

## RECONSTITUTING THE “UN-PERSON”: THE KHMER KROM & THE KHMER ROUGE TRIBUNAL

by MAHDEV MOHAN\*

Despite the grand promise of victim participation at the ongoing trials of Extraordinary Chambers in the Courts of Cambodia (“ECCC”), this article notes the plight of an undeserved ethnic community, the members of which have become forgotten victims of genocide. The Article argues that if the ECCC’s trials are to have any resonance for the Khmer Krom, its affiliates and victims’ lawyers should avoid “othering” Khmer Krom victims of genocide, and instead adopt ethnographic approaches to lawyering that seek to ascertain communal desires for vindication.

### I. INTRODUCTION

Led by Pol Pot, who died in 1998, the ultra-Maoist Khmer Rouge emptied Cambodia’s cities in a bid to forge an agrarian utopia. Up to two million Cambodians died of starvation, overwork and torture or were executed during the regime’s 1975-1979 reign.<sup>1</sup> Khmer Rouge prison chief Duch is currently on trial for overseeing the torture and execution of around 15,000 people held at Tuol Sleng prison, also known as S-21. Four other former Khmer Rouge leaders are in detention and are expected to face trial next year for serious international crimes at the United Nations (UN)-backed Extraordinary Chambers in the Courts of Cambodia (“ECCC”), which was formed in 2006 after nearly a decade of wrangling between the UN and the Cambodian government.<sup>2</sup>

\* Assistant Professor of Law, Singapore Management University. Fulbright Scholar & Fellow, Stanford Program in International Legal Studies (SPILS), Stanford Law School. I am grateful to Stanford Law School’s Professor Erik G. Jensen for commenting on an early draft of this article.

<sup>1</sup> See generally David P. Chandler, *The Tragedy of Cambodian History* (New Haven: Yale University Press, 1991).

<sup>2</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 assistance”. See *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, done in Phnom Penh*, 6 June 2003, online: Royal Government of Cambodia < <http://www.cambodia.gov.kh/krt/english/index.htm> > [“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*, Preah Reach Kram No. NS/RKM/1004/004 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*, Preah Reach Kram No. NS/RKM/1004/006, online: Royal Government of Cambodia < <http://www.cambodia.gov.kh/krt/english/index.htm> > [ECCC Statute].

Despite the delay, some claim that the ECCC is a revolutionary war crimes court. Since their inception, war crimes courts have come under criticism for losing touch with and externalizing justice among the local communities they seek to champion,<sup>3</sup> thereby diminishing the expressive value of verdict, punishment and reparation.<sup>4</sup> However, James Cockayne suggests that the ECCC stands a better chance of meeting local expectations than other war crimes courts because it gives a prominent role to Cambodians, be they legal professionals or victims of the Khmer Rouge.<sup>5</sup> As we shall see, the ECCC's procedural rules ("2007 Internal Rules")<sup>6</sup> permit an unprecedented degree of victim participation that surpasses the Rome Statute.<sup>7</sup> Specifically, victims can be enjoined to the proceedings as civil parties with similar rights as the Prosecution and the Defence.

Commentators have applauded the ECCC for giving victims a robust role, saying that it is a long overdue "recognition, after fifteen years of international and hybrid courts like [the ECCC], not to exclude victims from the justice that is being dispensed on their behalf."<sup>8</sup> ECCC affiliates, such as Kheat Bophal, the former Head of the Victim's Unit, claims that participation has the potential to transform Cambodian victims into both agents and beneficiaries of a rule of law culture:<sup>9</sup>

It is essential for the effectiveness and legitimacy of the Court that victims are part of the [Khmer Rouge Tribunal's] process, and that they have their own voice. Participation restores faith in the justice system and provides the first hand-satisfaction of making public the harm suffered. The process of participation also allows victims the opportunity to denounce the crimes committed against them and support norms and laws that prohibit such actions and events.

<sup>3</sup> See generally Mark A. Drumbl, *Atrocity, Punishment and International Law* (New York: Cambridge University Press, 2007); also see generally Jose Alvarez, "Crimes of States/Crimes of Hate" (1999) 24 Yale J. Int. Law 365.

<sup>4</sup> On expressivism, see generally, e.g., Elizabeth S. Anderson and Richard H. Pildes, "Expressive Theories of Law: A General Restatement" (2000) 148 U. Pa. L. Rev. 1503; Dan M. Kahan, "The Secret Ambition of Deterrence" (1999) 113 Harv. L. Rev. 413.

<sup>5</sup> See James Cockayne, "Hybrids or Mongrels? Internationalized War Crimes trials as Unsuccessful Degradation Ceremonies" (2005) 4 J.H.R. 455 at 459. A majority of the ECCC's judges are Cambodian. The ECCC will be comprised of five international judges and seven Cambodian judges. There will be two chambers: a Trial Chamber (three Cambodian judges and two international judges) and Supreme Court (appeals) Chamber (four Cambodian judges and three international). Decisions by the court will require a "super-majority" (four out of five judges in the Trial Chamber and five out of seven judges in the Supreme Court Chamber). Notwithstanding this, the proposition that the involvement of local judges necessarily makes proceedings more accessible to local constituents or that these judges will pay tribute to local custom is doubtful. It has been my experience that Cambodians are generally more suspicious of justice initiatives that are linked to local authorities and judges, some of whom are regarded as corrupt.

<sup>6</sup> On 12 June 2007, the ECCC's Judicial Committee on the Rules of Procedure, composed of both national and international judges serving in their capacity as rule-makers, issued Internal Rules [2007 Internal Rules] that, *inter alia*, provided for civil party action purporting to confer victims extensive participatory rights. These Internal Rules will guide the investigation and trial process and help ensure that the court meets international standards for fair trials. Note that the Internal Rules have since been amended on 1 February 2008, 5th September 2008, 6th March 2009 and 11th September 2009.

<sup>7</sup> *Rome Statute of the International Criminal Court*, 17 July 1998, U.N. Doc. A/CONF. 183/9\* (entered into force on 1 July 2002) [Rome Statute].

<sup>8</sup> Seth Mydans, "In the Khmer Rouge Trials, Victims will not Stand Idle By" *The New York Times* (17 June 2008). ("Diane Orentlicher, Special Counsel of the Open Society Justice Initiative believes that the Tribunal marks the evolution of international criminal justice.")

<sup>9</sup> Interview with Kheat Bophal, Head of the Victim's Unit at ECCC, *Access Victims' Rights Working Group Bulletin* (Spring 2008), Vol. 11 at 4.

This Article explores the flipside of this purported transformation. Assuming that victim participation fosters the rule of law<sup>10</sup> and helps victims regain their dignity<sup>11</sup>, what would happen if a group of victims was prohibited by ECCC investigators and prosecutors from making public the harm it has suffered purely because of its identity? I posit that the group would then devolve into what George Orwell would term the “un-person” or an object whose past existence is expunged from the public record and memory.<sup>12</sup> Consequently, Bophal’s claims would be turned on their head—these “un-persons” would lose faith in the justice system and the laws and norms that prohibit mass crime; and the ECCC would lose legitimacy in the eyes of Cambodian victims as a whole.

My concerns are not academic. Cambodia is often cited as a clear example of the extermination of a country’s citizens (*i.e.* the central Cambodians or “Khmer” who form the majority) by its own people or government.<sup>13</sup> Yet, this characterization belies the fact that the Khmer Rouge had singled out certain political, ethnic and/or religious minorities such as the Cham Muslims, ethnic Vietnamese, lowland Khmer Kampuchea Krom, Chinese and tribal minorities for discrimination and elimination.<sup>14</sup> Purporting to “revive the glory and honour of Cambodia and to ensure the perenniality of the reinvented Kampuchean race”, the Khmer Rouge sought to “force Khmerization” upon these minorities, requiring them to abandon aspects of their distinct culture and ethnicity and to become part of the larger community” or die if they resisted.<sup>15</sup>

<sup>10</sup> See e.g. Naomi Roht-Arriaza, *Introduction to Impunity and Human Rights in International Law and Practice* (New York: Oxford University Press, 1995) at 3-4; see generally Johan D. van der Vyver, Book Review of *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* by Bruce Broomhall, (2004) 18 *Emory Int’l L. Rev.* 133.

<sup>11</sup> See e.g. Juan Méndez, “Comments on Prosecution: Who and For What?” in Alex Boraine *et al.*, eds., *Dealing with the Past: Truth & Reconciliation in South Africa* (Cape Town: Institution for Democracy in South Africa, 1994) 87 at 90 (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”); S.K. Ivkoviæ, “Justice by the International Criminal Tribunal for the Former Yugoslavia” (2001) *Stan. J. Int’l L.* 255 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” (2001) 178 *Br. J. Psychiatry* 373 at 375 (speculating that “[i]f justice is done, and seen to be done, psychological healing may be facilitated”); Neil J. Krutz, “Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights” (1996) 59 *Law & Contemp. Probs.* 127 at 129 (“[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>12</sup> See George Orwell, *Nineteen Eighty-Four* (New York: Plume, 2003).

<sup>13</sup> Karin Bjornson, *Genocide and Gross Human Rights Violations* (New Brunswick and London: Transaction Publishers, 1998).

<sup>14</sup> A Khmer Rouge order stated that henceforth “The Cham nation no longer exists on Kampuchean soil belonging to the Khmers” (U.N. Doc. A.34/569 at 9). Whole Cham villages were destroyed and their inhabitants murdered. The half of the Cham who survived were forced to speak only Khmer, and their children were taken away to be raised collectively as Khmers (defined as genocide by the Convention’s Article 2e). Buddhist monks were disrobed and subjected to especially harsh forced labour, killing over half of them. Christianity was abolished, and only one Christian pastor survived. Dr. Ben Kiernan has uncovered and translated a copy of the Central Committee’s order to demolish the Phnom Penh cathedral, part of the Khmer Rouge plan to eradicate all religion. (David Chandler, Ben Kiernan, and Chanthou Boua, *Pol Pot Plans the Future* (New Haven: Yale University Southeast Asia Studies Monograph No. 33, 1988) at 4. His research demonstrates that the Vietnamese and Chinese minorities were especially hit hard (Ben Kiernan, “Kampuchea’s Ethnic Chinese Under Pol Pot: A Case of Systematic Social Discrimination” (1986) 16 (1) *J. Contemp. Asia* 18). A crucial intent in the Eastern Zone massacres of 1978 was to eliminate all Eastern Zone people, because they had “Vietnamese minds” (Ben Kiernan, “Wild Chickens, Farm Chickens and Cormorants: Kampuchea’s Eastern Zone Under Pol Pot” in David Chandler and Ben Kiernan, eds., *Revolution and Its Aftermath in Kampuchea: Eight Essays*, (New Haven: Yale University Southeast Asia Studies Monograph No. 25, 1983). All Cambodian ethnic Vietnamese who did not flee into Vietnam were exterminated.

<sup>15</sup> Elizabeth Becker, *When the War Was Over* (New York: Public Affairs, 1986) at 243.

I argue that the indigenous Khmer Krom (pronounced “kra-uum”) victims have been reduced to the status of “un-persons” by the ECCC. Not only have the Co-Prosecutors failed to refer to the Khmer Krom in their Introductory Submissions, but the Co-Investigative Judges have been similarly remiss by failing to prefer genocide or persecution charges setting out the crimes that were committed against the Khmer Krom because of their identity and based on ethnic, political and/or national grounds. The Khmer Krom’s conspicuous absence from the legal record stems, in part, from a presumption amongst ECCC affiliates that the average Khmer Krom victim living in Cambodia’s rural provinces is not concerned about the legal characterization of the mass crimes they suffered.

This presumption is disingenuous. It is untested by empirical research and belies a prejudicial belief that the ECCC’s investigators and prosecutors are saviours who “know best”, while victims are powerless, helpless innocents whose naturalist attributes have been negated.<sup>16</sup> My field research and interviews suggest a very different story. It matters to survivors that the crimes they suffered are properly characterized, especially where they were persecuted or their loved ones were eliminated because they belonged to a particular group.<sup>17</sup> If the ECCC’s trials are to have any resonance for the Khmer Krom community, the ECCC affiliates should avoid “othering” survivors of mass crime such as the Khmer Krom, and instead adopt ethnographic approaches to lawyering in order to ascertain and give effect to their collective and communal desires for vindication.<sup>18</sup>

## II. KHMER KROM AS “UN-PERSONS”: A CASE-STUDY OF THE KHMER KROM OF BAKAN DISTRICT

Indigenous ethnic Cambodians known as Khmer Krom originated from the lowlands around the Mekong River delta.<sup>19</sup> They once occupied the south-eastern tip of a sprawling Khmer empire (now Vietnam) for several generations, but retain deep linguistic, religious, customary and cultural links to Cambodia. Nonetheless, they stand out from the majority central Khmer. The Khmer Krom differ from the central Khmer in terms of their dress, accent, communal practices, and surnames; all of which are easily identifiable by Khmers. Today, the Khmer Krom have been relegated to the southern tail of the state of Vietnam. During the Vietnam War, the U.S. government capitalized on that sense of injustice, training significant numbers of Khmer Krom to take arms against the Viet Cong. As John Ciorciari notes, when tensions have flared between Cambodia and Vietnam in the past, the Khmer Krom have unfortunately often been caught in the middle, but at no time were they subject to more abuse than during the Khmer Rouge years.<sup>20</sup>

Ironically, these abuses occurred during the Khmer Rouge’s war with Vietnam and as part of a campaign that purported to “liberate” the Khmer Krom from Vietnamese rule. Researcher Kim Keokanitha points to evidence of a “political education meeting” in late

<sup>16</sup> Makau Mutua, “Savages, Victims, and Saviours: The Metaphor of Human Rights” (2001) 42 Harv. Int’l L. J. 201 at 203.

<sup>17</sup> This year, I spent 3 weeks conducting intensive field and documentary research in Cambodia, particularly in Bakan district, Pursat province to ascertain Khmer Krom survivors’ past, and their perceptions of the ECCC charges as they are currently framed, taking into account the fact that these charges do not include genocide and persecution committed against the Khmer Krom. Apart from several trips made from 2006 to 2009, I was based in Cambodia as a monitor with UC Berkeley’s War Crimes Studies Center for six months, from July 2007 to January 2008. Field-notes are on file with author.

<sup>18</sup> *Supra* note 16. (“The human rights movement is marked by a damning metaphor. The grand narrative of human rights contains a subtext that depicts an epochal contest pitting savages, on the one hand, against victims and saviors, on the other”).

<sup>19</sup> In Vietnamese, they are known as *Kho-me Crôm* or *Kho-me duói*, which literally means “Cambodians from below” (“below” referring to the lower areas of the Mekong Delta).

<sup>20</sup> See John Ciorciari, *The Khmer Krom and the Khmer Rouge Trials*, August 2008, online: Documentation Center of Cambodia <[http://www.dccam.org/Tribunal/Analysis/pdf/Summer\\_Assn\\_John\\_KRT\\_Khmer\\_Krom.pdf](http://www.dccam.org/Tribunal/Analysis/pdf/Summer_Assn_John_KRT_Khmer_Krom.pdf)>.

1977, in which Pol Pot himself invited and addressed a group of Khmer Krom in the Olympic Stadium in Phnom Penh, telling them that he would “keep” only those who agreed to follow *Angkar*.<sup>21</sup> In another infamous May 1978 radio address to the population at large, Pol Pot attempted to rally the army and the population, painting the struggle with Vietnam as one of national and racial survival. He exhorted each Khmer Rouge soldier to “kill 30 Vietnamese” because of Cambodia’s smaller numbers and urged the general population to resist Vietnam on all fronts “in defense of Cambodian territory and the Cambodian race”, including the indigenous Khmer Krom.<sup>22</sup> Pol Pot lamented the fact that the Khmer Krom were “forbidden ...to speak, dress, eat or learn according to [their] traditions on pain of death and the male babies are strangled at their birth.”<sup>23</sup>

Yet, just as Pol Pot publicly described the Khmer Krom as “victims of the worst cruelties”, he was sending large numbers of Khmer Krom suspects to prison or the grave. Pol Pot’s nationalistic rhetoric disguised his orders to district and provincial Khmer Rouge chiefs to screen, identify and destroy the Khmer Krom due to their perceived affiliation with Vietnam and “Vietnamese networks”.<sup>24</sup> According to one Khmer Krom survivor of Bakan district, Pursat province, the Khmer Rouge described the Khmer Krom as having “Khmer bodies with Vietnamese minds.”<sup>25</sup>

Based on his interviews with victims shortly after the fall of the Khmer Rouge in 1979, historian Ben Kiernan suggests that there was a nationwide policy of screening the ethnic Khmer Krom, imprisoning them and subsequently killing them.<sup>26</sup> As one survivor Kiernan interviewed recounts, the Khmer Rouge

collected all the Khmer Krom in Bakan district [Pursat province]... and put them in a cooperative called [Khmar Totueng]. Later they killed all the Khmer Krom as traitors ...They were lied to and told that they were being taken to a new ‘front’, seventy to eighty at a time. I saw the bodies later in big pits.<sup>27</sup>

Kiernan’s research suggests that 700 Khmer Krom were killed and dumped into these mass graves in Bakan district, purely because of their ethnicity or perceived affiliation to the Vietnamese. My conversations with Khmer Krom survivors suggest that several thousand Khmer Kroms were executed in Bakan’s Rumlech village alone.

My independent field-research in Bakan district confirms the Khmer Rouge’s calculated destruction of the Khmer Krom, whom they deliberately branded the “Vietnamese enemy”, segregated from the central Khmers, and executed.<sup>28</sup> If a central Khmer person had a Khmer Krom person spouse, (s)he was given a choice to join his/her Khmer Krom spouse to a detention or execution centre and be killed or remain behind and be spared. Children of ethnically mixed parents were also compelled to make the same heart-breaking choice and were killed if they chose to accompany the Khmer Krom parent. Khmer widows and widowers who remained behind were forcibly married to other central Khmers at mass wedding ceremonies organized by the Khmer Rouge. The Khmer Krom suffered a similar fate

<sup>21</sup> Kim Keokanitha, “Rumlech Sub-district: Khmer Krom under Khmer Rouge”, unpublished essay on file with the Documentation Center of Cambodia at 10-11.

<sup>22</sup> See “Cambodia’s Strategy of Defence against Vietnam”, Phnom Penh Radio Home Service, 10 May 1978, quoted in *BBC Summary of World Broadcasts*, FE/5813/A3/1.

<sup>23</sup> *Voice of Democratic Kampuchea*, 18 October 1978.

<sup>24</sup> Kim Keokanitha, “Khmer Kampuchea Krom in the mind of Khmer Rouge” *Searching for the Truth* (31 July 2002) at 26.

<sup>25</sup> *Ibid.*

<sup>26</sup> Ben Kiernan, *The Pol Pot Regime: Race, Power, and Genocide under the Khmer Rouge, 1975-1979* (New Haven, CT: Yale University Press, 1996), at 423-425 [Kiernan, *Pol Pot Regime*]; Timothy Carney makes a similar argument, asserting that a “nationwide campaign” against ethnic Vietnamese and Khmer Krom was in place by 1978. See Timothy Carney, “The Organization of Power” in Karl D. Jackson, *Cambodia 1975-1978: Rendezvous with Death* (Princeton, NJ: Princeton University Press), at 83, note 3.

<sup>27</sup> Kiernan, *ibid.* at 423-25.

<sup>28</sup> Field-notes/interviews on file with author.

throughout Cambodia, especially in those provinces that share their borders with Vietnam. As Jon Ciorciari observes, “[I]t’s probably safe to say that the Khmer Krom were among the groups that suffered a high proportion of killing.”<sup>29</sup>

It appears that the crimes the Khmer Krom suffered at the hands of the Khmer Rouge amount to genocide under Article 4 of the ECCC Statute.<sup>30</sup> In other words, the Khmer Krom were treated as a distinct ethnic, racial and/or national group and these crimes were committed with an intent to destroy the group in whole or in part due to their perceived affiliations with and sympathies towards Vietnam, such as killing members of the group; causing them serious bodily or mental harm; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction; imposing measures intended to prevent births within the group; and forcibly transferring children from one group to another. Further, or in the alternative, these crimes constituted a systematic attack directed against the Khmer Krom on political and/or racial grounds amounting to persecution, which is a crime against humanity under Article 5 of the ECCC Statute.

One would therefore expect the Co-Prosecutors to have included these crimes in their Introductory Submissions. After all, under the 2007 Internal Rules, this submission is meant to outline facts, ascertain crimes and crime sites, identify persons suspected of being responsible for crimes within the jurisdiction of the ECCC, and request the Co-Investigating Judges to investigate those crimes, crime sites and suspects.<sup>31</sup> Yet, an inspection of the Co-Prosecutors’ voluminous Introductory Submissions reveals that not a single paragraph is dedicated to the plight of the Khmer Krom at the hands of the Khmer Rouge.<sup>32</sup>

The Co-Investigating Judges are no better. Despite being properly seized of the case since 2007, they have not charged any of the five senior leaders of the Khmer Rouge currently under arrest with ethnically motivated genocide in general and/or a politically motivated crime against humanity with respect to the Khmer Krom. Put simply, the Khmer Krom are not currently within the scope of the ECCC’s judicial investigation. Unless they are persuaded otherwise, the Co-Investigating Judges could decide against charges based on the crimes committed against the Khmer Krom.

Different reasons are cited for the exclusion of the Khmer Krom from the judicial investigation. One scholar believes that the authorities might be vacillating because the Khmer Krom case is contentious as it “sits on the border of what might be considered ethnically motivated genocide or politically motivated crimes against humanity”.<sup>33</sup> A senior ECCC official I spoke to remarked that the Co-prosecutors may have “overlooked” the Khmer Krom altogether since it is “difficult to tell them apart from the rest”, indicating that the Co-Prosecutors did not endeavor to distinguish the ethnically and nationally distinct low-land Khmer Krom from the majority central Khmers.<sup>34</sup> Most recently, Co-Investigating

<sup>29</sup> Robbie Corey-Boulet, “Khmer Krom survivors find relief in visit to Khmer Rouge Tribunal” *The Phnom Penh Post* (19 June 2009), quoting John Ciorciari.

<sup>30</sup> *ECCC Statute*, *supra* note 2, Article 4.

<sup>31</sup> *2007 Internal Rules*, *supra* note 6, R.53.

<sup>32</sup> The ECCC’s Co-Prosecutors publicly disclosed that the submission refers to 25 distinct factual situations of murder, torture, forcible transfer, unlawful detention, forced labour, and religious, political, and ethnic persecution as evidence of crimes committed in the execution of a common criminal plan. The prosecutors transmitted more than 1,000 documents constituting over 14,000 pages, including statements or records of over 350 witnesses, a list of 40 other potential witnesses, thousands of pages of Democratic Kampuchea-era documentation, and the locations of over 40 undisturbed mass graves. Based on these documents, the Introductory Submissions refer to allegations that constitute crimes against humanity, genocide, grave breaches of the Geneva Conventions, homicide, torture, and religious persecution. Although some of the key crime sites investigated include sites where Khmer Krom were singled out for elimination, the Prosecutors’ allegations make no substantive reference crimes committed against the Khmer Krom.

<sup>33</sup> *Supra* note 29.

<sup>34</sup> Author’s interview with ECCC Official ‘A’ (anonymity preferred), Phnom Penh, Cambodia, 7 July 2009. Record of interview on file with author.

Judge Marcel Lemonde told the press that it was immaterial if a charge evincing the Khmer Rouge’s genocidal intent towards a particular group was retained for the purposes of the trials:

I can only confirm that we are still working on the question of a possible genocide charge... If ultimately a genocide charge is not retained, this will certainly not have the effect of minimizing the scale of suffering or of giving it a weaker name.<sup>35</sup>

Yet, scholars and ECCC affiliates have not paused to ask what Khmer Krom victims have to say. Affiliates would find it hard to explain to Khmer Krom victims that they are not considered a distinct ethnic or political group under the law or that the destruction of their entire community and all that it stood for may not be publicly acknowledged due to prosecutorial oversight or managerial concerns. Contrary to Judge Lemonde’s assertion that foregoing a genocide charge does not “minimiz[e] the scale of suffering or of giving it a weaker name”, I suspect that they would feel cheated if the ECCC does not conclude that they were victims of genocide,<sup>36</sup> which is widely considered to be the most egregious of international crimes. One Khmer Krom survivor and civil party applicant from Bakan district has told me that he considers the ECCC affiliates’ reluctance to prefer a genocide charge in respect of the crimes committed against the Khmer Krom a grave affront to his family who perished in the Khmer Rouge years:<sup>37</sup>

The [ECCC’s] lawyers can say whatever they want, but if they don’t make it clear that we were screened and killed because of who we are, because we were called Vietnamese traitors, then they insult my loved ones! I need to see that the court recognizes our special discrimination. If there is no special recognition; if the Krom are considered just like other Cambodians, it means that the court does not care about us. The court may betray us, just like the Khmer Rouge did in Bakan! If this happens, I will lose faith in this court.

This survivor’s pithy depiction of the Khmer Krom is reminiscent of George Orwell’s “un-person”. According to Orwell, the “un-person” has been “vaporized”; (s)he has been not only physically destroyed, but also effectively erased from existence. Such a person is written out of existing books, photographs, and articles so that no trace of her existence could be found in the historical record. If Khmer Krom survivors continue to be omitted from the legal record because of selective prosecutorial and investigative amnesia, they too will be effectively erased from existence and social memory, just as thousands in their community were physically destroyed by the Khmer Rouge.

### III. “BECOMING LIVING PEOPLE” THROUGH CIVIL PARTY PARTICIPATION IN THE TRIALS

The ECCC’s trials are an expressivist exercise for the victims of the Khmer Rouge: a dramaturgical process that is designed to tell a story and, through trial, verdict and punishment, affirm the value of law, strengthen social solidarity and incubate a moral consensus among victims.<sup>38</sup> Expressivism is not as concerned with whether a law deters or whether a law punishes, as it is with the *message* we get from a law. Diane Marie Aman reminds us that for the law to have expressive value, the “message understood, rather than the message

<sup>35</sup> Douglas Gillison, “Genocidal Intent Still a Quandary, Says KR Investigator” *Cambodia Daily* (20 June 2009).

<sup>36</sup> Ciorciari agrees with this assessment. See generally Ciorciari, *supra* note 20.

<sup>37</sup> Author’s interview dated 10 July 2009 with Khmer Krom survivor (anonymity preferred) from Bakan district, Pursat province, Cambodia. Record of interview on file with author.

<sup>38</sup> Mark Drumbl, *Atrocity, Punishment, and International Law* (New York: Cambridge University Press, 2007) at 17.

intended, is critical.”<sup>39</sup> Khmer Krom survivors I spoke with fear that their role at the ECCC is a token or non-existent role.

It follows, that however noble the ECCC’s intentions might be, a harmful message of exclusion in itself causes harm to the Khmer Krom. The Khmer Kroms’ true history should therefore be preserved and not crimped by prosecutorial and investigative strategizing, negligence and ambivalence, as is currently believed to be the case. The Khmer Krom should be reconstituted and transformed from being invisible “un-persons” to becoming genuine participants in the ECCC process, with concomitant legal rights and privileges. In short, I recommend that the Khmer Krom case be put before the ECCC’s trial courts by none other than Khmer Krom victims in their capacity as civil parties and with the assistance of competent legal representation.

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 Defence. 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>40</sup> It is fair to say that the civil party is akin to an auxiliary prosecutor. Its chief purpose is to participate “by supporting the prosecution.”<sup>41</sup> Nonetheless, it remains distinct from the ECCC’s Prosecutors, who may solely be concerned with trial, verdict and punishment. On the other hand, 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 convicted persons at the conclusion of the trials.<sup>42</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 I[n]ternational C[riminal] C[ourt].”<sup>43</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>44</sup> the level of victim involvement at the ICC is “largely symbolic, administrative and self-serving;

<sup>39</sup> Diane Marie Aman, “Message As Medium in Sierra Leone” (2001) 7 I.L.S.A. J. Int’ & Comp. L. 237 at 238.

<sup>40</sup> 2007 *Internal Rules*, *supra* note 6, R.32, 74 and 105. See also 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* (March 25 2008); David Boyle, “The Rights of Victims” (2006) 4(2) J. Int’l Crim. J. 307.

<sup>41</sup> 2007 *Internal Rules*, *ibid.*, R.23(1).

<sup>42</sup> *Ibid.*, 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 also *ibid.*, R.23(12).

<sup>43</sup> *Cambodia Tribunal Allows Victims of the Khmer Rouge to Participate in Proceedings* (28 March 2008), online: The Redress Trust (REDRESS) <http://www.redress.org/news/08-03-28%20Cambodia%20ECCC%20Press%20Release%20-%20FIDH,%20ASF,%20REDRESS%20-Eng.pdf>.

<sup>44</sup> Alex Little, “Balancing Accountability and Victim Autonomy at the International Criminal Court” (2007) 38 *Geo. J. Int’l L.* 315 at 369–70; see also David Donat-Cattin, “Article 68 Protection of the Victims and Witnesses and Their Participation in the Proceedings” in Otto Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court* (Baden-Baden: Nomos Verlagsgesellschaft, 1999), 869 at 871–873 (“[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” in Roy S. Lee, ed., *The International Criminal Court: The Making of the Rome Statute* (The Hague: Kluwer Law International, 1999) at 264 (“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 . . .”).



it does not relate to any wider conception of victim or community."<sup>45</sup> At the ICC, a victim may only present his or her observations if his or her "personal interests are affected."<sup>46</sup> Even when his or her personal interests are affected within the meaning of the Rome Statute, (s)he may only present his or her observations at "stages of the proceedings determined to be appropriate *by the Court*,"<sup>47</sup> if his or her observations are "specifically relevant to the issues"<sup>48</sup> at hand, and provided that these observations are consistent with the rights of the accused and a fair and impartial trial.<sup>49</sup>

At the sentencing stage, the ICC, not the victim, has the discretion to decide whether to involve victims and may do so if it is of the opinion that a more complete presentation of facts is required in the "interests of justice",<sup>50</sup> which suggests that victims' rights are not a paramount consideration for the ICC.<sup>51</sup> In fact, ICC judges have held that victim participation is purely *incidental* to the efficacy of the proceedings and not supplementary thereto.<sup>52</sup> Ultimately, therefore, the ICC's process retains power in the hands of the traditional actors of the international legal process: the judges, the prosecution and the defense. The ICC's Pre-Trial and Trial Chambers have repeated that participation is not a "once-and-for-all-event."<sup>53</sup> Victims must submit a new application prior to each hearing or stage in the proceedings.<sup>54</sup> The Chamber then considers on a case-by-case basis whether participation is appropriate.<sup>55</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>56</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>57</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

<sup>45</sup> Ralph Henham, "Conceptualising access to justice and victims' rights in international sentencing" (2004) 13 Soc. & Legal S. 27-55.

<sup>46</sup> *Rome Statute*, *supra* note 7, Art. 68(3).

<sup>47</sup> *Ibid.*

<sup>48</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), at para. 50.

<sup>49</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), at 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>50</sup> *Rome Statute*, *supra* note 7, Art. 65(4)(a).

<sup>51</sup> Ralph Henham, "Some Issues for Sentencing in the International Criminal Court" (2003) 52 I.C.L.Q. 81 at 108. (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>52</sup> See generally *supra* note 51; 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 Georgios M. Pikis, at para. 8.

<sup>53</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, at para. 101 (18 January 2008).

<sup>54</sup> ICC's Rules of Procedure and Evidence, ICC-ASP/1/3, R. 89.

<sup>55</sup> *Rome Statute*, *supra* note 7, Art. 68(3).

<sup>56</sup> ECCC Pre-Trial Chamber Decision on Civil Party Participation in Provisional Detention Appeals, 20 March 2008, paras. 36 and 38.

<sup>57</sup> *Ibid.*

criminal proceedings.”<sup>58</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>59</sup> The reverse is true at the ECCC. Civil party action at the ECCC is premised on Cambodia’s Criminal Procedure Code, which permits a victim to join the ECCC’s proceedings, enjoy rights *qua* victim, and support the prosecution as an auxiliary prosecutor.<sup>60</sup>

Inspired by Cambodia’s French civil law tradition, the ECCC’s civil party process seeks to follow in the footsteps of the famous trials of Nazi war criminals Paul Touvier, Klaus Barbie and Maurice Papon where victims participated as civil parties. Civil party participation at these trials apparently had an assuaging value for Holocaust victims. Author and Holocaust survivor Primo Levi likened the need to “bear witness” to the Holocaust to an *elementary physical need* for survivors.<sup>61</sup> Understood in this way, testimony from civil parties is not only an act of narration but also a form of survivorship: a re-constitution of the victim. For psychotherapist Dori Laub, survivor testimony entails this more elaborate psychical process by which the survivor “comes to know” his or her own story of survival and by so doing is able to ideally achieve the therapeutic goal of “repossessing the act of witnessing.”<sup>62</sup> As Dr. Laub has observed, “[civil parties at these trials] did not only need to survive so that they could tell their story; they also needed to tell their story in order to survive. There is, in each survivor, an imperative need to tell and thus to come to know one’s story.”<sup>63</sup>

Similarly, Khmer Krom victims should not be deprived of a similar need to tell their story as parties to the ECCC’s proceedings, with the right, *inter alia*, to address the court and transmit their unique stories. The testimony of Holocaust survivors and civil parties has constituted, according to Éric Conan, a kind of “sacred ceremony”, listened to by the members of the gallery in French courts in a silence that seemed to suspend the trial’s relentless positivist juridical progression.<sup>64</sup> Noting that a civil party at the Papon trial proclaimed, “we have been survivors, we hope to become living people”, Nancy Wood suggests that victim participation ensures that “transmission [of victim stories] would eventually achieve a *selfhood* released from the singular identity of the survivor.”<sup>65</sup>

#### IV. LAW & ETHNOGRAPHY: A CASE FOR “THICK DESCRIPTION”

Notwithstanding the broad rights conferred to civil parties under the 2007 Internal Rules,<sup>66</sup> as I have said elsewhere, these rights are only as powerful as their effective

<sup>58</sup> *Supra* note 53, Separate Opinion of Judge Georghios M. Pikis.

<sup>59</sup> *Ibid.*, at 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 Georghios M. Pikis, at 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>60</sup> The civil party process provided for under the Internal Rules borrows from the Cambodian Criminal Procedure Code [“CPC”], which is in turn inspired by Cambodia’s French legal heritage. 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.

<sup>61</sup> See also Primo Levi, *If This Is A Man/The Truce* (United Kingdom: Abacus Paperback, 1987) at 15.

<sup>62</sup> Dori Laub, *Testimony Crises of Witnessing in Literature, Psychoanalysis, and History* (New York: Routledge, 1992) at 78.

<sup>63</sup> *Ibid.*, at 80.

<sup>64</sup> Éric Conan, “Cérémonies sacrées” *L’Express* (25 December 1997).

<sup>65</sup> Nancy Wood, “The Papon Trial in an ‘Era of Testimony’”, in R. Golsan, ed., *The Papon Affair: Memory and Justice on Trial* (New York: Routledge, 2000) at 100-101.

<sup>66</sup> *Supra* note 6.

application.<sup>67</sup> The degree to which the Khmer Krom can vindicate their desire to tell their story will depend on the sensibilities of their legal counsel. Put differently, in order to reconstitute the Khmer Krom from “un-persons” to “living people”, the investigative techniques practiced by ECCC prosecutors and investigators should be discarded by civil party lawyers who wish to represent the Khmer Krom before the ECCC. Civil party lawyers would instead do well to examine how anthropologists approach statement taking and field research when dealing with predominantly rural populations.<sup>68</sup>

I find that ethnography, which mainly consists of extended periods of participant observation and informal interviews with civil party applicants, is the most appropriate approach to examine how a criminal justice mechanism such as the ECCC actually works in practice for ordinary people. Piecemeal investigations that “get in, extract information, get out” are undoubtedly problematic in contexts in which a group such as the Khmer Krom are emerging from mass violence and have historical reasons not to trust any exercise that resembles official information gathering.

On the other hand, independent lawyering that respects ethnographic field research could give us access to a very different body of knowledge from that accessible to someone who examines, documents and evaluates stories of historical trauma from within the ECCC. In order to find out what the Khmer Krom suffered, a civil party lawyer would have to look beyond the physical space of the hearings, evidentiary documents or victim information forms prepared by third party intermediaries and spend time in rural provinces talking to people who have never met investigators or prosecutors, or in villages from which they had been driven, as well as those in which they were welcomed.

Ultimately, ethnography is a useful approach to dealing with victims of mass crime as it entails spending time with ordinary people and listening to them on *their* terms—not through the medium of our survey forms, or in our sensitization workshops, or through local NGOs and intermediaries. With this general ethos in mind, these are my specific recommendations for interviewing and providing adequate and fair legal representation to the Khmer Krom and their case.

(1) Local Partner. Work with local organisations, which enjoys the community’s trust and confidence. Based on the indications of this intermediary organisation, investigate, trace and interview Khmer Krom victims who are keen to be civil parties and may be in a position to provide valuable evidence or testimony before the ECCC. Nonetheless, however good the local NGOs are, it bears mentioning that over-reliance can marginalize victims who do not wish to speak the lingo of NGOs, human rights, and humanitarian assistance.

(2) Focal Sites. Identify locations that have been recognized in the existing literature or data currently housed at the Documentation Center of Cambodia (DC-Cam) that evince a targeted attack against the Khmer Krom community with the intent of destroying that community in whole or in part. This will serve as a good starting point for ultimately establishing a genocide charge.<sup>69</sup>

<sup>67</sup> See generally, Mahdev Mohan, “The Paradox of Victim-Centrism: Victim Participation at the Khmer Rouge Tribunal” (2009) 9(3) Int’l Crim. L. R. (forthcoming). Here, I set out some of the practical constraints of civil party participation that can undermine the soothing effects that the civil party mechanism purports to deliver.

<sup>68</sup> I owe an intellectual debt to Rosalind Shaw, whose seminal special report examining Truth and Reconciliation Commissions has informed how I conduct legal field interviews. See generally Rosalind Shaw, *Rethinking Truth and Reconciliation Commissions: Lessons from Sierra Leone* (Washington: United States Institute of Peace, 2005).

<sup>69</sup> *Supra* note 20. For example, documents recovered from the Khmer Rouge’s infamous Kraing Ta Chan prison in Takeo province, one of the few provincial prisons to leave behind a large trove of paperwork, suggest that the Khmer Krom were frequent suspects of espionage and other counter-revolutionary activities and were singled out for torture and imprisonment. According to Dr Ciorciari, senior legal advisor of DC-Cam roughly 1,000 pages of documentary material from Kraing Ta Chan prison are on file at DC-Cam.

(3) “Thick Description”<sup>70</sup>. Adopt a qualitative approach that views members of the Khmer Krom community as subjects rather than objects and allows time for interviewees to roll up their sleeves and properly document the victims’ genuine historical narrative, examine their desires and reservations regarding reparations and answer their questions about the process. Only then can we hope to arrive at, in Clifford Geertz’s words, a “thick description” of the Khmer Krom community that includes information about who they are as a people, the context of the crimes they suffered, and their present plight and desires for social change.<sup>71</sup> Social scientist Roger Henke cautioned me against relying on using quantitative surveys in group settings as a data source, Henke believes that country-wide surveys that do not have a qualitative element were prone to distortion, bias and mimicry of opinions – “getting them altogether in a dreadful focus-group to fill forms is counter-productive; they may not be forthcoming, some who have been made to fill surveys may have rehearsed answers and others may echo popular sentiments, leading to a distortion of data”.<sup>72</sup>

(4) Further Systematic Research. Design concise and clear interview questions, in consultation with experienced social scientists who have conducted empirical research in Cambodia’s rural and urban provinces. Future researchers should investigate the data I have collected in a scientific manner. With more reliable field-data, researchers could seek to refine the typology presented here and sharpen the explanations of individual dynamics.

(5) Legal Representation. Provide pro-bono legal representation for all aspects of Khmer Krom victim participation, including conducting interviews with victims, preparing victim impact statements, collecting and analysing evidence where appropriate, and taking instructions from and keeping Khmer Krom apprised of the legal proceedings as they unfold.

## V. CONCLUSION

This Article has not purported to generalize with confidence about Cambodian victims in general, let alone all victims of mass atrocity. Instead, it simply seeks to move beyond and challenge vague speculations by ECCC affiliates that victims are unconcerned with the characterization of charges even if they operate to limit or exclude the story of these victims from the legal record.

My discussion would undoubtedly have been enriched by systematic, multi-province empirical research into how Khmer Krom victims from all over Cambodia might perceive the ECCC’s reluctance to prefer a genocide or persecution charge based on their plight during the Khmer Rouge years. However, this is not a reason to delay the opening of a debate. For now, I propose a mechanism and the legal methodology with which lawyers should approach the Khmer Krom case.

I argue that unless ECCC affiliates or victims’ lawyers endeavour to paint a thick description of what the Khmer Krom have suffered and call it by its proper name—genocide—the Khmer Krom will be reduced to being “un-persons” and gradually be erased from Cambodia’s social memory. Not only would this be detrimental to the Khmer Krom, but also

<sup>70</sup> Clifford Geertz, *The Interpretation of Cultures: Selected Essays* (New York: Basic Books, 1973).

<sup>71</sup> *Ibid.* As Joseph Ponterotto notes in “Brief Note on the Origins, Evolution, and Meaning of the Qualitative Research Concept” (2006) 11(3) *The Qualitative Report* 538. (“Thick description accurately describes observed social actions and assigns purpose and intentionality to these actions, by way of the researcher’s understanding and clear description of the context under which the social actions took place. Thick description captures the thoughts and feelings of participants as well as the often complex web of relationships among them”.)

<sup>72</sup> Author’s Interview with Roger Henke, Institutional Development Specialist, Phnom Penh, Cambodia, 5 December 2008.

to the international community as a whole. After all, without properly documenting past genocides, such as the one endured by the Khmer Krom, it would be difficult to give effect to William Cohen's and Madeline Albright's recent call for the international community to take preventive action, along with international partners, to forestall the spectre of future cases of genocide and mass atrocities.<sup>73</sup>

<sup>73</sup> On 8 December 2008, the Prevention of Genocide Task Force, co-chaired by Madeline Albright, a former US Secretary of State, and William Cohen, a former US Secretary of Defence, released its final report which concludes that the US government can prevent genocide and mass atrocities in the future. Madeline Albright and William Cohen, *Preventing Genocide: A Blueprint for U.S. Policymakers*, online: United States Institute of Peace < [http://www.usip.org/genocide\\_taskforce/index.html](http://www.usip.org/genocide_taskforce/index.html) >.

