

Singapore Management University

## Institutional Knowledge at Singapore Management University

---

Research Collection School Of Law

School of Law

---


2009

### The Paradox of Victim-Centrism: Victim Participation at the Khmer Rouge Tribunal

Mahdev MOHAN

Singapore Management University, [mahdevm@smu.edu.sg](mailto:mahdevm@smu.edu.sg)

Follow this and additional works at: [https://ink.library.smu.edu.sg/sol\\_research](https://ink.library.smu.edu.sg/sol_research)

 Part of the [Asian Studies Commons](#), [Dispute Resolution and Arbitration Commons](#), and the [International Law Commons](#)

---

#### Citation

MOHAN, Mahdev. The Paradox of Victim-Centrism: Victim Participation at the Khmer Rouge Tribunal. (2009). *International Criminal Law Review*. 9, (5), 733-775. Research Collection School Of Law. Available at: [https://ink.library.smu.edu.sg/sol\\_research/830](https://ink.library.smu.edu.sg/sol_research/830)

This Journal Article is brought to you for free and open access by the School of Law at Institutional Knowledge at Singapore Management University. It has been accepted for inclusion in Research Collection School Of Law by an authorized administrator of Institutional Knowledge at Singapore Management University. For more information, please email [library@smu.edu.sg](mailto:library@smu.edu.sg).



# The Paradox of Victim-Centrism: Victim Participation at the Khmer Rouge Tribunal

**Mahdev Mohan** 3

Assistant Professor of Law, Singapore Management University 4

E-mail: mahdevm@smu.edu.sg, mahdevm@stanford.edu 5

**Abstract** 6  
 It has been claimed – though not proved – that victims will be benefited by participation in international criminal tribunals. This article interrogates this claim in the context of victim participation at the Extraordinary Chambers in the Courts of Cambodia (ECCC), commonly referred to as the Khmer Rouge Tribunal. Based on interviews with Cambodian victims and Tribunal affiliates, it examines why and how the Tribunal permits victims to intervene as *les parties civile*, pulling together the normative and legal basis for this mode of victim participation. This article does not purport to generalize with confidence about Cambodian victims in general, let alone all victims of mass atrocity. Instead, it simply seeks to move beyond vague speculations that victim participation in international trials is always therapeutic, and suggest a new indigenized victimology that the Tribunal should explore as the long-awaited trials of the Khmer Rouge unfold. 16

**Keywords** 17  
 Extraordinary Chambers in the Courts of Cambodia (ECCC); Khmer Rouge Tribunal; Cambodia 18

“My Guru says I am like a lotus flower that floats on water. People may try to drag me down by my roots but, like the lotus, I will rise to the surface, stronger and better than before.” 19  
 Chin Navy (Cambodian Survivor of the Khmer Rouge, 4 December 2008) 21

## 1. Introduction 22

Affiliates, jurists and scholars of international justice tend to have vaunted ambitions. They argue that international(ized)<sup>1</sup> courts deter future crime,<sup>2</sup> establish an 24

<sup>1</sup> I use the phrase international(ized) to refer to both purely international *ad hoc* courts such as the international criminal tribunals for the former Yugoslavia (“ICTY”) and Rwanda (“ICTR”), and the International Criminal Court (“ICC”) as well as hybrid tribunals, such as the Special Panels of the Dili District Court (“SPDC”), the Special Court for Sierra Leone (“SCSL”), the Special Tribunal for Lebanon and the Extraordinary Chambers in the Courts of Cambodia (“ECCC”).

<sup>2</sup> See, e.g., *Richard A. Posner*, Retribution and Related Concepts of Punishment, 9 *Journal of Legal Studies*. 71, 72-78 (1980); *Michael P. Scharf*, The Case for a Permanent International Truth Commission, 7 *Duke Journal of Comparative & International Law*. 375, 398 (1997).



25 official historiographic record,<sup>3</sup> foster the rule of law,<sup>4</sup> promote reconciliation  
 26 within post-conflict societies,<sup>5</sup> and achieve restorative justice by helping victims  
 27 regain their autonomy and dignity.<sup>6</sup> Each of these arguments is largely unproven  
 28 by empirical research,<sup>7</sup> raising the question of whether advocates risk undermin-  
 29 ing the credibility of prosecution processes by overstating their likely consequenc-  
 30 es.<sup>8</sup> This article examines the final argument in the context of Cambodian victims  
 31 of the Khmer Rouge.<sup>9</sup>

<sup>3</sup> See, e.g., *Sanja Kutnjak Ivković*, Justice by the International Criminal Tribunal for the Former Yugoslavia, 37 *Stanford Journal of International Law* 255, 265 (2001) (quoting the ICTY's President as stating that many people in the former Yugoslavia consider the tribunal most valuable to "remind people what happened here"); *Diane F. Orentlicher*, Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime, 100 *Yale Law Journal* 2537, 2546 n.32 (1991) (quoting Justice Robert Jackson, chief U.S. prosecutor for the Nuremberg trials of Nazi war criminals, on the purpose of those proceedings).

<sup>4</sup> See, e.g., *Naomi Roht-Arriaza*, Introduction to Impunity and Human Rights in International Law and Practice 3, 4 (*Naomi Roht-Arriaza* ed., 1995); see generally *Johan D. van der Vyver*, Book Review, 18 *Emory International Law Review* 133, (2004) (reviewing *Bruce Broomhall*, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (2003)).

<sup>5</sup> See, e.g., *Harvey M. Weinstein & Eric Stover*, Introduction: Conflict, Justice and Reclamation, in *My Neighbour, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* 1, 3–4 (*Eric Stover & Harvey M. Weinstein* (eds.), 2004) (quoting former ICTY President Antonio Cassese); *Laurel E. Fletcher & Harvey M. Weinstein*, Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation, 24 *Human Rights Quarterly* 573, 597–601 (2002).

<sup>6</sup> See, e.g., *Juan Méndez*, Comments on Prosecution: Who and For What?, in *Dealing with the Past: Truth & Reconciliation in South Africa* 87, 90 (*Alex Boraine et al.* (eds.), 1994) (arguing that "prosecution in itself will provide a measure of healing and show the victims that their plight has not been forgotten by the states and society"); *Ivković*, Justice by the ICTY, op.cit., at 334 (the ICTY aims to provide "justice to the victims and thereby advanc[e] the processes of healing and reconciliation"); *Debra Kaminer et al.*, The Truth and Reconciliation Commission in South Africa: Relation to Psychiatric Status and Forgiveness Among Survivors of Human Rights Abuses, 178 *British Journal of Psychiatry* 373, 375 (2001) (speculating that "[i]f justice is done, and seen to be done, psychological healing may be facilitated"); *Neil J. Kritz*, Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights, 59 *Law and Contemporary Problems* 127, 129 (1996) ("[T]otal impunity, in the form of comprehensive amnesties or the absence of any accountability for past atrocities, is immoral, *injurious to victims*, and in violation of international legal norms." (emphasis added)).

<sup>7</sup> *Laurel E. Fletcher & Harvey M. Weinstein*, Violence and Social Repair, op.cit., at 585 ("[the] primary weakness of writings on transitional justice is the paucity of empirical evidence to substantiate claims about how well criminal trials achieve the goals ascribed to them.")

<sup>8</sup> See e.g. *Jose E. Alvarez*, Crimes of States/Crimes of Hate: Lessons from Rwanda, 24 *Yale Journal of International Law* 365, 459 (1999) (calling for tribunal sponsors and affiliates to articulate their goals more clearly and to be wary of over-stating their potency); *Nehal Bhuta*, How Shall We Punish the Perpetrators? Human Rights, Alien Wrongs and the March of International Criminal Law, 27 *Melbourne University Law Review* 255, 2555 (2003) ("Among victims and their families from Rwanda to East Timor, disillusionment with internationalised justice processes — in the wake of unrealistically high expectations — is not difficult to find."); For Rwanda, see generally *Samantha Power*, Rwanda: The Two Faces of Justice', *The New York Review of Books* (New York), 47 (2003). For East Timor, see generally *Nehal Bhuta*, East Timor and the Vicissitudes of Externalised Justice" 165 (2001) *Finnish Yearbook of International Law*.

<sup>9</sup> On April 17, 1975, the Khmer Rouge troops seized control of Cambodia's capital, Phnom Penh, marking the beginning of 3 years, 8 months and 20 days of an attempt to transform Cambodian

Today, thirty years after the atrocities of the Khmer Rouge, Kaing Guek Eav, 32  
 66, better known by his *nom de guerre*, Duch, stands trial before the Extraordinary 33  
 Chambers in the Courts of Cambodia (“ECCC or the Tribunal”), a hybrid criminal 34  
 tribunal co-installed by the United Nations (“UN”) and the Cambodian gov- 35  
 ernment.<sup>10</sup> Duch is the first defendant to be tried by the ECCC. Duch was the 36  
 commandant of S-21 (“Tuol Sleng”) prison and detention center, which allegedly 37  
 sent at least 15,000 people to their deaths in unmarked graves. Four other senior 38  
 Khmer Rouge leaders who were in a position to order the commission of mass 39  
 atrocity are also in custody. They are Nuon Chea, 82, the movement’s chief ide- 40  
 ologue; Khieu Samphan, 76, who was head of state; Ieng Sary, 82, the former 41  
 foreign minister; and his wife, Ieng Thirith, 75, a fellow member of the Khmer 42  
 Rouge Central Committee. Their joint trial is expected to commence later this 43  
 year.<sup>11</sup> 44

ECCC affiliates claim that one of the major innovations of the ECCC is the 45  
 enhanced recognition of victims in its proceedings.<sup>12</sup> Anyone who has suffered 46  
 from physical, psychological, or material harm as a direct consequence of the 47  
 crimes committed in Cambodia by the Khmer Rouge regime between 17 April 48

---

society into an agrarian utopia. Pol Pot and his senior leaders established a society based on agricul-  
 ture and total collectivism. The *Angkar* or ‘Organization’, as the revolutionary movement named  
 itself, was the sole governing power and the owner of all means of production and private property.  
 Cambodia was renamed Democratic Kampuchea (DK). There was, however, nothing democratic  
 about the regime or its methods. From 1975 to 1979, it is estimated that at least 1.7 million people  
 were executed or died of overwork, starvation, torture or untreated disease because of the Khmer  
 Rouge. See generally *David P. Chandler, The Tragedy of Cambodian History* (New Haven: Yale  
 University Press, 1991).

<sup>10</sup> The ECCC, commonly known as the Khmer Rouge Tribunal, is a hybrid tribunal established on  
 6 June 2003 by a bilateral agreement between the UN and the Cambodian government as an  
 “Extraordinary Chambers within the existing court structure of Cambodia for the prosecution of  
 crimes committed during the period of Democratic Kampuchea;”, albeit “with international assist-  
 ance”: 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, U.N.-Cambodia, 6 June 2003, available at < [http://www.cambodia.gov  
 .kh/krt/english/ index.htm](http://www.cambodia.gov.kh/krt/english/index.htm)> [hereinafter “the UN Agreement”]. The ECCC was recognized by the  
 Cambodian legislature on 27 October 2004 when it ratified and implemented the UN Agreement  
 through the adoption of enabling legislation named the Law on the Ratification of the 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 and  
 Law on Amendments to the Law on the Extraordinary Chambers in the Courts of Cambodia for  
 the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, U.N.-  
 Cambodia, 5 October 2004, available at <<http://www.cambodia.gov.kh/krt/english/index.htm>>  
 [hereinafter “the ECCC Statute”].

<sup>11</sup> For further information on the charges against the accused persons and the trials, see the ECCC’s  
 web site <<http://www.eccc.gov.kh/english/>>.

<sup>12</sup> ECCC Website, available at < [http://www.eccc.gov.kh/english/victims\\_unit.aspx](http://www.eccc.gov.kh/english/victims_unit.aspx)> (“One of the  
 major innovations of the Extraordinary Chambers in the Courts of Cambodia (ECCC) is the  
 enhanced recognition of victims in its proceedings. Victims of crimes that fall under the jurisdiction  
 of the Court are given a fundamental role in the ECCC.”)

49 1975 and 6 January 1979 is considered a “victim” by the ECCC.<sup>13</sup> Victims can  
 50 submit complaints to the Co-Prosecutors, who take the interests of victims into  
 51 account when considering whether to initiate an investigation or a prosecution.  
 52 Victims may also participate as ‘civil parties’. Civil parties are participants in the  
 53 proceedings, and therefore ostensibly enjoy the same rights as the Prosecution  
 54 and the Defense.<sup>14</sup> Importantly, civil parties can claim collective and moral repa-  
 55 rations.<sup>15</sup> Commentators have applauded the new role for victims at the ECCC,  
 56 saying that it is long overdue “recognition, after fifteen years of international and  
 57 hybrid courts like [the ECCC], not to exclude victims from the justice that is  
 58 being dispensed on their behalf.”<sup>16</sup>

59 The ECCC’s civil party process derives from a victim-centered approach to  
 60 punishment, which suggests that a victim needs to tell her story before a decision-  
 61 maker within the framework of a formalized process in order to feel better.<sup>17</sup> Sug-  
 62 gestions abound about the soothing effects of participation. To *Naomi Roht-Arriaza*,  
 63 victims gain “a sense of control, an ability to lessen their isolation and be reinte-  
 64 grated into their community, and the possibility of finding meaning through  
 65 participation in the process.”<sup>18</sup> For *Jamie O’Connell*, participation may also restore

<sup>13</sup> Extraordinary Chambers in the Courts of Cambodia Internal Rules (Rev. 3) (6 March 2007) [hereinafter “ECCC Internal Rules”, R.23 (2)(a)]. Since the ECCC Internal Rules were first issued on 12 June 2007, they have been amended on 1 February 2008, 5 September 2008, and 6 March 2009. Unless otherwise specified, the phrase ‘ECCC Internal Rules’ refers to the latest version (Rev.3) of the Rules dated 6 March 2009. All four versions of the ECCC Internal Rules - i.e. the original version and the 3 subsequent amended versions - are available at <<http://www.eccc.gov.kh/english/>>.

<sup>14</sup> Several sources suggest that civil parties have a fundamental role at the ECCC as separate players in their own right. ECCC Internal Rules, R.23(6), (7), (8) and (9); Decision on Civil Party Participation in Provisional Detention Appeals (20 March 2008) 002/19-09-2007-ECCC/OCIJ (PTC01) (Pre-Trial Chamber, ECCC), para 36, 38; Gabriela González Rivas, deputy head of the ECCC’s victims unit, interview with Seth Mydans in Khmer Rouge Tribunal, Victims will not stand idly by, *New York Times*, 17 June 2008 (“For the first time in history, the internal rules of a international tribunal will give victims of crimes the possibility to participate as parties”); HE Sean Visoth speaking at the Reparations Conference, 26 November 2008, on file with author (“No other hybrid court has given victims equivalent rights as the prosecution and defence than those set out in Cambodia’s ECCC ...”); Annex A is the ECCC’s Practice Direction on Victim Participation (“Practice Direction”), which sets out the rights and responsibilities of victims under the ECCC’s Internal Rules and explains how potential victim participants can apply to be a part of the process.

<sup>15</sup> ECCC Internal Rules, R. 23(1)(b).

<sup>16</sup> Seth Mydans, In the Khmer Rouge Trials, Victims will not Stand Idle By, (June 17, 2008) (“Diane Orentlicher, Special Counsel of the Open Society Justice Initiative believes that the Tribunal marks the evolution of international criminal justice.”)

<sup>17</sup> *Naomi Roht-Arriaza*, ‘Impunity and Human Rights’, in *Naomi Roht-Arriaza* (ed.), *International Law and International Law and Practice*, 1995, p. 21 (“...more formalized procedures, including the ability to have an advocate and to confront and question their victimizers, may be more satisfying for victims than less formal, less adjudicative models.”)

<sup>18</sup> *Ibid*, 19; See also *Raquel Aldana-Pindell*, *An Emerging Universality of Justiciable Victims’ Rights in the Criminal Process to Curtail Impunity for State-Sponsored Crimes*, 26 *Human Rights Quarterly*. 607, 675 (2004).

a victim's dignity by giving him "a sense of agency and capacity to act that the original abuse sapped."<sup>19</sup> More than testifying as a witness, playing a role in the prosecution is said to "assist victims to take back control of their lives and to ensure that their voices are heard, respected, and understood."<sup>20</sup> In short, participation is equated with 'truth-telling', which is held out as being fundamentally and necessarily beneficial, validating the victims' experience and permitting them to heal.<sup>21</sup>

The notion that victims benefit from participation is powerful and has rarely been disputed.<sup>22</sup> But is it correct? This article asks how the efficacy of the civil party process can be measured as a mode of participation, what civil participation means to (potential) Cambodian civil parties, and whether the process has delivered on its promises. Given that the pre-trial phase of the ECCC's proceedings began in 2007 and that the first trial is underway, I ask if Cambodian civil parties feel that they have enjoyed the benefits of participation. Based on my conversations with and observations of Cambodian victims and civil parties, I argue that the promises of victim-centrism are rhetorical devices that have little practical resonance for Cambodians. If anything, they soothe the ECCC's affiliates (and bolster their legitimacy), not victims, some of whom complain that their token participation has "revive(d) memories, bitterness and misery", and a "loss of faith in the ECCC."<sup>23</sup>

Despite being a localized court, the ECCC has begun to externalize justice much like purely international tribunals. The ECCC's promise that victims have a place in the proceedings results – as I shall explore below – in heightened disillusionment for victims when the process turns out to be unreceptive to and incompatible with their subjective impressions, general reminiscences, emotions

<sup>19</sup> *Jamie O'Connell*, *Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?*, 46 *Harvard International Law Journal*, 295, 337 (2005), (quoting from a telephone interview with Mary Fabri, clinical psychologist).

<sup>20</sup> *Yael Danieli*, *Victims: Essential Voices at the Court*, Bull. (Victims Rts. Working Group, London, U.K.), Sept. 2004, at 6, *available at* [www.vrwg.org](http://www.vrwg.org).

<sup>21</sup> *Judith Lewis Herman*, *Trauma and Recovery*, p. 181 (New York: Basic Books, 1992) ("The fundamental premise of psychotherapeutic work [with survivors of severe trauma] is a belief in the restorative power of truth-telling.")

<sup>22</sup> See *Emily Haslam*, *Victim Participation at the International Criminal Court: A Triumph of Hope Over Experience*, in *Dominic McGoldrick et al.* ((eds.)), *The Permanent International Criminal Court: Legal and Policy Issues*, p. 315 (2004) (observing the "widespread assumption that victims either do or can benefit from participating in international criminal proceedings").

<sup>23</sup> Press Release, *Victims' Press Conference at the ECCC, Victims Voice their Hopes and Concerns about ECCC* (Dec. 3, 2009), on file with author. ("We hope participation in this process will provide us with some relief, a sense that justice has been done and an understanding of our history; but it also revives memories, bitterness, and misery. We began with hope that the ECCC would provide some satisfaction, but we are now concerned about the delays, the allegations of corruption, the sufficiency of available resources, and the lack of information on the progress made by the ECCC and prospects for our involvement. These problems prompt many of us to lose hope and faith in the ECCC").

91 and renditions of truth.<sup>24</sup> Contrary to the extant orthodoxy of victim-centrism, I  
 92 found that the civil party process has begun to degrade victims even as it claims  
 93 to soothe them. Far from giving victims a hearing or a genuine voice, it may leave  
 94 them feeling silenced or frustrated.

95 Last December, I witnessed a striking illustration of this paradox that deserves  
 96 to be set out at in this introductory section, as a foretaste of things to come. At a  
 97 press conference held at the conclusion of a pre-trial hearing, Suth Ny, a petite  
 98 51-year-old female civil party accosted Khieu Samphan's Cambodian defense  
 99 lawyer Sa Sovan, demanding that he explain how he could bring himself to defend  
 100 a *genocidaire*. Since the ECCC's legal process provided her no avenue to express  
 101 the full range of her feelings and emotions, Suthy Ny took it upon herself to  
 102 chastise Sa Sovan, insisting that it was her right as a civil party to speak her  
 103 mind.<sup>25</sup> As Suth Ny's tone became increasingly strident, Sa Sovan rushed at the  
 104 civil party. Security forces had to intervene to restrain them.

105 Two civil party applicants I spoke to, Ly Monysak and Sok Chear, were dis-  
 106 tressed by what happened. Sok Chear, 42, who said she was raped as a girl by the  
 107 Khmer Rouge, remains inconsolable over the loss of her father, an engineer, who  
 108 disappeared into the hands of a cadre and never returned. "We were always wait-  
 109 ing for him to come home, but he never came," she told the press.<sup>26</sup> "We were  
 110 always waiting and waiting. Even now, I still look around. Maybe my father is still  
 111 alive." Tears flow when she talks about him. "He gave me rice to eat, and I want  
 112 to repay him," she said, "even one plate of rice, my gift to him, even one plate for  
 113 him to eat from his daughter."<sup>27</sup> If Sok Chear had her way, she would flay the  
 114 Khmer Rouge leaders - "slice him (a Khmer Rouge leader) into ribbons and pour  
 115 salt into his wounds...and beat him up and torture him and give him electric

<sup>24</sup> *Marie-Benedicte Dembour and Emily Haslam, Silencing Hearings? Victim-Witnesses at War Crimes Trials*, 15 *European Journal of International Law*, 151, 156 (2004).

<sup>25</sup> See *Douglas Gillison, Khieu Samphan Defense Team Blasts Translations, The Cambodia Daily*, 5 Dec., 2008. The press conference can be viewed at "Khieu Samphan's Defense Team Faces off with Khmer Rouge Survivors <<http://www.youtube.com/profile?user=ElenaLesley&view=videos>>. The contentious altercation between Suth Ny and Sa Sovan went as follows:

Suth Ny: "You keep talking together and not letting us speak! We, victims, have come here to find out the truth and inform the media of the sufferings we have been through during the Khmer Rouge regime, and to know how many people were killed! Hey, you, Khieu Samphan's lawyer, don't go away, I want to ask you a question!"

Sa Sovan [shrilly]: "Do not use this phrase [going away]! If Khieu Samphan has killed, I am not responsible for that!"

Suth Ny: "I did not say go away, I am asking you to stay! My parents died under the Khmer Rouge regime, and you, you are defending [Khieu Samphan]!!!", the woman replied, more and more infuriated by the whole situation.

Sa Sovan (shouting, finger pointed towards Suth Ny reproachfully, and rushing towards Suth Ny): "My parents died too!"

<sup>26</sup> *Seth Mydans, Trial begins for Khmer Rouge Leader, International Herald Tribune*, Feb. 16, 2009.

<sup>27</sup> *Ibid.*



shocks to make him talk.”<sup>28</sup> After she witnessed what happened to Suth, she said that she wished to “cut [Khieu Samphan and his lawyers] into tiny little pieces and eat them.”<sup>29</sup>

For Ly Monysak, even that would be too little punishment for the alleged *genocidaires*: “only killing (the Khmer Rouge leaders) will make me feel calm,” he said. “I want them to suffer the way I suffered. I say this from the heart.”<sup>30</sup> Ly, 41, is an angry man, his voice quavering and eyes closed as he tells me of the loss of all 21 members of his family when he was just a boy of nine. Ly explained that he has come forward as a civil party to find justice through verdict or punishment.<sup>31</sup> Remarking that Sa Sovan’s act of lunging at Suth Ny had turned the court process “into a comedy”, Ly insisted that he would take matters into his own hands: “I want to kill all those people who did this to me,” he said. “And if I cannot, I’ll come back in the next life and find them. Perhaps I will call on the Al’Quaeda or create my own genocidal regime and take my revenge on them all.”<sup>32</sup>

Suth, Sok and Ly’s expressions are, in my opinion, simply a way for them to attempt to cope with what they have endured. It is the truth that they wished to tell, however chilling or jarring it may seem. Yet, it was not the truth that the ECCC’s affiliates wished to hear or appreciate. Startled by their expressions, ECCC Prosecutors have described these victims as terrorists who posed a threat to the process, regardless of the fact that these victims had come forward to assist them.<sup>33</sup> I found that the ECCC’s legal process regards victims as having a collective story, a unitary, bounded and unchanging narrative of trauma that reduces and incorporates all that is essential into the ‘story of the victim.’<sup>34</sup> The story of

<sup>28</sup>) Ibid.

<sup>29</sup>) Author’s interview with Sok Chear, Dec. 4, 2008. On file with author.

<sup>30</sup>) *Seth Mydans*, In the Khmer Rouge Trials, Victims will not Stand Idle By, New York Times, 17 June 2008.

<sup>31</sup>) Author’s interview with Ly Monysak, 6 Dec. 2008 (“There are three reasons why I have applied to join as a civil party. First, 21 members of my family were killed during the Pol Pot time. The second reason is that other people took my house in Phnom Penh. The third reason is that I lost my future... This would not have happened to be if there was no Khmer Rouge. My family was quite rich. I could have continued my studies in France in 1975 if Pol Pot had not come. I lost everything. I can only be at rest, no longer angry and bitter about my past, if the court can sentence the wrongdoers. I will not find peace until my family is avenged by the law and the Khmer Rouge are brought to justice. After I saw the lawyer (Sa) behaving so fiercely towards sister Suth Ny, I think this court is a comedy.”)

<sup>32</sup>) Author’s interview with Ly Monysak, Dec. 6 2008.

<sup>33</sup>) Co-Prosecutor’s Response to Khieu Samphan’s Appeal Brief Against the Order Refusing request for Release Dated Oct. 28, 2008, Filed on Jan. 22, 2009. (“Three persons (Suth Ny, Sok Chear and Ly Monysak) reiterated those statements / threats against Khieu Samphan and his Defence team but also against the court at a press conference held after the PTC hearing on 4 December 2008.... Therefore, the potential threat to the personal security of [the defendants], is not illusory, but vivid and concrete”.)

<sup>34</sup>) *Christopher J. Colvin*, Trafficking Trauma – Intellectual Property Rights and the Political Economy of Traumatic Storytelling in South Africa in *Telling Stories to Change the World*, pp. 231, 227-237, *Rickie Solinger, Madeline Fox, Kayhan Irani* ((eds.)), 2008)



139 the victim adheres to an unspoken norm that prefers narratives of helplessness to  
 140 stories of responsibility, and tales of victimization to narratives of victimhood.<sup>35</sup>  
 141 ECCC affiliates thus find it difficult to tolerate a victim who appears roguish,  
 142 unreceptive to the court's process, or simply convinced that *her story* is unique  
 143 and deserves special attention.<sup>36</sup>

144 I find that the ECCC's civil party process, as it currently operates, does not  
 145 always benefit victims as it claims to. It has been said that international justice  
 146 "will not only provide a forum for the particular defendant but also an arena in  
 147 which the victims may be heard."<sup>37</sup> Yet, as we shall see, legal justice is often too  
 148 'thin' to support therapeutic goals. Instead of seeking to provide for both retribu-  
 149 tive and restorative justice within the ECCC's procedures or even a complemen-  
 150 tary legal mechanism, we should look to fora beyond the legal "arena" in order to  
 151 deliver restorative justice to Cambodian victims. To do so even modestly, restor-  
 152 ative justice must be based on pre-existing values and communicated in a way  
 153 that resonates amongst victims. I argue that victim-centrism's therapeutic goals  
 154 would be better served by a new victimology rooted in inherently local concep-  
 155 tions of story telling, art and ritual that avoid universalized narratives and deploy  
 156 extra-legal ideas about mass atrocity in Cambodia. Given the attention that the  
 157 ECCC has attracted, the hopes pinned on its performance, and the alternatives  
 158 that could be foreclosed by exclusive reliance on law, it is critical for the ECCC  
 159 to re-evaluate its goals.

160 This article begins in Section 2, by setting out the legal and normative frame-  
 161 work for victim participation at the ECCC. Section 3 sets out my qualitative,  
 162 story-based research methodology. Section 4, the heart of this article, explores  
 163 victims' perceptions of the civil party process and demonstrates that the legal  
 164 process can sometimes harm rather than help them. The article concludes in  
 165 Section 5 by recommending that the ECCC should tone down and revisit its  
 166 ambitions. Cambodian victims would be better served if local civil society and  
 167 the international community focus their efforts on and route reparations towards  
 168 the non-legal approaches to victim-centrism.

## 169 2. Politics, Law and Norms of Victim Participation

170 The ECCC is, as *James Goldston* astutely notes, an unusual experiment in  
 171 transitional justice that stands at the juncture of two distinct, if overlapping,

<sup>35</sup> *Martha Minow*, *Stories in Law in Telling Stories to Change the World*, pp. 256, 250-263, *Rickie Solinger, Madeline Fox, Kayhan Irani* ((eds.)), 2008)

<sup>36</sup> *Makau Mutua*, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 *Harvard International Law Journal*. 201, 230 (2001).

<sup>37</sup> *Leila N. Sadat*, *Universal Jurisdiction*, op. cit., 196.

politico-historical narratives.<sup>38</sup> At one level, the ECCC marks a milestone in Cambodia's tortured experience of violence and suffering—the first serious effort to bring the law to bear, however incompletely, on the crimes wrought by the Khmer Rouge more than a quarter century ago. At the same time, the ECCC is the latest in a series of tribunals—starting with Nuremberg and culminating most recently with the ICC—intended to secure legal accountability for mass atrocities and, increasingly, to heal its victims, but not always succeeding in this regard. By permitting victims to participate in the ECCC's proceedings, its affiliates and proponents seem to hope that international(ized) justice can atone, or at least be seen as atoning for, past allegations that it has externalized justice. Victim participation at the ECCC has thus become, by moral if not legal obligation, a form of apology.<sup>39</sup>

## 2.1. *Old Vestiges, New Courts: Judicial Activism at the ECCC*

### 2.1.1. *“Evidentiary Cannon-fodder”: Victims & the ICTY/R*

Victim participation in criminal trials is not a novel concept. Many civil law countries permit victims to join proceedings as a third party, a “victim-prosecutor”, “auxiliary prosecutor” or a “subsidiary prosecutor.”<sup>40</sup> Yet the ad hoc tribunals, which have largely been based on the common law adversarial system, have not afforded victims the same rights.<sup>41</sup> The ad hoc tribunals have not ventured outside the adversarial foundation of international criminal procedure that is

<sup>38</sup> James A. Goldston, *An Extraordinary Experiment in Transitional Justice*, in Justice Initiative 1, pp. 1-6(Open Society Justice Initiative, 2006).

<sup>39</sup> *Suzannah Linton*, *Reconciliation in Cambodia*, Documentation Center of Cambodia, 2004, 62 (“The views of [Cambodian] survivors and others directly affected must be taken into account, not simply on democratic principles but from moral obligation, perhaps even as part of the State's legal obligation to provide an effective remedy for gross violations of human rights. The public has been disempowered by the Cambodian government's reluctance to involve it and share information of immense public interest.”)

<sup>40</sup> In these countries, the victim (or often the victim's lawyer) can request investigatory measures, review the evidence against the defendant, deliver submissions, present evidence, cross-examine witnesses, and make closing arguments. See generally *Criminal Procedure: A Worldwide Study* 45 (Craig Bradley ed., 1999); U.N. Office for Drug Control & Crime Prevention, *Handbook on Justice for Victims* 39 (1999) [hereafter U.N. Handbook].

<sup>41</sup> The victims' role in most common law jurisdictions is thus limited to that of witness. As a witness, the victim can only speak if called by the prosecution (or defense) and can only answer questions that are posed to her. Traditionally, common law criminal justice is, as Andrew Ashworth reminds us, “designed to punish crimes that impinge upon the public interest, and rob those crimes of their inter-personal character”, which includes their significance to victims who have been wronged by these crimes in the first place. *Andrew Ashworth*, *What Victims of Crime Deserve* (Paper presented to the Fulbright Commission on Penal Theory and Penal Practice, University of Stirling, September 1992) as cited by *M. Cavadino* and *J. Dignan*, *Towards a Framework for Conceptualizing and Evaluating Models of Criminal Justice from a Victim's Perspective*, 4(3) *International Review of Victimology* 153 (1996).

192 primarily conceived as conferring rights to defendants, not victims.<sup>42</sup> *Patricia*  
 193 *Wald* has claimed that victim-witnesses are the “the soul of war crimes prosecu-  
 194 tion” at the ICTY and ICTR.<sup>43</sup> In reality, the victim-witness, whose complaint is  
 195 instrumental in initiating the case, plays a limited role: she may only speak in  
 196 court if called by the prosecution, and may only relay information to the judges  
 197 within the questioning parameters laid down by counsel.<sup>44</sup> Other affiliates, jurists  
 198 and scholars posit that the tribunals’ proceedings have served as a forum for  
 199 “catharsis”, “mourning”, “fundamental healing” and provided an opportunity for  
 200 victims to have their stories “formally heard and acknowledged” in a public  
 201 forum.<sup>45</sup> Yet, victim-witnesses have frequently been treated poorly: exposed  
 202 to indifference, insult and the dangers associated with testifying in a hostile

<sup>42</sup> *Mark Findlay*, Internationalized Criminal Trial and Access to Justice, 2 *International Criminal Law Review*. 237, 253 (2002). International tribunals’ preference for retributive justice in the name of victims, as opposed to restorative justice for their benefit, can be traced to the Nuremberg and the Tokyo international military tribunals. Neither tribunal provided protection, support, representation or participatory rights of any sort for victims. Victims were a peripheral concern as these trials were devoted to delivering retributive (victors’) justice through the “prompt trial and punishment of the major war criminals of the European Axis and in Japan.” Rather than hear live testimony, Prosecutors relied heavily on the paper trail left behind by the perpetrators of World War II crimes. It is telling that the Nuremberg tribunal’s founding statute does not even mention the phrase ‘victim’. See e.g. *S. Garkawe*, Victims and the International Criminal Court: three major issues, 3 *International Criminal Law Review*. 345 (2003); see also *M. Bachrach*, The Protection and Rights of Victims under International Criminal Law, 34 *The International Lawyer*. 7, 12 (2000); see also *H.A.M. von Hebel*, An International Criminal Court—a historical perspective, in *H. A. M. von Hebel, et. al.*, ((eds.)), *Reflections on the ICC*, pp. 19, 21 (1999).

<sup>43</sup> See *Patricia M. Wald*, To ‘Establish Incredible Events by Credible Evidence’: The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings, 24 *Harvard International Law Journal*. 535, 538 (2001).

<sup>44</sup> *N’Dri & Maurice Kaudio*, Critical Analysis of Victims’ Rights Before International Criminal Justice 20 (Oct. 2006) (unpublished manuscript on file with Faculty of Law, Centre for Human Rights, University of Pretoria); *Claude Jorda & Jérôme de Hemptinne*, The Status and the Role of the Victim, in *The Rome Statute of the International Criminal Court: A Commentary* 1387 (Antonio Cassese ed., 2004) (stating that international criminal justice provided by the ad hoc tribunals is “deleterious”).

<sup>45</sup> See *Prosecutor v. Erdemovic*, Case No. IT-9 6-22-T, para 65 (ICTY, Trial Chamber I Nov. 29, 1996) (aiming to allow the “sorely afflicted to mourn those among them who had been unjustly killed”); see also *Mark J. Osiel*, Ever Again: Legal Remembrance of Administrative Massacre, 144 *U. PA. L. Rev.* 463, 471-73, 478, 512 (1995) (describing prosecutions as providing “a cathartic theater” and “national group therapy”). Fourth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, U.N. GAOR, 52d Sess., Agenda Item 49, 179, U.N. Docs. A/52/375, S/1997/729 (1997), para. 192 (“[W]itnesses who have come to The Hague have commented afterwards that the opportunity to testify before a duly constituted court has brought them great relief. Justice’s cathartic effects may therefore promise hope for recovery and reconciliation ....); see also, e.g., *Minna Schrag*, The Yugoslav War Crimes Tribunal: An Interim Assessment, 7 *Transnational Law & Contemporary Problems*, Issue 19 (1997) (“For the international community to acknowledge, in a public forum, what happened to the victims is probably essential to fundamental healing.”).

environment against powerful defendants.<sup>46</sup> Although the *ad hoc* tribunals are celebrated as landmark achievements in the struggle against impunity for serious violations of international humanitarian law, to many victims, the tribunals' processes have been far from healing.<sup>47</sup>

In 2000, lamenting the fact that victim-witnesses at the ICTY/R have often been reduced to "evidentiary cannon fodder"<sup>48</sup>, former Chief Prosecutor of both tribunals *Carla Del Ponte* had this to say: "The voice of survivors and relatives of those killed are not sufficiently heard. Victims have almost no rights to participate in the [ICTR's] trial process, despite the widespread acceptance nowadays that victims should be allowed to do so. And those remarks apply equally to the Yugoslav Tribunal, where the position of victims is no better... *It is regrettable that the Tribunal's statute makes no provision for victim participation during the trial . . . I would therefore respectfully suggest to the Council that the present system falls short of delivering justice to the people of Rwanda and the former Yugoslavia, and I would invite you to give serious and urgent consideration to any change that would remove this lacuna in our process*" [Emphasis added].<sup>49</sup>

#### 2.1.2. "Extraordinary": Victims & the ECCC

*Del Ponte's* call was not lost on the ECCC's judges. The ECCC's foundational documents do not expressly provide for civil party action. The UN Agreement is silent on the matter.<sup>50</sup> The ECCC Statute is ambiguous and inconclusive. Article 36 of the ECCC Statute states that victims may lodge appeals against trial

<sup>46</sup> *Eric Stover* has observed that ICTY judges "can – and often do – admonish witnesses who stray from the facts, which in turn can frustrate victims who have waited years to tell their story publicly." See *Eric Stover*, *The Witnesses: War Crimes and the Promise of Justice in The Hague* 106 (2005) which documents the findings from the first study of victim-witnesses who have testified before the ICTY; *Mikaela Hekkila*, *International Criminal Tribunals and Victims of Crime: A Study of the Statutes of Victims Before International Criminal Tribunals and the Factors Affecting This Status*, pp. 57, 57-136 (2004).

<sup>47</sup> *Jean-Marie Kamatali*, *From the ICTR to ICC: Learning from the ICTR Experience in Bringing Justice to Rwandans*, 12 *New England Journal of International & Comparative Law* 89, 96 (2005) ("Denying victims [participation and compensation] is not only a justice delayed, but also a justice denied."); *ibid.*, at 99 (stating that bringing justice and reconciliation to Rwandans was only secondary to the ICTR's main interest in deterring future crimes).

<sup>48</sup> *Jonathon Doak*, *Victims' Rights in Criminal Trials: Prospects for Participation* 32 *Journal of Law and Society* 294, 299 (2005); *M. Cavadino and J. Dignan*, *Towards a Framework for Conceptualizing and Evaluating Models of Criminal Justice from a Victim's Perspective*, 4(3) *International Review of Victimology* 153, 155 (1996).

<sup>49</sup> *Carla Del Ponte*, *Address to the UN Security Council*, (September 21, 2000). ICTY Doc. JL/PI.S./542-e of 24 November 2000.

<sup>50</sup> The UN Agreement's sole reference to victims states that prosecutors and judges ought to protect victims and witnesses who are interviewed or called to testify (Article 23: "The co-investigating judges, the co-prosecutors and the Extraordinary Chambers shall provide for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the identity of a victim or witness".)

224 chamber decisions, which implies that they may become party to the proceed-  
 225 ings.<sup>51</sup> On the other hand, Article 38, which states that penalties “shall be limited  
 226 to imprisonment,” seems to exclude companion civil proceedings that usually  
 227 seek compensatory damages.<sup>52</sup> As *Scott Worden* notes, the Statute thus left it “up  
 228 to the court and the procedures it adopts to determine whether civil parties be  
 229 allowed to join prosecutions... [and] have a more active and visible role within  
 230 the [ECCC’s] criminal prosecutions” by recourse to Cambodian Law.<sup>53</sup>

231 The ECCC’s judges did not miss this opportunity.<sup>54</sup> On 13 June 2007, the  
 232 ECCC’s Judicial Committee on the Rules of Procedure (‘ECCC Rules Com-  
 233 mittee’), composed of both national and international judges serving in their  
 234 capacity as rule-makers, issued Internal Rules (“2007 Internal Rules”) that pro-  
 235 vided for civil party action purporting to confer victims extensive participatory  
 236 rights.<sup>55</sup> The ECCC Rules Committee explained the basis and scope of the civil  
 237 party process it had created as follows: “[A] complex issue has been how to ensure  
 238 the rights and involvement of victims. While a familiar element of Cambodian  
 239 law, this was not spelled out in detail in the ECCC Law and Agreement. [...] We  
 240 note that the ECCC is a court within the existing court structure of Cambodia.  
 241 *We interpreted this to mean that victims have the right to join as civil parties.* However,

<sup>51</sup> ECCC Statute, Art 36. (“The Extraordinary Chamber of the Supreme Court shall decide appeals made by the accused, *the victims*, or the Co-Prosecutors against the decision of the Extraordinary Chamber of the trial court . . .”) (Emphasis added).

<sup>52</sup> ECCC Statute, Art. 38 (“All penalties shall be limited to imprisonment”). This provision is inconsistent with the stated purpose of civil party action under Article 2 of the Cambodian Criminal Procedure Code (‘CPC’). (“The purpose of a civil action is to seek compensation for injuries to victims of an offense and with this purpose to allow victims to receive reparation corresponding with the injuries they suffered”).

<sup>53</sup> *Scott Worden*, *An Anatomy Of The Extraordinary Chambers in Jaya Ramji & Beth Van Schaack*, (eds.) *Bringing the Khmer Rouge to Justice: Prosecuting Mass Violence Before the Cambodian Courts 206* (Edwin Mellen Press, 2005).

<sup>54</sup> The civil party process provided for under the Internal Rules borrows from the Cambodian Criminal Procedure Code (‘CPC’).

<sup>55</sup> Established on 3 July 2006, the Committee on the Rules of Procedure was composed, at the time, of three Cambodian and two international judges. The Judicial Committee circulated a draft set of Internal Rules (IRs) to the rest of the ECCC judges, the Co-Prosecutors, the Principal Defender, the Office of Administration, and interested organizations and individuals. A weeklong plenary session was convened on 20 November, 2006, but failed to produce consensus on the content of the IRs. The plenary issued a press statement citing “substantive disagreement” among the judges, including on the issue of victim participation. The Committee, now made up of five Cambodian and four international judges resume work 15 January 2007. On 26 January 2007 the Committee, renamed the Internal Rules Review Committee, convened a two-week session to discuss the disagreement which had arisen in the November plenary. The Review Committee convened a two-week session to renew discussion of the draft IRs. The IRs were finally adopted on 13 June 2007, 11 months after the establishment of the Committee. All plenary sessions and the Committees’ deliberations were closed to the public and the minutes thereof were declared confidential. My analysis is thus based on official reports in the media as well as interviews with tribunal officials who prefer to remain anonymous.

due to the specific character of the ECCC, we have decided that only collective, non-financial reparation is possible”<sup>56</sup> [Emphasis added].

Under the 2007 Internal Rules, a civil party is a full-fledged party to the proceedings against those allegedly responsible for the crimes under investigation by the ECCC, and they enjoy the same rights as every other party to the proceedings, such as the Prosecution and the Defense. Specifically, a civil party has the right, inter alia, to: (a) choose a legal representative; (b) request the investigation of alleged crimes; (c) question witnesses and the accused; (c) produce evidence; (d) ask the court to take measures to respect their safety, well being, dignity and privacy in the course of their participation in the proceedings; (d) access all court documentation; and (e) request collective and moral reparations.<sup>57</sup> It is fair to say that the civil party is akin to an auxiliary prosecutor - her chief purpose is to participate “by supporting the prosecution.”<sup>58</sup> Nonetheless, she remains distinct from the ECCC’s Prosecutors, who may be animated by very different concerns. The Prosecution is solely concerned with trial, verdict and punishment. Becoming a civil party not only gives victims the right to actively participate in the proceedings, but it also allows victims to ask the court for collective and moral reparations from the convicted persons.<sup>59</sup>

Victims’ rights advocates praised the 2007 Internal Rules as “ground-breaking because victims will be permitted to join in the proceedings as civil parties, *going beyond* the regime of victims’ participation before the ICC.”<sup>60</sup> Their assessment is accurate. Although the Rome Statute is credited with creating “an expansive model of international criminal law that encompasses social welfare and restorative justice,”<sup>61</sup> the level of victim involvement at the ICC is “largely symbolic, administrative and self-serving; it does not relate to any wider conception of

<sup>56</sup> Joint Press Statement by the Committee, Roundup: ECCC Overcomes Complexity, Adopts Internal Rules for DK Trials, (Xinhua) (13 June, 2007), at [http://english.peopledaily.com.cn/200706/13/eng20070613\\_383831.html](http://english.peopledaily.com.cn/200706/13/eng20070613_383831.html) (last viewed: 09/10/08).

<sup>57</sup> ECCC Internal Rules, R.32; See Gabriela Gonzalez, former Deputy Head of the Victim’s Unit, interviewed by Andrew Nette, Locus Standi For Victims at Khmer Rouge Trials?, Inter-Press Service, Mar. 25, 2008; See also David Boyle, The Rights of Victims, 4(2) Oxford Journal of International Criminal Justice 307-313(2006); see ECCC Internal Rules, rules 74 and 105.

<sup>58</sup> ECCC Internal Rules, R.23(1)

<sup>59</sup> ECCC Internal Rules, R.23(1)(b). These reparations may take the form of an order to publish the judgment in any appropriate media at the convicted person’s expense; fund any non-profit activity or service that benefits victims; or other appropriate and comparable forms of reparation that the Tribunal thinks fit. See ECCC Internal Rules, R.23(12).

<sup>60</sup> Ibid.

<sup>61</sup> *Alex Little*, Balancing Accountability and Victim Autonomy at the International Criminal Court, 38 Georgetown Journal of International Law. 315, 369-70 (2007) ; see also *David Donat-Cattin*, Article 68 Protection of the Victims and Witnesses and Their Participation in the Proceedings, in *Commentary on the Rome Statute of the International Criminal Court* 869, 871 (*Otto Triffterer* ed., 1999), at 873 (“[I]t is clear that the search for the truth—not retribution or punishment of given individuals—is the most significant goal of the ICC proceedings.”); *Christopher Muttukumaru*, Reparation to Victims, in *The International Criminal Court: The Making of the Rome Statute* 264



267 victim or community.”<sup>62</sup> At the ICC, a victim may only present her observations  
 268 if her “personal interests are affected.”<sup>63</sup> Even when her personal interests are  
 269 affected within the meaning of the Court’s statute, she may only present her  
 270 observations at “stages of the proceedings determined to be appropriate *by the*  
 271 *Court*,”<sup>64</sup> if her observations are “specifically relevant to the issues”<sup>65</sup> at hand, and  
 272 provided that these observations are consistent with the rights of the accused and  
 273 a fair and impartial trial.<sup>66</sup>

274 At the sentencing stage, the ICC, not the victim, has the discretion to decide  
 275 whether to involve victims and may do so if it is of the opinion that a more com-  
 276 plete presentation of fact is required in the “interests of justice,”<sup>67</sup> which suggests  
 277 that victims’ rights are not a paramount consideration for the ICC.<sup>68</sup> In fact, ICC  
 278 judges have held that victim participation is purely *incidental* to the efficacy  
 279 of the proceedings and not supplementary thereto.<sup>69</sup> Ultimately, therefore, the  
 280 ICC’s process retains power in the hands of the traditional actors of the interna-  
 281 tional legal process: the judges, the prosecution and the defense. The ICC’s  
 282 Pre-Trial and Trial Chambers have repeated that participation is not a “once-and-  
 283 for-all-event.”<sup>70</sup> Victims must submit a new application prior to each hearing or

---

(*Roy S. Lee* ed., 1999) (“There was a gradual realization that there had to be a recognition in the Statute that the victims of crimes not only had (as they undoubtedly did) an interest in the prosecution of offenders but also an interest in restorative justice . . .”).

<sup>62</sup> *Ralph Henham* Conceptualising access to justice and victims’ rights in international sentencing. 13 *Social & Legal Studies*. 27, 27-55 (2004).

<sup>63</sup> Rome Statute of the International Criminal Court adopted on July 17, 1998, entered into force on July 1, 2002, (“Rome Statute”), Art. 68(3).

<sup>64</sup> *Ibid.*

<sup>65</sup> *Prosecutor v Lubanga Dyilo*, Appeals Chamber, Decision, *in limine*, on Victim Participation in the appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision entitled ‘Decision on Victims’ Participation’ of 16 May 2008 (ICC-01/04-01/06-1335), para 50.

<sup>66</sup> *Prosecutor v Lubanga Dyilo*, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the ‘Directions and Decisions of the Appeals Chamber’ of 2 February 2007” 13 June 2007 (ICC-01/04-01/06-925), para. 28 (“Even when the personal interests of victims are affected within the meaning of article 68 (3) of the Statute, the Court is still required, by the express terms of that article, to determine that it is appropriate for their views and concerns to be presented at that stage of the proceedings and to ensure that any participation occurs in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”).

<sup>67</sup> Rome Statute, Art.65(4)(a).

<sup>68</sup> *Ralph Henham*, Some Issues for Sentencing in the International Criminal Court, 52 *International & Comparative Law Quarterly*. 81, 108 (2003) (A “realistic assessment suggests that the *interests of justice* are more likely to be equated with notions of retributive justice than victims’ rights and reparation.”)

<sup>69</sup> See generally *Prosecutor v Lubanga Dyilo* “Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the ‘Directions and Decisions of the Appeals Chamber’ of 2 February 2007” 13 June 2007 (ICC-01/04-01/06-925); see also *Prosecutor v Lubanga Dyilo* Decision on the participation of victims in the appeal ICC-01/04-01/06 OA 13, 29 August 2008, Dissenting Opinion of Judge Georghios M. Pikis, para 8.

<sup>70</sup> Situation in the Democratic Republic of the Congo (*Prosecutor v. Lubanga Dyilo*), Case No. ICC-01/04-01/06-1119, Decision on Victims’ Participation, ¶ 101 (Jan. 18, 2008),

stage in the proceedings.<sup>71</sup> The Chamber then considers on a case-by-case basis whether participation is appropriate.<sup>72</sup> Put simply, victims who participate in some stages of the proceedings may subsequently be prohibited from participating in others.

By contrast, the ECCC's Pre-Trial Chamber, in its first decision on civil participation, held that civil parties are full-fledged parties to the criminal proceedings with "active rights to participate... *in all criminal proceedings*... starting from the investigative stage."<sup>73</sup> Rejecting the Defense's arguments, the Chamber held that civil party involvement did not prejudice the rights of the Defendant to a fair trial.<sup>74</sup> Victim participation at the ICC has, as Judge Pikis has noted, "no immediate parallel or association with the participation of victims in criminal proceedings [akin to] the Romano-Germanic system of justice, where victims in the role of civil parties or auxiliary prosecutors who have a wide-ranging right to participate in criminal proceedings."<sup>75</sup> According to Judge Pikis "[i]t is not the victims' domain either to reinforce the prosecution or dispute the defense" at the ICC.<sup>76</sup> As we have seen, the reverse is true at the ECCC. Civil party action is premised on Cambodia's civil law tradition, which permits a victim to join the ECCC's proceedings, enjoy rights *qua* victim, and support the prosecution as an auxiliary prosecutor.<sup>77</sup>

## 2.2. *Great Expectations: The Promise of Victim-Centrism at the ECCC*

In sum, the fact that civil party action is a familiar element of Cambodian law, criticisms of the *ad hoc* tribunals, and the success of civil party action at Nazi war crime trials in French courts in the 1990s together ensured a greater role for victims in proceedings before the ECCC. Each of these factors is underpinned by the promise of victim-centrism: the theory that participation in a formal legal

<sup>71</sup> ICC's Rules of Procedure and Evidence, ICC-ASP/1/3, R. 89

<sup>72</sup> Rome Statute of the ICC, Art. 68(3).

<sup>73</sup> ECCC Pre-Trial Chamber Decision on Civil Party Participation in Provisional Detention Appeals, 20 March 2008, para 36, 38.

<sup>74</sup> *Ibid.*

<sup>75</sup> *Prosecutor v Lubanga Dyilo*, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the 'Directions and Decisions of the Appeals Chamber' of 2 February 2007, June 13, 2007 (ICC-01/04-01/06-925), Separate Opinion of Judge Georgios M. Pikis.

<sup>76</sup> *Ibid.*, para 16; *Prosecutor v Lubanga Dyilo*, Decision on the participation of victims in the appeal ICC-01/04-01/06 OA 13, August 29, 2008, Dissenting Opinion of Judge Georgios M. Pikis, para 10: ["Acknowledging an interest individuating to victims in relation to the holding of a fair trial would equate them with a party to the cause, which they are not".]

<sup>77</sup> By filing a complaint or becoming a civil party to criminal proceedings, a victim, *inter alia*, gains access to the case-file, may participate in all stages of the proceedings and has the right to claim compensatory damages in the event of a conviction. Criminal Procedure Code of the Kingdom of Cambodia, Art. 6.

309 process heals victims and restores their dignity. Since the inception of the civil  
310 party process, the ECCC's affiliates have ascribed it several soothing effects.

311 *Gabriela Gonzalez-Rivas*, Deputy Head of the ECCC's Victim's Unit,<sup>78</sup> notes:  
312 "Participation in these types of proceedings is a tool of empowerment [for victim  
313 civil parties]...People can tell their story, feel that what happened to them is a  
314 consideration, a recognizing that what happened to them should not have  
315 happened."<sup>79</sup>

316 H.E. *Sean Visoth*, Head of Administration at the ECCC and the top Cambodian  
317 official at the Tribunal, believes: "The ECCC ensures that victims are aware of  
318 various avenues through the media and outreach by which they can participate,  
319 e.g., as complainants, witnesses and civil parties, so that their experience with the  
320 ECCC is rewarding and it relieves some of their suffering."<sup>80</sup> *Kheat Bophal*, head  
321 of the ECCC's Victim's Unit, adds: "Participation restores faith in the justice  
322 system and provides the first hand-satisfaction of making public the harm suf-  
323 ferred."<sup>81</sup> These promises are laudable, but while they are easy to say, they are, as  
324 we shall see, easier said than done.

### 325 3. Methodology

326 Over the years, several quantitative surveys have been conducted on public atti-  
327 tudes towards a Khmer Rouge Tribunal, all of which extol the importance of  
328 prosecuting leaders of the Khmer Rouge before such a tribunal.<sup>82</sup> Yet, these sur-  
329 veys do not consider the effects of the proceedings on current and potential civil  
330 parties who have begun or have applied to be a part of the process. No studies  
331 have considered how Cambodian civil parties perceive and respond to this process,

<sup>78</sup>) The Victim's Unit is the focal point for victims wishing to participate in the proceedings and the unit most frequently in contact with victims.

<sup>79</sup>) *Gabriela González Rivas*, deputy head of the ECCC's victims unit, interview with Seth Mydans in Khmer Rouge Tribunal, Victims will not stand idly by, New York Times, June 17, 2008.

<sup>80</sup>) Reparations Conference, 26 November 2008.

<sup>81</sup>) *Kheat Bophal*, head of the Victim's Unit at the ECCC, Access Victims' Rights Working Group Bulletin, 11, Spring 2008, p.4. In this passage, Bophal acknowledges that victim participation at the ECCC is victim-centric because it allows victims to "have their own voice" and "restores" their "face in the justice system", as well as expressive because it allows victims to "denounce the crimes... and support the norms and laws" that prohibit their occurrence.

<sup>82</sup>) For details on some of the results, see generally *Laura McGrew*, Truth, Justice, Reconciliation and Peace in Cambodia (Phnom Penh, Cambodia: Funded by the Canadian Embassy (Canada Funds), February 2000); The Khmer Institute of Democracy, Survey on the Khmer Rouge Regime and the Khmer Rouge Tribunal 2004, available at <http://www.bigpond.com.kh/users/kid/KRG-Tribunal.htm>; *Suzannah Linton*, Reconciliation in Cambodia, Documentation Series No.5 (Phnom Penh, Cambodia: Documentation Center of Cambodia, 2004); *William Burke-White*, Preferences Matter: Conversations with the Cambodian People on the Prosecution of the Khmer Rouge Leadership, in *Jaya Ramji* and *Beth Van Schaack*, ((eds.)) *Bringing the Khmer Rouge to Justice: Prosecuting Mass Violence Before the Cambodian Courts*, pp. 97-126 (New York: The Edwin Mellen Press, 2005).

even though the ECCC's pre-trial proceedings – which have included several public hearings – began in 2007 and the first trial has commenced. this article seeks to begin to fill this intellectual void.

### 3.1. *What is Participation?*

Before I set out my research methodology for examining the promises of victim-centrism at the ECCC, it is critical to examine what is meant by 'participation'. I have explained the modalities of the civil party process in theory, but on what normative scale would we measure its effects in practice? Victims' rights discourse is unhelpful in this regard as it is dominated by appeals to participation.<sup>83</sup> As one commentator puts it, "the idea of ... participation is a little like eating spinach: no one is against it in principle because it is good for you."<sup>84</sup> Given this tautology, there is a danger that by using the term 'participation', and in vaunting its appeal, we fail to capture its real significance.<sup>85</sup>

Discourse on citizenship instructive in this regards. As *Ian Edwards* notes, 'participation' may be said to stem from the concept of citizenship, and may include "being in control, having a say, being listened to, or being treated with dignity and respect – all aspirations of those within the victim movement; but it may also mean providing information whether one wants to or not."<sup>86</sup> Evidently, participation has gradations of meaning. *Sherry Arnstein*, the late health policy specialist, formulated an eight-rung "ladder of participation" that sets out the different shades of meaning that the phrase 'participation' connotes, ranging from perfunctory inclusion to genuine control (Table 1).

**Table 1. Arnstein's Ladder of Citizen Participation**

Degrees of Power	Control Delegated power Partnership Placation
Degrees of Tokenism	Consultation Information
Non-participation	Therapy Manipulation

<sup>83</sup> *Ian Edwards*, *An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making*, 44 *British Journal of Criminology*. 967, 973 (2004). [Hereafter *An Ambiguous Participant*].

<sup>84</sup> *Sherry R. Arnstein*, *A Ladder of Citizen Participation in the USA*, 57 *J. Royal Town Planning Institute*, 176,177 (1971). [Hereafter *A Ladder of Participation*].

<sup>85</sup> *Ian Edwards*, *An Ambiguous Participant*, op. cit, at 972-3.

<sup>86</sup> *Ian Edwards*, *An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making*, 44 *British Journal of Criminology*. 967, 973 (2004).

354 *Arnstein's* classification distinguishes between real power to affect the outcome of  
 355 a process and participation that she considers "empty ritual," that is, participation  
 356 that purports to promote involvement but only serves to bolster the legitimacy of  
 357 the facilitating or decision-making body or institution. The latter, *Arnstein* argues,  
 358 provides no real benefits for participants. Her classification is "designed to be  
 359 provocative," intended to underscore the gap between real empowerment and the  
 360 maintenance of the *status quo* in power relations in the context of US town plan-  
 361 ning.<sup>87</sup> Yet, the ladder is a useful point of departure from which to consider the  
 362 different modalities of victim participation and the different ways in which such  
 363 participation may or may not affect the process, and by extension, victims' per-  
 364 ceptions. Indeed, *Edwards* has used this ladder to propose a typology of victim  
 365 participation within the British criminal justice system.

366 At the lowest rungs of the ladder are *manipulation* and *therapy*, forms of non-  
 367 participation rather than participation, "contrived by some to substitute for genu-  
 368 ine participation."<sup>88</sup> These rungs, according to *Arnstein*, operate when persons  
 369 are "placed on rubber stamp advisory committees or advisory bodies" in order to  
 370 engineer their support, thereby "[signifying] the distortion of participation into a  
 371 public relations vehicle by power-holders."<sup>89</sup> *Arnstein* is particularly critical of  
 372 participation that amounts to *therapy* because it is "dishonest and arrogant". Such  
 373 (non-) participation occurs when persons are involved only to be subjected to  
 374 "clinical group therapy."<sup>90</sup>

375 Just above these rungs, *Arnstein* describes token forms of participation, where  
 376 citizens are *informed* of decisions, *consulted* about decisions, but with no guaran-  
 377 tee that this transfer of knowledge will have any bearing on outcomes. Tokenism  
 378 also includes *placation*, which allows greater input and influence, although those  
 379 with power continue to retain the right to decide and are not obliged to consider  
 380 participant views. Applying *Arnstein's* classification to victim participation in  
 381 international courts, I would place the role of victim-witnesses at the ad hoc tri-  
 382 bunals under the category of *consultation*, and the role of victim-participants at  
 383 the ICC under *placation*.

384 At the top of *Arnstein's* ladder resides citizen power, which endows participants  
 385 citizens with more "decision-making clout" when participation takes the form of  
 386 *partnerships*, *delegated power*, and *citizen control* or, put differently, when power is  
 387 shared with or conferred to the participant *qua* citizen.<sup>91</sup> This language of empow-  
 388 erment, control and autonomy – in this case of an individual being able to make  
 389 decisions about her own life, have her say before a formal judicial process, and be

<sup>87</sup> *Sherry Arnstein* (1971), op. cit, 176.

<sup>88</sup> *Ibid.*, 176 -177

<sup>89</sup> *Ibid.*, 176-77.

<sup>90</sup> *Ibid.*, 177.

<sup>91</sup> *Ibid.*, at 177.

the author and arbiter of her own recovery – is espoused by the ECCC’s affiliates.<sup>92</sup> If these affiliates are to be believed, Cambodian civil parties enjoy a degree of power *qua* victim that makes them a *delegate* of or *partner* to the Prosecution. An important feature of these “degrees of power” is that once “the ground-rules have been established through some form of give-and-take, they are not subject to unilateral change.”<sup>93</sup> To the extent that the ECCC’s civil party process provides victims these degrees of power, it may be said to be beneficial to them.

### 3.2. *Scope of Research*

During the pre-trial phase of the ECCC’s proceedings, 28 civil parties were officially recognized, questioned by ECCC judges and prosecutors, interacted with ECCC affiliates and NGO intermediaries and otherwise participated before the ECCC. Yet, there is a striking dearth of research on how Cambodian victims of mass atrocities perceive their participation before the ECCC. To date, no qualitative or quantitative research has been conducted (or at least published) to shed light on this issue, despite the fact that the ECCC’s pre-trial phase began in 2006 and the first public pre-trial hearing was held in 2007. This article seeks to begin to fill this intellectual void.

My research asks how victim participants perceive their participation in the ECCC’s process and its effects. It relies on the following sources: records of the ECCC’s preliminary observations, and judicial decisions and plenary rulings concerning victim participation; on-line web-casts of the ECCC’s public hearings and transcripts, which include submissions by civil party lawyers and civil parties; journalistic reports on contemporary public sentiment towards the Tribunal process and victim participation; and interviews conducted with the key Tribunal and civil society informants, including two investigators, two civil party lawyers, one prosecutor, three defense counsel, two members of the Tribunal’s administration, and three members of the Tribunal’s Victim’s Unit. Importantly, this article draws on my field interviews with 24 civil parties, victims and ECCC affiliates in order to examine whether or not the realities of the civil party process are consistent with its promises. This article does not purport to have a large enough representative sample to generalize with confidence about all Cambodian victims, let

<sup>92</sup> *Ian Edwards*, *An Ambiguous Participant*, op. cit, at 972-73. See also *Diane Orentlicher*, Report of the Independent Expert to Update the Set of Principles to Combat Impunity, U.N. Doc. E/CN.4/2005/102 (2005), para. 7 (originally submitted to the UN Commission on Human Rights in 1997). As *Diane Orentlicher*, UN independent expert tasked with updating the UN Set of Principles to combat impunity, notes in the introduction to her report: “[victim] participation helps ensure that policies for combating impunity effectively respond to victims’ actual needs and, in itself, can help reconstitute the *full civic membership* of those who were denied the protection of the law in the past.”

<sup>93</sup> *Sherry Arnstein* (1971), op. cit, 178.



421 alone all victims of mass atrocity. Instead, it seeks to move beyond vague specula-  
 422 tions that victim participation in a legal process is always therapeutic. My research  
 423 yielded a varied analysis of Cambodian victims' interpretations and identities that  
 424 is distinct from the orthodoxy represented in the extant literature about the thera-  
 425 peutic effects of victim participation, which I have set out above.

#### 426 **4. Victim Participation as Empty Ritual**

##### 427 *4.1. Victim as Subversive Speaker, not Ventriloquist: Theary Seng*

428 Theary Seng is the first victim recognized as a civil party, does not fit this profile  
 429 of the typical victim. She is a memoirist; a media celebrity; a civil society leader;  
 430 and lawyer.<sup>94</sup> So far, she is the only civil party who has addressed the ECCC  
 431 directly. When given this opportunity, Seng did more than just speak. Proclaiming  
 432 that it was a “right and a privilege for victims to speak before the court”, Seng’s  
 433 first act when faced with alleged genocidaire Noun Chea at the Pre-trial Chamber’s  
 434 public hearing on Feb 8 2008 was to address him directly, using the opportunity  
 435 to publicise a book about post-traumatic stress published by her NGO, the  
 436 Center for Social Development (CSD).<sup>95</sup>

437 Seng offered Noun Chea a copy of this book, saying that she wanted him to  
 438 read it so he would understand more clearly the effects of his policies on the  
 439 people of Cambodia. Interestingly, no element of the court – Prosecution, Defense  
 440 nor Judges – protested. The Judges even ordered that the bailiff hand the book to  
 441 Noun Chea. In a decision issued in March 2008, the Pre-Trial Chamber adopted  
 442 a broad interpretation of the civil parties’ right to participate, stating that the  
 443 Internal Rules are “clear in [their] wording that Civil Parties can participate in *all*  
 444 criminal proceedings...” and that “Civil Parties have *active rights to participate*  
 445 starting from the investigative stage of the procedure.”<sup>96</sup> The Judges rejected the  
 446 Defense’s argument that civil parties should not participate in pre-trial proceed-  
 447 ings.<sup>97</sup> Victims’ rights advocates have welcomed the Pre-Trial Chamber’s decision  
 448 as “a landmark decision in international criminal justice and a major achievement  
 449 for victims of gross human rights violations, whose voices have long gone

<sup>94</sup> For more information on Theary Seng, her background and her accomplishments see < <http://www.thearyseng.com/>>.

<sup>95</sup> A web-cast of February 2008 pre-trial hearing is available at < <http://www.cambodiatribunal.org/>>.

<sup>96</sup> *Decision on Civil Party Participation in Provisional Detention Appeals* (20 March 2008) 002/19-09-2007-ECCC/OCIJ (PTC01) para 36 (Pre-Trial Chamber, ECCC).

<sup>97</sup> *Decision on Civil Party Participation in Provisional Detention Appeals* (20 March 2008) 002/19-09-2007-ECCC/OCIJ (PTC01) para 5 (Pre-Trial Chamber, ECCC).

unheard.”<sup>98</sup> One advocate jubilantly claimed that the decision “set an important precedent in the interpretation of the rules applicable to civil party participation before the ECCC.”<sup>99</sup>

Yet, a mere four months later in July 2008, the same Chamber took a markedly different approach towards Seng. When Seng asked to address the court during proceedings concerning Ieng Sary’s appeal against provisional detention, just as she had in Noun Chea’s case, the Defense objected on the ground that she was not called to the Cambodian Bar. Agreeing with the Defense, the judges denied Seng’s request to speak, ruling that since she had legal representation, she could only speak through her lawyer. Seng promptly dismissed her lawyer and requested once again that she be heard as an unrepresented civil party. The Judges refused her request, seemingly impatient with her repeated attempts to speak. Relying on Internal Rule 77(10), which provides that, in pre-trial appeals, “the Co-Prosecutors and the lawyers for the parties may present brief observations”, the majority of the Chamber held that it was “clear” that only civil party *lawyers* could address it, regardless of the fact that civil parties had, by virtue of being parties to the proceedings, legal standing.<sup>100</sup> The Chamber’s three-paragraph decision is misconceived.

Properly construed, the 2007 Internal Rules did not require a civil party to be represented by a lawyer. In fact, they expressly provided that she had the right to request reparations without the assistance of a lawyer, strongly suggesting that she was within her rights to address the bench in person.<sup>101</sup> Further, according to the 2007 Internal Rules, there is a fundamental obligation that “proceedings shall be fair and adversarial and preserve a balance between the rights of the parties.”<sup>102</sup> As such, Seng, as a party to the proceedings, should have been granted a right to speak, not silenced simply because she had no lawyer. Yet, this is what happened: a disheartened Seng stormed out of the courtroom, vowing not to return until “[she has] a voice.”<sup>103</sup>

<sup>98</sup> Joint Press Release issued by established international victims’ rights organizations titled, Cambodia Tribunal Allows Victims of the Khmer Rouge to Participate in Proceedings, 28 March 2008, on file with author.

<sup>99</sup> International Federation for Human Rights (FIDH) Cambodia Tribunal Allows Victims of Khmer Rouge to Participate in Proceedings (28 March 2008) available at [www.fidh.org/spip.php?article5386](http://www.fidh.org/spip.php?article5386) (accessed 15 August 2008.)

<sup>100</sup> *Written Version of Oral Decision of 1 July 2008 on the Civil Party’s Request to Address the Court in Person* (3 July 2008) 002/19-09-2007-ECCC/OCIJ(PTC03) para 3 (Pre-Trial Chamber, ECCC).

<sup>101</sup> ECCC Internal Rules, Rule 23(7) (Any Victim participating in proceedings before the ECCC as a Civil Party has the right to be represented by a national lawyer, or a foreign lawyer in collaboration with a national lawyer, as follows...)

<sup>102</sup> ECCC Internal Rules, Rule 21(1) (a).

<sup>103</sup> *Georgia Wilkins*, Victims in Emotional, Legal Limbo over Participation at the KR Trial, Phnom Penh Post, Sept. 11, 2008. A web-cast of this pre-trial hearing is available at < <http://www.cambodiatribunal.org/>>.

478 It appears that the shift in the Chamber’s attitude away from victim participa-  
 479 tion can be attributed to their “disinclination to hear from [Seng] rather than upon  
 480 a correct reading of the Internal Rules.”<sup>104</sup> Some say that Seng compromised the  
 481 nascent civil party process, threatening to unravel it even before the trials began.  
 482 According to Sarah Thomas, a legal fellow based at a local NGO: “*Despite seeking*  
 483 *to further victims’ rights, [Seng] has done victims a great disservice by demanding a*  
 484 *robust scheme for civil party participation so early in the proceedings...* The Judges  
 485 had – until this time – adopted a very progressive approach. When, however, the  
 486 civil party sought to force their hand, the Judges responded negatively, restricting  
 487 opportunities for direct participation for all civil parties”<sup>105</sup> [Emphasis added].

488 A senior ECCC official I spoke to was more blunt: “Theory Seng is manipulat-  
 489 ing the process. I do not think that the process will be well managed if we allow  
 490 [her] to stand on her soapbox... *I used to think highly of victim participation, but*  
 491 *I realize that individual victims cannot be allowed to speak in court as they are emo-*  
 492 *tional. Judges do not want to hear only about their mental anguish alone, that is for*  
 493 *a psychiatrist, not a court of law. Common legal representation is necessary*”<sup>106</sup>  
 494 [Emphasis added].

495 Such reasoning spurred the ECCC’s Rules Committee to back-pedal on some  
 496 of the initial rights it gave to civil parties. On 5 September 2008, two months  
 497 after Seng was denied the chance to address the court directly during Ieng Sary’s  
 498 appeal against his provisional detention on the basis she had legal representation,  
 499 the ECCC Rules Committee amended the Internal Rules to regulate civil party  
 500 involvement in court.<sup>107</sup> Victims are now required to apply at least 10 days ahead  
 501 of an initial hearing if they want to be civil parties.<sup>108</sup> The Rules Committee also  
 502 gave ECCC judges – of which it is part - the power to compel civil parties into  
 503 groups with a single common lawyer representing them.<sup>109</sup> More recently, on 6  
 504 March 2009, the Internal Rules were amended once more to specify that where a  
 505 lawyer represents a civil party, it is the lawyer and not the civil party herself who  
 506 must address the Tribunal.<sup>110</sup>

<sup>104</sup> See comments by lawyer Sarah Thomas, available at < <http://intlawgrlrs.blogspot.com/search/label/ECCC?max-results=20>. >

<sup>105</sup> Sarah Thomas, Civil Party’s Repeated Attempts to Address Bench and Poor Management of Proceedings Force Worrying Precedent for Victim Participation Before the ECCC, available at <http://intlawgrlrs.blogspot.com/search/label/ECCC?max-results=20>

<sup>106</sup> Author’s interview with a senior ECCC official (anonymity preferred), 2 December 2008.

<sup>107</sup> Georgia Wilkins, Victims in Emotional, Legal Limbo over Participation at the KR Trial, Phnom Penh Post, Sept.11, 2008.

<sup>108</sup> ECCC Internal Rules, Rule 24(3) [introduced on 5 September 2008]. As a consequence, as detailed in the press release, the application made by Norng Chanphal, a surviving victim of S-21, was rejected as it was submitted to the Court two days after the deadline. I will set out his story below.

<sup>109</sup> ECCC Internal Rules, Rule 24(8)(a)(b) [introduced on 5 September 2008].

<sup>110</sup> ECCC Internal Rules, Rule 24(7)(i) [introduced on 6 March 2009]. The amended Rules states that it does not apply where a Civil Party is being interviewed, and do not prevent a Civil Party from answering questions put to him or her by the Chamber.

The ECCC Rules Committee sought to justify its recent amendments to the Internal Rules as follows: “*The amendments do not limit the rights of Civil Parties but instead, modify the manner in which these rights are to be exercised*, due to the extremely large number of Civil Parties before ECCC proceedings, and the impracticability of concluding trials expeditiously if all Civil Parties were allowed to intervene on any matter at any stage of proceeding. ... *The significant involvement of victims is a notable feature of ECCC proceedings and the Court’s practice in this area is expected to be watched closely by other international Tribunals, in particular the International Criminal Court, whose Statute and Rules contain similar provisions*”<sup>111</sup> [Emphasis added].

Regardless of the semantic distinction that the Committee sought to draw between ‘limit’ and ‘modify’, its amendments to the Internal Rules have far-reaching consequences. The Rules Committee’s amendments have abridged civil parties’ active rights to participate in all criminal proceedings as equal participants, undermining the very spirit of the civil party process it first established. These amendments are tantamount to a procedural reversal of the Pre-Trial Chamber’s much applauded decision of March 2008.<sup>112</sup> More significantly, they run counter to statements made by the ECCC’s affiliates and intermediaries to victims on the basis of the original Internal Rules.

After calling for unprecedented victim participation that, as I explained earlier, promised Cambodian victims more rights than those contemplated by the ICC, the ECCC appears to have reneged. Civil party victims at the ECCC now have fewer rights than their non-party counterparts at the ICC, who can address the court if the Judges deem that their contribution serves the interests of justice. By precluding civil parties from addressing the ECCC directly, save for when they asked questions by Judges, the Rules Committee has, I argue, undermined victim participation at the ECCC. Civil parties have been procedurally lowered from their position on Arnstein’s ladder where they appeared to hold a degree of participatory power as the Prosecution’s partners, to a position that is, at best, sheer tokenism, and at worst, manipulation (see Table 1, above).

I am not suggesting that the ECCC should forsake practical considerations and allow every civil party to make individual interventions during the trial process. Undoubtedly, there are bound to be gaps between the ECCC’s promise and its operational impact. However, these gaps should prompt a vigorous self-examination on the ECCC’s part, not a retroactive restriction of victims’ rights. Concerns about practicality and expedience, though merited, are often self-referential. They are a safe-refuge for legal conservatism: judges who may fear that

<sup>111</sup>) 5th Plenary Session of Judicial Officers, Closing Press Statement, 6 March 2009, available at <[http://www.eccc.gov.kh/english/cabinet/press/101/closing\\_plenary\\_session\\_EN.pdf](http://www.eccc.gov.kh/english/cabinet/press/101/closing_plenary_session_EN.pdf)>.

<sup>112</sup>) *Decision on Civil Party Participation in Provisional Detention Appeals* (20 March 2008) 002/19-09-2007-ECCC/OCIJ (PTC01) para 36 (Pre-Trial Chamber, ECCC).

544 victims may not bend to the will of their endeavour, defense lawyers who may  
 545 fear that victims may strengthen the elbow of the prosecution, and prosecutors  
 546 who may fear that victims may show them up.

547 Vilifying civil parties and valorising the internationalized criminal process,  
 548 without seeking to query or understand the former's distinct perspective or the  
 549 shortcomings of the latter may send the message that the ECCC is not particu-  
 550 larly interested in entertaining the views and voices of victims and civil parties.  
 551 It is convenient to dismiss Seng's conduct, as her critics do, as being disruptive,  
 552 but there is more to her story. The amendments to the Internal Rules on victims  
 553 participation that were prompted, in part, by Seng's conduct, underscore a ten-  
 554 sion that has emerged at the ECCC – not the traditional opposition between the  
 555 powerless victim and the savage perpetrator; but between the capable (if diffi-  
 556 cult) victim and the aloof Tribunal. Seng sees herself, she admitted to me, as a  
 557 conduit for Cambodian victims in general; someone who can give them a voice,  
 558 and translate and convey their desires within the strictures of the legal process: “I  
 559 rushed to become the first civil party to help shape the process, and it took a bit  
 560 of time. I saw the potential to engage the process and the court in a meaningful  
 561 way and I knew that I could use my background as a Cambodian victim in a  
 562 legal sense.... I am aware of my unique position as a Cambodian victim in that  
 563 regard and as an American-trained lawyer. *I am also aware that because of my work*  
 564 *engaging the Cambodian public I do have an understanding of what it is they want*  
 565 *and I felt, I don't want to be dramatic or boastful, but I felt I could translate the*  
 566 *voices and somehow incorporate that into myself and use that voice, my voice as a*  
 567 *vehicle to translate those desires and the suffering within this court*<sup>113</sup> [Emphasis  
 568 added].

569 Besides serving as a communal translator, Seng also feels that she is entitled to  
 570 be heard in her own right. To tell the story of her personal suffering as a child  
 571 victim and orphan on her own terms: “*But otherwise I am not unique so this is why*  
 572 *when people look at me, superficially they don't understand that I lived during that*  
 573 *time period and the suffering, my suffering I have gone through a certain suffering,*  
 574 *so allow me to hear the suffering of Cambodians and help translate that, so to me*  
 575 *knowing that I have uniqueness of two voices and this court is an international*  
 576 *instrument*”<sup>114</sup> [Emphasis added].

577 Seng's proclamation that she is worthy of representing “two voices” – hers and  
 578 that of the community of victims – is contested, as we shall see, by other members  
 579 of that community. Yet it demonstrates that she has reconfigured her role in the  
 580 process. On the basis of her authority as a civil party who has been promised a

<sup>113</sup>) Author's interview and conversation with civil party Theary Seng, 30 November 2008, 1 December 2008 Transcripts of conversation on file with author.

<sup>114</sup>) Author's interview with civil party Theary Seng, 1 December 2008. Transcripts of conversation on file with author.

chance to voice her own perspective,<sup>115</sup> Seng has remade herself into what *Linda Alcott* and *Laura Gray* term a “subversive speaker”: that is, a survivor who is (self) authorized to be both witness and expert: both reporter and theorist of experience.<sup>116</sup>

When an expert is called for, *Alcott* and *Gray* opine that a survivor’s narratives are often “recuperated” to reinforce dominant social relations and power structures. To enable subversive speaking, the role of the expert must be eliminated or reconfigured, and the split between direct experience and third-party interpretation must be erased.<sup>117</sup>

That is precisely what Seng sought to do. Once she was conferred the status of ‘civil party’, Seng saw herself not only as having a right of audience before the ECCC, but a duty to breathe life into the civil party process: “When Nuon Chea was first arrested I rushed to file, but ... there was no form! There was no Victim’s Unit! The court had not resolved these issues. Duch was arrested earlier and no one applied to be a civil party! It was one of those things where people were content with the idea, with the theory but did not have the time, experience or energy, or depth to pursue it. So the onus fell on victims like me to shape [the process] and to see that it does not become illusory.”<sup>118</sup>

Even after the Victim’s Unit was established and proceeded to assign her a lawyer, Seng saw little need for this formal interpolator. Seng did not wish to have her experiences re-presented by another person, another lawyer; especially when, regardless of his apparent competence and ability as an advocate, her lawyer could not have nor appreciate her expertise, suffering or gendered perspective. By discharging her lawyer, Seng was indeed subverting the civil party process. She used her testimony and memory as “tools of intervention” rather than “instruments for recuperation”, and thereby “alter[ed] existing subjectivities as well as structures of domination and relations of power” that placed the law at the center of the process rather than her.<sup>119</sup> As she articulated: “I wasn’t sure how much room I had to say, when in court, to shift direction, because I had a lawyer... I think the national lawyers were not thinking about the issue, they were from public interest organizations and had been given one week or two weeks to think about this whereas *I have been thinking about the CP participation, what it means for a long time. ... For*

<sup>115</sup> In Seng’s words, her role is “to give voice to that which has not been heard before and that voice is really important to the legal process but more so than the legal process, to the larger search for justice”.

<sup>116</sup> *Linda Alcott & Laura Gray*. *Survivor Discourse: Transgression or Recuperation?* 18 *Signs* 260, 282 (1993).

<sup>117</sup> Roseanne Kennedy, *Subversive Witnessing: Mediating Indigenous testimony in Australian cultural and legal institutions*, 36 *Wom. Stud. Q.* 1, 58, 62 (2008).

<sup>118</sup> Author’s interview with civil party Theary Seng, 1 December 2008. Transcripts of conversation on file with author.

<sup>119</sup> *Alcott, Linda, & Gray, Laura. Survivor Discourse: Transgression or Recuperation?* 18 *Signs* 260, 282 (1993).



613 *me, there was a different level of analysis; as in, why can't I articulate this, my story,*  
 614 *by myself? Why do I have to go through another voice? ... Because of my dual back-*  
 615 *ground, I thought I could articulate what should be said. That was limited because my*  
 616 *lawyer is a man. He is brilliant, but because of his legal education in the rigid system*  
 617 *here, he is further limited. I felt these frustrations*<sup>120</sup> [Emphasis added].

618 Victim participation is supposed to be empowering, but that exhilarating high  
 619 can quickly disappear when the opportunity for such expression vanishes and  
 620 when a victim is displaced from her perceived place at the top of *Arnstein's* ladder  
 621 (*control*) and is forced to cling on to the bottom rung (*non-participation*). This  
 622 was Seng's experience. Speaking at the Reparations Conference about the way in  
 623 which she has been silenced by the Tribunal, Seng was reduced to tears: "I would  
 624 like to remind the ECCC officials and judges here not to take my suffering for  
 625 granted. You allowed me to become a civil party. Give me, give us [civil parties]  
 626 the voice that you promised. Do not play with the hearts and the souls of the  
 627 victims and my (dead) parents. Justice must be transparent, if not it will not  
 628 count for anything, and you will have a real problem on your hands."<sup>121</sup>

#### 629 4.2. *Victim as Individual, Not Tribe – Sum Rithy & Chin Navy*

630 Tensions arise not only between victims and the Tribunal, they manifest between  
 631 victims as well. As I have explained, a victim is defined under the Internal Rules  
 632 as a person who suffered harm – physical, material or psychological – at the hands  
 633 of the Khmer Rouge. The ECCC's affiliates suggest that all Cambodian victims  
 634 who fall under this definition are created equal: that is, they have an equal right  
 635 to participate in the process.<sup>122</sup> Veteran NGO activist, Judy Ong, however, dis-  
 636 agrees: "Victims usually prefer to fill out and submit civil party applications as  
 637 individuals. They submit their applications to us specifying what they endured.  
 638 Each individual suffered different things. *Each victim wants, and should be encour-*  
 639 *aged, to make a distinct statement of what they suffered, as this will inform requests*  
 640 *for reparations*" [Emphasis added].<sup>123</sup>

641 Sum Rithy is one such victim who desires to stand apart from others. Sum,  
 642 who was detained in a Khmer Rouge prison in Siem Reap for two years, told me  
 643 that individual reparation should be available to prisoners like him. Sum recounts  
 644 that more than 150 people were also interred at that prison, but that he is amongst  
 645 only a handful of survivors who are still alive. "The prison was very similar to Tuol

<sup>120</sup> Author's interview with civil party Theary Seng, 1 December 2008. Transcripts of conversation on file with author.

<sup>121</sup> Reparations Conference, 26 November 2008.

<sup>122</sup> Author's interview with Keat Bophal, Head of the ECCC's Victim's Unit, 11 December 2008 ("amongst (those recognized as) civil parties, we must realise that all are victims...we cannot say that some suffered less or more"). Transcript on file with author.

<sup>123</sup> Reparations conference, 27 November 2008.

Sleng, although I think that my fellow prisoners and I suffered more,” Sum told me. “The Khmer Rouge soldiers poured hot porridge on me and tortured me for no reason, it was hell on earth. I don’t think you can ever understand what I am talking about. I have seen hell and survived.”<sup>124</sup>

Sum feels that there is a hierarchy of suffering. He believes that a distinction should be drawn between prisoners like him – “true victims” – and those who were interred for a short period of time (like Seng), others who were spared imprisonment, and still others who suffered psychological or material harm rather than physical harm as a result of what happened to their property or their loved ones. In his eyes, these other ‘fake’ victims should not be placed on the same footing as him, nor enjoy the same claim to reparations, even if they are designed to be symbolic rather than monetary: “*I am a true victim because I was in prison and I was tortured for a long time. I was treated very cruelly in prison. People like Theary Seng and others did not go through as much. I suffered so much more. I am the real victim of the Khmer Rouge. Her 15 days in prison are important, but I was there for two years. I am still a victim of the Khmer Rouge because they have not been held responsible for their terrible crimes*”<sup>125</sup> [Emphasis added].

To Sum, the title of civil party is an emblem of victimhood that he feels deserves a special status. This is partly the reason why he came forward to be a civil party, braving warnings that the ECCC’s trials would end up being little better than the trials of the People’s Revolutionary Tribunal (PRT) that took place in 1979.<sup>126</sup> He said: “*I was told that a civil party is a special victim. Now that I am a civil party, I want the court to respect me as a special person. If there is a plane crash, the survivor is very important, right? All survivors, especially prison victims like me, should be respected and recognized as important too. The court should make a card for me that says I am a civil party, a former prisoner, so that no one will look down on me. Since the court treats the defendants as very important people, shouldn’t we be treated as people who are even more important?*”<sup>127</sup> [Emphasis added].

Yet, Sum says that the process has not lived up to his expectations. Sum feels that he is little more than a sideshow, not the central figure or “special victim” that he was told he would be. He has not had a chance to speak in court, despite

<sup>124</sup>) Author’s interview with civil party Sum Rithy, 6 December 2008.

<sup>125</sup>) *Ibid.*

<sup>126</sup>) Author’s interview with civil party Sum Rithy, 6 December 2008. Coming forward was not an easy decision for Sum Rithy. He told me that a family member had advised against it. Advice he feels, on hindsight, that he ought to have heeded: “I have a close friend who was also imprisoned in Siem Reap just like me. This female friend was part of the PRT in 1979. She has also made a complaint before the present Tribunal as well, but when I asked her to become a civil party, she refused. She gave me some advice. She said ‘be careful, you will be cheated by the court and the government and you may be killed’. *At that time, I said nothing. I just listened to her advice and she repeated it several times to me. Looking at my position right now, I think I should have listened to her*” [Emphasis added].

<sup>127</sup>) *Ibid.*

677 various requests. He is rarely consulted and he finds the legal process, both court  
678 hearings and meetings with his lawyers, boring and often incomprehensible.<sup>128</sup> As  
679 Sum pithily puts it - “it is always about the law, what about the victims? When  
680 the court needs us, they ask us to come, but when they don’t need us they kick us  
681 out.”<sup>129</sup>

682 Another civil party, Chin Navy, considers herself as ‘special’ as Sum Rithy (or  
683 more so). Navy disagrees with Sum’s statement that victims of physical harm  
684 should trump or have a greater claim to victimhood, and reparations, than vic-  
685 tims of psychological harm. “My brain is stuck on what happened in April 1975  
686 when the Khmer Rouge took over”, Navy told me. “I was forced to evacuate  
687 Phnom Penh. I feared for my life and I ran. As I fled to my village in Takeo prov-  
688 ince on foot, all I saw were bodies covered with plastic.”<sup>130</sup> Navy’s greatest suffer-  
689 ing stems from the loss of her husband who was executed for being a suspected  
690 Central Intelligence Agency (‘CIA’) spy.

691 Yet, this is not a story that the Tribunal has thus far desired to hear. Navy has  
692 not been granted an opportunity to address the Tribunal. The following exchange  
693 at the Reparations Conference between Navy and a Tribunal official is revelatory  
694 of ECCC affiliates’ reluctance to engage civil parties:

695 Official: “Aunty, I am sorry to interrupt you. I know you suffered. But we are here to listen to  
696 your views on reparations.”

697 Chin Navy: (*persistently*) “Yes, but how can I tell you what I want before I tell you my story?”

698 Official: “*There will be another opportunity for you to tell your story. Now we are at a Conference,*  
699 *I need to know what you think is appropriate reparations.*”

700 Chin Navy: (*shows photo of husband to audience*) “I want individual reparations for all victims,  
701 especially widows like me who have suffered the most... This is the only remaining property of  
702 my husband that I have left. He was tortured and killed at Tuol Sleng prison. What are you  
703 going to do about it? Do you understand my pain?”

704 Official: (Silence)<sup>131</sup>

705 Neither Sum nor Navy are content that the Tribunal will only provide collec-  
706 tive, not individual, reparations at the conclusion of the trials is untenable to both  
707 Sum and Navy. In their minds, they were invited by the Tribunal to come for-  
708 ward; they were asked to reveal and relive their traumatic pain and suffering by

<sup>128</sup> Author’s interview with civil party Sum Rithy, 6 December 2008. When I asked Sum Rithy about how he would characterise his role at the court so far and what he thinks of the civil party process, he had this to say: “*The court treats us badly... I have never had a chance to speak in court. I just listen to my lawyers when they speak in court. And they can be very boring. I hardly understand what goes on in court... I want to question the defendants, but they [the Tribunal] say no*”. When I asked him if he had asked his lawyers to explain what transpires, he said: “*I meet my lawyers once a month, but they are too busy to explain things to me. Anyway, these meetings are also about the law and very boring*”. (Emphasis added). Author’s interview with civil party Sum Rithy, 6 December 2008.

<sup>129</sup> Ibid.

<sup>130</sup> Author’s interview with civil party Chin Navy, 4 December 2008.

<sup>131</sup> Reparations Conference, 26 November 2008. Notes of conference on file with author.

completing the civil party application process; to forsake their anonymity and put their safety at risk; and finally, to attend numerous hearings and lawyer's meetings that were incomprehensible. At the Reparations Conference, Cambodian Judge Kong Srim, President of the ECCC's Supreme Chamber, told a room full of civil parties that "compensation cannot be done for individuals."<sup>132</sup> When I spoke to Navy about how she felt about what Judge Kong had said, she balked: "I heard him, but I disagree. US\$100 million is being spent on the Tribunal. If there is no individual compensation, there is no justice in this entire world. They are still allowing those bad people to continue to abuse others and commit more evil deeds. I have suffered so much, so much more than many others. Individual reparations are a must because I personally come down and have attended many meetings so far."<sup>133</sup>

When I spoke to Sum about the same, he became visibly upset and wondered if he should withdraw from the process: "I was told that we would get 'collective' and 'moral' reparations. I thought that this could include some financial compensation, at least for the effort it takes for me to get to this far-away court. *When I was told by my lawyers that the court would not even give me this, I feel that they are threatening me. It feels so familiar. I cannot believe that there will be no individual reparations; that the court wants to shut my mouth. Actually, if there are no individual reparations, it means the court does not respect me. Maybe I should take back my civil party application*"<sup>134</sup> [Emphasis added].

Sum and Navy's insistence that they are entitled to financial rather than non-financial reparations in the event of conviction could be because the distinction between both forms of reparation occasionally gets lost in translation.<sup>135</sup> However, it is equally likely that Sum and Navy view non-financial reparations as an insubstantial form of redress which they were unwilling to accept.<sup>136</sup> In the course of the Reparations Conference, Sum Rithy pressed Judge Kong Srim to answer why a civil party victim like him should not be entitled to financial compensation as

<sup>132</sup> *Ibid.*

<sup>133</sup> Author's interview with civil party Chin Navy, 4 December 2008.

<sup>134</sup> Author's interview with civil party Sum Rithy, 6 December 2008.

<sup>135</sup> Taing Hun, Director of Cambodian branch of NGO International Center for Conciliation, speaking at the Reparations Conference confirmed that "the Khmer (Cambodian) phrase for 'reparations' can be construed to mean financial "compensation" and this can be taken to mean that money damages/compensation will be awarded to victims.

<sup>136</sup> As a civil society leader I spoke with remarked: "With victims, their emotions overwhelm them and even if you tell them once that there will be no money, because they want it, their mind is set, they hear you but then it's lost. Because they have already made up their minds that there is going to be redress, that there is going to be reparations of a certain kind. ... it (the fact that there is no provision for individual reparations) needs to be repeated again and again. The lawyers think "Oh I said it!" but that does not mean it was effectively communicated. I think they (civil society and the Tribunal) are trying their best, and they have information but they are not communicating it properly. You need to know whether it has been received at a level that sticks and can be accepted and internalized by the victims." Author's interview with civil society leader (Anonymity preferred), 4 December 2008.

737 redress for his suffering. Judge Kong replied, to applause from the audience,  
 738 “although the Internal Rules do not provide for individual reparations, I will take  
 739 your concerns into account and see what we can do”.<sup>137</sup> When I asked Sum at the  
 740 conclusion of the Reparations Conference what he made of Judge Kong’s state-  
 741 ment and if it had restored his faith in the civil party process, he told me that he  
 742 did not believe the Judge’s “polite lie”, as it was purely meant to pacify him.<sup>138</sup>

743 When faced with the ECCC’s attempts to pay lip service to their comments  
 744 and feelings shortly after promises of genuine participation, Sum Rithy likened  
 745 the ECCC to its show-trial predecessor, the much-criticized 1979 People’s  
 746 Revolutionary Tribunal,<sup>139</sup> or even a return to the *Angkar*. Poignantly likening his  
 747 memories to a pentimento, which peels back to reveal an arduous personal tale  
 748 that he feels the Tribunal does not give credence to, Sum said that he felt disillusioned.  
 749 Sum expressed mistrust in the legitimacy of the ECCC and its local and  
 750 foreign affiliates: “I am like an old piece of paper with creases. Now the paper is  
 751 blank, but there is a story behind the creases. I think they (the Tribunal) do not  
 752 really want the people to know what happened. *Hun Sen wants to erase everything*  
 753 *that happened during the Pol Pot time, maybe even my memory. The Barangs (for-*  
 754 *eigners) are no better. I feels that nothing changes. This Tribunal is just like Angkar”*<sup>140</sup>  
 755 [Emphasis added].

#### 756 4.3. *One Crime Site, Many Desires: Chum Mey, Bou Meng, Van Naath*

757 Sum Rithy is a former prisoner, and Chin Navy a widow. Each arrogates centrality  
 758 for his/her individual pain and claim to victimhood. Each feels he/she suffered more  
 759 than the other did. This is not a phenomenon peculiar to these two victims, but a  
 760 trait common to many other victims I interviewed as well. Each individual story,  
 761 and claim to victimhood, is separate from the next. Interestingly, I found that even  
 762 victims who have suffered a similar plight in the same site subscribe to very different  
 763 values, and have very different identities, views and desires for vindication.

764 Civil parties Chum Mey and Bou Meng and Prosecution witness Van Naath  
 765 are among a handful of survivors of the notorious Khmer Rouge S-21 prison  
 766 where 17,000 persons were tortured and perished. They all underwent tremendous

<sup>137</sup> Reparations Conference, 26 November 2008.

<sup>138</sup> Author’s interview with civil party Sum Rithy, 6 December 2008.

<sup>139</sup> In 1979, senior Khmer Rouge leaders Pol Pot and Ieng Sary were accused of genocide at the People’s Revolutionary Tribunal established in Phnom Penh by the newly installed, Vietnamese-controlled government. The trials were held, and the accused convicted of genocide, *in absentia*. Due to the animus of the proceedings, they are widely regarded as show-trial staged by the aggressors/victors without any clear governing laws or respect for due process. In fact, the *defence* lawyer for the two accused persons, siding with the prosecution, described her clients as “criminally insane monsters” who deserved to be condemned to death. See generally *David Chandler, Will There Be a Trial for the Khmer Rouge?* 14 *Ethics & International Affairs*. 67 (2006).

<sup>140</sup> Author’s interview with civil party Sum Rithy, 6 December 2008.

cruelty at the hands of the commandant of that prison, Duch, who is currently on trial. Yet, each survivor is a very different person – and none of them individually nor all of them put together, can truly be said to be representative of a larger group of Cambodian victims. “They tortured me for three months,” Chum Mey said, recalling his time as a prisoner. “They beat me. They removed my toenails. They gave me electric shocks in my ear—kup-kup-kup-kup, it sounded like a machine in my head, and my eyes were burning.” Chum is one of the civil parties who wish to question Duch. “I want to stay alive to give evidence,” he said. “Because I survived the Khmer Rouge, and if I die before the trial, what was the point of surviving?”<sup>141</sup>

Chum came forward to be a civil party in the hope that the ECCC’s promise of relief through participation would vindicate his survival. In addition to telling his story in court as an eye-witness to the torture and killings that transpired in S-21, Chum wants to do what witnesses cannot: to personally ask Duch those questions that have gone unanswered. Although Chum has made repeated requests to confront Duch and put questions to him, he has not been permitted to do so: “*They call it an extraordinary court but then in practice it is not so extraordinary. I did not do anything wrong. Why did they torture me? They killed my wife and my children and they did not do anything wrong. Why did they kill my family? I want to ask Duch directly. I want to ask this myself, not through a lawyer ... I have asked for this opportunity many times, I thought I had the right to do this as a victim party, but I have never had a chance to speak in court*”<sup>142</sup> [Emphasis added].

Despite the pain he has suffered, Chum eschews vengeance and prefers a Theravada Buddhist approach to the trials.<sup>143</sup> Chum would rather show compassion than mimic their violence. He feels that he can forgive the Khmer Rouge leaders if they are repentant and held legally accountable by the Tribunal for the crimes they allegedly committed. Chum would like the prison where he was tortured to become a memorial or a museum, and for his suffering to be individually acknowledged, even if only symbolically.<sup>144</sup> Failing this, Chum says that participating in the trials could augur well for national reconciliation, “if my generation

<sup>141</sup> Author’s interview with civil party Chum Mey, 25 November 2008.

<sup>142</sup> Author’s interview with civil party Chum Mey, 2 December 2008.

<sup>143</sup> See generally Ian Harris, “Onslaught on Beings”: A Theravada Buddhist Perspective on Accountability for Crimes Committed in the Democratic Kampuchea Period, in *Jaya Ramji & Beth Van Schaack*, (eds.) *Bringing the Khmer Rouge to Justice: Prosecuting Mass Violence Before the Cambodian Courts* 206 (Edwin Mellen Press, 2005).

<sup>144</sup> Author’s interview with civil party Chum Mey, 2 December 2008. (“I need an apology – not just verbal, but the judgment of the court is critical. As long as they talk about their story and make a genuine apology, I may forgive them... They can have a chance to formally apologise after the trial. I will forgive. I always remember that if a dog bites me, I cannot bite the dog back as I am not a crazy as the dog. In addition to the apology, I would like Tuol Sleng to be converted into a genocide museum and for it to be about the victims and not about the Khmer Rouge and the skulls everybody talks about. I also need some form of individual reparations even if it is just \$1, it will be significant to me.”)



797 can kill each other we should do something to avoid it happening again and heal  
798 wounds in our society.”<sup>145</sup> Chum’s friend and fellow former Toul Sleng prisoner,  
799 Bou Meng, on the other hand, is not as easily appeased.

800 Bou lost his wife to the Khmer Rouge. He believes the only reason he survived  
801 was because of his skill as a painter. “They asked me to draw a picture of Brother  
802 Number One, Pol Pot. They said your pictures must be 100 per cent accurate.  
803 If they aren’t, we’ll kill you and you’ll be fertiliser on the rice fields.”<sup>146</sup> Bou says that  
804 he will only be able to reconcile with the past if he receives US\$50,000 from the  
805 Tribunal.<sup>147</sup> I asked him why he had such a precise figure in mind, and if this may  
806 seem like more of a pay-off than a tribute. Displeased, Bou lifted his shirt to reveal  
807 a deep laceration that trailed across his bare back. “Look at this, and then you ask me  
808 the question again,” he retorted.<sup>148</sup> The wound may have healed, but the emotional  
809 damage has not. “There is a scar on my back which also scars my soul,” Bou said.  
810 I want them (the judges) to make Duch admit his guilt, not remain quiet. I want  
811 compensation of \$50,000 for my wife’s death. He executed my wife. If it happened  
812 to the judges’ wives, how would they feel? Would US\$50,000 be enough?”<sup>149</sup>

813 At first glance, we may seek to brush aside Bou’s frustration at the Tribunal’s  
814 decision to respect Duch’s due process rights. Due process rights that appear to  
815 molycoddle perpetrators often dismay victims of violent crime. Yet, the ECCC’s  
816 civil party process does not hold itself out to be any ordinary criminal process. It  
817 has, as I have explained, restorative aspirations: it seeks to place the victim civil  
818 party at the center of the justice process, as an equal participant with the  
819 Prosecution and Defense, in the hopes that this re-orientation will restore his/her  
820 dignity. It is therefore reasonable for Bou to complain that he does not enjoy the  
821 defendants’ resources, protection or medical care: “My lawyer says I am same as  
822 the Prosecution and Defence. But all the money goes to the defendants. The vic-  
823 tims got nothing from that money, but the defendants got a lot of things. They  
824 live in their comfortable cells with great doctors. They live comfortable lives. It is  
825 like they are being given a salary and accommodation. It is unfair to me. I am the  
826 one working for the Tribunal, helping them. The defendants got US\$3 million  
827 for the trial, but we get nothing. Not even an apology.”<sup>150</sup>

828 Like Bou Meng, the Khmer Rouge spared Van Naath who was beaten, tor-  
829 tured and almost starved to death at S-21, when they discovered his talent for  
830 painting. Van was forced to paint portraits of Duch and Pol Pot until the regime  
831 was toppled in 1979. He too lost family – including two sons – to the regime. Ye,  
832 unlike Bou, Van does not want to be a civil party. He is content if the Prosecution

<sup>145</sup> Author’s interview with civil party Chum Mey, 2 December 2008.

<sup>146</sup> Author’s interview with civil party Bou Meng, 25 November 2008.

<sup>147</sup> Ibid.

<sup>148</sup> Ibid.

<sup>149</sup> Ibid.

<sup>150</sup> Author’s interview with civil party Bou Meng, 25 November 2008.

calls on him to be a witness. “My reason for choosing not to be civil party member is a matter of my personal choice,” Van told me. I believe the people working for the Khmer Rouge Tribunal are fully competent people. I do not want to be a civil party, but I will accept the court’s (subpoena) whenever they want me to appear in court and tell the truth about S-21.”<sup>151</sup>

Upon speaking to Van further, I discovered that his reluctance to be a civil party is not based so much on his blind faith in the Prosecution as it is on a belief that the civil party process may not do justice to his suffering. While other victims perceive the title ‘civil party’ to be a talisman of purported authority, to Van, it symbolises opportunism, a means to obtain financial reparations for personal benefit. In his view, Van does not want to be associated with victims who wish to profit from their suffering: “I often hear discussions about the Tribunal. *Many times, people seem to want to make use of the Tribunal for themselves. If they are given some forms of financial reparations, they are willing to be in the party. If no reparation, they said that would be a waste of their time.* This is contrary to what I think. I have been working hard for the past 30 years so that firstly, I can help prevent this unfortunate thing to happen again, secondly, the subsequent generations will be able to understand how much evil the elder ones had gone through. Lastly, it is for the dead so that they did not die in vain. *No matter what they give me in reparation, they cannot pay back what I have lost. They can never pay me enough. As for me, this is not the case. If they ever are going to give us reparations, we all can continue to survive because we live, but how about those who have already passed away? Do they (civil parties) consider the dead?*”<sup>152</sup> [Emphasis added].

I asked Van if his disdain for the status and title of ‘civil party’ arises from the fact that he is a wealthy painter and does not need the individual financial reparations that Bou, who is also a painter, but not as widely known or acclaimed as Van, seeks. Laughing at the bluntness of the question, Van told me that this is not true. He recounts how hard his life has been and how he has struggled. Besides, for Van, there is no monetary measure that can be put on the loved ones whom he lost and to do so would be unthinkable. According to Van, he will speak as a witness for his “conscience.”<sup>153</sup>

Van does not want S-21 to be remade into a museum, as Chum and leading Cambodian NGOs do. He prefers that the collective reparations that the court

<sup>151</sup>) Author’s interview with survivor Van Naath, 8 December 2008.

<sup>152</sup>) Ibid.

<sup>153</sup>) Author’s interview with survivor Van Naath, 8 December 2008 (“What you think is wrong. From 1979, we all started our lives once again from scratch. The government gave me one house (in Phnom Penh), just like any other. I simply worked hard to survive. I went to work for the Ministry of Defence, serving this state for almost 20 years. After the army service, I came back to live and do small business like any other Cambodians, with no government’s support because the government is poor. I did not even collect my pension. I worked day and night; I dared not sleep too much because if you are not afraid of being tired, you are afraid of being poor. I am not very wealthy. I am not in any debt and I can provide food for my children.”)

866 orders at the end of the day take the form of a hospital for victims, which he feels  
 867 will have far greater utility for Cambodians than a memorial: “A genocide  
 868 museum? That is pointless. It is of no benefit to the victims. I want the victims to  
 869 receive some forms of benefits, I am not asking that for myself, no. It is for the  
 870 elderly, the lonely ones who have lost their spouses, children and relatives during  
 871 the regime. They are suffering because whenever they fall sick, they have no  
 872 money to go to hospital. I want all of them to have access to healthcare just like  
 873 any other Cambodians. If there is anyone at all who is willing to give us collective  
 874 reparation, I want them to provide for us as a community. As in, for example,  
 875 I want them to give us a hospital, an absolutely independent hospital, without the  
 876 aid from the government. It shall be open for the victims like the lonely elderly,  
 877 the poor and miserable, absolutely free of charge. It shall be a general hospital.  
 878 If this is ever done, I will feel that justice is served and I shall be pleased.”<sup>154</sup>

879 What emerges from my conversations with Van, Chum and Bou is not that  
 880 one is more righteous than the other, but that they simply are different people  
 881 with different identities and desires, regardless of the similarity of the site and  
 882 severity of the crimes they suffered at the hands of the Khmer Rouge. When the  
 883 victim is promised a place at the centre of the justice equation, vindication  
 884 becomes important, and similar offences may be resolved in an entirely distinct  
 885 manner. Victims such as Chum may be satisfied with a symbolic demonstration  
 886 of the Tribunal’s willingness to acknowledge the victim’s trauma whereas another  
 887 victim, like Bou might require a far more significant, monetarily measured recog-  
 888 nition of his pain in order to distinguish it from the aggregation that trial pro-  
 889 cesses, including the civil party process facilitate. Still others, like Van may wish  
 890 for communal goals to be achieved though his approach, which may be attractive  
 891 to the Tribunal, but could alienate victims’ individual needs. Victims often feel  
 892 that they need or want to express a range of desires and emotions in court or to  
 893 intermediaries, simply for their own benefit.

894 If the ECCC and its affiliates neglect these varied desires, there is a risk of disil-  
 895 lusionment among civil parties. A significant consequence of according a purely  
 896 expressive role to victims that subordinates them to a calculus of greatest overall  
 897 societal good, as the ECCC’s procedure and practice has begun to do, is that if  
 898 victims perceive their role as something more than just an expressive one, frustra-  
 899 tion is likely to ensure.

#### 900 4.4. *Victims – ‘They can be difficult’*

901 As we have seen, tensions arise when victims are conferred (or denied) legal stand-  
 902 ing as civil parties. Cambodian victim civil parties do not kow-tow and gratefully

<sup>154</sup> Ibid.

whisper “*au kun, au kun borng*”,<sup>155</sup> the familiar greeting ECCC affiliates may be used to hearing and acknowledging with a nod. Victims may shout, scream or express a range of emotions that are frowned upon in court. As ECCC investigator David Boyle told me: “In my experience, a problem arises when you think that because you are trying to help and include them that they should line up and nod politely to you. Often they do not. They shout. They express their individualism. They have deep feelings that are beyond my comprehension.”<sup>156</sup>

Another ECCC investigator and scholar, Craig Etcheson, added that victims can be a “difficult” bunch: “During investigations, after a while the bones become beautiful and the ghosts become your friends, but the victim survivors – they can be difficult. This is because they are deeply emotional beings. We should not discount that. Many still suffer from deep psychological scarring and it can be transmitted across generations.”<sup>157</sup>

When I asked Etcheson what the role of civil parties at the tribunal was, and if it should be a prominent one, he replied: “Victim civil parties are not and should not be the driving force of the court – they are at best an auxiliary force. What is their role? Well, someone has to tell the story, but it is unresolved if this is best left to [Prosecution] witnesses rather than civil parties.”<sup>158</sup>

When victims learn that the ECCC’s gift of legal standing comes with strings attached, i.e. that victims cannot be the Tribunal’s “driving force”, but must take a back seat to the Prosecution and defer to the Defendant’s rights, the victims I spoke to were unimpressed. I observed that once Cambodian victims are promised or conferred legal standing and made parties to the proceedings, they carve out their own path. Apart from the fact that desires for vindication can differ dramatically between victims who have suffered similar crimes – as we have seen in the case of Chum Mey, Bou Meng and Van Naath – there are obvious distinctions between Cambodian victims who wish to participate in the ECCC’s proceedings. First, there is an obvious gender distribution: about 58% of potential civil parties are female victims. Second, their ages differ a great deal as well.

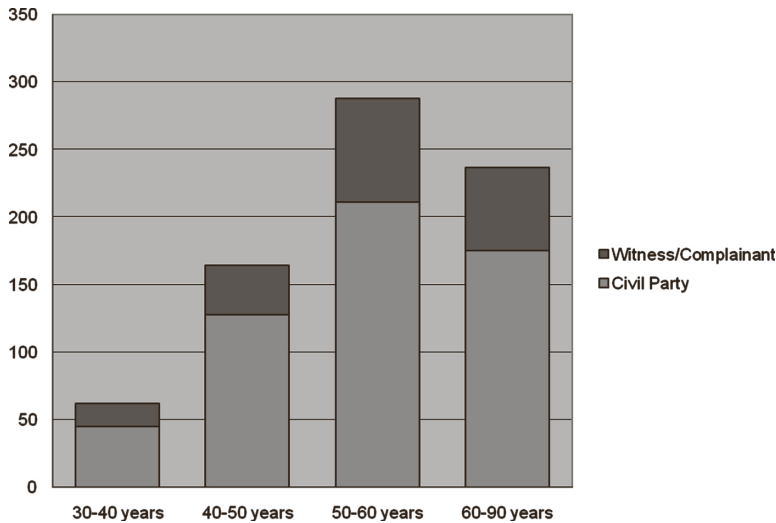
Under the rules, a victim who lived through the Khmer Rouge period and has suffered direct physical harm (a “1st Generation Victim”) has an equal right to be recognized as a civil party as victim who suffers psychological harm as a result of the loss of kin at the hands of the Khmer Rouge, even if she did not sustain any other direct harm (a “2nd Generation Victim”). This has resulted in a significant variation between the ages of civil parties (see Figure 1 below), which brings with it attendant differences in attitudes, memories, perceptions and desires for vindication amongst civil parties and victim participants.

<sup>155</sup> “Thank you, thank you, sir” in Khmer.

<sup>156</sup> Author’s interview with David Boyle, 28 Nov 08.

<sup>157</sup> Author’s interview with Craig Etcheson, 28 Nov 08.

<sup>158</sup> Author’s interview with Craig Etcheson, 28 Nov 08.



**Figure 1.** Age structure of Cambodian victim participants.

#### 940 4.5. *Therapeutic Legalism*

941 As we have seen, even when we compare victims of the same gender and similar  
 942 age who have shared experiences, it becomes clear that they can have very differ-  
 943 ent perceptions that confound and resist any attempt by to reduce and universa-  
 944 lise civil parties. By clothing civil parties with a uniform legal identity because of  
 945 their victimization, the ECCC's legal process, just as it lowers the perpetrator's  
 946 identity, has also begun to ignore or conflate the victims' varied personal identi-  
 947 ties, memories, and desires for vindication. Paradoxically, the very identity that  
 948 victims coveted when applying to become civil parties has prompted some to  
 949 claim that they have been degraded by it.

950 An examination of the relationship between these victim civil parties and the  
 951 Tribunal reveals that the victims' narratives are being given short shrift. The  
 952 expression of their individual stories – a foremost reason for including victims in  
 953 the first place – is being constrained by the ECCC's judicial fervour to establish a  
 954 legally authoritative account of 'what happened.' Even before trials have begun,  
 955 legal considerations premised on notions of collective justice have begun to bypass  
 956 the individuality of victims, including their needs as traumatized persons.  
 957 Conflicts have also emerged between victims and the legal stage they have entered  
 958 as civil parties; between the individual needs of victims and the requirements of  
 959 collective justice.

960 Civil parties rarely speak with one voice and are likely to have different identi-  
 961 ties, perspectives and desires for vindication. Yet, civil parties' individuality of  
 962 experience has been diminished by the aggregation of victim identities by the Tri-  
 963 bunal and the prospect of common legal representation and collective reparations.

Further, civil parties do not have equal access to the Tribunal's process, as some remain passive observers, while others have become subversive speakers, whose rights have been curtailed.

The paradox of victim-centrism in the context of the ECCC's civil party process is that the process is set up to externalise conceptions of justice even as it promises to internalise them for victims' benefit. From what I have observed, the promise of 'empowerment' through participation is a rhetorical device. The only way for civil parties to be recognised is by "submitting to a world of others that is fundamentally not one's own" and results in a "primary alienation in sociality."<sup>159</sup> Yet, victims' submission to the ECCC's regulatory power, while the source of the civil party's legal status and existence in the public domain, also spells the end of their individual expression.

There is not always room for historical narratives, personal identity and social memory within the formalism of the legal process. Chim Math and Norng Chan Pal need social acknowledgement and support; the Tribunal requires them to endure a public challenge to their credibility. Bou Meng, Sum Rithy and Ly Monysak need to establish a sense of power and control over their lives; the Tribunal requires them to submit to a complex set of rules and procedures that they may not understand, and over which they have no control. Theary Seng needs an opportunity to tell her story in her own way, in a setting of her choice and in a manner she sees fit; the Tribunal requires her to submit to and speak through a lawyer tasked with constructing a factually coherent narrative.<sup>160</sup> Therefore, one cannot conclude that participation as a civil party in the ECCC's proceedings is *ipso facto* beneficial to victims of the Khmer Rouge.

## 5. Recommendations 988

### 5.1. Modesty of Ambition 989

*Diane Marie Aman* reminds us that for the law to have expressive value, the "message understood, rather than the message intended, is critical."<sup>161</sup> The message that many of the civil party victims I spoke with understand, is that theirs is a token role. The ECCC, which began with grand ambitions that promised to place the civil party at the top of Arnstein's ladder, high above victim-witnesses or complainants, seems to have incrementally forced them to occupy a lower rung:

<sup>159</sup> *Judith Butler*, *Psychic Life of Power*, p. 28.

<sup>160</sup> *Judith Lewis Herman*, *The Mental Health of Crime Victims: Impact of Legal Intervention*, 16 *Journal of Traumatic Stress* 159, 165 (2003).

<sup>161</sup> *Diane Marie Aman*, *Message As Medium in Sierra Leone*, 7 *International Law Students' Association Journal of International & Comparative Law* 237, 238 (2001).



996 it is tantamount to therapy (see Table 1.). *Peter Macquire* states that the civil party  
 997 process, for all its promise, lacks any empirical basis: “I would put [the process]  
 998 this under the category of therapeutic legalism. This is an invention of the 1990s,  
 999 where people freighted the trials with all this baggage.”<sup>162</sup>

1000 I do not propose the usual palliative that is traditionally prescribed as a comple-  
 1001 ment or substitute to ailing internationalized trials, i.e., the truth and reconcilia-  
 1002 tion commission (TRC). As *Rosalind Shaw* notes in her ethnographic study of the  
 1003 Sierra Leone TRC, these commissions are often freighted with the same baggage  
 1004 that weighs heavily upon the ECCC – i.e., “to transform a population that pre-  
 1005 ferred to heal through forgetting into truth-telling subjects who would, after ade-  
 1006 quate sensitization, recognize their “need” to talk about the violence.”<sup>163</sup> Legal and  
 1007 formal processes often buckle under the strain of supporting therapeutic or restor-  
 1008 ative goals. The ECCC should abide by its foundational goal of delivering account-  
 1009 ability under the law. As a parallel process, it should be more receptive to strategies  
 1010 that commemorate victims in the non-legal arena using pre-existing traditions  
 1011 that are communicated in a language that resonates amongst victims.<sup>164</sup>

## 1012 5.2. *Towards a New Victimology at the ECCC*

1013 In view of the cognitive dissonance between the ECCC’s rhetoric and the reality,  
 1014 it is wise to heed *Hannah Arendt’s* call that a war crimes tribunal like the ECCC  
 1015 should never promise more than it can deliver.<sup>165</sup> This dissonance is more than  
 1016 just conceptually unsatisfying; it may also impair the greater effort to address the  
 1017 causes and effects of mass atrocity. Even if individual Tribunal affiliates recognize  
 1018 that prosecution is no panacea, the aggregate exaggerated claims supporting inter-  
 1019 national tribunals may relieve pressure on Cambodian and International power  
 1020 brokers to supplement prosecution with other tools, diverting precious attention  
 1021 and resources from mechanisms that may more effectively meet some of the ratio-  
 1022 nales discussed above.

1023 If existing means of prosecution can adequately spur individual catharsis  
 1024 and national reconciliation, why sponsor additional communal reconstructive  
 1025 measures?<sup>166</sup> Given the difficulty of mobilizing and coordinating political will to

<sup>162</sup> *Seth Mydans*, In Khmer Rouge Trials, Victims Will Not Stand Idly By, *International Herald Tribune*, June 17, 2008.

<sup>163</sup> *Rosalind Shaw*, Rethinking Truth and Reconciliation Commissions: Lessons from Sierra Leone. U.S. Institute of Peace. February 2005, Special Report 130. p. 4.

<sup>164</sup> See *Mark A. Drumbl*, Toward a Criminology of International Crime, 19 *Ohio State Journal of Dispute Resolution*. 263, 276 (2003).

<sup>165</sup> See generally *Hannah Arendt*, *Eichmann in Jerusalem: A Report on the Banality of Evil* (1963).

<sup>166</sup> Indeed, advocates have been so successful at focusing political energy on prosecution that the international community’s attention may have been unduly distracted not only from other means

achieve international goals beyond narrow national and international self-interest, 1026  
 even this initial effect may disproportionately deter support for supplemental 1027  
 mechanisms outside the legal arena that more adequately meet the objectives of 1028  
 victim-centrism.<sup>167</sup> 1029

Of course, this is not to suggest that we should do away with the ECCC. 1030  
 Tribunals serve a purpose: to try perpetrators and, if their guilt meets the requisite 1031  
 standard of legal proof based on the admissible evidence adduced, to convict and 1032  
 punish them accordingly. While this purpose is limited, it is dependable and less 1033  
 likely to result in unfulfilled promises. However, tribunals and other *legal* justice 1034  
 mechanisms may not be ideal platforms for Cambodian victims to recount their 1035  
 stories and regain their dignity, let alone for effecting peace and national 1036  
 reconciliation.<sup>168</sup> 1037

### 5.3. *The Non-Legal Arena* 1038

#### 5.3.1. *Art* 1039

Victims may benefit a great deal from the arts. “Artistic response to genocide”, as 1040  
*Jean-Pierre Karegeye* reminds us, “is the effort to create a space between possibility 1041  
 and impossibility, to find speech for the unspeakable, an attempt to represent a 1042  
 ‘non-object.’ An artist who tries to represent genocide becomes *ipso facto* a wit- 1043  
 ness.”<sup>169</sup> Artists in Cambodia have been engaged in precisely this work for more 1044  
 than a decade, when the Tribunal was just a theoretical construct and the promise 1045  
 of legal justice was an abstraction. For instance, art historian Ly Daravuth and the 1046  
 late artist Ingrid Muan established the Reyum Institute of Arts and Culture in 1047  
 1998, which has among other things, developed exhibitions and programs for 1048  
 Cambodians that “offer images and texts” aimed at opening a “modest public 1049  
 forum in which those who wish to participate can look, think, discuss, and 1050

of accountability, but also from efforts to confront the root causes of humanitarian violations. Affiliates may well have created an analogue to Nuremberg without a corresponding analogue to the Marshall Plan. See *Mark A. Drumbl*, *Punishment, Post genocide: From Guilt to Shame to Civis in Rwanda*, 75 *New York University Law Review*. 1221, 1303 (2000).

<sup>167</sup> *Jose Alvarez*, *Rush to Closure: Lessons of the Tadic Judgment*, 96 *Michigan Law Review*. 2031, 2104 (1998) (“Attempts to make international criminal tribunals carry as much freight as some of their advocates recommend . . . may endanger alternative processes and possibly undermine competing goals for the international community . . .”)

<sup>168</sup> Critics have suggested that the international criminal justice project is “a religious exercise of hope” that “just feels right” whose purpose is a “soothing strategy” so that the international community can “measure the immeasurable.”: *Tallgren*, at 561, 593; see also *Alvarez*, at 460-61 (arguing that the ICTR represents the pursuit of an international political and liberal-legalist agenda less helpful to Rwanda than joint initiatives within Rwanda itself would have been).

<sup>169</sup> “Arts in the One World: A Consideration of Genocide.” Conference co-sponsored by Theater Without Borders, Co-Existence International Brandeis University, CalArts, Los Angeles, CA, 27-29 January 2006. Conference notes online at: [http://www.brandeis.edu/coexistence/linked%20documents/Genocide\\_Conference\\_Notes.pdf](http://www.brandeis.edu/coexistence/linked%20documents/Genocide_Conference_Notes.pdf)

1051 create". By doing so, they "feel that we contribute towards coexistence – if not  
1052 reconciliation – in Cambodia,"<sup>170</sup> and Reyum has strived to live up to its promise  
1053 at every opportunity.<sup>171</sup>

1054 In contrast to the law, which understands 'facts' restrictively and is bound by  
1055 formalism, art – be it paintings, story-telling, dance or song – operates at the  
1056 experiential, sensory level and creates a space for victims to confront unbound  
1057 events and emotions that remain unarticulated. This is not to say that there is no  
1058 structure to art. *Cynthia Cohen* describes the aesthetic of artistic transactions, a  
1059 vital prerequisite that creates a space of trust and openness for survivors to re-  
1060 member brutal pasts, as follows: "A framed picture, for instance, and a theatrical  
1061 event with a clear beginning and end, each provides boundaries within which  
1062 viewers can focus intensively...The bounded quality and formal structures of  
1063 artworks and ritual can provide support for survivors of violence to confront and  
1064 work through painful history that might otherwise be too overwhelming to  
1065 face."<sup>172</sup>

1066 Put simply, whereas the strictures of legal stage can be 'tiny', the structure of  
1067 artistic space permits it to grow 'huge'. An artistic space, be it an empty canvas,  
1068 an as yet unoccupied stage or an empty room, provides survivors with the free-  
1069 dom to articulate bold and commemorative counter-narratives that emphasise  
1070 victim-centrism in opposition to the dominant discourse of powerlessness and  
1071 degradation. Artists in Cambodia have begun to voice these counter-narratives  
1072 for the benefit of the larger Cambodian community.<sup>173</sup> At the same time,

<sup>170</sup> *Ly Daravuth & Ingrid Muan*, *Recasting Reconciliation through Culture and the Arts*, together with the Slifka Program in *Inter-Communal Coexistence*, Brandeis University, 2003. See: [http://www.ceri-sciencespo.com/themes/re-imaginingpeace/va/base/Cambodia\\_1173189188.pdf](http://www.ceri-sciencespo.com/themes/re-imaginingpeace/va/base/Cambodia_1173189188.pdf)

<sup>171</sup> Reyum contributed towards a worldwide exhibition under the auspices of The Legacy Project, an organization set up by entrepreneur Clifford Chanin to "draw together artists from countries that have suffered mass national traumas or genocides, leaving a great 'absence' among the populace." Reyum and Ly Daravuth called this the "The Legacy of Absence" exhibition. Organized in 2000, it featured ten Cambodian painters both old and young, who wrestled with the traumatic memory of genocide in Cambodia using the visual arts medium. *Sarah Stephens*, *The Legacy of Absence: Cambodian Artists Confront the Past*. Article online at: <http://www.asianart.com/exhibitions/legacy/intro.html>

<sup>172</sup> *Cynthia Cohen*, *Creative Approaches to Reconciliation in Mari Fitzduff & Christopher E. Stout* (eds.), *The Psychology of Resolving Global Conflicts: From War to Peace*, p. 6 (Westport, Connecticut: Praeger Security International, 2005) Also available online at: <http://www.brandeis.edu/slifka/vrc/Creative%20Approaches.pdf>

<sup>173</sup> In April 2008, a gallery exhibited works by older and contemporary Cambodian painters in an exhibition called "The Art of Survival" at the Meta House in Phnom Penh. 28-year old Vandy Rattana, whose canvas shows a political chessboard involving Vietnam, the U.S. and Cambodia – a fragmented portrait of a tragedy, said, regarding the exhibition, "It gives me a voice to say something about my history." Indeed, Meta House director Nico Mesterharm called this exhibition a "platform for community dialogue" and expressed hope that it would contribute to the reconciliation process in Cambodia "Cambodia's Khmer Rouge Genocide Inspires first of its kind art exhibit." AFP, 6 April 2008. Online at: <http://newsgroups.derkeiler.com/pdf/Archive/Soc/soc.culture.cambodia/2008-04/msg00097.pdf>

Cambodian artists engage in expression that may be non-verbal and allows for silences, inasmuch as it invites articulation. 1073  
1074

The efforts by Cambodians to engage with the arts and respond to the genocide are too numerous to detail here. It suffices to say that there is great potential and interest for artistic expression in Cambodia as a means of restorative justice.<sup>174</sup> The ECCC's Victims Unit should consider engaging Cambodian artists and arts organizations to discover what silences need to be respected; what forms of forgetting and remembering are desired and required by the community and what desires and hopes victims have for the future, beyond the strictures of the Tribunal itself. 1075  
1076  
1077  
1078  
1079  
1080  
1081

### 5.3.2. *Ritual* 1082

Every year around late September to early October, Cambodians mark fifteen days in their calendars beginning with Kan Ben on the first day and ending with Pchum Ben on the fifteenth day. Sticky rice balls are a central feature of the ritual and are prepared in large numbers to be scattered across temple grounds for the spirits. This annual ceremony is a way for the souls of the dead to be honoured, fed, remembered (through local ritual means) and allows the living to assist to re-enter the cycle of life and death and ultimately, to reincarnate. Artist and Reyum director *Ly Daravuth* has called for a special Pchum Ben ceremony and there is merit to heeding this call. 1083  
1084  
1085  
1086  
1087  
1088  
1089  
1090  
1091

For *Ly*, Pchum Ben has particular significance because it bridges the gap between the individual and the collective, a bridge that the ECCC's civil party process has thus far been unable to construct: "For instance, formal elements of this ceremony suggest the interaction between the one and the multiple, the individual and the collective...The individual rice balls...are gathered together to form a collective Ben...The notion of private and public is also articulated through the combination of paying respect to the deceased of one's own family as well as the deceased of the community as a whole."<sup>175</sup> 1092  
1093  
1094  
1095  
1096  
1097  
1098  
1099

Here, the most poignant aspect of Pchum Ben emerges – in its inclusivity, its gathering of souls, of food, of the living who give and share regardless of social hierarchies, identities and even sins. That Pchum Ben critically includes offerings for the *pretta*, or the souls of the damned, is a reminder that local communities have their own, particular ways of reconciling with the irreconcilable. Cambodians 1100  
1101  
1102  
1103  
1104

<sup>174</sup> Apart from the visual arts, theatre and dance, documentary films have been made by Cambodians in the diaspora such as "New Year Baby" by Socheata Poouv and "S-21: The Khmer Rouge Killing Machine" by Rithy Panh, as well as documentaries by foreigners such as Greg Cahill's "The Golden Voice" about legendary Khmer pop icon Ros Sereysothea, and John Pirozzi's documentary "Don't Think I've Forgotten – Cambodia's Lost Rock'n'Roll." The examples cited in this Part are only a small sample of the efforts by Cambodians to reinvigorate and kick-start a decimated arts scene.

<sup>175</sup> *Ly Daravuth*, Notes on Pchum Ben – A Working Paper of Recasting Reconciliation through Culture and the Arts, p. 2. Online at: [http://www.brandeis.edu/programs/Slifka/vrc/papers/daravuth/pchum\\_ben.html](http://www.brandeis.edu/programs/Slifka/vrc/papers/daravuth/pchum_ben.html)

1105 silently engage in an annual ritual of forgiving, forgetting, letting go and quite  
 1106 literally offering both food and solace to wandering spirits – the damned, those  
 1107 that sinned and those sinned against. Now, with the advent of the Tribunal, which  
 1108 has elicited and stirred memories, the time is ripe for what *Ly Daravuth* calls a  
 1109 “special Pchum Ben.” As *Ly* reminds us, many Cambodian victims “can only start  
 1110 down the path toward healing, accepting, forgiving and reconciling only after this  
 1111 ‘initial duty’ has been fulfilled... The impulse of the Pchum Ben is one of rebuild-  
 1112 ing and re-gathering, rather than dividing, separating, and scattering. Living and  
 1113 deeply rooted in Cambodian society, it draws its strength from the religious and  
 1114 spiritual strata.”<sup>176</sup>

1115 The ECCC’s internationalized legal justice process may be wary of ritualistic  
 1116 practices that are unfamiliar and incommensurable with international legal  
 1117 norms. Yet, legal norms often have, as we have seen, little resonance for victims.  
 1118 *Rama Mani* reminds us that “[i]f ideas and institutions about as fundamental and  
 1119 personal a value as justice are imposed from the outside without an internal reso-  
 1120 nance, they may flounder, notwithstanding their assertions of universality.”<sup>177</sup>  
 1121 The law, as a form of power, seeks reverence through subordination and, if it fails  
 1122 to deliver, engenders frustration and disenchantment. Rituals – widely respected  
 1123 local norms – such as the ‘special Pchum Ben’ on the other hand occupy the  
 1124 realm of the sacred. Ritual is a marker of each community’s particular approach  
 1125 to life, death, bereavement and memory. It provides a way for communities to  
 1126 reconstruct their lives, their kinship networks and their sense of rootedness in the  
 1127 aftermath of mass violence. The special Pchum Ben could thus play a vital role  
 1128 towards achieving victim-centric notions of catharsis. By extolling the devotee as  
 1129 expert, in this case the victim, the Pchum Ben allows her to commemorate herself  
 1130 just as she commemorates her memory of the loved ones she has lost. Seen in this  
 1131 light, it is the antithesis of the judicial ritual.<sup>178</sup>

## 1132 6. Conclusion

1133 The ECCC’s civil party process promises to deliver restorative justice, but clings  
 1134 to modes of accountability that set limits upon how the victim’s story is narrated

<sup>176</sup> Ibid.

<sup>177</sup> *Rama Mani*, *Beyond Retribution: Seeking Justice in the Shadows of War* 47, 48 n. 128 (2002).

<sup>178</sup> See, e.g., *Cynthia Cohen*, *Engaging with the Arts to Promote Coexistence in Antonia Chayes & Martha Minow*, (eds.) *Imagine Coexistence: Restoring Humanity After Violent Ethnic Conflict* 6. (San Francisco, Jossey-Bass: 2003) (“Even when material resources are scarce, people still have their songs, stories, cooking styles, children’s games, and perhaps gardens. These resources exist within the community and the community’s members themselves are the experts.”) Also available at [http://www.brandeis.edu/ethics/pdfs/publications/Engaging\\_Arts.pdf](http://www.brandeis.edu/ethics/pdfs/publications/Engaging_Arts.pdf)

and what parts of the story are permissible and how, if at all, it should be expressed. 1135  
 The victim who wishes to participate in this judicial ritual is required to provide an 1136  
 account that “is completed only on the occasion when it is effectively exported and 1137  
 expropriated from the domain of what is (her) own.”<sup>179</sup> Paradoxically, the victims 1138  
 I spoke to who were asked to come forward with promises of significant participa- 1139  
 tion as a means of assuaging their suffering now find themselves dispossessed. 1140

Going forward, victims’ perceptions of participation in the ECCC’s proceed- 1141  
 ings require specific attention and research. Judges and other Tribunal affiliates 1142  
 need, at the very least, to be trained not to make the process of participation as a 1143  
 civil party an unnecessarily painful or exclusive process that pays lip-service to 1144  
 victims. Victims must be put in a position to make an informed decision about 1145  
 the modality of their participation. They should, for example, be made aware 1146  
 from the very outset that they may not be able to express the full range of their 1147  
 emotions in court. I accept that victim-centrism in its purest sense responds to a 1148  
 genuine desire amongst many victims to ‘have their say’ in an authoritative legal 1149  
 arena. However, the legal arena is only willing and able to go so far. If the ECCC 1150  
 is indeed serious about pursuing the goals of restorative justice, it must be pre- 1151  
 pared to explore the non-legal arena, however alien it may seem to lawyers. 1152

The authority that the law enjoys makes it difficult for the ECCC to accept this 1153  
 conclusion. Yet, in view of the fact that the ECCC’s civil party process may harm 1154  
 and degrade victims even as it seeks to include them, it is imperative that ECCC’s 1155  
 affiliates be wary of the goals they heap upon the legal process that is meant to 1156  
 provide accountability according to law. For a start, the ECCC’s Victim Unit 1157  
 should engage art and ritual to find ways for victims to grapple with the non- 1158  
 narrativizable. At the conclusion of the trials, the ECCC’s Trial Chamber should 1159  
 consider ordering collective and moral reparations that contribute and support 1160  
 these activities. Without entertaining a new, inter-disciplinary victimology that 1161  
 recognizes that restorative justice can be meted outside the courtroom at a spiritual 1162  
 ceremony, on a dramatic stage or through the arts, the civil party process may be 1163  
 nothing more than, in the erudite words of one Cambodian victim, a “circus.”<sup>180</sup> 1164

<sup>179</sup> *Judith Butler*, *Giving An Account of Oneself* 36-37 (New York: Fordham University Press, 2005); see also *Martha Minow*, *Stories in Law* in *Rickie Solinger, Madeline Fox & Kayhan Irani*, (eds.) *Telling Stories to Change the World* 249-263 (New York, Routledge: 2008). *Minow*, drawing from *Hannah Arendt*, discusses the value of storytelling in court settings and the need for stories to off-set the predominance of rationalist social science techniques that treat genocides as capable of being explained. She also emphasizes, via *Arendt* again, the partial, incomplete nature of stories in the face of horror, something akin to my use of *Butler’s* analysis of subjection, power and narrative.

<sup>180</sup> Author’s interview with Ly Monysak, 6 December 2008: “I would like the court to have the real will to find justice. The court is not supposed to be a circus. But sometimes I feel that this court is performing a circus. I don’t really trust the court.”