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

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ABSTRACT

In 2016, I interned at the Extraordinary Chambers in the Courts of Cambodia (ECCC), the primary mechanism of transitional justice for the Khmer Rouge regime. The ECCC is, truly, extraordinary; however it seemed to me that the tribunal and the outside world were somewhat disjointed: there was little correlation between the rigidity of the tribunal structure, working to high evidentiary civil standards in the air-conditioned court room, to the vibrant, messy, communal, often impoverished life outside. Victims who participated as civil parties 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 UN-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 dissertation, I explore these questions and advocate for a victims-oriented, context-specific approach to transitional justice, through the post-conflict experience of Cambodia.

PART I

A) INTRODUCTION TO TRANSITIONAL JUSTICE

It does not take an expert to see that humankind has, in equal measure, the propensity for self-destruction and the inability to learn from history. Intra- and inter-state conflict has always and will continue to exist, as perennial as the diversity of beliefs as to what form society, morality, politics, and religion should take – and the forceful imposition of these beliefs on others. It is true of the Persian Empire's invasion of the Hellenic cities, as it is of Nazi Germany's conquest of most of Europe, as it is of the Khmer Rouge's imposition of radical communism on its own people. In this sense, diversity is simultaneously necessary and destructive. With the development of the United Nations (UN) and modern international law, a responsibility has emerged to prevent or deal with the consequences of conflicts so as to at least prevent their recurrence. In the gloomy realisation of the inevitability of war, the crucial question for the international community is *how* this should be done. This is the pursuit of transitional justice.

With its genesis in World War I and its proliferation only after World War II,[1] transitional justice is a constantly evolving paradigm and in its newness, cannot easily be defined. Teitel considers transitional justice to be a period of political change in which legal responses are used to confront the wrongdoings of a repressive predecessor regime.[2] The International Center for Transitional Justice[3] (ICTJ) and the UN alternatively prefer broader definitions that do not necessitate political change nor purely legal responses. In 2004, Secretary-General Kofi Annan described transitional justice as:[4]

> The full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial

[1] Ruti G. Teitel "Transitional Justice Genealogy (Symposium: Human Rights in Transition)" (2003) 16 Harv Hum Rts J 69 at 70.
[2] At 69.
[3] "What is Transitional Justice?" (1 January 2009) International Center for Transitional Justice <www.ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf> at 1:
"Transitional justice is a response to systematic or widespread violations of human rights. It seeks recognition for victims and promotion of possibilities for peace, reconciliation and democracy. Transitional justice is not a special form of justice but justice adapted to societies transforming themselves after a period of pervasive human rights abuse." For a full discussion of the definitional differences see Jens Iverson "Jus Post Bellum and International Criminal Law: Differentiating the Usages, History and Dynamics" (2013) 7 IJTJ 413 at 418.
[4] *Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies* S/2004/616 (2004) at [8].

> mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.

Iverson prefers a definition that excludes international criminal law (ICL) and remains directed to systematic, non-individual problems of wider human rights violations beyond what is covered by ICL.[5] He warns against the looser ICTJ and UN definitions for fear they hinder transitional justice's ability to focus on and achieve a specific goal, particularly in post-conflict Cambodia.[6] Indeed, it is unclear whether present-day transitional justice requires Teitel's political transition or not and Iverson proposes a way out of the conceptual disparity that, no doubt, contributes to this ambiguity. However, this writing does not prescribe to this definition. Too widespread is the conflation of ICL with "other" transitional justice practices – "ICL 'plus'… the perception of transitional justice as a collection of tools, with international criminal tribunals being just one of them"[7] – to deem them to be distinct. In addition, as the UN is the most influential transitional justice actor, its definition is the most informative. Perhaps as the effectiveness of the 'processes and mechanisms' is discovered, the field will find its focus and a more refined and purposeful definition may emerge.

The focus of transitional justice has shifted over time and this is reflected in the mechanisms pursued. The Nuremburg trials set a strong retributive precedent, the drive for deterrence clear in the decision to prosecute Nazi leaders under the spotlight of an international court.[8] Teitel attributes the trials' success to these exceptional post-1945 political conditions which never recurred and thus in subsequent years triggered recourse to other transitional justice mechanisms to better match the post-Cold War transitional movements.[9] Focus shifted to restoration rather than retribution, as the political climates of countries such as South Africa and Rwanda necessitated the pursuit of reconciliation in attempting to re-establish the rule of law and create long-lasting peace.[10] Thus, less focus was placed on retribution, accountability and tribunals and more on restoration, nation-building and truth commissions.[11]

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[5] Iverson above n 3 at 420.
[6] At 433.
[7] At 420.
[8] Bronwyn Anne Leebaw "The Irreconcilable Goals of Transitional Justice" (2008) 30 HRQ 95 at 101; Teitel above n 1 at 72.
[9] Teitel above n 1 at 71-72.
[10] At 84.
[11] Leebaw above n 8 at 104; Teitel above n 1 at 77.

The shift temporarily created a perceived dichotomy that justice and reconciliation were incompatible goals. Retributive justice had the effect of destabilising the former regime and the law that had legitimised its abuses,[12] while reconciliative measures were seen to seek compromises between the old and new regimes in pursuit of long-term stability.[13] Today's position however is that of complementarity.[14] The concept that reconciliation is a tool of political compromise has been dispelled, as it is now seen as vital in re-building national justice capacities [15] and reinforcing human rights. [16] Secretary-General Annan recognised the importance of complementarity in warning that approaches pursuing a singular mechanism or ignoring either restoration or retribution will be ineffective.[17] Thus, retributive and restorative goals as well as tribunals and reconciliatory mechanisms are now accepted as coexisting. The current focus – as transitional justice becomes 'normalised' as a branch of international law[18] – is how best to negotiate and implement transitional justice in light of the complexities that come with complementarity.

B) INTRODUCTION TO CAMBODIA

Cambodia has had a troubled history.[19] It is forever the weaker younger sibling of Vietnam, struggling free also from the hand of its coloniser France. In 1970, US-backed Lon Nol overthrew the autocratic monarchy of Prince Sihanouk. This triggered the rise of the Khmer Rouge regime, which on the 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'.

[12] Leebaw above n 8 at 97.
[13] At 102.
[14] Paul Gready and Simon Robins "From Transitional to Transformative Justice: A New Agenda for Practice" (2008) 8 IJTJ 339 at 344.
[15] *Report of the Secretary-General* above n 4 at 1.
[16] Leebaw above n 8 at 105.
[17] *Report of the Secretary-General* above n 4 at 1.
[18] Patricia Lundy and Mark McGovern "Whose Justice? Rethinking Transitional Justice from the Bottom Up" (2008) 35 J Law Soc 265 at 268; Teitel above n 1 at 90; also see Priscilla Hayner, International Center for Transitional Justice "Re-establishing the Rule of Law and Encouraging Good Governance" (presentation to the 55th Annual DPI/NGO Conference, 'Rebuilding Societies Emerging from Conflict: A Shared Responsibility', United Nations, New York, 9 September 2002).
[19] 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* (Yale University Press, Bellevue, 2008); David P. Chandler *A History of Cambodia* (Allen & Unwin, New South Wales, 1993); Isabelle Chan "Rethinking Transitional Justice: Cambodia, Genocide, and a Victim-Centered Model" (International Studies Honors Projects, Paper 3, Macalester College, 2006) at 34-60.

However, their own fear of betrayal and mistrust of others led them to auto-genocide and the breakdown of the regime.[20]

The policies and practices of the new regime 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 would be killed or tortured for appearing 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"[21] and a deep delusional fear of hidden enemies, which resulted in policies of purging and "smashing". People were sent to concentration "re-education" centers or killed for the slightest hint of disagreement with the regime. Those who had obtained university degrees would hide their identity, as intelligence 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 made to betray their parents, to falsely accuse them of being enemies to the regime.[22] Mistrust was rife among cadres also – 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

[20] Chan above n 19 at 35.
[21] Dr. Rudina Jasini *Victim Participation and Transitional Justice in Cambodia: the case of the Extraordinary Chambers in the Courts of Cambodia (ECCC)* (Research Report, Impunity Watch, April 2016) at 14.
[22] Beth V. Schaack, Daryn Reicherter and Youk Chhang *Cambodia's Hidden Scars: Trauma Psychology in the Wake of the Khmer Rouge* (An Edited Volume on Cambodia's Mental Health, Documentation Center of Cambodia, 2011) at 101.

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 making 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.[23] 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, still lag behind. 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 the Prime Minister Hun Sen.

C) THE TRIBUNAL

It took until 2006 for the United Nations and a reluctant Cambodian government to set up the Extraordinary Chambers in the Courts of Cambodia (ECCC). It is the sole transitional justice solution pursued, and the only judicial body to prosecute those responsible. Despite Secretary-General Annan's wide definition of transitional justice supposedly embracing "non-judicial mechanisms"[24] and the concept of complementarity, creating a tribunal has been the United Nations' instinctive reaction to a post-conflict environment (PCE) since Nuremburg.[25] 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

[23] The death toll of the Khmer Rouge regime varies. The official ECCC estimate is 2 million: see *Khieu Samphan and Nuon Chea* (Judgment) ECCC Trial Chamber 002/19-09-2007/ECCC-E313, 7 August 2014 at [99].
[24] *Report of the Secretary-General* above n 4 at [8]. "*The notion of transitional justice…may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.*"
[25] Since the original Nuremburg trials and as well as the creation of the International Criminal Court, there have been various tribunals for Yugoslavia, Rwanda, Sierra Leone, Lebanon, Cambodia, and panels in East Timor and Chad. See also 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."*

world.[26] The creation of that which can be depended upon as "best practice"[27] becomes important. 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.[28]

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.[29] 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; as well as bring 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, providing 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 dissertation 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 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:[30]

> 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

[26] Fletcher, Weinstein and Rowen above n 25 at 169.
[27] At 210; Leebaw above n 8 at 116.
[28] *Report of the Secretary-General* above n 4 at [16].
[29] 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 see 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 7 at 347-350.
[30] Interview with Civil Party Case 002 (on file with the author, Siem Reap, 24 October 2014) as cited in Jasini above n 21 at 17.

> 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.[31] On the other hand, the UN's late involvement was seen as suspicious and "motivated by collective guilt, rather than the best interests of Cambodia."[32] The timing is also questionable – in 2006, 27 years after the regime fell, many of the highest leaders had already passed away. 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.[33] 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 – $293 million USD and rising[34] – have been worth these limited results. Some have been satisfied with the pursuit of the tribunal, albeit its taint of controversy: at an Asia Society Symposium, participants stated, "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."[35] Yet, one cannot help but wonder how $293 million might have had more tangible results for the survivors of the regime – and indeed the generations growing up in its aftermath. In 2004, the Secretary-General Annan acknowledged that despite the benefits of

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[31] Jelena Subotic "The Paradox of International Justice Compliance" (2009) 3 IJTJ 362 at 381.
[32] 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 at 905-906 as cited in Chan above n 19 at 61.
[33] *Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea ('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…"*
[34] "ECCC Financial Outlook" (31 December 2016) United Nations Assistance to the Khmer Rouge Trials <www.unakrt-online.org/finances>.
[35] Kelli Muddell, Rapporteur *Transitional Justice in Cambodia: Challenges and Opportunities* (Symposium Report, Asia Society, New York, 9 September 2003) at 9.

tribunals, "they have, however, been expensive and have contributed little to sustainable national capacities for justice administration."[36] Bewilderingly, it was two years *after* this statement was made that the ECCC opened its doors. Thus, the following chapter 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.

[36] *Report of the Secretary-General* above n 4 at 1-2.

PART II: NORMATIVE FRAMEWORK

A) "UNIVERSAL" HUMAN RIGHTS – "A SET OF VALUES FOR A GODLESS AGE"[37]

In its modern iteration, one of the central tenets of international law is to protect cross-cultural human rights. These are commonly articulated[38] as the the end to suffering, marginalisation and abuse; recognition of the dignity of the person; and the experience of freedom and cooperation. This chapter demonstrates how today these common principles are packaged in Western hegemony – giving rise to the need for a broader normative framework in transitional justice – and therefore, it is important to recognise first and foremost that abuse of these rights is no more acceptable in non-Western places than elsewhere. Killings, torture, intimidation and exploitation are proscribed across cultures, although perhaps not conveyed as explicitly as in Western charters.[39] Singapore's foreign minister stated at the Vienna Conference on Human Rights that "no one claims torture as part of their heritage".[40] Or, as one scholar has written:[41]

> Human rights are born not because they fall from the sky, or come from a textbook from a Western university, but because people make complaints and search for freedom from a sense of profound exploitation. In other words, human rights are born from real conditions.

This author refrains here from describing these human rights as "universal", to avoid conflating the universality of mass agreement with real universal ideals. For in modern international law, "universality" is purported ubiquitously for the international community's creations: Secretary-General Kofi Annan stated that the UN Charter, international humanitarian law, international criminal law, international human rights law and international refugee law, which form the normative foundations of the UN's work today, "represent universally applicable standards".[42] This is not to discount the immense value in what there is. UN standards have been adopted by

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[37] F Klug *Values for a Godless Age: The story of the United Kingdom's New Bill of Rights* (Penguin, London, 2000) as cited in Kieran McEvoy "Beyond Legalism: Towards a Thicker Understanding of Transitional Justice" (2007) 34 J Law Soc 411 at 418.

[38] See Emmanuelle Jouannet "Universalism and Imperialism: The True-False Paradox of International Law?" (2007) 18 EJIL 379 at 403 and M. Anne Brown *Human Rights and the Borders of Suffering: The promotion of human rights in international politics* (Manchester University Press, Manchester and New York, 2002) at 9.

[39] Jouannet above n 38 at 403. See also the "Asian Human Rights Charter: A People's Charter" (1998) Asian Human Rights Commission <www.refworld.org/pdfid/452678304.pdf>.

[40] Brown above n 38 at 77-78.

[41] G Mohamad *Sidelines: Writings from* Tempo, *Indonesia's Banned Magazine* (Hyland House, Monash University, South Melbourne, 1994) as cited in Brown above n 38 at 80.

[42] *Report of the Secretary-General* above n 4 at [9].

states from all legal traditions, including common, civil, and Islamic law.[43] The global community's aspirations for peace and order are not entirely reducible to "the pressure of Western institutions":[44] it has created a genuine sense of international justice[45] that simply did not exist some 70 years ago.

However, there is danger in thinking that the covenants and charters that purport to give effect to these cross-cultural rights are universal truths in themselves. This is because the key authors of these UN creations were Western, or educated in the Western intellectual tradition.[46] Political and cultural ideas from African, Asian, Muslim and Hindu traditions were, for the most part, missing.[47] The UN Charter itself is an example. It claims to be representative "of nations large and small" and yet it was formed by 51 predominantly Western states who together drastically lacked the voice of the global South.[48] Since its creation, non-Western and developing states have objected to proposals for "international" documents that put forward views on women's or gay rights with which they disagree, or which neglected the patriarchal structure of Asian culture.[49] Therefore, mass agreement on human rights in the international community cannot be conflated with true universality. True universality would not create such different experiences for those who were excluded, rather than included, in its articulations.[50]

B) BUT MODERN INTERNATIONAL LAW IS A WESTERN CONSTRUCTION

> All law transcribes the values of those that create it; it is not a substance-less form, but the translation of the values of the society it regulates.[51]

Indeed, modern international law has been criticised for operating like an exclusive club[52] in which powerful players use the law as a political exercise for the assertion of supremacy; promoting principles that are essentially their own as "international". These players seek their

[43] *Report of the Secretary-General* above n 4 at [10].
[44] Brown above n 38 at 6-7.
[45] 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 137.
[46] Makau Mutua "What Is the Future of Transitional Justice?" (2015) 9 IJTJ 1 at 4.
[47] At 4; Makau Mutua "Human Rights in Africa: The Limited Promise of Liberalism" (2008) 51 ASR 17 at 24.
[48] Makau Mutua "Standard Setting in Human Rights: Critique and Prognosis" (2007) 29 HRQ 547 at 553.
[49] David Armstrong "Evolving conceptions of justice in international law" (2011) 37 Rev Int Stud 2121 at 2134.
[50] Brown above n 38 at 204. For more in-depth discussion of this see Jouannet above n 38 at 379.
[51] Jouannet above n 38 at 387.
[52] Dupuy above n 45 at 132.

view to be accepted as *the* view[53] and in this way to become universal and universally applied. It is the reason why international law primarily focuses on areas of conflict and ennoblement in which international actors can "cast` the pursuit as a moral crusade".[54] As Brown has noted, reputation and taking the moral high-ground are valuable commodities in world politics.[55] Therefore, proclamations of international law cannot be detached from the political views and context from which they are made. They take their form from the cultures, values and preferences of those who create them and thus are inextricably a product of *someone*, in some context.[56]

Is this simply masked neo-colonialism? Certainly, that the political landscape has rendered modern international law a Western construction, while paradoxically claiming to be formed of universal values, has been true since far before the UN era. Classical international principles were "a direct product of European thought, and thus of a narrowly regional vision of international law, from one specific culture and civilisation." [57] The proliferation of international law through the 19th and 20th centuries was critically interpreted as imperialism and colonialism, entrenching discrimination between states *into law* – thus confirming its non-universality, but managing to legitimate itself regardless.[58] The writings of early jurists discuss this overtly: for example J. de Hornburg wrote in 1905: "the civilised must set the example of a superior justice… the civilised nations must help the 'inferior races' to enter into the political system of states."[59] The West is criticised for using modern international law to undermine the growing power of developing countries,[60] but this paper conserves its view to hegemonic contestation[61] rather than a real neo-colonialist crusade.

Mutua makes the case that the Universal Declaration of Human Rights (UDHR) – which presents itself in "biblical" and "forbidding" [62] language as the "common standard of

[53] Martti Koskenniemi "International law and hegemony: a reconfiguration" (2004) 17 Camb Rev Intl Aff 197 at 199.
[54] Brown above n 38 at 42.
[55] Above.
[56] Koskenniemi above n 53 at 199, 208.
[57] Jouannet above n 38 at 380.
[58] At 382.
[59] At 383.
[60] Brown above n 38 at 98.
[61] Koskenniemi above n 53 at 208. *"Hegemonic contestation is the invocation of legal rules with meanings that support the states' own preferences and counteract their opponents"*.
[62] Mutua "What Is the Future of Transitional Justice?" above n 46 at 4; Mutua "Human Rights in Africa: The Limited Promise of Liberalism" above n 47 at 25.

achievement for all peoples and nations"[63] – conveniently guarantees rights that "yield a society framed by those [the West's] systems."[64] Yet because the UDHR claims universality rather than a Western genesis, this bias is difficult to pin down and becomes "a cloak and dagger contest that pushes a value system without directly stating its normative and political identity".[65] This can be observed in, for example, Article 10: "everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal"; and Article 11(1): "the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."[66] Against which law must the accused be judged, to make the proving of the guilty conviction legitimate? What constitutes a "fair and public hearing"? What do these "necessary" guarantees entail and against whose word is it judged? Albeit subtly, these rights are presented in the expectation that states will adhere to them to a Western standard of liberal criminal procedure.

EXAMPLE: GACACA TRIALS

Such expectations became clear in the international community's response to the *gacaca* trials of post-genocide Rwanda. The UN's International Criminal Tribunal for Rwanda (ICTR) lacked the jurisdiction and capacity to try the hundreds of thousands of perpetrators,[67] and so a decision was made to deal with the overflow through adapting the traditional *gacaca* trial process. Translating to 'justice among the grasses'[68] and often literally being held outside, or in public halls or classrooms,[69] *gacaca* trials were heavily criticised by the international community for breaching these UDHR fair trial rights in Article 10 and 11, as inscribed in Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR) and Article 7(1)(b) of the African Charter on Human and People's Rights (ACHPR).[70] Yet, such breaches

[63] Universal Declaration of Human Rights (UDHR) GA Res 217 III A (10 December 1948), Preamble.
[64] Mutua "What Is the Future of Transitional Justice?" above n 46 at 4; Mutua "Human Rights in Africa: The Limited Promise of Liberalism" above n 47 at 31.
[65] Above n 46 at 4; above n 47 at 33.
[66] UDHR above n 63, art 10 and 11.
[67] Hollie Nyseth Brehm, Christopher Uggen, and Jean-Damascène Gasanabo "Genocide, Justice, and Rwanda's Gacaca Courts" (2014) 30 J Contemp Crim Just 333 at 335.
[68] At 336.
[69] At 337.
[70] "Rwanda: Gacaca: a Question of Justice" (17 December 2002) Amnesty International <www.amnesty.org/en/documents/afr47/007/2002/en/> at 30. Also see Leslie Haskell "Justice Compromised: The Legacy of Rwanda's Community-Based Gacaca Courts" (31 May 2011) Human Rights Watch <www.hrw.org/report/2011/05/31/justice-compromised/legacy-rwandas-community-based-gacaca-courts>.

and allegations of illegitimacy are only so warranted when viewed through this narrow frame of Western thought.

Western liberalism pursues retribution to the exclusion of restorative goals of community healing and forgiveness. Yet in *gacaca,* retribution is only part of a wider discourse. Restoration is inherent in Rwanda's traditional ideas of justice and thus in a post-genocide environment the community also seeks reconciliation, forgiveness, truth, and a sense that justice has been owned and earned by the community itself.[71] The lofty institution of the ICTR lacked this focus and was far removed from Rwandan culture.[72] Yet, restorative justice was clearly not the standard by which *gacaca* was measured. Critics assumed only a Western retributive focus in finding them to be "an unjust and illegitimate attempt to deal with the legacies of the genocide".[73] Among them, Human Rights Watch saw "significant due process violations" and in a 2009 report the UN Human Rights Committee (UNHRC) articulated breaches of the ICCPR fair trial rules. The UNHRC was concerned that in response to the report, the Rwandan government "made clear… that compliance with its international obligations in this context was not its top priority."[74]

In essence, these criticisms fundamentally misinterpreted *gacaca*'s 'top priority' as one seeking the standards held in Western liberal criminal law, that a "fair and public hearing"[75] would be one deemed to be so by Western standards. This presumption was made notwithstanding the fact that its pre-genocide procedure shared little with the Western legal system.[76] Of course, according to this framework, *gacaca* contained significant breaches. The *inyangamugayo* leaders of the *gacaca* were chosen for their moral integrity, but did not require any formal legal training. They did not match the fundamental assumption in Western criminal law that the judiciary be educated, nonpartisan and resolutely law-abiding.[77] Thus, the *inyangamugayo* leaders' ability to issue sentences of life imprisonments raised cries of illegitimacy.[78] The

[71] Brehm, Uggen and Gasanabo above n 67 at 336.
[72] Lauren Haberstock "An Analysis of the Effectiveness of the Gacaca Court System in Post-Genocide Rwanda" (2014) 8 Global Tides 1 at 9.
[73] Phil Clark "Hybridity, Holism and Traditional Justice: The Case of the Gacaca Courts in Post-Genocide Rwanda" (2007) 39 Geo Wash Intl L Rev 765 at 804.
[74] Leslie Haskell above n 70.
[75] International Covenant on Civil and Political Rights (ICCPR) 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 14.
[76] Brehm, Uggen and Gasanabo above n 67 at 338.
[77] At 337.
[78] At 335.

inyangamugayo were inextricably engaged with local politics and aware of the community's emotionalism. The *gacaca* had but a basic structure, was brief and upfront: there was no space to hide behind the careful construction of a lawyer's defence. While the West denounced this as an illegitimate means of achieving justice,[79] it revealed the presupposition that its own standards were the archetype of correctness.

The lack of the right to a lawyer was central to the alleged breach of the right to a fair trial and Rwanda had formally assented to this right through both Article 14(1) of the ICCPR and Article 7 of the ACHPR. Yet criticisms also failed to consider the validity of this breach, that it was an informed decision[80] in post-genocide circumstances. Firstly, most Rwandan lawyers had been killed during the genocide.[81] Including the right to a lawyer would have required a colossal one million attorneys – impossible even before the genocide – which would then create unacceptable inequalities between those who could, and those who could not have representation.[82] Including lawyers would result in the *gacaca* taking more than a century to complete while devastating the Rwandan economy.[83] The breach was also in furthering the restorative purposes of *gacaca,* not taken into consideration by Western critics. In the pursuit of community "ownership" and the "open, participatory spirit of *gacaca*", lawyers were excluded so as to preserve this and not intimidate or dominate the hearings.[84] Western standards would restrict any debate in hearings, permit lawyers to intervene and follow a strict line of defence, and limit statements to information determinate of guilt or innocence[85] – rather than broader feelings of pain or guilt, which are key to reconciliation and healing.

It should be recalled that in their 10-year period of operation, the *gacaca* courts completed nearly two million cases, at a cost of between $46 to $64 million USD. In comparison, the ICTR completed 75 cases over 20 years with *annual* budgets of over $200 million USD.[86] Although the ICTR provided "a framework to which Western justice systems can more readily relate"[87], the West has only itself to say that this is the correct framework on which to operate,

[79] Leslie Haskell above n 70; "Rwanda: Gacaca: a Question of Justice" above n 70.
[80] Clark above n 73 at 824.
[81] Brehm, Uggen and Gasanabo above n 67 at 335.
[82] Clark above n 73 at 824.
[83] Megan M. Westberg "Rwanda's Use of Transitional Justice After Genocide: The Gacaca Courts and the ICTR" (2011) 59 Kan L Rev 331 at 347.
[84] Clark above n 73 at 810.
[85] At 822-823.
[86] Westberg above n 83 at 346.
[87] At 357-358.

as most Rwandans preferred *gacaca*.[88] *Gacaca* can be seen in a very different light on a purely neutral interpretation of "fair trial"; the breach of a right to a lawyer is only truly flagrant when seen through Western rigidity. Thus, modern international law comes with the hegemonic expectation that it will be met to the standard of its creators, that validity and legitimacy is judged by its terms.

EXAMPLE: ICCPR VERSUS ICESCR

Western dominance in modern international law is evident in the differences in effort and expenditure[89] between the ICCPR, and its sibling, the International Covenant on Economic, Social and Cultural Rights (ICESCR). Both were created under the "spiritual parent"[90] of the UDHR, but Cold War politics – the East/West split and a disagreement over the value of socioeconomic rights – drove the division into two separate documents.[91] The Western doctrine emphasised only civil and political rights because economic, social and cultural rights were regarded with suspicion and linked with the Soviet bloc.[92] "Economic rights were linked to [the United States'] new arch enemy, the Soviet monolith", and were "fatally linked with the Soviets" even after the Cold War was over.[93] It was only because of intense pressure from the Soviet bloc that the ICESCR came to fruition.[94]

As modern international law developed, the West has remained reluctant to put economic, social and cultural rights "on the same plane"[95] as civil and political rights because they would threaten the free-market economy and the prioritisation of the individual within the liberal

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[88] Haberstock above n 72 at 9.
[89] Mutua "Standard Setting in Human Rights: Critique and Prognosis"above n 48 at 579.
[90] Henry J. Steiner "Political Participation as a Human Right" (1988) 1 Harv Hum Rts Y B 77 at 79.
[91] David P Forsythe "Reviewed Work: International Cooperation for Social Justice: Global and Regional Protection of Economic/Social Rights by A. Glenn Mower" (1986) 8 HRQ 540.
[92] Barbara Stark "U.S. Ratification of the other half of the International Bill of Rights" in David P Forsythe (ed) *The United States and Human Rights: Looking inward and outward* (University of Nebraska Press, Lincoln and London, 2000) 75 at 77. See also Adamantia Pollis "Cultural Relativism Revisited: Through a State Prism" (1996) 18 Hum Rts Q 316.
[93] Stark above n 92 at 79.
[94] Antonio Cassese *Human Rights in a Changing World* (Temple University Press, Pennsylvania, 1990) as cited in Daniel J. Whelan and Jack Donnelly "The West, Economic and Social Rights, and the Global Human Rights Regime: Setting the Record Straight" (2007) 29 HRQ 908 at 910; at 35 "*The West proposed proclaiming at the world level only the civil and political rights… It was only in a second stage, given the hostility of the Socialist countries and under strong pressure from the Latin Americans… that the West agreed to incorporate… a number of economic and social rights as well.*"
[95] Aryeh Neier "Social and Economic Rights: A Critique" (2006) 13 Hum Rts Brief 1 at 2. Neier was the former Executive Director of Human Rights Watch. *"Putting economic and social rights on the same plane as civil and political rights implicitly takes an area where compromise is essential and brings that into the process of rights* adjudication."

state.[96] In the liberal state, guarantees such as health care, social security and education are not considered to be legally enforceable human rights but "commodities or gifts to be acquired through the market."[97] Economic, social and cultural rights were associated with the socialist view of welfare and state duties and so interfering in this way would thus both disrupt the Western market economy and make state obligations look much like those of its Soviet enemies.[98] The demise of Soviet influence has permitted the prioritisation of Western ICCPR rights to continue into this century, and has allocated a "second-class status" of protection to socioeconomic rights.[99] The ICCPR is written in definitive language,[100] requires states adopt laws in accordance with its rights,[101] and is overseen in its implementation by the Human Rights Commission.[102] The political capital put into the ICCPR's enforcement is incomparably higher than the ICESCR.[103]

In stark comparison, the ICESCR is seen to contain "desirable goals, not rights".[104] It is framed in vague and non-justiciable terms,[105] does not have its own committee of experts and states parties are only required to submit occasional reports to the UN – a condition considered to be a "largely meaningless oversight function".[106] Only one NGO is devoted solely to furthering its rights; this was created after the end of the USSR and the loss of the ICESCR's "communist stigma".[107] The ICESCR lacks performance targets and only requires that they be given effect to progressively, according to the state's available resources.[108] This is perhaps a result of the huge costs associated with enforcing socioeconomic rights,[109] but the term "progressiveness" has been considered "of such a nature as to be legally negligible". Its provisions "defy any sense of obligation… giving states almost total freedom of choice and action as to how rights

[96] Mutua "Standard Setting in Human Rights: Critique and Prognosis" above n 48 at 576.
[97] Joe Wills "The World Turned Upside Down? Neo-Liberalism, Socioeconomic Rights, and Hegemony" (2014) 27 LJIL 11 at 12.
[98] Mutua "Human Rights in Africa: The Limited Promise of Liberalism" above n 47 at 30. Also see Matthew Craven *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on its Development* (Clarendon Press, Oxford, 1995).
[99] Wills above n 97 at 19.
[100] Mutua "Standard Setting in Human Rights: Critique and Prognosis" above n 48 at 616. Compare the language of "no one shall be…" (ICCPR) with "states parties to the present covenant undertake to…" (ICESCR).
[101] ICCPR above n 75, art 2.
[102] Art 28.
[103] Mutua "What Is the Future of Transitional Justice?" (2015) above n 46 at 4.
[104] Mutua "Standard Setting in Human Rights: Critique and Prognosis" above n 48 at 616.
[105] At 618.
[106] At 616.
[107] At 593. (The Centre for Economic and Social Rights, founded in New York in 1993)
[108] At 616.
[109] Craven above n 98 at 130.

should be implemented".[110] This weak framework has given Western states the leeway to disregard the ICESCR, while actively furthering the ICCPR.

Thus, modern international law is packaged in Western hegemony. This is seen through the international response to the *gacaca* trials, and the advancement of Western liberalism's civil and political rights along with tactical neglect of socioeconomic rights. Of course, this is an amoral and distracted use of modern international law. For the West to manipulate cross-cultural human rights to push that the liberal democratic way is the "right" and universal way, is to presuppose that the Western world does not create or sustain abuse or conflict itself and is the only solution to the question of how to approach an environment that does.[111] It is to suggest, foolishly, that universalisation of Western ideals is a natural, transparent, innocent path of evolution;[112] that "the "West" is the holder of a unique truth which it must impart to the "East", groping in darkness".[113] It is to doubt, condescendingly, that the grieving Rwandan population was capable of knowing what it wanted and needed in transitional justice. Thus, perhaps modern international law does have a neo-colonialist tendency, in the ignorance of the proposition that international law should be applied mechanically everywhere. To disbelieve a country's tenacity to self-heal and hold the emancipatory view that it knows superior medicine is a thing of classical preoccupation[114] and must not be sustained unquestioningly today.

D) THE CAMBODIAN TRIBUNAL AS A PRODUCT OF THIS FRAMEWORK

In a general sense, the tribunal structure is the flagship of this Western framework as civil and political rights direct priority to retributive and truth-finding mechanisms like tribunals. The tribunal is 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.[115] The UN Security Council is the police and the legislator, international treaties are legislation and the tribunal is the judiciary[116] – a projection of the domestic court onto an international canvas.

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[110] Wills above n 97 at 20, n 59 and 61.
[111] Brown above n 38 at 12.
[112] At 47.
[113] At 77.
[114] Jouannet above n 38 at 380; mentioning Grotius, Pufendorf, Wolff and Vattel.
[115] Marti Koskenniemi "International Law in Europe: Between Tradition and Renewal" (2005) 16 EJIL 113 at 122.
[116] At 117.

In Cambodia, the tribunal is somewhat different because it is a "hybrid" – part-national, part-United Nations – concerned with violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognised by Cambodia.[117] Albeit being painted in Cambodian colours, the place of Cambodian law within it does not extricate it from being a product of Western influence. Firstly, 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[118] – is based on the French civil system, a legacy present only due to Cambodia's colonisation.[119] 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.[120]

Secondly, the UN transitional authority preceding the tribunal and the Paris Peace Agreements mandated the Cambodian government's assent to the ICCPR and the ICESCR.[121] 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".[122] Yet, Cambodian transitional justice was entirely crafted through the ICCPR – only the ICCPR, not the ICESCR, was woven throughout the ECCC's founding documents.[123] 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.

E) EVALUATION: AN UNSUITABLE NORMATIVE STANDPOINT FOR CAMBODIA

Therefore, Cambodian transitional justice was informed by Western thought. There are several reasons why this was the wrong approach, why applying this liberal democratic framework in Cambodia was bound to be unpalatable. Exploring these flaws is necessary to recognise the

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[117] *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 ('Agreement')*, art 1.
[118] Franziska Eckelmans "The ECCC in the Context of Cambodian Law" in Hor Peng, Kong Phallack, Jörg Menzel (eds) *Introduction to Cambodian Law* (Konrad-Adenauer-Stiftung, Cambodia, 2012) 439 at 442.
[119] Eckelmans above n 118 at 441; Jasini above n 21 at 21; 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.
[120] Eckelmans above n 118 at 446.
[121] 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.
[122] Neilson above n 121 at 5.
[123] See *Law on ECCC* above n 33, and *Agreement* above n 117.

benefit that lies in approaching transitional justice from a broader normative framework, as is discussed below.

Firstly, 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.[124] 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.[125] The family is the "building block of society", and thus fulfilment of the individual occurs through participation in duties to the family, the community and 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.[126] Imposing a normative framework that perceives rights as belonging primarily to the individual may undermine this central family and community structure.[127] 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,[128] especially according to the wider definition of transitional justice as put forward by the Secretary-General. 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 remedied or at least 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

[124] Bilahari Kausikan "East and Southeast Asia and the Post-Cold War International Politics of Human Rights" (1993) 16 Stud Conflict Terror 241 at 250.
[125] Yash Ghai "Human Rights and Governance: the Asia Debate" (2000) 1 APJHRL 9 at 15.
[126] At 24.
[127] At 35.
[128] Lundy and McGovern above n 18 at 275.

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".[129] The poverty, insecurity and instability that exists continues a culture of human rights abuse[130] and thus economic and social rights must not be ignored if society is to make a real transition. 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.[131] All have daily and debilitating effects on Cambodian people – regime consequences as real as the crimes discussed in the courtroom, but not raised among them. 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 less-developed 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."[132] 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[133] – can be perceived as neo-imperialism[134] 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

[129] Brown above n 38 at 63.
[130] Kausikan above n 124 at 249; Ghai above n 125 at 11.
[131] Lundy and McGovern above n 18 at 274.
[132] Dupuy above n 45 at 132.
[133] Rosemary Nagy "Transitional Justice as Global Project: critical reflections" (2008) 29 TWQ 275 at 275.
[134] Jouannet above n 38 at 390; Fletcher, Weinstein and Rowen above n 25 at 195.

"delivery of a message".[135] Ignorance as to the falsity of the universality coming from the West and choosing to dogmatically adhere to it[136] will hinder the ability of transitional justice to be effective. Secretary-General 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.[137]

F) 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.[138] Yet, it must be possible: in modern international law, rights are expressed through a man-made framework in order to have legal effect; there are "no authentic universals that one could know independently of their particular manifestations."[139] It so happens that 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.[140] Universality of mass agreement is a manufactured thing and thus there must be more than one way to approach a post-conflict environment – and one or some of these will be more 'right' 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.[141] This

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[135] Brown above n 38 at 12.
[136] Mutua "What Is the Future of Transitional Justice?" above n 46 at 5.
[137] *Report of the Secretary-General* above n 4 at [17].
[138] Jouannet above n 38 at 379.
[139] Koskenniemi "International Law in Europe: Between Tradition and Renewal" above n 115 at 113.
[140] Brown above n 38 at 13 and 203; Koskenniemi "International Law in Europe: Between Tradition and Renewal" above n 115 at 119; Mutua "Human Rights in Africa: The Limited Promise of Liberalism" above n 47 at 32.
[141] 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

would silence the pessimist as the creation of a new set of human rights, or the complete dismissal of current modern international law, is not required.[142] 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".[143] 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 Secretary-General 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 (Article 13, 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 reconciliative measures in the PCE such as school-building.

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.[144] 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."[145] 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

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).

[142] Brown above n 38 at 198.

[143] Mutua "What Is the Future of Transitional Justice?" above n 46 at 5.

[144] Mutua "Standard Setting in Human Rights: Critique and Prognosis" above n 48 at 595.

[145] Lundy and McGovern above n 18 at 274.

conformity with principles that have their origins in Western thought".[146] While "the difficulty of this process… seems no good reason not to engage in it",[147] whether the international community will realistically engage is another thing. And yet, it is a necessary step if a true transition is to occur.

[146] Mikhail Xifaras "Commentaire sur "Les ambivalences imperials" 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 legislation comparée, Paris, 2007) at 183. As quoted in Jouannet above n 38 at 406.
[147] Brown above n 38 at 63.

PART 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.[148]

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 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, manifest 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[149] or, in what has been heralded as a "ground-breaking"[150] arrangement, have the right to appear as civil parties to the trial in a similar capacity to that of the defence and prosecution.[151] Civil parties' general powers are broad and include requesting and questioning witnesses, making limited appeals and submissions of their own, and making and rebutting closing arguments.[152] The desire to balance the importance of hearing victims' voices while trying their perpetrators 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 Court'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,

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[148] Transcript from Reparations Conference (on file with author, 26 November 2008) as cited in Mahdev Mohan "The Paradox of Victim-Centrism: Victim Participation at the Khmer Rouge Tribunal" (2009) 9 Intl Crim Law Rev 733 at 758, n 121.
[149] *Extraordinary Chambers in the Courts of Cambodia Internal Rules ('Internal Rules')* (as revised on 16 January 2015), r 24.
[150] Mohan above n 148 at 745.
[151] *Internal Rules* above n 149 r 23; for more information also see the ECCC Victims Support Homepage at <www.eccc.gov.kh/en/victims-support>.
[152] Jasini above n 21 at 23.

because the Cambodian system was "not designed to deal with individualised participation by victims on this scale."[153] 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. According to Internal Rule 23, 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.[154] Inadequate proof of such harm is often due to a combination of lack of investigatory resources and an absence of remaining evidence.[155] The latter is likely after thirty years' time passed – as Etcheson lamented, crime sites become "hopelessly contaminated and even vanish completely", evidence is "progressively lost, and the chain of custody required to demonstrate the provenance of the material becomes inexorably more ambiguous over time."[156] 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.[157] The Court 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.[158] 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."[159]

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[153] Extraordinary Chambers in the Courts of Cambodia "7th Plenary Session of the ECCC Concludes" (Press Release, 9 February 2010).
[154] *Internal Rules* above n 149, r 23.
[155] Beth V. Schaack, Daryn Reicherter and Youk Chhang *Cambodia's Hidden Scars: Trauma Psychology in the Wake of the Khmer Rouge* (An Edited Volume on Cambodia's Mental Health, Documentation Center of Cambodia, 2011) above n 22 at 153.
[156] Craig Etcheson "The Challenges of Transitional Justice in Cambodia" (3 January 2014) Middle East Institute <www.mei.edu/content/challenges-transitional-justice-cambodia>; also see 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, Hampshire, 2007) 185 at 192.
[157] V. Schaack, Reicherter and Chhang above n 22 at 153 – 154.
[158] At 154.
[159] *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 284: *"Among those who ultimately had their status denied, anger, helplessness, shame, and feelings of worthlessness prevailed."*

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"[160]; "I did not name my father in my complaint form, that's why I missed a chance."[161] 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."[162] However the gravity of rejection from the Court is perhaps no better articulated than by the following applicant:[163]

> 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.

Secondly, the narrow prism of what is considered legally relevant to trial can let down victims' expectations. For those witnesses and civil parties who successfully get 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.[164] This can lead to dissatisfaction and disappointment for victims, who for instance come to Court with the expectation that they can deliver a eulogy and honour the spirits of their relatives.[165] 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."[166] 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 Court. 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

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[160] Meeting at TPO with Case 001 Civil Party Applicant (on file with author, 29 October 2010) as cited in V. Schaack, Reicherter and Chhang above n 22 at 154.
[161] Above.
[162] Above.
[163] Interview with Case 001 Civil Party Applicant (on file with author, 5 December 2010) as cited above n 22 at 154.
[164] 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 further 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 355-374.
[165] *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 V. Schaack, Reicherter and Chhang above n 22 at 133.
[166] Interview with a senior ECCC official, anonymity preferred (on file with author, 2 December 2008) as cited in Mohan above n 148 at 754.

of coping with the suffering...[and] is part of the story that he wants to tell".[167] The judge's reasoning was that the Court was "not a place for vengeance" and would not tolerate "unethical" comments towards the accused.[168] Clearly it 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 court's time schedule. To constrain victims in this way is a heavy ask of their thirty years' suffering.

Indeed, incongruity between the court structure and victims' daily lives drives deeper the court's inability to fully engage with victim participants. Victims often travel far to the Court from rural areas that have none of the technology or grandeur they arrive to, let alone the electricity. This can mean they are so preoccupied with following unfamiliar procedure, for example speaking into a microphone, that their testimony is delayed or compromised.[169] Victims find the lawyers intimidating, perceive them to be uninterested in what they have to say,[170] or feel that in cross-examination they are on trial themselves. 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".[171] 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.[172] 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 – "I felt afraid that I would make a mistake in my talk that they

[167] *Kaing Guek Eav alias Duch* (Transcript) ECCC Trial Chamber 001/18-07-2007- ECCC/TC, 20 August 2009, at 26 as cited in V. Schaack, Reicherter and Chhang above n 22 at 133.
[168] Report Issue 18, 23 August 2009, Khmer Rouge Tribunal Trial Monitor, at 4 (on file at U.C. Berkeley War Crimes Studies Center/East-West Center, Berkeley, California) as cited above n 22 at 159.
[169] *Kaing Guek Eav alias Duch* (Transcript) ECCC Trial Chamber 001/18-07-2007- ECCC/TC, 23 November 2009 (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 above n 22 at 177.
[170] At 176.
[171] 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.
[172] Cogan above n 171 at 849.

might notice or note. Seeing so many lawyers, nationals and internationals, I was worrying that I would do something wrong."[173]

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.[174] 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.[175] However the Court 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 testimonial credibility.[176] 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 S-21. 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.[177]

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."[178] 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 the others' case. Due to a lack of resources to correct this

[173] Interview with Civil Party of Case 001 (on file with author, 26 November 2010) as cited in V. Schaack, Reicherter and Chhang above n 22 at 157.
[174] At 107-108.
[175] At 101-103.
[176] At 106-107; Cogan above n 22 at 849.
[177] *Kaing Guek Eav alias Duch* (Transcript) ECCC Trial Chamber 001/18-07-2007- ECCC/TC, 6 July 2009 at 70-71 as cited in V. Schaack, Reicherter and Chhang above n 22 at 131.
[178] *Kaing Guek Eav alias Duch* (Transcript) ECCC Trial Chamber 001/18-07-2007- ECCC/TC, 7 July 2009 at 32 as cited above n 22 at 129 [emphasis added].

information asymmetry, participating in the court 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.[179] Yet, it is hard to deny the sheer insignificance and paltry symbolism of ECCC reparations. Only moral and collective – not individual – reparations are possible.[180] 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 Court. In addition to this, judges have taken an extremely narrow approach to the interpretation of collective and moral reparations.[181] In Case 001, all reparation requests apart from naming the civil parties in the judgment were denied, because they were imprecise, the accused was indigent, or they required a decision of the Cambodian government.[182] New Zealand Judge Dame Sylvia Cartwright commented:[183]

> 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 Court's work.[184] 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."[185] 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

[179] *Internal Rules* above n 149, r 23.
[180] Above, *quinquies*.
[181] Renée Jeffery "Beyond Repair?: Collective and Moral Reparations at the Khmer Rouge Tribunal" (2014) 13 JHR 103 at 115.
[182] *Kaing Guek Eav alias Duch (Judgment)* ECCC Trial Chamber 001/18-07-2007/ECCC/TC, 26 July 2010, at [667]-[675].
[183] Dame Sylvia Cartwright, ECCC Trial Chamber Judge "International criminal trials. A promise fulfilled?" (speech to the 2011 Annual Hawke Lecture, University of South Australia, Adelaide Town Hall, 9 June 2011).
[184] 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 Intl Crim Law Rev 1 at 29.
[185] Jasini above n 21 at 45.

the group of victims the court 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 Court 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 Court 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 Court's work. Only 10 per cent knew that there were five accused at trial and 54 per cent did not know at all.[186] Another survey from 2009 found that more than 60 per cent of the respondents were indifferent to the ECCC. [187] An ECCC employee stated how "community outreach literally can mean dropping off copies of 700 page ECCC decisions throughout relatively illiterate communities and without explanation."[188] 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. Victims perceive that if the accused die before the conclusion of the trial, "there will be no justice for the victims, as well as for the world."[189] There is also the fear that Civil Party applicants will

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186 Phuong Pham, Patrick Vinck, Mychelle Balthazard, Sokhom Hean and Eric Stover *So We Will Never Forget: A Population-Based Survey on Attitudes About Social Reconstruction and the Extraordinary Chambers in the Courts of Cambodia* (Human Rights Center, University of California, Berkeley, January 2009) at 36-37.

187 Terith Chy *A Thousand Voices* (Documentation Center of Cambodia, Phnom Penh, 2009) 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.

188 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), 14-15.

189 Interview with Civil Party Cases 001 and 002 (on file with author, Tuol Sleng Genocide Museum, 18 September 2014) as cited in Jasini above n 21 at 32.

not live to see the trials take place – in Case 002, 18 applicants died after applying and before trial commenced.[190]

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 in fact 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."[191] 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 Court 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. The ECCC is an extraordinary mechanism, and in Western states the tribunal structure no doubt can be the best option. In Cambodia, however, it could not have been more misguided. A better design must be possible.

[190] 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 (FIDH) < https://www.fidh.org/IMG/pdf/eccc_victrights_rep_nov2012_en_web.pdf> at 25.
[191] Mark E. Wojcik "False Hope: The Rights of Victims before International Criminal Tribunals" (2010) 28 L'Observateur des Nations Unies at 1.

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 this author's opinion, entirely correct. The following section will explore how the victim must be placed at the center of transitional justice practice if a real transition is to take place – because it refocuses the field to 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 Court, within the bounds of what the Court 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 paper 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, this author contests that the solution is the victim as the determinant; the central force around which mechanisms, responsible actors and other priorities fall into orbit.

Firstly, a victims-oriented approach realigns the field to 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.[192] The same should be asked of transitional justice schemes and the answer sought must be "the victim" because it re-centers the field to its elemental purpose. Human rights, as Mohamad stated, "are born from real conditions."[193] And, inherent to the concept of justice is the "notion of restitution to right an injustice".[194] 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

[192] Celestine Nyamu-Musembi "Towards an actor-oriented perspective on human rights" (IDS Working Paper 169, Institute of Development Studies, October 2002) at 2.
[193] G Mohamad *Sidelines: Writings from* Tempo, *Indonesia's Banned Magazine* (Hyland House, Monash University, South Melbourne, 1994) as cited in Brown above n 38 at 80.
[194] Jasini above n 21 at 29.

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 the wrong'".[195] This is one of the reasons for the tribunal's incompetence, as was discussed in Part 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, as was demonstrated above. This has been termed "letting go of legalism",[196] and is necessary if the Western bias is to be shaken. Transitional justice is an impossibly 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.[197] However, judging the success or failure of transitional justice through legalism oversimplifies the post-conflict environment[198] and precludes alternative perspectives.[199] Indeed, the ECCC is a legalist's success story – a victory of international standards despite adversity and corruption – but this sees only a fraction of the post-conflict environment, which is in no way representative of the whole. What is required is that responsible actors "let go" of looking at post-conflict environments as if they seek the end-point of a liberal democracy.[200] 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

[195] Above.
[196] McEvoy above n 37 at 411.
[197] At 416 and 440.
[198] At 424.
[199] At 417.
[200] 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; 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.

to seeing beyond the tribunal as 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.

This concession of superiority may be unlikely, as discussed in Part II-F. 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;[201] to presuppose that it knows the solution and that victims will benefit from it. 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.[202] 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".[203] Thus, victims' needs cannot be better known or assumed by a "faceless bureaucrat or an opaque committee somewhere in Geneva or New York".[204] A victims-oriented approach would elevate them from their presently symbolic role to one where a tribunal should only exist 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

[201] 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"*
[202] Pham et al., above n 186 at 35.
[203] Simon Robins "Towards Victim-Centred Transitional Justice: Understanding the Needs of Families of the Disappeared in Postconflict Nepal" (2011) 5 IJTJ 75 at 98.
[204] Mutua "Standard Setting in Human Rights: Critique and Prognosis" above n 48 at 578.

in Cambodia, for one, has seriously hindered the realisation of justice.[205] 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 from Part II-E 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 in 1979. But – at least – Cambodia can stand as proof of 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, Secretary-General Annan recognised the importance of victims: "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."[206] 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."[207] 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? This author contends 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-

[205] Chan above n 19 at 70.
[206] *Report of the Secretary-General* above n 4 at [18].
[207] At [15].

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.[208] 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.[209] However as the international community grows to realise that "non-elites...are very often important human rights theorists, so that the idea of human rights is perhaps most consequentially shaped and conceptualized outside the centers of elite discourse",[210] Secretary-General Annan has also supported letting this presumption go. He stated:[211]

> 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.[212] This approach stems from Freire's theory that the oppressed "can and should be enabled to conduct their own analysis of their own reality"[213] and Chambers' conclusion that participatory research has three central features:[214]

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[208] 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"; "participants said they considered the consultation an extraordinary opportunity for the people of Afghanistan"*.

[209] Lundy and McGovern above n 18 at 278.

[210] 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.

[211] *Report of the Secretary-General* above n 4 at [15]-[16].

[212] Robins and Wilson above n 200 at 226; citation in their discussion from Andrea Cornwall and Rachel Jewkes "What is Participatory Research?" (1995) 41 Soc Sci Med 1667-1676. 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 and Portland, Oregon, 2008) 99-120.

[213] 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* (The Seabury Press, New York, 1968).

[214] Chambers above n 213 at 954.

> 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 assessment requirement looks objectively at the state of the PCE. What are the rule-of-law capacities of the country?[215] 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.[216] 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.[217] 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, not does it attempt to be complete or prescriptive. The specifics of a participatory research strategy in Cambodia could be another dissertation in itself. 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.

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[215] *Report of the Secretary-General* above n 4 at [14].
[216] Fletcher, Weinstein and Rowen above n 25 at 209.
[217] Teitel above n 1 at 93.

D) APPLICATION TO CAMBODIA

CONSULTATION

> Certainly, very few people have made any effort to consult the Cambodian people about whether this tribunal will appease their need for truth and justice in regard to the Khmer Rouge regime, or whether this is no longer a concern for them over 20 years following the demise of the Regime.[218]

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",[219] despite victims' desires to participate. Cambodians at the Asia Society Symposium in 2003 ('the Symposium') asked for national consultation that would reveal the Cambodian population's opinions and priorities for transitional justice schemes.[220] While complaints made by Cambodian activists did result in meetings with victims and NGOs, activists "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."[221] 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.[222] Even the former King Norodom Sihanouk in 2005 stated that a tribunal would be a "comedy and hypocrisy", and funds would

[218] Chea Vannath "Khmer Rouge and National Reconciliation" (2002) 14 Peace Rev 303 at 304.
[219] Muddell above n 35 at 6.
[220] At 13.
[221] At 7.
[222] Pham et al., above n 186 at 35.

be better spent in agriculture, providing irrigation and fertile land to Cambodians.[223] Indeed, victims when both requesting reparations at the ECCC and in stand-alone surveys, called for the provision of basic needs.[224] These included jobs; medical services – like hospitals, village health care 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 percent replied 'justice'. Around 50 percent of respondents said "the economy" and "infrastructure".[225]

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.[226] One victim was vehement that Cambodians needed:[227]

> some 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 $293 million tribunal.

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[223] "Chronology of the Khmer Rouge Tribunal" Documentation Center of Cambodia <http://www.d.dccam.org/Archives/Chronology/Chronology.htm>.
[224] For discussions of the following requests, see: Pham et al., above n 186 at 5 and 44; Killean above n 184 at 30; Jeffery above n 181 at 113.
[225] Pham et al., above n 186 at 5.
[226] Jeffery above n 181 at 113.
[227] Interview with survivor Van Naath (on file with author, 8 December 2008) as cited in Mohan above n 148 at 766.

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 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.[228] 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".[229] 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.[230] 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.

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 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 the Secretary-General'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.[231]

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.[232] In 1998, after the Cambodian government requested assistance to prosecute senior Khmer Rouge leaders, a UN Group of Experts investigated and

[228] Muddell above n 35 at 8.
[229] At 9.
[230] At 14; 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.
[231] *Report of the Secretary-General* above n 4 at [3].
[232] Chan above n 19 at 4.

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."[233] This, a culture of domestic impunity, doubts about Cambodian judges' familiarity with international law and the national Criminal Code,[234] and law's reputation in the country as an "instrument to affirm the rightfulness of the power holders"[235] makes questionable the decision to pursue a tribunal so connected to the domestic system. Indeed, Symposium participants predicted that this would render a tribunal incompetent to "deliver credible justice."[236] The impact of this dire domestic system on a hybrid tribunal should have been anticipated. Indeed, the former UN human rights envoy to Cambodia stated, "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".[237]

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.[238] 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."[239] He has offered, for example, amnesty to former Khmer Rouge officials within his government,[240] and arranged the timing of the trials to cross with the elections.[241] Hun Sen may also have been supportive of criminal trials because pursuing individual accountability takes focus away from the structural injustices sustained by his government – like the estimated $300 to $500 million government officials take annually from state assets.[242] 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

[233] *Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135* GA Res 52/135 A/53/850 S/1999/231(16 March 1999) at 36.
[234] Jasini above n 21 at 18; Bates above n 156 at 192.
[235] Bates above n 156 at 191.
[236] Muddell above n 35 at 11.
[237] Lak Chansok "Can Khmer Rouge Survivors Get Justice?" *The Diplomat* (online ed, Tokyo, May 30 2014).
[238] Subotic above n 31 at 381; Muddell above n 35 at 8-9; Chan above n 19 at 62-63 and 70.
[239] "Khmer Tribunal Stalled Again" (22 August 2005) Global Policy Forum <www.globalpolicy.org/component/content/article/163/28902.html>
[240] Jasini above n 21 at 15 and 17.
[241] Subotic above n 31 at 381.
[242] Joel Brinkley "Cambodia's Curse: Struggling to Shed the Khmer Rouge's Legacy" (2009) 88 Foreign Aff 111 at 118.

comment in consultation that fully international trials are not a preferred alternative[243] – would have pointed responsible actors away from criminal trials as the primary and sole mechanism.

Thirdly, Cambodians' perception of justice is heavily influenced by their Buddhist beliefs. Approximately 95% of the population is Buddhist.[244] 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.[245] 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.[246] 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.[247] *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.[248] Western juristic measures are indeed seen as egoistical and unwholesome,[249] with each party asserting his own interests and the '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 watching loved ones be murdered. The Khmer Rouge destroyed the entire community and family structure – by separating children from their parents, and forcing

[243] See again Muddell above n 35 at 9.
[244] Pham et al., above n 186 at 22.
[245] Ian Harris "Onslaught on Beings: A Theravada Buddhist Perspective on Accountability for Crimes Committed in the Democratic Kampuchea Period" in Ramji, J. and Van Schaack, B. (eds) *Bringing the Khmer Rouge to Justice: Prosecuting Mass Violence Before the Cambodian Court* (Edwin Mellen Press, Lewiston, 2005) 59 at 85.
[246] Harris above n 245 at 85; Jasini above n 21 at 391-392; Ken above n 119 at 868.
[247] Mohan above n 148 at 773-774.
[248] Harris above n 245 at 87.
[249] At 85.

families to betray each other.[250] 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.[251] Sotheara Chhim diagnosed the psychological condition of *baksbat* – unique to Khmer Rouge survivors – which translates to "broken courage" and typically involves submission, passivity, mistrust and "being afraid forever".[252] Chhim considered *baksbat* to be a "major stumbling block to social development and prosperity."[253] 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 justice.[254] 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:[255]

[250] V. Schaack, Reicherter and Chhang above n 22 at 37.
[251] At 38, and 76-77.
[252] Sotheara Chhim "Baksbat (Broken Courage): A Trauma- Based Cultural Syndrome in Cambodia" (2013) 32 Med Anthropol 160 at 162.
[253] At 164.
[254] 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.
[255] Chhim above n 252 at 163, citing national poet Kong Bunchoeun.

> 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.

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.[256] 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 as discussed in Part II-F. 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 thirty-eight years 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' suffering and encourage them to pursue the professions that were targeted under the regime: doctors, lawyers, teachers and religious leaders. These would have been much-needed investments in psychological services, to help victims surmount their suffering. They would perhaps have looked like a more widespread

[256] 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

version of the community dialogues that were conducted independently by the Documentation Center of Cambodia: 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".[257]

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.[258] The Buddhist ceremonies of *teuch mun*[259], *rab bat*[260], *sangha tien*[261] and *salaboun*[262] 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".[263] 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[264] 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 looked a lot more like Rwanda's *gacaca* – where imported concepts were eschewed and instead traditional culture was balanced with modern realities, and ownership was in the hands of those who live with the consequences of the violence.[265]

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257 V. Schaack, Reicherter and Chhang above n 22 at 181-182.
258 Mohan above n 148 at 774.
259 Craig Etcheson "Faith Traditions and Reconciliation in Cambodia" (Harvard University, *"Settling Accounts? Truth, Justice, and Redress in Post-Conflict Societies"* Conference, Weatherhead Centre for International Affairs, 1-4 Nov 2004) as cited in Chan above n 19 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."*
260 Above. *"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."*
261 Above. "*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."*
262 Above. "*another 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."*
263 Harris above n 245 at 86.
264 At 61.
265 Arthur Molenaar *Gacaca: grassroots justice after genocide. The key to reconciliation in Rwanda?* (African Studies Centre, Leiden, 2005) at 157.

CONCLUSION

A victim is made of many types of losses. A victim is no less of a victim if his 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 honored.

Part II of this paper traced this to a Western hegemonic stronghold; and while surrender of this may be unlikely, it is absolutely necessary. For one, it is necessary so as to reflect the truth above 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 he; that despite living through the experience of the injury, the soldier need not speak; by virtue of his 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 thirty years before his 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.

Part II also demonstrated how this 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 showed 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 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.

This exercise for Cambodia is realistically and unfortunately no more than hypothetical. But at the least Cambodia can stand as a lesson: a lesson, it seems, that the international community has yet to learn, as there are murmurs of creating a similar tribunal for Syria.[266] This is despite the fact that the Syrian government is as, if not more, intractable than that of Cambodia; and as in Cambodia there is victimisation on a colossal scale. Nor is the international community a novice to the experience of interventions in this area of the world. Just recently, former Afghan President Hamif Karzai was quoted in the *Christchurch Press* to say that "Afghanistan would have been a very different country today" had the United States and international community "listened to Afghans, had they adopted an approach that was suitable to the environment."[267] It seems that the Cambodian experience is not the only one from which the international community could learn a lesson.

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[266] For a discussion of the Syrian crisis and transitional justice discussions, see Alex Schank "Sectarianism And Transitional Justice In Syria: Resisting International Trials" (2014) 45 Geo J Intl L 557-587; and "Transitional Justice in Syria" (July 2013) Dawlaty and No Peace Without Justice <_http://www.npwj.org/sites/default/files/ressources/TJSyria_EN.pdf>.

[267] Paula Penfold and Eugene Bingham "Afghan war effort a 'failure' – president" *The Press* (Christchurch, 24 August 2017) at A7.

Perhaps more pressingly, in modern warfare within and beyond Syria 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.[268] Moreover, these insurgency 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."[269]

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.

[268] For in-depth discussion of this see Laura Mackay "The Non-State Actor Lacuna: Recognising ISIL and International Law" (LLB (Hons) Dissertation, University of Otago, 2015).
[269] Jouannet above n 38 at 402.

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