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**ERASING THE NON-JUDICIAL NARRATIVE: VICTIM TESTIMONIES AT THE
KHMER ROUGE TRIBUNAL**

By Mahdev Mohan & Vani Sathisan¹

“This Tribunal is not about politics, this is about justice.” – Cambodian Prime Minister Hun Sen.

INTRODUCTION

International criminal justice is widely regarded as the accepted means to deal with mass atrocity. It fortifies and “lends authority and legitimacy to the international realm through tribunals, proceedings and juridical language.”² Various peace agreements concluded in the 1990s enshrine the primacy of international justice through individual accountability as a catalyst for national stability.³ United Nations (“UN”) Security Council Resolution 1329, which established the International Criminal Tribunal for the Former Yugoslavia (“ICTY”), sought to “bring to justice those responsible for serious violations of international humanitarian law” and thus contribute to the “restoration and maintenance of peace in the region.”⁴

To former ICTY President Antonio Cassese, peace and justice go hand-in-hand:

*“Justice is an indispensable ingredient of the process of national reconciliation. It is essential to the restoration of peaceful and normal relations between people who have had to live under a reign of terror. It breaks the cycle of violence, hatred and extra-judicial retribution.”*⁵

Even as the ICTY prepares to conclude its tasks by 1 July 2013, this formula for achieving peace through justice appears to have taken root in the normative discourse of

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² Jackson Nyamuya Maogoto, *War Crimes and Realpolitik: International Justice from World War I to the 21st Century*, Lynne Rienner Publishers, 2004: <https://www.rienner.com/uploads/47da985f5271e.pdf>

³ Simon Chesterman, *You the People, The United Nations, Transitional Administration, and State-Building* (Project of the International Peace Academy) *Human Rights Quarterly* - Volume 27, Number 2, May 2005, p. 159

⁴ Website of the ICTY: <http://www.icty.org/sid/320>

⁵ Antonio Cassese, ICTY Press Release Number 27, 24 November 1995.

international justice and has been employed in the founding documents of international(ized) courts⁶, including the statute of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”)⁷.

On April 17, 1975, Pol Pot and the Khmer Rouge entered Cambodia’s capital Phnom Penh as conquerors.”⁸ Pol Pot sought to create an ultra-Marxist agrarian utopia and “turned back Cambodian clocks to year zero.”⁹ The *Angkar* or ‘Organization’, as the revolutionary movement named itself, was the sole governing power and the owner of all means of production and private property.

Cambodia was renamed Democratic Kampuchea (DK). There was, however, nothing democratic about the regime or its methods. From 1975 to 1979, an estimated 1.7 million people were executed or died of overwork, starvation, torture or untreated disease at the hands of the Khmer Rouge.¹⁰ Twenty five years later, the Cambodian government and UN agreed to establish the ECCC, a hybrid tribunal that seeks to hold the senior leaders of the Khmer Rouge those most responsible for the crimes accountable under law.¹¹ According to then UN Secretary-General Kofi Annan, the ECCC was meant to symbolize “judicial accountability, which alone can provide the basis for peace, reconciliation and

⁶ We use the phrase international(ized) to refer to both purely international *ad hoc* courts such as the international criminal tribunals for the former Yugoslavia (“ICTY”) and Rwanda (“ICTR”), and the International Criminal Court (“ICC”) as well as hybrid tribunals, such as the [Special Panels of the Dili District Court](#) (“SPDC”), the [Special Court for Sierra Leone](#) (“SCSL”), the Special Tribunal for Lebanon and the Extraordinary Chambers in the Courts of Cambodia (ECCC).

⁷ For example, in relation to the Special Court for Sierra Leone, the hope of the UN Security Council was that a “credible system of justice and accountability for the very serious crimes committed there would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace.” – UN Security Council Resolution 1315 (2000), Preambular Paragraph 6 (August 14, 2000).

⁸ Shanberg, Sydney H, *The Death and Life of Dith Pran* (New York: Penguin, 1985), p.26.

⁹ Powers, Samantha, *A Problem From Hell, America and the Age of Genocide* (Perennial Harper Collins Publishers, 2002), p. 87.

¹⁰ *See generally* David P. Chandler, *The Tragedy of Cambodian History*, (New Haven: Yale University Press, 1991).

¹¹ Please see Statute of the ECCC:

[http://www.eccc.gov.kh/english/cabinet/agreement/5/Agreement between UN and RGC.pdf](http://www.eccc.gov.kh/english/cabinet/agreement/5/Agreement%20between%20UN%20and%20RGC.pdf)

development.”¹² Reiterating this formula when recommending the establishment of the ECCC, the UN General Assembly added that justice would also serve as a “remedy” for victims:

*“Accountability of individual perpetrators of grave human rights violations is one of the central elements of any effective remedy for victims of human rights violations and a key factor in ensuring a fair and equitable justice system and, ultimately, reconciliation and stability.”*¹³

To provide “remedy” to the victims and “reconciliation” to the broader Cambodian society through “accountability,” the ECCC’s Internal Rules promised victims an unprecedented opportunity to participate in the trials as “Civil parties.” Purporting to give ownership of the trials to survivors of the Khmer Rouge regime, the ECCC has encouraged them to participate in its trials as “civil parties,” with the promise that they will now be conferred with the power to cross-examine witnesses, have a voice in the proceedings and very significantly, be able to request for collective and moral reparations.¹⁴ Many have hailed victim participation as a tool of empowerment and believe that the Tribunal may stand a good chance of meeting local expectations because it gives a prominent role to victims in the legal process.¹⁵

¹² Preamble, Report of the Group of Experts.

¹³ Preamble, Resolution adopted by the General Assembly – the Khmer Rouge Trials, GA Resolution A/RES/57/228, 27, February 2003 [the UN GA Resolution adopting the UN Agreement which created the ECCC].

¹⁴ ECCC Internal Rules, 17 September 2010: <http://www.eccc.gov.kh/english/cabinet/fileUpload/121/IRv6-EN.pdf>

¹⁵ James Cockayne, “Hybrids or Mongrels? Internationalized War Crimes trials as Unsuccessful Degradation Ceremonies” *Journal of Human Rights*, 4:455, 2005 atp.459. Also, Diane Orentlicher, special counsel of the Open Society Justice Initiative, believes that the Tribunal marks the evolution of international criminal justice, “recognition, after 15 years of international and hybrid courts like this one, not to exclude victims from the justice that is being dispensed on their behalf”, telephone interview with Seth Mydans, “*In the Khmer Rouge Trials, Victims will not Stand Idle By*” *New York Times*, June 17 2008.

Relying on these sentiments, the ECCC's biggest donors, such as Canada, Japan and the European Union, expect the tribunal to usher in "lasting peace and reconciliation"¹⁶ and to "promote peace, democracy, the rule of law and good governance" in Cambodia.¹⁷ However, it appears to us that the globalitarian rhetoric of peace through justice promises more than it can deliver.

Yet, peace and justice, we argue, do not always go hand-in-hand; in part, because prosecution (justice) is often prioritized over the requirements of reconciliation (peace). Although the phrase "transitional justice" is used to refer to both prosecution of war criminals and post-conflict capacity building, "it is typically the former that receives the most attention and resources."¹⁸ Moreover, at least three tensions plague the prosecution of international crimes. They are, first, the tension between the need to focus narrowly upon the person of the accused, while simultaneously establishing a wider historical record of past events; second, the tension between adhering to the strictures of the legal process, while attending to the suffering of individual victims; and, finally, the tension between the need to make harrowing past events the focus of the trial, whilst aspiring to contribute to the creation of a more hopeful future.¹⁹

Our article disputes the frequently asserted – but rarely examined – second claim that victim-participants benefit from participating in war crimes trials and may be able to reconcile with their traumatic pasts. In particular, our article will consider the ECCC's first

¹⁶ Please refer to: <http://www.france24.com/en/20090321-japan-announces-funds-broke-khmer-rouge-tribunal-cambodia>

¹⁷ Please refer to: <http://www.canada.com/ottawacitizen/news/story.html?id=b4fa6297-d68c-4e4f-bc42-1e21065f45dd>

¹⁸ Simon Chesterman, An International Rule of Law?, *American Journal of Comparative Law*, Vol. 56, pp. 331-361, 2008

¹⁹ See generally Marie-Benedicte Dembour and Emily Haslam, "Silencing Hearings? Victim-Witnesses at War Crimes Trials," *European Journal of International Law*, February 2004.

trial (“Case 001”) which concluded in July 2010 after almost a year and a half of proceedings.

We recognize that the ECCC, like other international(ized) criminal tribunals, has its limitations in terms of funds and resources and do not seek to freight the Tribunal with more baggage than it ought to withstand. Nevertheless, it is crucial that the ECCC be held to its stated promise of “victim empowerment” and of “pursuing internationally accepted principles of justice and of national reconciliation,” which have set expectations for justice in Cambodia soaring.²⁰

Cambodian victims who came forward to participate in Case 001 were led to believe that the Defendant, Kaing Guek Eav, better known by his *nom de guerre* “Duch”), the commandant of S-21 or “Tuol Sleng” prison where close to 17,000 people perished, would be brought to book *on their terms*. However, the gap between the ECCC’s feel-good rhetoric and reality; between victims’ desires for vindication and the strictures of legalism are significantly wide.

To claim, as ECCC affiliates do, that catharsis and reconciliation necessarily flow from legal accountability is misleading. Drawing upon the seminal work of Judith Shklar and her description of gradations or degrees of legalism, we analyze journalistic and trial monitoring reports relating to the experiences of victims before the ECCC in Case 001. Our article would certainly have been enriched by empirical research into how civil parties perceived their participation in their proceedings and their treatment by the court. However, this is not a

²⁰ The ECCC was established by the UN agreement dated 6 June 2003 and implemented by the ECCC law, which entered into force on 27 October 2004. It came into formal existence and began operating on the 3rd of July 2006 when judges were sworn in and on the 12 June 2007, the internal rules, upon which its investigations and prosecutions were based, were adopted in the plenary meeting of judges. (Mohan, p.284)

reason to forestall examination of these issues. This article will, we hope, serve to guide the ECCC in how it should modify the trial process and consider ways in which to conceive and engage with non-judicial measures outside the court-room which may be more resonant with victim civil parties.

TRAUMA IN THE COURT-ROOM

Anyone who has suffered from physical, psychological, or material harm as a direct consequence of the crimes committed by the Khmer Rouge between 1975 and 1979 is considered a “victim” and may apply to become a ‘civil party’ to the proceedings at the ECCC. Civil parties enjoy rights at trial akin to the prosecution and the defence. The ECCC’s civil party process thus derives from a victim-oriented approach to punishment, which suggests that a victim needs to tell her story before a judge within the framework of a formalized process in order to feel better. In theory, the notion that victims benefit from participation is difficult to dispute, but in practice the civil party process leaves much to be desired.

According to Internal Rule 23(1), victims can participate in the proceedings by ‘supporting the prosecution;’ yet the extent and parameters within to which they are able to provide supplementary information to be accepted by the Co-investigating Judges, question witnesses or the defendants and add weight to the Co-Prosecutors’ elbow by adducing new evidence are not clearly defined. As a result, the court has been vested with a wide ambit of discretion when determining the extent to which civil parties should be able to participate.²¹ In addition, monitors at the Tribunal report that the Court failed to budget for the inclusion of a victims’ participation process from the outset of the proceedings and thus has not fully

²¹ Please see KRT Trial Monitoring Reports: Monitoring Program Update # 22: “Lessons Learned from Duch’s Trial”: http://socrates.berkeley.edu/~warcrime/KRT_monitoring_reports.htm

committed itself to meaningfully upholding its promise of active participation to victim civil parties.²²

These vagaries impinged on the rights of victim civil parties in Case 001. Defence lawyer Francois Roux invoked Rule 23(1) to argue that Civil parties merely were there to act as a “second prosecutor.” Civil Party lawyers took issue with the watered-down role of the victim witnesses, arguing that Civil parties were not participating in the trial only to prove the guilt of the Accused but also to express their views and to confront and understand why atrocities had occurred. Lawyer for Civil Party Group 1, Alain Werner, argued for a broad interpretation of Internal Rule 23(1) as there was no guidance to the Rule defining the parameters of “civil party participation.”²³

Civil Party Mr. Chum Mey said that he keenly felt a sense of satisfaction whenever the Court responded to his observations or complaints.²⁴ Yet, throughout the trial, the court increasingly adopted a restrictive approach to civil party participation, paying less and less attention to the views of civil parties.²⁵ Civil parties were at first not afforded the right to make opening statements at the Tribunal. Later, their requests to be allowed to make submissions on the defendants’ release from provisional detention as well as to respond to the Co-Prosecutor’s opening statements were also both denied.²⁶ By limiting the scope of victim

²² See ‘Table S.2.e: Resource Requirements by Object of Expenditure’ and ‘Table S.2.f: Post Requirements for Defence Support Section and Victims Unit’ and paras S.82 – 89 of the budget estimates produced by the ECCC in *Revised Budget Estimates for 2005 – 2009 (July 2008)*, available online at: <http://www.unakrt-online.org/04_documents.htm#Budget>. The tables show that the Court’s original budget did not provide for any funding for a victims participation scheme. This has been elucidated in the KRT Trial Monitoring Report: Monitoring Program Update # 22.

²³ *Supra* note 20.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*

participation in the trial, the court prompted civil parties to actively boycott the proceedings in a silent protest against the Judges' decisions.²⁷

On one occasion, the President of the ECCC Trial Chamber, Nil Nonn, told civil parties to console themselves and carry on with their evidence because time was of the essence. When witnesses broke down and their lawyers asked for more time to help victims compose themselves, the President became annoyed, stressing that “the Chamber was already vigilant about keeping track of the time used for questions.”²⁸ When Chum Mey broke down several times, he was immediately instructed by the President to “compose himself.”²⁹ He went on to remind civil parties to gather themselves quickly because details might be forgotten if they expressed emotion in the court-room. Clearly, judges were unable to deal with nervous, traumatized witnesses who were testifying to their experiences from more than thirty years ago.

This echoes the manner in which victim witnesses were treated in the trial of Radislav Krstic in the ICTY, where even though the Court aimed to restore peace and reconciliation, it could only legally try the defendant brought before it. It was left to social psychologists and historians to plumb the depth of the Srebrenica massacre and probe the deep-seated causes by listening to victims' stories.³⁰ Judges and witnesses talked past each other. It was apparent that legal proceedings cannot produce the definitive collective memory of the events with which they deal and that there is a need to foster a variety of collective memories outside the judicial platform.

²⁷ See “Letter of Civil parties in Case 001 to the President of Trial Chamber;” Interview with Civil Party Chum Mei; Interview with Civil Party Chum Neou.

²⁸ “Traumatized survivor painted Pol Pot amidst screams for help,” Laura MacDonald, 1 July 2009.

²⁹ Ibid.

³⁰ *Supra* note 18.

In the interests of time and securing convictions, the victims' full narrative is pruned and then co-opted by the legal process, thereby instrumentalizing individual memory, trauma and suffering for the court's collective end of wanting to fit the legal pieces and establishing criminal liability.

In its decision issued on 9 October 2009, the majority of the Trial Chamber noted that Civil parties' role in trial proceedings did not confer on them 'a general right of equal participation with the Co-Prosecutors.'³¹ Though previously able to question witnesses and the defendants on issues pertaining to their character, civil parties were thereafter robbed of the opportunity to fully immerse participate in the proceedings. Delivering a powerful dissent, Judge Laverne criticized the Chamber's decision, noting that it would be difficult to achieve reconciliation if victims were deprived of their right to inquire why the crimes had been committed against them.³² In fact, Expert Witness Dr Chhim Sotheara confirmed that victims could hardly overcome their traumatization without identifying "those people behind the intangibility."³³

The judicial endeavour of the ECCC, to maintain a legally authoritative account of what happened, crippled the participation of the Civil parties as they are excluded from the process of asking questions that are vital in aiding them deal with their post-conflict trauma. Several Civil parties were also forced to leave the stand as their identities as victims were questioned by the Tribunal. During the testimony of Civil Party Mr Ly Hor, an alleged survivor of S-21, inconsistencies in his account led Duch to publicly challenge his identity as

³¹ *Case 001* ECCC Trial Chamber (9 October 2009) Decision, para 25.

³² Judge Lavergne's Dissenting Opinion; see also Dr Chhim Sotheara, *Case 001* ECCC Trial Chamber 'Transcript of Proceedings' (25 August 2009), p 20.

³³ *Ibid.*

a victim.³⁴ Such an experience, scholars and trial monitors assert, may “defeat the positive outcomes of participation and instead lead to re-traumatization.”³⁵ Civil party Ly Hor³⁶ took the stand only to have his oral testimony and credibility come under fire as it deviated materially from both his written statement and the written confession purportedly produced at S-21 that he insisted was his own.

Ly Hor’s lawyers,³⁷ who appeared none the wiser, were unable to offer any satisfactory reason for why the ECCC Trial Chamber should nevertheless regard the documents as supportive of Ly Hor’s claim.³⁸ “I suppose you would agree with me that this civil party has been very poorly prepared for this morning’s experience,” was Judge Sylvia Cartwright’s admonishment to Ly Hor’s lawyers,³⁹ after a morning of questioning that saw Ly Hor become visibly and increasingly distressed.⁴⁰ Also taken to task by the Chamber were the lawyers for civil party Nam Mon⁴¹ for Nam Mon’s belated disclosure of new allegations, which were eventually rejected.⁴²

But to Phaok Khan and Nam Mon, the inaccuracy of the written statements was peripheral to the fact that Phaok Khan was able to recount his “*very interesting*” experiences

³⁴ See *KRT Trial Monitor*, Report No.12 (week ending 9 July): http://socrates.berkeley.edu/~warcrime/KRT_monitoring_reports.htm

³⁵ *Supra* note 20.

³⁶ Civil party E2/61.

³⁷ Ly Hor was represented by lawyers from Civil Party Group 1.

³⁸ See Official Transcript of hearing on 6 July 2009 at pages 58 to 59. According to one of Ly Hor’s lawyers, the use of an informal instead of official translation resulted in the true purport of his client’s documentation being unclear: see Official Transcript of hearing on 6 July 2009 at pages 55 and 58.

³⁹ See Official Transcript of hearing on 6 July 2009 at page 55. Ly Hor informed the Trial Chamber that the last time he spoke to his lawyers was a month before his Court appearance: see Official Transcript of hearing on 6 July 2009 at page 54.

⁴⁰ KRT Report Issue No. 12 at page 7.

⁴¹ Civil party E2/32, who was represented by lawyers from Civil Party Group 2.

⁴² Nam Mon’s new allegations pertained to her alleged rape at S-21. According to Nam Mon’s lawyers, Nam Mon had not informed them of these allegations until just before her Court appearance. Nam Mon’s lawyers subsequently filed a written request for these allegations to be put before the Chamber. This was rejected on the ground that the allegations were belated: see Decision on Parties Requests to Put Certain Materials Before the Chamber Pursuant to Internal Rule 87(2), E176, 28 October 2009, at para. 14.

before the Trial Chamber.⁴³ The applications of Ly Hor and Nam Mon were ultimately rejected by the Trial Chamber.⁴⁴ By rejecting their non-judicial narrative – those parts of their stories which did not comply with the legal and evidential requirements of the court– the judges gravely underestimated the cost to survivors of laying bare their personal histories in open court, having their stories publicly undermined and his efforts potentially laid to waste. The credibility of the civil parties’ testimonies was, in their presence, questioned by the Chamber, and more fiercely, by Duch himself⁴⁵, and ultimately, for all intents and purposes, discredited.

Attempting then to create a space for victims in the judicial arena alone is misguided. Victims recount their stories of pain and distress to an audience that is more interested in seeing how these facts neatly fit evidentiary matrices. In that process, victims’ *non-evidentiary* voices, claims and desires for vindication are unfortunately not heard and taken into account, but carelessly sidelined and silenced.

At the start of Case 001, the ECCC announced that victims admitted as civil parties to the court may seek collective and moral reparations and that the court will award “any appropriate and comparable forms of reparation.”⁴⁶ On September 17, 2009, the four civil party groups in that case made their submission for reparations which included: (1) compilation and dissemination of apologetic statements made by Duch, (2) access to free medical and psychological care, (3) funding of educational programs to inform the public about crimes that took place during the Khmer Rouge regime, (4) erection of memorials to

⁴³ See Official Transcript of hearing on 7 July 2009 at pages 94 to 95.

⁴⁴ Case 001 Judgment at pages 223 to 225.

⁴⁵ For example, with regard to Ly Hor’s testimony, Duch, after bringing the Trial Chamber through certain documents, insisted that Ly Hor was wrongly claiming as his own a written confession of a different S-21 detainee who had already died: see Official Transcript of hearing on 6 July 2009 at pages 83 to 87.

⁴⁶ Please refer to: <http://www.cambodiatribunal.org/blog/labels/Civil%20Parties.html>

commemorate victims, and (6) publication of the names of all the civil parties in the final judgment.⁴⁷

At the conclusion of the trial, however, the only reparation ordered by the judges was the compilation and publication of their judgement containing names of the civil parties' and Duch's apology to his victims. The court eschewed innovative measures to settle instead for something unimaginative and expedient and that the court's preference for "expedience over recovery has unsettled many victims. Furthermore, several civil parties were told on the day of the judgment that their status as civil parties was rejected and that they would not stand to benefit from any reparations ordered by the Court – indeed these victims were made to feel that they were undeserving of even the compilation and publication of the ECCC's judgment.⁴⁸

Some civil parties we have spoken with have been disillusioned because the court process has turned out to be unreceptive to and incompatible with their subjective impressions, emotions and renditions of truth. Others who have applied to become civil parties but have been told that their applications are inadmissible for jurisdictional reasons – for instance, because the crimes they suffered took place outside the court's temporal mandate – have felt affronted because their status and identity as victims has been questioned. Still others wish to speak in their own voice in court rather than through their lawyers and are distraught when they are compelled to engage legal representation. For its part, the ECCC fearing an onslaught of almost 4000 Cambodians who have applied to be civil parties in the next case which looks set to begin in June 2011, all jostling for an opportunity to address the court, has back-pedalled on several of the rights it originally

⁴⁷ Ibid.

⁴⁸ Guy De Launey, Tears and Disbelief at Duch's Verdict, 26 July 2010: <http://www.bbc.co.uk/news/world-asia-pacific-10763409>

conferred to civil parties. In sum, the ECCC's civil party process promises far more than it can deliver.⁴⁹

TRIAL & ERROR

The Khmer Rouge's atrocities have been described as displaying "brutality that would make Hitler cringe."⁵⁰ Just as Hitler's Nazi regime was held accountable by the International Military tribunal at Nuremburg in 1945, Pol Pot and the DK Foreign Minister, Ieng Sary, were tried *in absentia* for genocide and other international crimes in 1979 by the so called People's Revolutionary Tribunal ("PRT") established by the Vietnamese installed Heng Samrin administration.⁵¹

However, even though foreign lawyers had been invited to serve as prosecutors and defence counsel in order to "reflect international standards of justice" and thereby enhance the legitimacy of the proceedings, the PRT was not well received by local and international stakeholders. The short duration of the trial, the denial of due process rights to the defendants who were convicted *in absentia* and a poor defence combined to create the impression of mob justice. Many Cambodians saw the trial as an assertion of Vietnamese sovereignty over Cambodia. The reaction in the West to the verdict was conspicuous silence – all it commanded was two square inches in the back pages of the *New York Times*. These factors created the impression of "primitive political justice" which was seen to be "akin to the Stalinist show trials of the 1930s."⁵²

Yet, even critics are hard-pressed to offer imaginative non-judicial options when examining the ambitions of war crimes trials. Despite surveying modern war crimes

⁴⁹ Almost 4,000 have applied to be civil parties in Case 002: <http://www.ictj.org/en/where/region3/642.html>

⁵⁰ "Out of the silence," *The Economist*, September 10, 1977, p.131.

⁵¹ Please refer to: <http://www.unhcr.org/refworld/country,,USCIS,,KHM,,3f52079b4,0.html>

⁵² Maguire, Peter, *Facing death in Cambodia*, (Columbia university press), 2005, p. 65.

tribunals from the trial of the Bonapartists to the indictment of former Serbian leader Slobodan Milosevic, and noting their failed efforts to mete justice and broker peace, Jonathan Bass merely concludes that they are better than violent purges or lynching – a conclusion we see as foregone:

*“A well-run legalistic process is superior, both practically and morally, to apathy or vengeance. True, the track record of war crimes tribunals so far has not been particularly impressive [...] But the track records of other approaches to defeated foes leave even more to be desired. The task is to do a tribunal, and to do it properly. If at first you don’t succeed, try again”.*⁵³

Legalism, Bass suggests, can help subdue the thirst for vengeance and transform it into a more cathartic form of being, i.e. reconciliation, “staying,” as Justice Jackson, an American prosecutor for the Nuremberg War Crimes Tribunal famously described it, “the hand of vengeance.” But cold-blooded revenge is not the only non-judicial response of survivors mass atrocity – by assuming as much legalism may, as Mark Drumbl explains, end up “externalizing justice so that it “resonates primarily with certain extraterritorial audiences.”⁵⁴ If Cambodians are to retain their place as the main beneficiary of the ECCC and its trials, then the court must transcend the rhetoric of accountability and equitable justice to begin a new normative discourse tailored to suit domestic circumstances and focuses on restorative justice. This discourse must consider, as Jenny Martinez does, that in an international criminal tribunal, “accountability and fairness are two strands of justice” that don’t always coexist.⁵⁵

REFUTING THERAPEUTIC LEGALISM

⁵³ Gary Jonathan Bass, *Stay the Hand of Vengeance* (Princeton: Princeton University, 2000), p. 57

⁵⁴ *Ibid.*

⁵⁵ *Supra* note 19.

For Judith Shklar, the assertion that the law is the ultimate recourse for victims of mass atrocity is not a self-evident one, regardless of whether legal justice is championed by positivist or natural lawyers. For her, “theories of law [...] have been devised almost exclusively by lawyers [...] who agree in nothing but in taking the prevalence of legalism and of law for granted.”⁵⁶

Legal theorists in both camps, she claims, take for granted the idea of “law as a conceptual pattern entirely distinct from all political, moral and social values and institutions.”⁵⁷ Both extol the “thereness” of the law, and adhere to the belief that a “pure theory” of law, a purely formalistic and universal conception of a legal system abstracted from all the social and political realities in which it is embedded, is not only possible, but indeed “necessary.”⁵⁸ They treat “law as a self-contained system of norms [...] without any reference to the content, aim and development of the rules that compose it”⁵⁹ and insist that the law “must be self-regulating, immune from the unpredictable pressures of politicians and moralists, [and] manned by a judiciary that at least tries to maintain justice’s celebrated blindness.”⁶⁰

Yet, as Shklar points out, by privileging formal justice above all contending interests, legalism is not the neutral ‘science’⁶¹ it claims to be, but is manifestly political; it is a calibrated “choice of political values, a choice usually in favour of stability [and] a position that is not [...] necessary or self-evident.”⁶² Formalistically instrumentalized, ‘justice’ or, as Shklar explains as the so-called “impartial blaming, praising, rewarding and

⁵⁶ Judith Shklar, *Legalism* (Cambridge: Harvard University Press, 1964) p.4

⁵⁷ Judith Shklar, *Legalism* (Cambridge: Harvard University Press, 1964) p. 33

⁵⁸ Judith Shklar, *Legalism* (Cambridge: Harvard University Press, 1964) pp. 15,35.

⁵⁹ Judith Shklar, *Legalism* (Cambridge: Harvard University Press, 1964) p. 33

⁶⁰ Judith Shklar, *Legalism* (Cambridge: Harvard University Press, 1964) p. 35

⁶¹ Judith Shklar, *Legalism* (Cambridge: Harvard University Press, 1964) p. 7.

⁶² Judith Shklar, *Legalism* (Cambridge: Harvard University Press, 1964) p. 106.

punishment of specific acts” according to consensus is not always blind, but “may be carried out for very different ends.”⁶³

Seen in this light, ‘justice’, or at least its legalist rendition is, as Thom Ringer notes, “a morality masquerading as an impartial science, deeply convinced that its presumed logical self-evidence puts itself above the nasty and confounding tumult of preferences and politics”.⁶⁴ But with war crimes trials, conflicts of all kinds – moral, political and ethno cultural – are not simply ended. In fact, as is usually the case in such trials, they are drawn out over a course of years.⁶⁵

Applied in the context of Case 001, Shklar’s critique helps explain why the ECCC’s trial process may have externalized justice away from the Civil parties who came forward to give testimony. Premised on notions of collective justice, the court assumed that “general categories correspond to essences which define individual phenomena and designate their place and purpose in a universal order”¹⁶. But bypassing the individual ‘politics’ of survivors by clothing them with a singular legal identity – that of the victim ‘Civil Party’ – hardly papers over the conflicts that have emerged between them and the court, and the survivors *inter se* : conflicts between the individual needs of victims and the requirements of collective justice.

International(ized) war crimes courts like the ECCC, much like their domestic brethren, subscribe to the mantra that “all politics must be assimilated to the paradigm of [...] the judicial process.”⁶⁶ In other words, their individuality of experience has been diminished by the aggregation of survivor identities by the ECCC and the prospect of the

⁶³ Judith Shklar, *Legalism* (Cambridge: Harvard University Press, 1964) p. 116.

⁶⁴ Thom Ringer, “Legalism & It’s Virtue: Tribunals and the concept of war crime legalism in Judith Shklar’s *Legalism* & Gary Bass’s *Stay the Hand of Vengeance*”

⁶⁵ *Id.* 22.

⁶⁶ Judith Shklar, *Legalism* (Cambridge: Harvard University Press, 1964) p. 122.

continued collectivization of justice. After all, Civil parties rarely speak with one voice and have different *extra-legal* identities, perspectives, means of experiencing catharsis, and desires for vindication.

As Shklar notes, “the policies of justice must constantly compromise with other social demands,”⁶⁷ particularly since “the inevitable diversity among people and the complexity of the demands that a highly developed culture makes upon them [...] creates a multiplicity of needs and values” which chafe against “the uncompromising character of justice.”⁶⁸

The ECCC’s affiliates should appreciate that the society of Cambodian survivors is heterogeneous one and seek to make space for such “pluralism” of view-points and narratives, both inside and outside the court-room. They should take note that pluralism, as Shklar posits, “is [...] a social actuality that no contemporary political theory can ignore without losing its relevance, and also something that any liberal should rejoice in and seek to promote”⁶⁹.

Diane Marie Aman reminds us that for the law to have expressive value, the “message understood, rather than the message intended, is critical.”⁷⁰ The message that many Civil parties seem to express in Case 001 is that theirs is a token role. Peter Macguire states that the civil party process, for all its promise, lacks any empirical basis: “I would put [the process] this under the category of therapeutic legalism. This is an invention of the 1990s, where

⁶⁷ Judith Shklar, *Legalism* (Cambridge: Harvard University Press, 1964) p. 118.

⁶⁸ Judith Shklar, *Legalism* (Cambridge: Harvard University Press, 1964) p. 122.

⁶⁹ Judith Shklar, *Legalism* (Cambridge: Harvard University Press, 1964) p. 5.

⁷⁰ Diane Marie Aman *Message As Medium in Sierra Leone*, 7 ILSA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 237, 238 (2001).

people freighted the trials with all this baggage.”⁷¹ We tend to agree. Let us be clear. We do not assert that war crimes trials ought to do less for victims; but must be cognizant that non-judicial measures and options can, if properly operationalized, potentially do more for them.

As Shklar points out, a critique of legalism does not “diminish the value of legalistic ethics or of legal institutions. To show that justice has its practical and ideological limits is not to slight it.”⁷² In fact, deeply aware of the various politics underlying such legal processes, Shklar believes that the ECCC’s forerunner, the Nuremburg trials had “enormous social value as an expression of legalistic politics on an occasion when it was most needed.”⁷³ In her view: (t)he political advantages of a trial that replaces the anarchic cycle of vengeance need hardly be belaboured; they have been well known since the days of Aeschylus.⁷⁴

Viewing ‘justice’ teleologically, instead of deontologically as lawyers tend to do, Shklar sees legalism not as an ideology, but as a continuum, with different “degrees of legalism”⁵³ applicable to different conditions. According to Shklar, “[I]aw as a political instrument can play its most significant part in societies in which open group conflicts are accepted and which are sufficiently stable to be able to absorb and settle them in terms of rules.”⁷⁵

Shklar herself is silent on what these conditions might be, and when and how societies may come to accept violent conflict and legal accountability institutions that are devised to come to terms with them. We feel a great deal more normative research should go into helping to fill this intellectual lacuna, lest therapeutic legalism be falsely

⁷¹ Seth Mydans, *In Khmer Rouge Trials, Victims Will Not Stand Idly By*, INT’L HERALD TRIBUNE, June 17, 2008.

⁷² Judith Shklar, *Legalism* (Cambridge: Harvard University Press, 1964) p. 122.

⁷³ Judith Shklar, *Legalism* (Cambridge: Harvard University Press, 1964) p. 158.

⁷⁴ Judith Shklar, *Legalism* (Cambridge: Harvard University Press, 1964) p. 159.

⁷⁵ Judith Shklar, *Legalism* (Cambridge: Harvard University Press, 1964) p. 144.

championed, regardless of their pretentious promises to deliver catharsis through the law alone.

NON-JUDICIAL ARENA

Despite the grandiose promises of empowerment, reconciliation and justice made by the ECCC to victims, some civil parties emerged from the first trial more harmed than helped. The civil parties, unprepared for interrogatory litigation, were required to focus upon past events in isolation from their current troubles. In the pursuit of justice, legal requirements ended up bypassing the individuality of the victims, including their needs as traumatised persons. The ECCC should not have promised more than it can deliver. Legal accountability processes often buckle under the strain of supporting therapeutic goals. The ECCC and other accountability processes should instead abide by their foundational goal of delivering accountability under the law. To ask more of it than that, may be asking too much of any criminal trial.

Restorative justice may better reside with parallel transitional justice processes that can be more receptive to strategies that commemorate victims in the non-judicial arena using pre-existing traditions that are communicated in a manner that resonates with victims. The instinctive response from lawyers is to equate the non-judicial arena with an effort to provide reparations. In the ECCC, reparations are not a “non-judicial” measure per se but are part of the newly updated Internal Rules of the Court. This makes it an integral component of the legal process in the ECCC. According to Rule 23*bis* (1), a Civil Party applicant will be able to make a claim for “collective and moral reparation if he or she has suffered physical, material or psychological injury.”⁷⁶ Some examples of reparations requested to the ECCC by

⁷⁶ Ibid.

civil parties include access for S-21 victims to free medical care, including psychological assistance, initiatives to educate Cambodian society concerning gross human rights abuses, genocide and crimes against humanity, the erection of public memorials and pagodas in the local communities of the Civil parties, and a full and frank disclosure of the assets in the name of the defendant.⁷⁷

At the largest civil parties' conference organized by the Centre for Social Development in Phnom Penh in 2009, the two biggest demands of the civil parties were an accurate depiction of the crimes they had suffered and reparations. The main form of reparation ordered by the court in Duch's case - a publication and dissemination of the court's judgment is a far cry from the sort of reparations we have come to expect from international courts. If the ECCC did not want the civil parties' views to be sidelined, why then were their calls for reparations not answered in the judgment of Case 001?

The Chamber acknowledged in its Final Judgment that it is constrained in its task and that the type of reparations permitted under its Internal Rules are limited; "limitations of this nature cannot be circumvented through jurisprudence but instead require Rule amendments."⁷⁸ At the Inter-American Court of Human Rights, for instance, governments have been ordered to ensure that each civil party receives a copy of the judgment in their native language; establish trust funds for education or medical treatment; hold commemoration ceremonies to honour victims; provide security to victims; and investigate related contemporary human rights abuses.⁷⁹

⁷⁷ Case 001 Judgment, 26 July 2010:

http://www.eccc.gov.kh/english/cabinet/courtDoc/635/20100726_Judgement_Case_001_ENG_PUBLIC.

⁷⁸ *Supra* note 123.

⁷⁹ Please refer to these cases of the IACHR: Case of the "White Van" (Paniagua-Morales et al.) v. Guatemala Judgment of March 8 1998:

<http://www.lawschool.cornell.edu/womenandjustice/legalresources/upload/IACtHR-20-White-20Van-20-Paniagua-Morales-20et-20al-20v-20Guatemala.pdf> and Case of the Miguel Castro-Castro Prison v. Peru Judgment of November 25, 2006:

The ECCC should take this into account for the upcoming trials or risk alienating significant portions of the civil parties who look to the court for reparations. Mark Drumbl highlights that the “*de jure* and *de facto* primacy of criminal courts may not reflect what societies under reconstruction actually want.”⁸⁰ Victims seek diverse remedies and some lie beyond incarceration. Reparations go a long way in restorative justice by not only alleviating the economic situation of the victims, but at a collective level, pagodas and the building of memorials contribute to the discourse on social memory and aid in the post-conflict healing process.

We suggest that the ECCC explore the non-judicial arena when considering victim-oriented measures premised on restorative justice, regardless of how alien that may seem to lawyers. The following non-judicial initiatives which run or will run parallel to the ECCC’s trials give us confidence that restorative justice can be meted outside the courtroom at a spiritual ceremony or ritual, through testimonial therapy, on a dramatic stage or through the arts.

First, we should look toward local and communal approaches to transitional justice. every year around late September to early October, Cambodians mark fifteen days in their calendars beginning with Kan Ben on the first day and ending with *Pchum Ben* on the fifteenth day. Sticky rice balls are a central feature of the ritual and are prepared in large numbers to be scattered across temple grounds for the spirits. This annual ceremony is a way for the souls of the dead to be honoured, fed, remembered (through local ritual means) and allows the living to assist to re-enter the cycle of life and death and ultimately, to reincarnate.

<http://www.lawschool.cornell.edu/womenandjustice/legalresources/upload/IACtHR-20Miguel-20Castro-Castro-20Prison-20v-20Peru-20INTERPRETATION-20REPARATIONS-20AND-20COSTS.pdf>

⁸⁰ *Supra* note 22, p. 205

Now, with the advent of the ECCC, which has elicited and stirred memories, the time is ripe for a “special *Pchum Ben*.”

According to an expert, Ly Daravuth, many Cambodian victims “can only start down the path toward healing, accepting, forgiving and reconciling only after this ‘initial duty’ has been fulfilled...The impulse of the *Pchum Ben* is one of rebuilding and re-gathering, rather than dividing, separating, and scattering. Living and deeply rooted in Cambodian society, it draws its strength from the religious and spiritual strata.”⁸¹ This spiritual ritual should not be eschewed from the consideration of UN officials and judges who do not, and may not care to, appreciate the immediacy and resonance it holds to the survivors in whose name they seek to administer justice.

Second, investigation and documentation of alleged mass atrocities can be led by formal or informal truth and reconciliation commissions and referenda, by existing NGOs or others established for such purposes, or by researchers at academic and documentation institutions dedicated to contemporaneous data collection and analysis. It has been our experience that where effective formal judicial accountability mechanisms are not possible, justice processes devoted to truth and reconciliation can nonetheless provide a foundation for future accountability, not to mention strengthen local legal capacity and justice institutions which maintain the rule of law.

The *Kraing Meas*, for instance, is an almost mythical Buddhist sacred book written on parchment and folded accordion-style and bound between wooden covers and kept in monastery libraries. It is said to contain the life stories of every person ever to be born. Conceptualized as a ‘Victim’s Register’, this should be re-created by the ECCC and

⁸¹ Ly, Daravuth & Muan, Ingrid, *Recasting Reconciliation through Culture and the Arts*, together with the Slifka Program in Inter-Communal Coexistence, Brandeis University, 2003. See: http://www.ceri-sciencespo.com/themes/re-imaginingpeace/va/base/Cambodia_1173189188.pdf

Cambodian civil society that will include the names, birth years and narrative accounts of victims, in written form, and recorded in audio-visual format that can be digitized for preservation and access.

Third, it is critical to note that stories of survival matter. The Documentation Centre of Cambodia (DC-CAM) was established to conduct research, documentation and training on the Khmer Rouge Regime. DC-CAM and the Tuol Sleng Museum serve as the principal sources of evidentiary material for the ECCC. Nevertheless, despite the best efforts of archives and libraries in Cambodia and elsewhere, over the years much evidence of and witnesses to the Cambodian ‘killing fields’ have been destroyed, disappeared or perished and unfortunately will not form part of Cambodia’s historical record. For survivors of mass violence who have now come forward to give evidence, there needs to be a repository of their important narratives and aspirations may become the only formal acknowledgment they will receive of the atrocities they endured under the Khmer Rouge regime. Individual stories, which are another part of justice and the healing process, can potentially reach a broad audience and thus facilitate reconciliation in a manner that legal proceedings cannot.

Keeping this in mind, the ECCC Victims’ Unit had made a proposal to create a Victims Register to complement the formal participation of victims in the judicial process before the ECCC. In order to provide some recognition to victims, the Victims’ Register is expected to collect and compile complete testimonies and victim stories together with a system of audiovisual recording.⁸² In a comprehensive population-based survey by the Berkeley Human Rights Centre on Cambodians’ attitudes about social reconstruction and the ECCC, entitled “So We Will Never Forget,” the locals’ opinions and attitudes about accountability

⁸² Ibid.

and justice were rightly captured.⁸³ The survey results suggest that 43% of the respondents expect justice to mean the revealing or establishing of the truth behind the atrocities.⁸⁴ 64.3 % of the respondents said that they would not be able to reconcile without such knowledge.⁸⁵ Quite evidently, a significant majority of locals expect a truth-seeking process to be established by the ECCC.

The Cambodian Human Rights Action Committee (“CHRAC”) and Redress laud this proposal of a Victims’ Register as an important legacy project for the court with the “possibility to create the basis for other measures for the benefit of victims, such as a documentary and audiovisual archive, memorialisation, commemorative services and truth-seeking initiatives.”⁸⁶

Justice in the wake of mass atrocity is not synonymous with prosecution. The alternatives to international prosecution need not be impunity, but rather other mechanisms of accountability better able to meet the goals that international prosecution cannot. National prosecutions, truth commissions, independent investigations, textbook revisions, lustration, banishment, political isolation, fines, sanctions, and civil damages are just a few of the other means to establish and respond to responsibility for violations of international humanitarian law.⁸⁷

The ECCC, its donors and power-brokers should supplement trials with non-judicial mechanisms and measures to address the objectives for which prosecution all too often falls short. Enormous resources devoted to running the ECCC can, and should, be diverted to

⁸³ “So We Will Never Forget - A population-based survey on attitudes about social reconstruction and the ECCC, Berkeley, January 2009: hrc.berkeley.edu/pdfs/So-We-Will-Never-Forget.pdf

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Redress: Cambodian Human Rights Action Committee & Redress: Considering Reparations for Victims Of The Khmer Rouge Regime: A Discussion Paper, 18 November 2009.

⁸⁷ Neil J. Kritz, *Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights*, *Law & Contemp. Probs.*, Autumn 1996, at 127, 127-44

illustration, the production of documentaries, theatre plays, film-making, literature, school textbooks, photography and historical research that archives life stories during the Khmer Rouge regime.

CONCLUSION

As the proceedings in Case 001 have shown, the judicial arena is hardly an ideal space for victims to deal with or vindicate their traumatic history. The adversarial nature of the legal process, coupled with the Court's single-minded focus on securing the legal evidence necessary to establish criminal accountability can end up being more injurious to victims than it is curative.

Given the inflated rhetoric surrounding the ECCC, there is a risk that promises will outstrip reality, leaving violations of international humanitarian law inadequately addressed by institutions only partially suited to the task. This is made worse by the fact that the ECCC is floundering: it did not put in place a completion strategy at the outset of the trials as to what it would do after its original 3-year mandate came to an end and its US \$90 mn budget ran out, as is now the case. In view of the cognitive dissonance between the ECCC's rhetoric and the reality, it is wise to heed Hannah Arendt's call that a war crimes tribunal like the ECCC should never promise more than it can deliver.⁸⁸ The society in whose name the ECCC is trying the Khmer Rouge is multi-tiered, with each exerting a varying demand for justice upon the tribunal.

It is high time that the ECCC move away from its monochromatic vision of accountability and undertake a rigorous self-examination. Only then would it be possible to engage with a robust array of mechanisms, both judicial and non-judicial, in the interests of survivors.

⁸⁸ See generally Hannah Arendt, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* (1963).

The ECCC must transcend its rhetorical promises of accountability and equitable justice and must tailor its approach to suit victims' desires for vindication, reconciliation and closure by exploring innovative measures. After all, as Director of the Documentation Centre of Cambodia (DC-CAM) and Cambodian survivor Youk Chhang notes, "*Even if the word justice is defined in different ways, from human rights groups to the government, for the victims... I think the issue is how do we move on? The tribunal, to me, is the last solution to Cambodia's genocide.*"⁸⁹

The Tribunal should not freight its trials with "therapeutic legalism" when the judicial process alone cannot deliver its promise of peace and reconciliation. The privileging of the law must not suppress or unnecessarily delay the development of non-legal narratives and processes to complement the legal process.⁹⁰ By not channelling all of our resources on prosecution alone, we will be able devote our resources on other forms of powerful transitional justice measures, such as theatre, archiving and film-making which more effectively tell the victim's stories.

Accountability and justice are complex ideas in post-conflict places with transitional justice. As the rubric of international norms of justice penetrate the Khmer Rouge Tribunal, the ECCC must ensure that the core principles of justice would not be "*subjugated to the vagaries of realpolitik*" within Cambodia.⁹¹ The real beneficiaries of the ECCC's work should be the Cambodians.⁹² Otherwise, the court risks alienating victims by embarking on a

⁸⁹ Chan, Isabelle, "Rethinking Transitional Justice: Cambodia, Genocide, and a Victim-Centered Model" (2006). *Honors Projects*. Paper 3: http://digitalcommons.macalester.edu/intlstudies_honors/3.

⁹⁰ *Supra* note 15.

⁹¹ Jackson Nyamuya Maogoto, *War Crimes and Realpolitik: International Justice from World War I to the 21st Century*, Lynne Rienner Publishers, 2004: <https://www.rienner.com/uploads/47da985f5271e.pdf>

⁹² *Supra* note 22.

grandiose search for international standards of justice, which may not necessarily sit well with the Cambodian people.⁹³

⁹³ Ibid.