Kujenga Amani* (blog), 2018. https://kujenga-amani.ssrc.org/2018/04/17/what-is-the-local-exploring-grassroots-justice-systems-as-a-means-of-understanding-the-local/. Zegveld, Liesbeth. “Victims as a Third Party: Empowerment of Victims?” *International Criminal Law Review* 19, no. 2 (2019): 321–45. https://doi.org/10.1163/15718123-01806002