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NEW ZEALAND JOURNAL OF PUBLIC AND INTERNATIONAL LAW

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LESSONS FROM CAMBODIA: TOWARDS A VICTIMS-ORIENTED APPROACH TO CONTEXTUAL TRANSITIONAL JUSTICE

Rosie Fowler* *and Stephen Eliot Smith***

The Extraordinary Chambers in the Courts of Cambodia (ECCC) is the primary mechanism of transitional justice for the Khmer Rouge regime. The ECCC is, truly, extraordinary; however, the tribunal and the outside world are somewhat disjointed. There is little correlation between the rigidity of the tribunal structure, working to high evidentiary civil standards, to the vibrant, messy, communal and often impoverished life outside. Victims who participated as civil parties before the ECCC would not understand when sometimes – despite their indisputably real injury – there was insufficient evidence for the crime site, or responsibility could not be attributed to the accused and they received no recognition or compensation for their suffering. What justice, reconciliation or peace is there in a mechanism that is not understood, or connected in anything more than a remote sense to the millions of victims themselves? Does "justice" have to come from the authority of a United Nations-endorsed, internationally reputable tribunal in order to be legitimate? Or, could there be an approach that takes its form and meaning directly from the injury of the victims, and through this deliver a sense of justice perhaps more tangibly than through an imported solution? In this article, we examine these questions and advocate for a victims-oriented, context-specific approach to transitional justice, through the lens of the post-conflict experience of Cambodia.

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I INTRODUCTION AND BACKGROUND

A The Khmer Rouge Regime

Modern Cambodia has had a troubled history.[1] French colonisation began in 1863 with the establishment of a protectorate; independence was declared in 1953. In 1970, United States-backed Lon Nol overthrew the autocratic monarchy of Prince Sihanouk. This triggered the rise of the Khmer Rouge regime, which on 17 April 1975 managed to take the capital Phnom Penh from Lon Nol's government troops. The leaders of the Khmer Rouge envisaged a Marxist-Leninist revolution, creating a communist and racially homogenous society starting at "year zero". However, their own fear of betrayal and mistrust of others led them to auto-genocide and the breakdown of the regime.[2]

The policies and practices of the Khmer Rouge were unthinkably cruel. City-dwellers were forced from their homes and into the rural areas where impossible rice-yielding targets and inhumane conditions of forced labour awaited them. Children would be separated into work units away from their parents; workers would share six small cans of rice between 20 people per day and sometimes were starved for no reason; pregnant women would work up until the day of delivery and often lost the child; slowness, which was perceived as laziness, often meant being beaten to death; and those who fell sick would be accused of "consciousness illness" and starved. Monks were disrobed or killed and Muslim Cham faced a policy of extermination. Those with light-coloured skin were killed or tortured for appearing to be Vietnamese. People were forced to marry en masse, then would be spied upon to ensure they had sexual relations and were killed if they did not. Showing emotion at the sight of watching loved ones die was perceived as weakness and could result in being killed.

Khmer Rouge leadership had a "diabolical disregard for human life" and a deep delusional fear of hidden enemies, which resulted in policies of purging and "smashing".[3] People were sent to concentration "re-education" centres or killed for the slightest hint of disagreement with the regime. Those who had obtained university degrees would hide their identity, as education was seen as an enemy to the revolution. Entire families and communities disappeared in the night for supposed links to the American CIA, Soviet KGB, or the previous Lon Nol regime, and babies of "enemy" affiliates were killed by smashing them against trees. Children were forced to falsely accuse their parents of

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1 For comprehensive analyses of the Khmer Rouge regime and Cambodian history, see Ben Kiernan *The Pol Pot Regime: Race, Power, and Genocide in Cambodia under the Khmer Rouge, 1975–79* (3rd ed, Yale University Press, New Haven, 2008); David P Chandler *A History of Cambodia* (Allen & Unwin, Crows Nest (NSW), 1993); and Isabelle Chan "Rethinking Transitional Justice: Cambodia, Genocide, and a Victim-Centered Model" (Honors Paper, Macalester College, 2006) at 34–60.

2 Chan, above n 1, at 35.

3 Rudina Jasini *Victim Participation and Transitional Justice in Cambodia: The Case of the Extraordinary Chambers in the Courts of Cambodia (ECCC)* (Impunity Watch, Research Report, April 2016) at 14.

being enemies of the regime.[4] Mistrust was rife among cadres – resulting in waves of internal purges – which drove the implementation of these policies further and faster. All the while, the Khmer Rouge leadership issued propaganda portraying their "glorious revolution" – a joyful working force, liberated and grateful, sharing the plentiful rice and products they produced together. The reality was so different from this euphoria, and the hypocrisy was palpable. Leaders were well-fed while their people starved. Pol Pot, Brother Number One, was well-educated and had studied in France. One of his high comrades, Vorn Ven, wore glasses. Both of these attributes would have had them immediately killed had they not been the ones issuing the orders.

By the time a coalition of Khmer rebels and Vietnamese troops liberated the country in January 1979, approximately two million Cambodians were dead, amounting to one in three citizens.[5] Today, the country is still in a state of confusion and healing. In many instances, the fate of family members is still unknown, and the right to properly mourn and bury them in accordance with Cambodian custom has been denied to their families. Many among the older generation still fear *Angkar*, the figurative Khmer Rouge leader, and his power to hear and punish every anti-regime thought. Education rates, once oppressed entirely, continue to lag. Poverty is endemic as people struggle back from being stripped of all material possessions. Corruption is rife, and former Khmer Rouge officials can still be found in high-ranking government positions – including long-serving Prime Minister Hun Sen.

B The Tribunal

It took until 2006 for the United Nations (UN) and a reluctant Cambodian government to set up the Extraordinary Chambers in the Courts of Cambodia (ECCC).[6] It is the sole transitional justice solution pursued, and the only judicial body to prosecute those responsible. Despite UN Secretary-General Kofi Annan's wide definition of transitional justice, which embraces "non-judicial mechanisms"[7] and the concept of complementarity, creating a tribunal has been the UN's instinctive

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4 S Megan Berthold and Gerald Gray "Post-Traumatic Stress Reactions And Secondary Trauma Effects At Tribunals: The Eccc Example" in Beth V Schaack, Daryn Reicherter and Youk Chhang (eds) *Cambodia's Hidden Scars: Trauma Psychology in the Wake of the Khmer Rouge* (Documentation Center of Cambodia, Phnom Penh, 2011) 92 at 101.

5 The death toll of the Khmer Rouge regime varies. The official Extraordinary Chambers in the Courts of Cambodia (ECCC) estimate is two million: see *Khieu Samphan and Nuon Chea (Judgment)* ECCC Trial Chamber 002/19-09-2007/ECCC-E313, 7 August 2014 at [99].

6 Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea 2329 UNTS 117 (signed 6 June 2003, entered into force 29 April 2005) [Agreement between the United Nations and the Royal Government of Cambodia]. The first judges and staff members were not appointed to the ECCC until 2006.

7 *Report of the Secretary-General: The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies* S/2004/616 (2004) [*Report of the Secretary-General*] at [8]: "The notion of transitional justice … may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or

reaction to a post-conflict environment (PCE) since Nuremburg.[8] Recently, especially, the international community has continued to invest heavily in the tribunal structure, culminating in the creation of the International Criminal Court (ICC). Perhaps this is in reaction to the field's reconceptualisation as a normalised branch of international law, triggered by the pockets of mass conflict flaring up across the developing world.[9] The creation of that which can be depended upon as "best practice" becomes important.[10] And yet, the response that can grasp the knotty and confronting intricacies of a PCE is hard to know and even harder to prescribe. The uniqueness of each PCE means that each new situation can take little guidance from those preceding it.[11]

In light of the need for "best practice", it is, therefore, understandable that the international community has consistently invested in the tribunal structure, articulating its form over a half-century. As a result, it has tremendous value.[12] Tribunals can provide public accountability and stigmatisation to perpetrators in front of their victims rather than hiding violations of international law behind the body of the state; move those perpetrators, elites and implicated leaders from power and deter future abusers; and institute peace and justice by demonstrating to victims that atrocities will not go unpunished. It can promote constructive political behaviour for the future and boost trust in the legal system by de-legitimising the previous regime, offering a civilised alternative to revenge, obliging governments to conduct themselves openly and according to the rule of law, and providing incentive to rebuild the judiciary. It can serve victims' needs through returning their dignity, giving them the sense that their grievances are being addressed. From an academic perspective, tribunals create national historical records, enrich the jurisprudence of international criminal law and build on the articulations of international human rights.

The purpose of this article is not to doubt the ECCC's significance or its immense achievements in such a formidable environment. Rather, it is intended to examine whether the tribunal was the most

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none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof."

8 Since the original Nuremburg trials and as well as the creation of the International Criminal Court, there have been tribunals for Yugoslavia, Rwanda, Sierra Leone, Lebanon, Cambodia, and panels in East Timor and Senegal. See Laurel E Fletcher, Harvey M Weinstein and Jamie Rowen "Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective" (2009) 31 HRQ 163 at 167: "There remains an almost unremitting spotlight on trials and truth commissions."

9 Fletcher, Weinstein and Rowen, above n 8, at 169.

10 At 210; and Bronwyn Anne Leebaw "The Irreconcilable Goals of Transitional Justice" (2008) 30 HRQ 95 at 116.

11 *Report of the Secretary-General*, above n 7, at [16].

12 At [39]. For further discussion of the benefits of international criminal justice, see Peter Dixon and Chris Tenove "International Criminal Justice as a Transnational Field: Rules, Authority and Victims" (2013) 7 IJTJ 393; and Leslie Vinjamuri and Jack Snyder "Advocacy and Scholarship in the Study of International War Crime Tribunals and Transitional Justice" (2004) 7 Ann Rev Pol Sci 345 at 347–350.

logical or effective choice for the Cambodian context. Indeed, the creation of the ECCC with the earmark of a UN tribunal came with high expectations. One victim conveyed this clearly:[13]

> I was happy and hopeful about the establishment of the Court, because I thought that even if my parents were to die, they would do so in the knowledge that their son tried his best to find justice for them. I hope that people in the world, not just only Cambodian people, will participate in sentencing the Khmer Rouge leaders so that they may be held to account for the crimes they committed.

Yet, the tribunal has always been plagued by controversy. Internal corruption trickles in from the government, which in many ways shadows the old Khmer Rouge regime and treats the tribunal as a political tool.[14] At the same time, the UN's involvement was viewed with suspicion and thought to be "motivated by collective guilt, rather than the best interests of Cambodia."[15] The timing is also questionable – by 2006, 27 years after the regime fell, Pol Pot and many of the highest leaders had already died. The remaining perpetrators were not particularly representative of the leadership structure that was responsible for the harm and the tribunal's jurisdiction does not reach to the thousands of lower-level cadres living among their victims.[16] Finally, it seems illogical to have chosen the path of lengthy and intensive trials, given the accused were, by that point, frail octogenarians. Two cases have been forced to close prematurely, one because the accused developed dementia and became unfit for trial. The other accused passed away.

There have been three convictions resulting in sentences of life imprisonment, but one must wonder whether the heavy costs – USD 319 million and rising – have been worth these limited results.[17] Some have been satisfied with the pursuit of the tribunal, albeit its taint of controversy: at the 2003 Asia Society Symposium ("the 2003 Symposium"), participants stated that:[18]

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13 Interview with Civil Party Case 002 (on file with the authors, Siem Reap, 24 October 2014), as cited in Jasini, above n 3, at 17.

14 Jelena Subotic "The Paradox of International Justice Compliance" (2009) 3 IJTJ 362 at 381.

15 Scott Luftglass "Crossroads in Cambodia: The United Nation's Responsibility to Withdraw Involvement from the Establishment of a Cambodian Tribunal to Prosecute the Khmer Rouge" (2004) 90 Virginia L Rev 893 at 905–906, as cited in Chan, above n 1, at 61.

16 Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea 2001 [Law on ECCC], art 1: "The purpose of this law is to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible …".

17 "ECCC Financial Outlook" (31 October 2018) United Nations Assistance to the Khmer Rouge Trials <www.unakrt-online.org/finances>.

18 Kelli Muddell *Transitional Justice in Cambodia: Challenges and Opportunities* (Symposium Report, Asia Society, New York, 9 September 2003) at 9.

> … imperfect justice is better than no justice at all. The Khmer Rouge leaders are getting older and any further delay in establishing a tribunal may result in the chief perpetrators not living long enough to be held legally responsible.

Yet, one cannot help but wonder how USD 319 million might have had more tangible results for the survivors of the regime – and indeed the generations growing up in its aftermath. In 2004, Annan acknowledged that despite the benefits of tribunals, "they have, however, been expensive and have contributed little to sustainable national capacities for justice administration."[19] Bewilderingly, it was two years *after* this statement was made that the ECCC opened its doors. Thus, the following section examines the nature of the normative framework that underlies international law and informs transitional justice decisions. Perhaps this will shed light on why the tribunal has been depended upon in such an ingrained way.

II A NORMATIVE FRAMEWORK TO TRANSITIONAL JUSTICE

A The Tribunal as a Product of Normative International Law

In a general sense, the tribunal structure is the flagship of the Western framework of modern international law. In this framework, civil and political rights generally take priority, which results in retributive mechanisms such as courts and tribunals. Such mechanisms are also a key part of the assumption in modern international law that the international community is to work as domestic legal institutions do in Western societies.[20] The UN Security Council is the police and the legislator, international treaties are legislation, and the tribunal is the judiciary – a projection of a domestic court onto an international canvas.[21]

In Cambodia, the tribunal is somewhat different because it is a "hybrid" – part-national, part-UN – concerned with violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognised by Cambodia.[22] Albeit being painted in Cambodian colours, the place of Cambodian law within the tribunal does not extricate it from being a product of Western influence. First, the ECCC's "national law" – the reason for its claim to being a "hybrid" – could easily translate to "coloniser's law". Cambodian law – especially that which forms the ECCC, the Code of Criminal Procedure[23] – is based on the French civil system, a legacy present only due to Cambodia's

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19 *Report of the Secretary-General*, above n 7, at 1–2.

20 Martti Koskenniemi "International Law in Europe: Between Tradition and Renewal" (2005) 16 EJIL 113 at 122.

21 At 117.

22 Agreement Between the United Nations and the Royal Government of Cambodia, above n 6, art 1.

23 Franziska Eckelmans "The ECCC in the Context of Cambodian Law" in Hor Peng, Kong Phallack and Jörg Menzel (eds) *Introduction to Cambodian Law* (Konrad-Adenauer-Stiftung, Phnom Penh, 2012) 439 at 442.

colonisation.[24] Therefore, it in fact operates on Western civil legal concepts, including that of an investigatory judge, chambers with different levels of appeal and evidentiary standards.[25]

Secondly, the UN transitional authority preceding the tribunal and the Paris Peace Agreements mandated the Cambodian government's assent to the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[26] These pre-tribunal measures openly had as their goal "the transformation of Cambodia from a socialist monolithic regime to a Western model of liberal democracy".[27] Yet, Cambodian transitional justice was entirely crafted through the ICCPR – only the ICCPR, not the ICESCR, was woven throughout the ECCC's founding documents.[28] This, coupled with the decision to face transitional justice through a retributive tribunal mechanism of arrest and punishment rather than social and cultural security and healing, points to a Western bias.

B Evaluation: An Unsuitable Normative Standpoint for Cambodia

Thus, Cambodian transitional justice was informed by Western thought. There are several reasons why this was the wrong approach and why applying this liberal democratic framework in Cambodia was bound to be unpalatable. Exploring these flaws is necessary to recognise the benefit that lies in approaching transitional justice from a broader normative framework, as is discussed below.

First, liberal rights are mismatched to Cambodia's societal structure. In the West, the individual is the centre of the moral universe: rights are the individual's "trump card" over the state.[29] In Asian societies, this hierarchy is reversed. Society is placed above the individual, and the individual is not to overwhelm this society or other individuals.[30] The family is the "building block of society", and fulfilment of the individual occurs through participation in duties to the family, the community and

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24 At 441; Jasini, above n 3, at 21; and Ken Gee-kin Ip "Fulfilling the Mandate of National Reconciliation in the Extraordinary Chambers in the Courts of Cambodia (ECCC) – An Evaluation through the Prism of Victims' Rights" (2013) 13 Int CLR 865 at 881.

25 Eckelmans, above n 23, at 446.

26 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976); and International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976). See Kathryn E Neilson "They Killed All the Lawyers: Rebuilding the Judicial System in Cambodia" (CAPI Occasional Paper 13, University of Victoria Centre for Asia-Pacific Initiatives, 1996) at 5.

27 At 5.

28 See Law on ECCC, above n 16; and Agreement Between the United Nations and the Royal Government of Cambodia, above n 6.

29 Bilahari Kausikan "East and Southeast Asia and the Post-Cold War International Politics of Human Rights" (1993) 16 Stud Conflict Terror 241 at 250.

30 Yash Ghai "Human Rights and Governance: The Asia Debate" (2000) 1 APJHRL 9 at 15.

the state. In return, while the Western state refrains from interfering in the individual's rights, the Asian state has a positive duty to enforce these rights for its people.[31] Imposing a normative framework that perceives rights as belonging primarily to the individual may undermine this central family and community structure.[32] It is thus illogical to impose a normative framework that is not aligned with Cambodian society.

Secondly, the liberal democratic framework is unsuitable because in its narrow pursuit of accountability and retribution, it fails to grasp the immensity of the "transition" required in Cambodian society. While individual criminal sanctions are important, they are only a segment of the full social, political and economic context and all the complexities therein, especially according to the wider definition of transitional justice as put forward by Annan.[33] In Cambodia, economic, social and cultural rights violations have been and continue to be widespread. Injury does not lie solely in the loss of family members, of dignity or quality of life that can be addressed through convicting a perpetrator of war crimes and the crimes against humanity of murder, forced marriage or forced displacement. Injury is worsened by the massive violations of economic, social and cultural rights; by the ongoing corruption of the government and the sheltering of ex-Khmer Rouge officials within it; by the mass poverty and the unconscionable disparities between the poor and the rich; and by the lack of education and prospects that prohibit the victims and the children of victims from recovering from what the regime stripped them of and being free to move on. Suffering is sustained by the lack of truth and knowledge about the regime, and while questions are unanswered, so will the hurt be unresolved.

Therefore, justice in Cambodia is more than recompensing individual perpetration alone. It will not be served through meeting isolated, individual rights of accountability, but through "addressing the whole web of community relationships and ways that make freedom and congeniality possible".[34] The poverty, insecurity and instability that exists continues a culture of human rights abuse and thus economic and social rights must not be ignored if society is to make a real transition.[35] Likewise, civil and political rights alone are not capable of shifting or transforming the underlying systematic injustices of corruption, economic and political discrimination and inequality of resources.[36] All have daily and debilitating effects on Cambodian people – regime consequences as real as the crimes

31 At 24.

32 At 35.

33 Patricia Lundy and Mark McGovern "Whose Justice? Rethinking Transitional Justice from the Bottom Up" (2008) 35 J Law Soc 265 at 275.

34 M Anne Brown *Human Rights and the Borders of Suffering: The Promotion of Human Rights in International Politics* (Manchester University Press, Manchester, 2002) at 63.

35 Kausikan, above n 29, at 249; and Ghai, above n 30, at 11.

36 Lundy and McGovern, above n 33, at 274.

discussed in the courtroom. The Western framework is simply not appropriate, and its necessity is ill-conceived.

Thirdly, the Western framework often stirs disparagement among so-called third-world countries, for whom entry into the exclusionary modern international law "club" was made difficult. As developing countries, they were some of the last to join – and were "told to accept [international law] in its entirety, as the political condition for entry" into the club, which was "for a long time closed to those wishing to join and largely dominated by those who founded it, characterized by their taboos, their traditions and their … customs."[37] This discord is exacerbated by the memory of colonialism. In Cambodia, the humiliation from French, Vietnamese and American babysitting is still felt. Imposition of Western legal values – appearing from "on high" to the "savagery" of third-world conflict[38] – can be perceived as neo-imperialism,[39] and has the irritating effect of undermining all sense of competence to deal with conflict domestically.

Finally, the decontextualised exportation of liberal democratic norms will rarely be "an effective way of changing social practice", because it treats transitional justice like the "delivery of a message".[40] Ignorance of the false universality coming from the West and choosing to dogmatically adhere to it will hinder the ability of transitional justice to be effective.[41] Annan recognised – while never implicating Western influence as the reason – that the international community has not always succeeded in this, providing inappropriate assistance to the country's context through emphasising foreign experts, foreign models and foreign-conceived solutions. This has resulted in approaches, no matter how eloquently designed, that fail in effecting transitional justice.[42]

C Recommendation: A Broader Point of View

Thus, the Western construction of rights was ill-suited to Cambodia's non-Western PCE. But is the design of a better framework possible? The pessimist would wonder here whether being aware of Western influence on international law will be destructive for the field as a whole. Indeed, Jouannet asks whether international law is able at all to transcend its paradox to something truly universal, or whether without Western influence it would continue to exist at all.[43] Yet, it must be possible: in

37 Pierre-Marie Dupuy "Some Reflections on Contemporary International Law and the Appeal to Universal Values: A Response to Martti Koskenniemi" (2005) 16 EJIL 131 at 132.

38 Rosemary Nagy "Transitional Justice as Global Project: Critical Reflections" (2008) 29 TWQ 275 at 275.

39 Emmanuelle Jouannet "Universalism and Imperialism: The True-False Paradox of International Law?" (2007) 18 EJIL 379 at 390; and Fletcher, Weinstein and Rowen, above n 8, at 195.

40 Brown, above n 34, at 12.

41 Makau Mutua "What Is the Future of Transitional Justice?" (2015) 9 IJTJ 1 at 5.

42 *Report of the Secretary-General*, above n 7, at [17].

43 Jouannet, above n 39, at 379.

modern international law, rights are expressed through a human-made framework in order to have legal effect; there are "no authentic universals that one could know independently of their particular manifestations."[44] The political lay of the land has meant its manifestations have been Western. However, it must follow that liberal democratic expression is not the exhaustive and fixed truth.[45] Universality of mass agreement is a manufactured thing and thus there must be more than one way to approach a PCE – and one or some of these will be more appropriate than others. The hierarchy of rights that currently gives priority to the individual can be deconstructed to something more reflective of a non-Western societal structure.

In order to better match the complexity of the injury in Cambodia's PCE, its hierarchy of rights, and avoid any murmurings of neo-imperialism, a broader framework embracing all human rights – not just civil and political but also economic, social and cultural – is necessary.[46] This would silence the pessimist because the creation of a new set of human rights, or the complete dismissal of current modern international law, is not required.[47] When approaching non-Western PCEs, the ICESCR must merely be recognised equally to the ICCPR in the normative framework from which transitional justice measures are founded. Making possible acknowledgment of abuse of these economic, social, and cultural rights is the first step towards a solution that is accurately tailored to the injury and recognises its underlying causes. It would enable responsible actors to "craft an agenda that assumes a more holistic approach to repairing human relationships in post-conflict and especially postcolonial settings".[48] It is also what can challenge the entrenchment of norms that carry forward this Western hegemony, and displace tribunal bias in reminding responsible actors of the "non-judicial mechanisms" of transitional justice that Annan referred to in 2004. For example, through looking momentarily away from the savagery of murder, rape and torture, abuse of ICESCR rights were equally prevalent in the Khmer Rouge's overall barbaric scheme. The right to education (art 13 of the ICESCR) was denied nationwide throughout the regime and the effects of this hold back the country's ability to move forward today. If violation of the right to education was perceived as an equally relevant and legitimate cause for action in transitional justice, resources could be directed to reconciliatory measures in the PCE such as school-building.

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44 Koskenniemi, above n 20, at 113.

45 Brown, above n 34, at 13 and 203; Koskenniemi, above n 20, at 119; and Makau Mutua "Human Rights in Africa: The Limited Promise of Liberalism" (2008) 51 ASR 17 at 32.

46 Roger Duthie "Toward a Development-sensitive Approach to Transitional Justice" (2008) 2 IJTJ 292 at 294. See also Louise Arbour "Economic and Social Justice for Societies in Transition" (Second Annual Transitional Justice Lecture, New York University School of Law Center for Human Rights and Global Justice and the International Center for Transitional Justice, New York, 25 October 2006).

47 Brown, above n 34, at 198.

48 Mutua, above n 41, at 5.

Incorporating ICESCR rights into transitional justice mechanisms in not a novel idea.[49] And while a broader framework may be called for, it is not an easy solution. It may only be possible if the language of the ICESCR is revised to make its norms immediately enforceable, more like its ICCPR sibling. Critics doubt the likelihood that powerful states would embrace this, for it would compel concession of hegemonic control. It would also require the support of the immensely influential NGOs, which have played a role in reinforcing ICCPR bias.[50] Sidelining socioeconomic rights permits marginalisation of approaches "that might either challenge the forms and norms of Western governance, or implicate dominant global economic relations in the causes of conflict, rather than its solution."[51] In an ideal world, as Xifaras noted, modern international law would recognise its effect of forced Westernisation on the non-Western world, and "not simply content itself with affirming its own legitimacy in terms of its conformity with principles that have their origins in Western thought".[52] While "the difficulty of this process … seems no good reason not to engage in it", whether the international community will realistically engage is another thing.[53] And yet, it is a necessary step if a true transition is to occur.

III IN PRACTICE

A Effect of the Tribunal on Cambodia's Victims

> I would like to remind the ECCC officials and judges here not to take my suffering for granted. You allowed me to become a civil party. Give me, give us [civil parties] the voice that you promised. Do not play with the hearts and the souls of the victims and my [dead] parents. Justice must be transparent, if not it will not count for anything.[54]

In theory, it is clear, then, that the Western liberal democratic framework was the wrong approach for Cambodia. The following section examines from a practical perspective the effect of the Cambodian tribunal, as a product of this Western framework, on those most affected in the PCE. The

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49 See for example Evelyne Schmid and Aoife Nolan "'Do No Harm'? Exploring the Scope of Economic and Social Rights in Transitional Justice" (2014) 8 IJTJ 362; and Arbour, above n 46.

50 Makau Mutua "Standard Setting in Human Rights: Critique and Prognosis" (2007) 29 HRQ 547 at 595.

51 Lundy and McGovern, above n 33, at 274.

52 Mikhaïl Xifaras "Commentaire sur 'Les ambivalences impériales' de Nathaniel Berman" in Emmanuelle Jouannet and Hélène Ruiz-Fabri (eds) *Impérialisme et droit international en Europe et aux États-Unis: mondialisation et fragmentation du droit: recherches sur un humanisme juridique critique* (Société de législation comparée, Paris, 2007) (Translation: *Imperialism and international law in Europe and the United States: Globalisation and fragmentation of the law; research in critical legal humanism)* 183 at 183.

53 Brown, above n 34, at 63.

54 Transcript from Reparations Conference (on file with authors, 26 November 2008), as cited in Mahdev Mohan "The Paradox of Victim-Centrism: Victim Participation at the Khmer Rouge Tribunal" (2009) 9 Int CLR 733 at 758, n 121.

tribunal process, with its slowness, uncompromising evidentiary standards, highly selective vision of that which is legally relevant, and its reparative scheme as an afterthought to prosecution, results in an undeniable detriment to Cambodia's victims. This confirms the normative incompatibility between the Western framework and a non-Western PCE.

This detriment is notwithstanding the fact that the ECCC is more incorporative of victims than previous international tribunals. Victims may appear as witnesses[55] or, in what has been heralded as a "ground-breaking"[56] arrangement, have the right to appear as civil parties to the trial in a similar capacity to that of the defence and prosecution.[57] Civil parties' general powers are broad and include requesting and questioning witnesses, making limited appeals and submissions, and making and rebutting closing arguments.[58] The desire to balance the importance of hearing victims' voices while trying those accused came with a pioneer's optimism, but a measure of naivety too. It has, in reality, been less balance and more battle, from which the ideal of retribution has consistently emerged as the priority and the tribunal's commitment to victim participation has been significantly qualified. For example, after Case 001, all civil parties were amalgamated into a single group represented by two co-lawyers, because the Cambodian system was "not designed to deal with individualised participation by victims on this scale."[59] Adherence to this "process" points to the underlying superiority of retribution, inherent to the tribunal structure despite attempts to make it more victim-centred.

The high standard of proof that civil parties must satisfy in order to be accepted is the first in the plethora of ways in which the Western tribunal is incompatible with the Cambodian PCE. Victims must demonstrate that as a direct consequence of one of the crimes committed by the accused, they have suffered physical, psychological or material harm.[60] Inadequate proof of such harm is often due to a combination of lack of investigatory resources and an absence of remaining evidence.[61] The latter is likely after 30 years – as Etcheson lamented, crime sites become "hopelessly contaminated and even vanish completely", evidence is "progressively lost, and the chain of custody required to demonstrate

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55 Extraordinary Chambers in the Courts of Cambodia Internal Rules (as revised on 16 January 2015) [Internal Rules], r 24.

56 Mohan, above n 54, at 745.

57 Internal Rules, above n 55, r 23. For more information, see also the ECCC Victims Support Homepage at <www.eccc.gov.kh/en/victims-support>.

58 Jasini, above n 3, at 23.

59 ECCC "7th Plenary Session of the ECCC Concludes" (Press Release, 9 February 2010).

60 Internal Rules, above n 55, r 23.

61 Judith Strasser and others "Justice And Healing At The Khmer Rouge Tribunal: The Psychological Impact Of Civil Party Participation" in Beth V Schaack, Daryn Reicherter and Youk Chhang (eds) *Cambodia's Hidden Scars: Trauma Psychology in the Wake of the Khmer Rouge* (Documentation Center of Cambodia, Phnom Penh, 2011) 149 at 153.

the provenance of the material becomes inexorably more ambiguous over time."[62] On top of this disadvantage, civil parties do not have any experience of the Western court system's process of non-admissibility, and as a result do not understand the reasons for their rejection, or perceive the decision-making procedure as arbitrary.[63] The ECCC is not necessarily sensitive to this let-down, either: for example, only at the final verdict of Case 001 were some 20 civil parties told that their application was rejected, after having followed the entire trial.[64] In Case 002, the Supreme Court Chamber at least recognised that being rejected may have "caused anguish and frustration at the futility of their practical and emotional investment in the proceedings."[65]

The unfortunate result is that victims do not understand that rejection is a result of procedure and technicalities, and not of personal failure on their part. The well-being of applicants has been seen to decline rapidly following rejection, and self-deprecation is central in their statements: "I am here to find justice for my mother, who was killed at S21, but I did not succeed";[66] "I did not name my father in my complaint form, that's why I missed a chance."[67] Victims also feel as though they have let down their deceased family members: "It affects my relation[ship] to the spirits of the dead, because I could not fulfil my obligations towards my killed relatives."[68] However, the gravity of rejection from the tribunal is perhaps no better articulated than by the following applicant:[69]

> There are three things that I will remember all my life: I witnessed how my family was slaughtered in front of me; I never had a proper marriage ceremony in my life; and I was not recognized by the ECCC for the trial against Duch.

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62 Craig Etcheson "The Challenges of Transitional Justice in Cambodia" (3 January 2014) Middle East Institute <www.mei.edu/content/challenges-transitional-justice-cambodia>. See also Alex Bates "Cambodia's Extraordinary Chamber: Is it the Most Effective and Appropriate Means of Addressing the Crimes of the Khmer Rouge?" in Ralph Henham and Paul Behrens (eds) *The Criminal Law of Genocide: International, Comparative and Contextual Aspects* (Ashgate Publishing Limited, Aldershot (UK), 2007) 185 at 192.

63 Strasser and others, above n 61, at 153–154.

64 At 154.

65 *Kaing Guek Eav alias Duch (Judgment)* ECCC Supreme Court Chamber 001/18-07-2007-ECCC/SC, 3 February 2012 at [501]. The Chamber made this comment in reference to the article of Phuong Pham "Victim Participation and the Trial of Duch at the Extraordinary Chambers in the Courts of Cambodia" (2011) 3 J Hum Rts Prac 264 at 284: "Among those who ultimately had their status denied, anger, helplessness, shame, and feelings of worthlessness prevailed."

66 Meeting at Transcultural Psychosocial Organisation (TPO) with Case 001 Civil Party Applicant (on file with authors, 29 October 2010), as cited in Strasser and others, above n 61, at 154.

67 At 154.

68 At 154.

69 Interview with Case 001 Civil Party Applicant (on file with authors, 5 December 2010), as cited in Strasser and others, above n 61, at 154.

Secondly, the narrow prism of what is considered legally relevant can let down victims' expectations. For those witnesses and civil parties who are permitted to testify, there is often a disparity between what the victim considers significant and wants to contribute, and what the Court legally wants to hear.[70] This can lead to dissatisfaction and disappointment for victims, who for instance come to the ECCC with the expectation that they can deliver a eulogy and honour the spirits of their relatives.[71] This led an ECCC official to comment: "Judges do not want to hear only about their mental anguish alone, that is for a psychiatrist, not a court of law."[72] Alternatively, victims who attempt to vent to, and verbally abuse, the accused for the suffering they have caused are prevented from doing so by the tribunal. In one instance, the judge rejected the civil party lawyer's defence of her client's verbal barrage, that it was "part of the process of coping with the suffering ... [and] is part of the story that he wants to tell".[73] The judge's reasoning was that the tribunal was "not a place for vengeance" and would not tolerate "unethical" comments towards the accused.[74] Clearly, the ECCC was not mindful of the "ethics" of the suffering inflicted by the accused on the victim when making that statement.

Moreover, this demonstrates that victims wish to speak of more than what they are permitted to, and that their injuries are much broader than what is relevant to criminal proceedings. The ECCC should have foreseen that in welcoming victim participation as if on a similar par to the prosecution and defence, it would face a mass of emotional testimonies that do not naturally align to what is legally relevant, or fit neatly into the tribunal's time schedule. To constrain victims in this way is a heavy ask of their 30 years of suffering.

Indeed, incongruity between the ECCC structure and victims' daily lives drives deeper the tribunal's inability to fully engage with victim participants. Victims often travel far from rural areas

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70 Anna Bryson "Victims, Violence, and Voice: Transitional Justice, Oral History, and Dealing with the Past" (2016) 39 Hastings Intl Comp L Rev 299 at 325–326. See also Michelle Kelsall Staggs and Shanee Stepakoff "When We Wanted to Talk About Rape: Silencing Sexual Violence at the Special Court for Sierra Leone" (2007) 1 IJTJ 355.

71 *Kaing Guek Eav alias Duch (Transcript)* ECCC Trial Chamber 001/18-07- 2007-ECCC/TC, 19 August 2009 at 28–29 (Phung Guth details the character of her father), as cited in John D Ciorciari and Anne Heindel "Trauma in the Courtroom" in Beth V Schaack, Daryn Reicherter and Youk Chhang (eds) *Cambodia's Hidden Scars: Trauma Psychology in the Wake of the Khmer Rouge* (Documentation Center of Cambodia, Phnom Penh, 2011) 121 at 133.

72 Interview with a senior ECCC official, anonymity preferred (on file with authors, 2 December 2008), as cited in Mohan, above n 54, at 754.

73 *Kaing Guek Eav alias Duch (Transcript)* ECCC Trial Chamber 001/18-07-2007- ECCC/TC, 20 August 2009 at 26, as cited in Ciorciari and Heindel, above n 71, at 133.

74 Report Issue 18, 23 August 2009, Khmer Rouge Tribunal Trial Monitor, at 4 (on file at UC Berkeley War Crimes Studies Center/East-West Center, Berkeley, California), as cited in Strasser and others, above n 61, at 159.

that have none of the technology or grandeur they arrive to, let alone the electricity. This can mean that they are so preoccupied with following unfamiliar procedure, for example speaking into a microphone, that their testimony is delayed or compromised.[75] Victims find the lawyers intimidating, perceive them to be uninterested in what they have to say, or feel that in cross-examination they are on trial themselves.[76] This is exacerbated by unfamiliarity with the tasks asked of them in court: participants have difficulty "estimating distances, duration, and numbers but also understanding maps, photographs, and sketches".[77] There are daily difficulties and misinterpretations in translation between Khmer meanings and English or French terms. In light of the obvious barriers, it is baffling that the ECCC conducted no specific language or cultural training.[78] This perhaps indicates the victims' second-class status: lawyers do not learn about the victims; the victims must learn about the Court. Victims find this difficult to handle:[79]

> I felt afraid that I would make a mistake in my talk that they might notice or note. Seeing so many lawyers, nationals and internationals, I was worrying that I would do something wrong.

The criminal tribunal is also intransigent to the sensitivities of a traumatised victim, and too blunt an instrument to take into consideration the impact of this psychological state on testimony. Witnesses and civil parties at the ECCC are often unable to recall details to the specificity demanded of them, and have difficulty concentrating, articulating their answers or speaking at all.[80] The Documentation Center of Cambodia (DC-Cam) released a psychological study that found that these behaviours are a result of post-traumatic stress disorder, and a self-protection mechanism that traces back to the regime. Victims under the regime learned quickly to hide all emotions lest they be tortured or killed for weakness. In the years afterwards, they limited how much they thought about their experiences, in order to forget.[81] However, the ECCC cannot and does not attribute these inconsistencies in evidence to trauma causing memory loss or nervousness – instead, they may be interpreted as a lack of

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75 *Kaing Guek Eav alias Duch (Transcript)* ECCC Trial Chamber 001/18-07-2007- ECCC/TC, 23 November 2009 at 2 (during day 52, the President issued at least four reminders to a witness, Mr Sek Dan, to wait for the lighted signal before speaking), as cited in Toni Holness and Jaya Ramji-Nogales "Participation As Reparations: The Eccc And Healing In Cambodia" in Beth V Schaack, Daryn Reicherter and Youk Chhang (eds) *Cambodia's Hidden Scars: Trauma Psychology in the Wake of the Khmer Rouge* (Documentation Center of Cambodia, Phnom Penh, 2011) 172 at 177.

76 At 176.

77 Jacob Katz Cogan "Reviewed Work: Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions by Nancy A. Combs" (2011) 105 AJIL 848 at 849.

78 At 849.

79 Interview with Civil Party of Case 001 (on file with authors, 26 November 2010), as cited in Strasser and others, above n 61, at 157.

80 Berthold and Gray, above n 4, at 107–108.

81 At 101–103.

testimonial credibility.[82] The DC-Cam study gave an example of civil party Ly Hor, who included in his written statement that he was a prisoner at the central torture centre Tuol Sleng, or S21. Yet, during trial, he "could not think clearly" and had difficulty focusing on the questions posed to him. His inconsistent answers led the Court to deem his application inadmissible.[83]

This is perhaps one of the most objectionable aspects of the tribunal structure: that it challenges, undermines, and entangles indisputably real injury in evidentiary and admissibility battles between the prosecution and the defence. These parties are, in truth, not intent on denying recognition of the victims' suffering, but the plight of the individual victim is simply not in either parties' interests. One defence lawyer articulated this clearly, "I don't *really* contest your suffering during the Khmer Rouge regime."[84] But, victims do not understand that their testimony is a small part of a highly technical discourse between defence and prosecution that necessarily seeks to poke holes in one another's case. Due to a lack of resources to correct this information asymmetry, participating in the ECCC can have the opposite intended effect of retraumatisation, and create feelings of shame and desolation.

Fifthly, the tribunal structure's reparative scheme is fundamentally incompetent to reconcile Cambodia's victims. Civil parties have the right to ask for reparation as part of the direct harm inflicted by a crime of the accused.[85] Yet, it is hard to deny the sheer insignificance and paltry symbolism of ECCC reparations. Only moral and collective – not individual – reparations are possible.[86] Granted, the costs of adequate individual compensation are unworkable – remunerating millions of victims would require many more millions of dollars. Yet, the reparative scheme has no enforcement mechanism at all, and no trust fund has been set up by the tribunal. In addition to this, judges have taken an extremely narrow approach to the interpretation of collective and moral reparations.[87] In Case 001, all reparation requests apart from naming the civil parties in the judgment were denied,

82 At 106–107; and Cogan, above n 77, at 849.

83 *Kaing Guek Eav alias Duch (Transcript)* ECCC Trial Chamber 001/18-07-2007- ECCC/TC, 6 July 2009 at 70–71, as cited in Ciorciari and Heindel, above n 71, at 131.

84 *Kaing Guek Eav alias Duch (Transcript)* ECCC Trial Chamber 001/18-07-2007- ECCC/TC, 7 July 2009 at 32, as cited in Ciorciari and Heindel, above n 71, at 129 [emphasis added].

85 Internal Rules, above n 55, r 23.

86 Rule 23 *quinquies*.

87 Renée Jeffery "Beyond Repair?: Collective and Moral Reparations at the Khmer Rouge Tribunal" (2014) 13 JHR 103 at 115.

because they were imprecise, the accused was indigent, or they required a decision of the Cambodian government.[88] New Zealand Judge Dame Sylvia Cartwright commented:[89]

> The process of participation and the seeking of reparations was, to my mind, most unsatisfactory … After working through a complex, time-consuming and traumatic process ... the victims found that the Trial Chamber had no jurisdiction to order anything apart from formal recognition in the judgement.

Victims are often impoverished themselves, and so find the lack of reparations hard to understand considering the hundreds of millions of dollars spent funding the ECCC's work.[90] One victim expressed his disappointment: "so the ECCC is just a make-up Court. It is just to show the world that there is a trial, but there is no individual reparation."[91] Indeed, this scheme is ignominious in light of the two million invaluable lives lost and the unquantifiable suffering endured by those who survived. It is especially so considering the numerical negligibility of the group of victims the ECCC is being asked to provide for. Of the millions of Cambodian victims, only thousands become accepted civil parties, and only a fraction of these still are eligible for reparations. Yet, the tribunal again demonstrates its inadequacy in dealing with Cambodian victims, through seemingly allocating a right and being underprepared for the implications of its exercise.

For most Cambodians, especially those from rural areas, accessing the ECCC is an expensive and impractical option. ECCC results and reparations can thus realistically only be symbolic for most of the country. However, the criminal trial has minimal outreach and so its impact and symbolism are limited for the majority of the population, who are non-participant victims living beyond Phnom Penh. Two surveys present the significance of this shortcoming. One showed that 39 per cent of respondents had no knowledge of the ECCC and 46 per cent had only limited knowledge of the ECCC's work. Only 10 per cent knew that there were five accused at trial and 54 per cent did not know that there were any at all.[92] Another survey from 2009 found that more than 60 per cent of the respondents were indifferent to the ECCC.[93] An ECCC employee stated how "community outreach literally can mean

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88 *Kaing Guek Eav alias Duch (Judgment)* ECCC Trial Chamber 001/18-07-2007/ECCC/TC, 26 July 2010 at [667]–[675].

89 Sylvia Cartwright "International Criminal Trials: A Promise Fulfilled?" (2011 Annual Hawke Lecture, University of South Australia, Adelaide, 9 June 2011).

90 Rachel Killean "Procedural Justice in International Criminal Courts: Assessing Civil Parties' Perceptions of Justice at the Extraordinary Chambers in the Courts of Cambodia" (2016) 16 Int CLR 1 at 29.

91 Jasini, above n 3, at 45.

92 Phuong Pham and others *So We Will Never Forget: A Population-Based Survey on Attitudes About Social Reconstruction and the Extraordinary Chambers in the Courts of Cambodia* (Human Rights Center, University of California, Berkeley, 2009) at 36–37.

93 Terith Chy *A Thousand Voices* (Documentation Center of Cambodia, Phnom Penh, 2009) at 13, as cited in Toshihiro Abe "Perceptions of the Khmer Rouge Tribunal among Cambodians: Implications of the Proceedings of Public Forums Held by a Local NGO" (2013) 21 SEAR 5 at 9.

dropping off copies of 700 page ECCC decisions throughout relatively illiterate communities and without explanation."[94] One must surely doubt the suitability of a mechanism that touches, and indeed only attempts to touch, merely thousands of the millions that it claims to serve.

Finally, the speed of the trial process also causes concern among Cambodian victims. Trials, with their regimented due process and evidentiary requirements, are notoriously slow. This pace is at odds with the age of the Khmer Rouge perpetrators and their declining health. Some victims perceive that if the accused dies before the conclusion of the trial, "there will be no justice for the victims, as well as for the world."[95] There is also the fear that civil party applicants will not live to see the trials take place – in Case 002, 18 applicants died after applying and before trial commenced.[96]

Thus, the impact of pursuing a mechanism constructed from the Western liberal democratic framework in a non-Western state is not just misinformed in theory. It has real and debilitating effects on those most affected in the PCE – both victims who choose to participate, and those who have only to watch from afar. It is unprepared or unwilling to provide tangible reparations for the former, and limited in its symbolic outreach to the latter. Rigidity of court procedure and an innate and blinding focus on retribution operate to the exclusion, it seems, of being able to providing real reconciliation to victims. The effect can be counterproductive to healing and render participation derogating and retraumatising. No transitional justice mechanism should bring a participant to make the statement that "we are victims two times, once in the Khmer Rouge time and now once again."[97] This goes against the very purpose of transitional justice.

However, one cannot truly be surprised at this result. What must not be forgotten is that the ECCC is not human, and so cannot be attributed with human empathy or be held responsible for tending to the intricacies of a very human victim. It is a machine that is by its own nature uncompassionate, built to process evidence and not emotion. It will thus undoubtedly be incapable of producing transitional justice out of the insurmountable suffering and oppression in a PCE like Cambodia. It is doomed to inefficacy not simply because Cambodia does not share the Western legalistic background of its origin, but also because the circumstances of widespread victimisation demand an empathetic response, above and beyond what the Western retributive system is capable of doing. The ECCC is an extraordinary mechanism, and in Western states the tribunal structure no doubt can be the best

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94 Richard Varnes "Fractured: How Trauma and a Culture of Repression Impact Justice and Reconciliation in Post-Conflict Cambodia" (JD/MA candidate, American University, 12 December 2016) at 14–15.

95 Interview with Civil Party Cases 001 and 002 (on file with authors, Tuol Sleng Genocide Museum, 18 September 2014), as cited in Jasini, above n 3, at 32.

96 Marie Guiraud "Victims' Rights Before the Extraordinary Chambers in the Courts of Cambodia (ECCC): A Mixed Record for Civil Parties" (5 December 2012) International Federation for Human Rights <www.fidh.org> at 25.

97 Mark E Wojcik "False Hope: The Rights of Victims before International Criminal Tribunals" (2010) 28 L'Observateur des Nations Unies 1 at 1.

option. In Cambodia, however, it could not have been more misguided. A better design must be possible.

B Victims-Oriented Transitional Justice in Theory

Even though the ECCC has proven incapable of effecting meaningful reconciliation to victims, the idea underpinning this inclusion is, in our opinion, entirely correct. The following section will explore how the victim must be placed at the centre of transitional justice practice if a real transition is to take place – because it refocuses the field on the human rights it was designed to serve, avoids Western bias and elitism, informs an accurate and legitimate solution and gives structure and consistency to transitional justice practice.

The current role of Cambodian victims asks that they merely add their experiences to the knowledge of the ECCC, within the bounds of what the tribunal wants to hear. This is a byproduct of the institutionalisation of the field where the international community applies its "tools" to the PCE, and the victim is the recipient and not the actor. Their reconciliation is a positive consequence but not necessary for transitional justice to "go ahead anyway". The Cambodian experience is a classic example in that the underwhelming results for victims at the ECCC has not triggered any reconsideration from responsible actors about the suitability of its work. Part II of this article identified that this process exists because of a pervasive Western bias in modern international law that presupposes its own superiority. However, to refer again to the quest for "best practices" in the transitional justice field, we contest that the solution is the victim as the determinant: the central force around which mechanisms, responsible actors and other priorities fall into orbit.

First, a victims-oriented approach realigns the field on the human rights that comprise it. Nyamu-Musembi proposed that in human rights discourse, the question, "who does it work for?" should be answered from the perspective of those claiming the rights.[98] The same should be asked of transitional justice schemes and the answer sought must be "the victim" because it re-centres the field on its elemental purpose. Human rights, as Mohamad stated, "are born from real conditions."[99] And, inherent to the concept of justice is the "notion of restitution to right an injustice".[100] Thus, if a right is wronged, it logically must be righted from the place of the wrong. Human rights inform the transitional justice field, but they belong to the victim. Abuse of human rights is borne by the victims in the "real conditions" through which they suffer. Thus, "a guilty verdict will not in and of itself 'right

98 Celestine Nyamu-Musembi "Towards an Actor-oriented Perspective on Human Rights" (IDS Working Paper 169, Institute of Development Studies, October 2002) at 2.

99 Goenawan Mohamad *Sidelines: Writings from* Tempo, *Indonesia's Banned Magazine* (translation by Jennifer Lindsay, Hyland House, Monash University, South Yarra (VIC), 1994) at 78, as cited in Brown, above n 34, at 80.

100 Jasini, above n 3, at 29.

the wrong'".[101] This is one of the reasons for the tribunal's incompetence, as was discussed in section III A. By way of solution, if the field's purpose is to transition a PCE from a state of injury to a state of peace, then the end point is possible only if the justice sought is exactly that wished for by those who bear its violation. This is why responsible actors need to critically ask, "who does it work for?", because if the answer is not "the victim", then the real injustice will only be addressed incidentally, by chance, and incomprehensively. When asked of Cambodia, it seems clear that the tribunal "worked for" the international community's Western standards and the Cambodian government's desire to maintain control. The ancillary role of victims thus points to the Cambodian scheme's greatest flaw.

Embracing a victims-oriented approach requires recognition that the Western system is inappropriate for non-Western PCEs. This has been termed "letting go of legalism",[102] and is necessary if the Western bias is to be shaken off. Transitional justice is a greatly complicated field. It is unsurprising that responsible actors, with their formal educations and good intentions, see transitional justice in purely legalist terms and as a result believe it can be solved through following, almost by default, the rigid legal mechanisms in which they are trained and to which they are accustomed.[103] However, judging the success or failure of transitional justice through legalism oversimplifies the PCE,[104] and precludes alternative perspectives.[105] Indeed, the ECCC is a legalist's success story – a victory of international standards despite adversity and corruption – but this interpretation takes into account only a fraction of the PCE, which is in no way representative of the whole. What is required is that responsible actors "let go" of looking at PCEs with the end goal of establishing a liberal democracy.[106] Seeking this end-point, subconsciously or consciously, privileges the legalist mechanisms that do not account for political, economic and social context. While this contextual analysis is messy to the legalist's formalism, it is essential to seeing beyond the tribunal as being the best or only legitimate solution and dislodging Western elitism. This premise hindered true contextual engagement in Cambodia – because no matter how "hybrid" or nationally-derived the ECCC presented itself to be, the whole design of Cambodian transitional justice was tied, fundamentally, to legalist ideals.

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101 At 29.

102 Kieran McEvoy "Beyond Legalism: Towards a Thicker Understanding of Transitional Justice" (2007) 34 J Law Soc 411 at 411.

103 At 416 and 440.

104 At 424.

105 At 417.

106 Simon Robins and Erik Wilson "Participatory Methodologies with Victims: An Emancipatory Approach to Transitional Justice Research" (2015) 30 Can J Law Soc 219 at 219; Joakim Öjendal and Sivhouch Ou "The 'Local Turn' Saving Liberal Peacebuilding? Unpacking Virtual Peace in Cambodia" (2015) 36 TWQ 929 at 932; and Thorsten Bonacker, Wolfgang Form and Dominik Pfeiffer "Transitional Justice and Victim Participation in Cambodia: A World Polity Perspective" (2011) 25 Global Society 113 at 120.

This concession of superiority may be unlikely. However, a victims-oriented approach offers a resource of accurate and accountable knowledge about what is required of the transitional justice scheme. Victims know, more intimately and accurately than anyone, the injury that needs to be addressed in order to seek justice. For the international community to speak on their behalf is to render them silent and presupposes that it knows the solution and that victims will benefit from it.[107] Victims may well demand a retributive tribunal with international leverage, but in Cambodia, consultation with victims has shown that they seek the restorative measures of education, healthcare and understanding about what happened – things that mean more to the struggles of the day-to-day.[108] The disparity between what the international community prescribed and what the victim community wanted, to quote from a similar Nepalese study, shows that "imported and prescriptive approaches not only do not address their needs but also sometimes fail even to identify them".[109] Thus, victims' needs cannot be better known or assumed by a "faceless bureaucrat or an opaque committee somewhere in Geneva or New York".[110] A victims-oriented approach would elevate them from their presently symbolic role to one where a tribunal should exist only if the victims' experiences direct responsible actors to create such an institution.

Finally, a victims-based approach is "best practice" for the field. This is because victims are unfortunately the common reliable thread through all unique and vastly different PCEs. Taking *perpetrators* as the starting point for a transitional justice scheme is parochial and difficult: as in Cambodia, they may be well-sheltered by powerful people, remain unremorseful, or be too old to structure a meaningful scheme around. Nor can orienting transitional schemes around *governments* and official sources provide a reliable portrayal of context: the political situation in Cambodia, for one, has seriously hindered the realisation of justice.[111] Engaging with a PCE's leaders may in fact sustain or legitimise unhealthy political power and corruption and delay the drafting of a transitional justice scheme. It is clear that *not engaging* and imposing a foreign-conceived solution is tempting to legalists, but not "best practice" either. Victims, however, are common to all PCEs. As long as there are human rights abuses, there will be victims. They are not reluctant to be implicated nor are they embroiled in power-politics. For Cambodia, a victims-oriented scheme is hypothetical, as the time for this approach was at the end of the regime in 1979. But – at least – Cambodia can stand as proof of

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107 Sarah Cullinan *Torture Survivors' Perceptions of Reparation* (The REDRESS Trust, London, 2001) at 19, speaking of the lessons learned by the South African Truth and Reconciliation Commission: "a grave disservice is done to victims by those who seek to speak on their behalf, whether in the name of justice or reconciliation. By so doing … they render the victims silent."

108 Pham and others, above n 92, at 35.

109 Simon Robins "Towards Victim-Centred Transitional Justice: Understanding the Needs of Families of the Disappeared in Postconflict Nepal" (2011) 5 IJTJ 75 at 98.

110 Mutua, above n 50, at 578.

111 Chan, above n 1, at 70.

how a victims-oriented approach is the most commonsense reaction to an ineffective Western system, and can provide a more tangible sense of justice.

C A Context-Specific Process in Theory

In his 2004 report on the future of transitional justice, Annan recognised the importance of victims:[112]

> The United Nations must assess and respect the interests of victims in the design and operation of transitional justice measures. Victims and the organisations that advocate on their behalf deserve the greatest attention from the international community.

He also acknowledged the importance of a context-specific approach: "Unfortunately, the international community has not always provided rule of law assistance that is appropriate to the country context. Too often, the emphasis has been on foreign experts, foreign models and foreign-conceived solutions."[113] In Cambodia, the international community gave victims a more central role at the ECCC, and engaged with the Cambodian context through incorporating national law and judges. So, then, if both of these components were present, why were the results still so underwhelming? We contend that what the Secretary-General and indeed the international community did not recognise was that these two things – victims and context – are fundamentally linked to each other in an optimum transitional justice approach. A fully integrated, context-specific approach will not be possible without taking direction from the victims who have suffered and continue to live within the context. Likewise, victims will not have a true sense of reconciliation and justice unless the approach is context-specific and distinctively responsive to their needs and violated rights. It is suggested that this context-specific, victims-oriented approach should take its form in three stages: consultation; assessment; and implementation.

Consultation is not new to transitional justice practice, but has generally been treated as merely a cursory element.[114] It seems that this is so because responsible actors have had the tendency to view victims as a traumatised class, incapable of making their own informed decisions.[115] However, as the international community grows to realise that "non-elites ... are very often important human rights

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112 *Report of the Secretary-General*, above n 7, at [18].

113 At [15].

114 Simon Robins "Challenging the Therapeutic Ethic: A Victim-Centred Evaluation of Transitional Justice Process in Timor-Leste" (2012) 6 IJTJ 83 at 84. For an example of an effective consultation and outreach programme in Afghanistan, see Ahmad Nader Nadery "Peace or Justice? Transitional Justice in Afghanistan" (2007) 1 IJTJ 173 at 176: "There seemed to be a sense of gratitude at the very concept of being consulted"; "Now I feel that I am a part of this society. Nobody ever asked our view on such important decisions"; and "participants said they considered the consultation an extraordinary opportunity for the people of Afghanistan".

115 Lundy and McGovern, above n 33, at 278.

theorists, so that the idea of human rights is perhaps most consequentially shaped and conceptualized outside the centers of elite discourse",[116] Annan has also supported letting this presumption go. He stated:[117]

> Increasingly, the United Nations is looking to nationally led strategies of assessment and consultation … the most successful transitional justice experiences owe a large part of their success to the quantity and quality of public and victim consultation carried out. Local consultation enables a better understanding of the dynamics of past conflict, patterns of discrimination and types of victims.

Robins and Wilson discuss an illuminative "participatory" or "emancipatory" research strategy of consultation, where local knowledge and perspectives are not simply recognised, but form the basis for research and planning.[118] This approach stems from Freire's theory that the oppressed "can and should be enabled to conduct their own analysis of their own reality"[119] and Chambers' conclusion that participatory research has three central features:[120]

> … that poor people are creative and capable and can and should do much of their own investigation, analysis and planning; that outsiders have roles as conveners, catalysts and facilitators; that the weak and marginalised can and should be empowered.

The current process of transitional justice – limiting victim engagement to testifying at trial, and working in legalist terms to which victims are often unfamiliar – gives victims meagre opportunity to take ownership of what is implemented. Thus, consultation is necessary for actors to understand the full spectrum of human rights violations and issues, and facilitate their remedy through the victims' own vision.

The need for wide-ranging national development during the PCE is often overlooked, but it can be crucial for a sustainable recovery. However, as it has been pointed out:[121]

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116 Mark Goodale "Introduction: Locating Rights, Envisioning Law Between the Global and the Local" in Mark Goodale and Sally Engle Merry (eds) *The Practice of Human Rights: Tracking Law Between the Global and the Local* (Cambridge University Press, Cambridge, 2007) 1 at 25.

117 *Report of the Secretary-General*, above n 7, at [15]–[16].

118 Robins and Wilson, above n 106, at 226, citing Andrea Cornwall and Rachel Jewkes "What is Participatory Research?" (1995) 41 Soc Sci Med 1667 at 1667. For further discussion of participatory transitional justice, see Patricia Lundy and Mark McGovern "The Role of Community in Participatory Transitional Justice" in Kieran McEvoy and Lorna McGregor (eds) *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (Hart Publishing, Oxford, 2008) 99.

119 Robert Chambers "The Origins and Practice of Participatory Rural Appraisal" (1994) 22 World Dev 953 at 954. See also Paulo Freire *Pedagogy of the Oppressed* (Seabury Press, New York, 1968).

120 Chambers, above n 119, at 954.

121 Duthie, above n 46, at 309.

> If transitional justice is understood to seek accountability and redress for violations of economic and social rights, as it does for violations of civil and political rights, then the connection to development is much easier to make.

This reinforces the need, discussed above, to focus more on economic, social and cultural rights when assessing the needs of a PCE. To be sure, there are risks to focusing on development at the expense of justice and retribution,[122] but as Duthie has indicated, while "[t]ransitional justice is not a development strategy, … it should be, at a minimum, development sensitive".[123]

The assessment requirement looks objectively at the state of the PCE. What are the rule-of-law capacities of the country?[124] What is the nature of the judicial system and does it preclude a judicial remedy? What is the political will of the parties? Is there a threat of violent resurgence? Is the government implicated in the conflict, and if so, is it still a threat? Responsible actors have been criticised for not paying enough attention to these differences in drafting transitional justice schemes.[125] Cambodian rule-of-law capacities, for example, should not be expected to function at the same level as Western states, with a fully developed and accountable judicial system.[126] The Cambodian experience has shown, additionally, that the state of the victim as well as the state of the country should be assessed. Understanding the place of the victim within society and the impact of psychology, religion and custom can further tailor an effective remedy.

The result, and the third stage of this process, is the implementation of a transitional justice scheme that is tailored to both the injury of the victim and the realities of the PCE. This is not a perfect solution, nor does it attempt to be complete or prescriptive. It is merely the hypothesis of an alternative framework that, as the following section examines, would have resulted in a more effective transitional justice experience for Cambodia.

D Application to Cambodia

1 Consultation

Consultation with Cambodia's victims in establishing the tribunal was cursory, if that. Negotiations occurred almost exclusively between the Cambodian government and the UN and were "dominated by the agendas of Cambodian officials and foreigners",[127] despite victims' desires to

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122 See for example at 306–309.

123 At 292.

124 *Report of the Secretary-General*, above n 7, at [14].

125 Fletcher, Weinstein and Rowen, above n 8, at 209.

126 Ruti G Teitel "Transitional Justice Genealogy (Symposium: Human Rights in Transition)" (2003) 16 Harv Hum Rts J 69 at 93.

127 Muddell, above n 18, at 6.

participate. Cambodians at the 2003 Symposium asked for national consultation that would reveal the Cambodian population's opinions and priorities for transitional justice schemes.[128] While complaints made by Cambodian activists did result in meetings with victims and NGOs, activists:[129]

> … held the impression that these meetings were simply to inform them of compromises reached with the government, rather than an opportunity to take advantage of civil society's insight into the possible obstacles posed by Cambodia's legal system.

At least retrospectively, it is possible to glean from other groups' surveys what a proper consultation period – ideally following a participatory research strategy – would have revealed regarding the gravest violations and most important remedies for victims. When presented together, the demands for restorative community investments over a retributive tribunal are telling.

In terms of reparations, victims were often more concerned with day-to-day injustices than with Khmer Rouge perpetrators' impunity, which had prevailed since 1979. Due to this length of time, the denial of particularly economic, but also social and cultural privileges were seen as more significant, and their remedy was more urgent.[130] Even the former King Norodom Sihanouk in 2005 stated that a tribunal would be a "comedy and hypocrisy", and funds would be better spent in agriculture, providing irrigation and fertile land to Cambodians.[131] Indeed, victims – when both requesting reparations at the ECCC and in stand-alone surveys – called for the provision of basic needs.[132] These included jobs; medical services – like hospitals, village healthcare and psychological care; infrastructure – including building pagodas to mourn the dead and public roads; agriculture – land, livestock and food; religion – rebuilding Buddhist temples and destroyed pagodas, developing Theravāda Buddhist schools and conducting religious ceremonies; education – construction of schools, scholarships for students, funding of historical textbooks, and dissemination of information about the genocide to counter the taboo surrounding it. When asked what the government should focus on, only two per cent replied "justice". Around 50 per cent of respondents said "the economy" and "infrastructure".[133]

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128 At 13.

129 At 7.

130 Pham and others, above n 92, at 35.

131 "Chronology of the Khmer Rouge Tribunal" Documentation Center of Cambodia <www.dccam.org>.

132 For discussions of the following requests, see Pham and others, above n 92, at 5 and 44; Killean, above n 90, at 30; and Jeffery, above n 87, at 113.

133 Pham and others, above n 92, at 5.

Victims generally wanted reparations to be provided to the community as a whole. Interestingly, victims only supported memorials over the provision of socioeconomic requirements when the latter was not offered.[134] One victim was vehement that Cambodians needed:[135]

> [S]ome forms of benefits … for the elderly, the lonely ones who have lost their spouses, children and relatives during the regime. They are suffering because whenever they fall sick, they have no money to go to hospital. If there is anyone at all who is willing to give us collective reparation, I want them to provide for us as a community … an absolutely independent hospital, without the aid from the government. … If this is ever done, I will feel that justice is served and I shall be pleased.

In light of this statement, the inadequacy of the ECCC's limited symbolism is incontrovertible. It is also apparent that the preconception of economic, social and cultural rights being insupportably costly and only realisable on a progressive basis is incorrect: many of the demands above could have been implemented immediately, and perhaps more cheaply, than the USD 319 million tribunal.

When asked about accountability, some victims supported a tribunal, but did not support their government's involvement in it. In a 1999 survey, 84,000 Cambodians stated that they preferred an international tribunal over a hybrid. They knew little about the nature of an international tribunal, but enough to know that their corrupt government and judicial system should not be involved.[136] Despite that, a fully international tribunal held outside of the country was not a preferred alternative because it would disconnect Cambodians from any sense of justice gleaned from its trials. Thus, a tribunal with national involvement was still the better option, but because of the government's influence, "the Extraordinary Chambers would still not make a difference".[137] Victims noted that it was more important to address the thousands of former Khmer Rouge cadres living among them in order to feel a sense of justice and reconciliation.[138] A participatory consultation period would have thus been beneficial to all parties: it would have empowered victims, while signposting the most tangible and meaningful course of transitional justice.

2 Assessment

Assessing the state of the PCE and the place of victims within it would also have revealed much about what was appropriate for the situation. Government corruption, poor rule of law adherence, a chaotic judicial system, and scant public trust in these legal and political systems, should have

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134 Jeffery, above n 87, at 113.

135 Interview with survivor Van Naath (on file with authors, 8 December 2008), as cited in Mohan, above n 54, at 766.

136 Muddell, above n 18, at 8.

137 At 9.

138 At 14; and Eve Monique Zucker "Trauma and Its Aftermath: Local Configurations of Reconciliation in Cambodia and the Khmer Rouge Tribunal" (2013) 72 J Asian Stud 793 at 799.

indicated that pursuing a singular mechanism linked to and dependent on these establishments would have been doomed to inefficacy and lacked legitimacy in the eyes of the public. This is despite Annan's recognition in 2004 that such things as domestic capacities, independence within the justice sector and public confidence in the government were relevant considerations for responsible actors.[139]

In light of this, and especially in light of what the UN knew about the Cambodian judiciary, the pursuit of a hybrid tribunal is surprising. It has been suggested that the UN was pushed by a sense of failure to act sooner.[140] In 1998, after the Cambodian government requested assistance to prosecute senior Khmer Rouge leaders, a UN Group of Experts investigated and reported that "the Cambodian judiciary presently lacks three key criteria for a fair and effective judiciary: a trained cadre of judges, lawyers and investigators; adequate infrastructure; a culture of respect for due process."[141] This, a culture of domestic impunity, doubts about Cambodian judges' familiarity with international law and the national Criminal Code,[142] and law's reputation in the country as an "instrument to affirm the rightfulness of the power holders",[143] makes questionable the decision to pursue a tribunal so connected to the domestic system. Indeed, the 2003 Symposium participants predicted that this would render a tribunal incompetent to "deliver credible justice."[144] The impact of this dire domestic system on a hybrid tribunal should have been anticipated. Predictably, the former UN human rights envoy to Cambodia described how "the weakness and corruption within the national legal system have infected the ECCC, instead of the ECCC influencing the conduct of local judges and prosecutors".[145]

Secondly, the Cambodian government is known to be corrupt. There can be no surprise, then, that the government's support for the ECCC has been widely denounced as a façade for the manipulation and retention of power.[146] Prime Minister Hun Sen has been in power since defecting from his role within the Khmer Rouge to side with Vietnamese liberators and set up the new government. As the *Bangkok Post* wrote, "the truth is Hun Sen has no intention of allowing any meaningful tribunal to judge the Khmer Rouge crimes of excess."[147] He has offered, for example, amnesty to former Khmer

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139 *Report of the Secretary-General*, above n 7, at [3].

140 Chan, above n 1, at 4.

141 *Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135* A/53/850, S/1999/231(1999) annex, at 36.

142 Jasini, above n 3, at 18; and Bates, above n 62, at 192.

143 Bates, above n 62, at 191.

144 Muddell, above n 18, at 11.

145 Lak Chansok "Can Khmer Rouge Survivors Get Justice?" *The Diplomat* (online ed, Tokyo, 30 May 2014).

146 Subotic, above n 14, at 381; Muddell, above n 18, at 8–9; and Chan, above n 1, at 62–63, 70.

147 "Khmer Tribunal Stalled Again" (22 August 2005) Global Policy Forum <www.globalpolicy.org>.

Rouge officials within his government,[148] and arranged the timing of the trials to cross with the elections.[149] Hun Sen may also have been supportive of criminal trials because pursuing individual accountability takes the focus away from the structural injustices sustained by his government – like the estimated USD 300 to 500 million government officials take annually from state assets.[150] Criminal trials do not threaten to challenge the endemic poverty and corruption that Hun Sen has allowed to prevail. And thus, an objective assessment of this political situation – especially when considered with the comment in consultation that fully international trials are not a preferred alternative[151] – would have pointed responsible actors away from criminal trials as the primary and sole mechanism.

Furthermore, Cambodians' perception of justice is heavily influenced by their Buddhist beliefs. Approximately 95 per cent of the population is Buddhist.[152] Theravāda Buddhists seek *dhamma*, a divine law of existence governing all beings that holds as its ultimate goal the reconciliation of *dhamma* with the individual.[153] Perpetrators are responsible for the harm they have caused, but in equal measure victims are responsible for liberating themselves from their own suffering. Therefore, "undoing" and forgiveness, and relieving anger through a process of internal calming, is indispensable to conflict resolution and reconciling with the past.[154] This practice of forgiveness is seen clearly at the annual *pchum ben* festival. When Cambodians offer food and solace to the spirits of their dead loved ones, they also make *pretta* offerings to the souls of the damned, even those who have wronged them.[155] *Karma* is also a dominant concept. Wrongdoers will inescapably suffer for their wrongs, and thus a tribunal's finding of guilty or innocent will not have any bearing on the perpetrators' inevitable judgment. In this sense, a tribunal is redundant and inconsequential.[156] Western juristic measures are indeed seen as egoistical and unwholesome,[157] with each party asserting his own interests and the

148 Jasini, above n 3, at 15, 17.

149 Subotic, above n 14, at 381.

150 Joel Brinkley "Cambodia's Curse: Struggling to Shed the Khmer Rouge's Legacy" (2009) 88 Foreign Aff 111 at 118.

151 Muddell, above n 18, at 9.

152 Pham and others, above n 92, at 22.

153 Ian Harris "Onslaught on Beings: A Theravada Buddhist Perspective on Accountability for Crimes Committed in the Democratic Kampuchea Period" in Jaya Ramji and Beth Van Schaack (eds) *Bringing the Khmer Rouge to Justice: Prosecuting Mass Violence Before the Cambodian Court* (Edwin Mellen Press, Lewiston (NY), 2005) 59 at 85.

154 At 85; Jasini, above n 3, at 391–392; and Ip, above n 24, at 868.

155 Mohan, above n 54, at 773–774.

156 Harris, above n 153, at 87.

157 At 85.

"truth" being only that of the legal battle's victor. Cambodia's broad and reconciliative perception of justice thus conflicts with Western retribution, and signals that restorative measures based on Buddhist beliefs of forgiveness and acceptance will be the most effective.

Fourthly, in many ways the Khmer Rouge regime lives on in the minds and the households of Cambodian people. This persistence of mass victimisation points to widespread restorative measures, rather than the accountability of a select few perpetrators. The Khmer Rouge did not just effect individual psychological conditions in those who suffered torture, rape, forced labour, forced marriage, or watched loved ones be murdered. The Khmer Rouge destroyed the entire community and family structure – by separating children from their parents, and forcing families to betray each other.[158] This damage has continued into younger generations: domestic abuse is high, youth struggle with identity, detachment and substance abuse and there are few psychological services to address the problem.[159] Sotheara Chhim diagnosed the psychological condition of *baksbat* – unique to Khmer Rouge survivors – which translates as "broken courage" and typically involves submission, passivity, mistrust and "being afraid forever".[160] Chhim considered *baksbat* to be a "major stumbling block to social development and prosperity."[161] This suggests that victims suffering from *baksbat* in their submission and fear are unlikely to actively involve themselves in a criminal trial, especially one that has limited geographical and information outreach like the ECCC. Moreover, it indicates that the narrow focus of retributive trials will be disconnected from these issues and do little to ameliorate the problem. In a country with such widespread victimisation, the psychological wounds of the victim and the community must be addressed if a transitional change is to occur.

Finally, being aware of Cambodia's unique culture is crucial in planning a transitional justice scheme. For example, the concept of *chbab srey* – the way in which the woman is to conduct herself – dictates that Cambodian women are "unwomanly" if they are outspoken or dominant in the community. This could preclude a female victim's wish to face or speak out against a male offender, or require the provision of male elders to assist the female victim in being involved in transitional

158 James K Boehnlein and J David Kinzie "The Effect Of The Khmer Rouge On The Mental Health Of Cambodia And Cambodians" in Beth V Schaack, Daryn Reicherter and Youk Chhang (eds) *Cambodia's Hidden Scars: Trauma Psychology in the Wake of the Khmer Rouge* (Documentation Center of Cambodia, Phnom Penh, 2011) 33 at 37.

159 At 38; and Nigel P Field "Intergenerational Transmission Of Trauma Stemming From The Khmer Rouge Regime: An Attachment Perspective" in Beth V Schaack, Daryn Reicherter and Youk Chhang (eds) *Cambodia's Hidden Scars: Trauma Psychology in the Wake of the Khmer Rouge* (Documentation Center of Cambodia, Phnom Penh, 2011) 70 at 76–77.

160 Sotheara Chhim "Baksbat (Broken Courage): A Trauma-Based Cultural Syndrome in Cambodia" (2013) 32 Med Anthropol 160 at 162.

161 At 164.

justice.[162] Any transitional mechanisms that seek to challenge this custom – perhaps from being unaware of it, or under a Western perception of sexism – must be aware that it may offend Cambodian culture. Alongside this is a culture of deference and subservience prevalent among Cambodians, where they are likely to agree with people they perceive to be superior to them – not because they mean an affirmative answer, but as a show of respect and fear. This deference is further influenced by the *baksbat* condition: when in the company of people more powerful than them, Khmer Rouge survivors:[163]

> … stand bent, their hearts beating faster and their bodies trembling with fear, they never dare to make comments due to their fear of blame and retribution. [They] want to complain but dare not do so … their faces downturned.

Responsible actors must be sensitive to this when conducting investigations or consultations.

3 Implementation

From this non-prescriptive and hypothetical theorisation of what a victims-oriented, context-specific approach would have looked like in Cambodia – through consultation, and assessment of context and the circumstances of victims within it – it is clear that responsible actors would and should have been directed towards the implementation of restorative rather than retributive mechanisms.[164] This is not to discount the importance of ending impunity through retribution. It merely suggests that the exclusive pursuit of a hybrid criminal tribunal was not the most realistic, economical or effective option. It is notable that victims largely demanded investments in economic, social and cultural rights – like education and social services – highlighting the importance of looking at transitional justice from a broader normative framework. The Cambodian experience thus demonstrates that looking beyond civil and political rights does make a difference, in being able to embrace the full spectrum of violations whose remedy is more meaningful in a developing country.

Based on this approach, a variety of local-level mechanisms would have been better investments. These would have been sensitive to victims' custom, religion and psychological state; not contingent on or allied with the government; and realistic to the impact of a 30-year time lapse on the prospects of any mechanism's success. Fundamentally, they would have been a product of victims' own perspectives, demands and analysis, according to a strategy of participatory research. These would have been, for example, investments in education that inform younger generations about their elders'

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162 Pen Khek Chear "Restorative Justice in the Cambodian Community: Challenges and Possibilities in Practice" (MSW candidate, Boston University School of Social Work, 2011) at 3–5.

163 Chhim, above n 160, at 163, citing the national poet Kong Bunchoeun.

164 Lak Chansok and Khoun Theara "In Pursuit of Transitional Justice in Cambodia: From Theoretical to Pragmatic Applications" (Working Paper 47, Cambodian Institute for Cooperation and Peace, 2012) at 7–8. Restorative justice practices generally focus on amending perpetrators' and victims' relationships, informal community justice initiatives, and attending to psychological healing.

suffering and encourage them to pursue the professions that were targeted under the regime: doctors, lawyers, teachers and religious leaders. There would have been much-needed investments in psychological services, to help victims surmount their suffering. They would perhaps have looked like a more widespread version of the community dialogues that were conducted independently by the DC-Cam: held at sites of abuse for victims to discuss their losses and promote community-wide healing, these were highly successful and more "relevant and beneficial to [victims'] unique suffering".[165]

These investments would certainly have been directed through Buddhist community practices. Ritual is a central tenet in the way Cambodians approach life and death and thus also can have a role in dealing with mass suffering.[166] The Buddhist ceremonies of *teuch mun*,[167] *rab bat*,[168] *sangha tien*[169] and *salaboun*[170] have been extensively discussed by Etcheson and Chan, in their potential to ease suffering and appease the long-denied right to properly mourn and bury the dead. The formal act of *saccavacana* – an acknowledgement of truth – would have also been instrumental in reconciliation, as it realigns the wrongdoer with the essential Buddhist principle of "right speech".[171] Monks, traditional healers and spirit mediums would have been pivotal in these mechanisms, as they are a source of huge authority and wisdom in Cambodian life.[172] These ceremonies would have encouraged a dialogue between victims and perpetrators; for the former to formally express their suffering, and the latter in return to express their acknowledgement and remorse. In this sense, transitional justice in Cambodia should have eschewed imported concepts and rather balanced traditional culture with

165 Holness and Ramji-Nogales, above 75, at 181–182.

166 Mohan, above n 54, at 774.

167 Craig Etcheson "Faith Traditions and Reconciliation in Cambodia" ("Settling Accounts? Truth, Justice, and Redress in Post-Conflict Societies" Conference, Weatherhead Centre for International Affairs, Harvard University, 1–4 November 2004), as cited in Chan, above n 1, at 95: "The *teuch mun* ritual, which involves monks sprinkling blessed water on persons or objects, is performed to ward off evil spirits and bad luck, and has also been used to help ensure successful reintegration when former Khmer Rouge return to their non-Khmer Rouge home villages."

168 Etcheson, above n 167: "The *rab bat* ritual involves the faithful giving food or other gifts to monks, a process which is said to relieve feelings of anger in those giving the gifts."

169 Etcheson, above n 167: "The *Sangha tien* ritual is a ceremony performed by monks either for dead or living people, and victims and perpetrators have been known to jointly engage in this rite, helping to heal the chasm between them and bringing them together."

170 Etcheson, above n 167: "[A]nother ritual, more traditional than spiritual, is known as the *salaboun*, and is so named for a place in the community where people gather to discuss problems and conflicts in encounters that are usually mediated by village elders."

171 Harris, above n 153, at 86.

172 At 61.

modern realities, with ownership placed in the hands of those who live with the consequences of the violence.[173]

IV CONCLUSION

A victim is made of many types of losses. A victim is no less of a victim if their loss is economic, rather than physical; or psychological rather than political. The point is that while there are many ways of loss, human suffering is at its core the same affliction in its every manifestation; just as it is experienced indiscriminately across culture, race, religion and country. Therefore, the international community, charged as it is with the responsibility to act in alleviation or at least deterrence of human suffering, cannot in good faith sustain a practice that picks and chooses which forms of loss to redress. Transitional justice as it becomes normalised has become institutionalised, and has entangled Cambodia in its dogmatic liberal democratic practice. This parochial normative framework privileges civil and political losses, and neglects those economic, social and cultural losses that are no less valid but inferiorly honoured.

Surrender of the Western hegemonic stronghold over transitional justice is unlikely, but absolutely necessary. For one, it is necessary so as to reflect the truth that there is no hegemony in abstract human suffering. Next, it must be rejected because it presupposes the Western agenda as the sole source of universality and legitimacy, to be granted as a neo-colonial gift to non-Western states. This is imperious and flawed in its conviction. This tells the soldier that a doctor knows the pain of his wound better than they; that despite living through the experience of the injury, the soldier need not speak; by virtue of their esteemed education the doctor's assumption is better than whatever the soldier has to say. In the case of Cambodia, this is to tell the soldier to wait for 30 years before their wound is seen to – and still hold the conviction at the end of those years that the doctor was the best and the only option.

As discussed in Part II, the liberal democratic framework was normatively incompatible with the Cambodian environment, predominantly because its rights were mismatched to Cambodia's societal structure and in their insular nature failed to grasp the immensity of the transition required in the country. In this sense, the framework was self-limiting: it precluded a remedy that addressed the major structural economic, social and cultural injustices of the Cambodian environment, by failing to accommodate the rights in the first place. Part III demonstrated that beyond the egocentrism of the Western normative framework, the pursuit of its mechanisms can cause real detriment to the victims who have suffered the most, and so fail to effect a transition. Above all, this is why transitional justice must embrace a different approach. This must start with a shift in focus. The field can no longer seek to satisfy the agendas of its responsible actors, but must work for the victims that the field supposedly exists to serve. There are multiple justifications for this – as have been discussed above – but what it

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173 Arthur Molenaar *Gacaca: Grassroots Justice After Genocide. The Key to Reconciliation in Rwanda?* (African Studies Centre, Leiden, 2005) at 157.

comes down to is that the suffering of millions of Cambodians is indisputable; and the international community cannot conscionably continue to sustain a transitional justice practice in which any remedy for this suffering is conditional to the point of inconsequence. Transitional justice may be a country-wide practice, but perhaps the greatest movements must start small: every living victim is a precious opportunity to do better.

Thus, the best thing the international community can do is to listen. Victims in bearing their suffering are capable of directing their own healing – and by virtue of that, the optimum approach to transitional justice must be victim-oriented and context-specific to the victims' environment. A hypothetical theorisation of this in Cambodia has revealed that potentially powerful mechanisms, rooted in Buddhist religion, exist; and that victims were not voiceless, but would have demanded restorative and community-building measures if they were asked. This approach would have addressed past injustice more tangibly than the Western-imported solution, and in the long-term would have reconciled this past with a more hopeful future.

In modern warfare, perpetrators are increasingly taking the form of stateless insurgents and terrorists. This diminishes the suitability of international criminal tribunals because these perpetrators do not bind themselves to the jurisdiction of the ICC, nor will the international community recognise them as a legitimate state to trigger prosecutorial action.[174] Moreover, these insurgent groups often take the West and indeed the Western system of international law as their adversary. Al-Qaida in 2004 made the harrowing statement that "the international system built-up by the West since the Treaty of Westphalia will collapse, and a new international system will rise under the leadership of a mighty Islamic state."[175]

This must heighten the imperative to look beyond the criminal tribunal structure as "best practice", and shake away Western bias from any transitional justice measures – lest it trigger vehement resistance and more. Focusing efforts on the more neutral, non-belligerent victim is not prescriptive nor conclusive. However, in the gloomy inevitability of global conflict, it is clear that much of its course and length is in the hands of perpetrators. So, responsible actors must do what they can – without prejudice or predilection – with the mechanisms available to them. The UN-led international community is as extraordinary as the mechanisms it creates, the ECCC included. But it must also learn to learn, and learn to adapt. The success of the future of transitional justice depends on it.

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174 For in-depth discussion, see Laura Mackay "The Non-State Actor Lacuna: Recognising ISIL and International Law" (LLB (Hons) Dissertation, University of Otago, 2015).

175 Jouannet, above n 39, at 402.