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The Extraordinary Chambers in the Courts of Cambodia

Politics and Ethics in Victim Recognition
and Rape Prosecution

BY MIKKEL JARLE CHRISTENSEN,* CAROLINE
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Abstract

This chapter embarks on a socio-legal analysis of the Extraordinary Chambers in the Courts of Cambodia (ECCC) to capture the general characteristics of the ECCC as a hybrid court

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and, moreover, to home in on some of the important measures and mechanisms that its mandate provide for. The first part entails an account of the way the ECCC came into existence *in the first instance*, and this reveals factors that make a non-separation of politics and law difficult. The second part identifies some pro-reform aspects about victims' rights in terms of reparations and—in the case of rape—an anti-ethical *cum* ultra-conservative outlook of rights in terms of recognition of the crimes committed. It seems therefore that the complexities and compromises of the ECCC reappear in its efforts to construct an enhanced recognition of victims and in its judicial reasoning on rape, which arguably introduces an almost absolute justice deficit.

I. INTRODUCTION

Negotiations for what became the Extraordinary Chambers in the Courts of Cambodia (ECCC, or the Chambers) began in 1997 and ended in 2003. The protracted negotiation period was caused by strong disagreements between the Cambodian government on the one hand and the United Nations' Office for Legal Affairs on the other. This controversial process reflected the political context in which the ECCC was created and in which it would later develop. It also shaped crucial elements of the legal framework of the Chambers as well as its practices and potential effects on Cambodia as a society.

As a hybrid court, the ECCC was part of a wider proliferation of international criminal justice institutions that began with the creation of the *ad hoc* international criminal tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR) in the mid-1990s. While the Rome Statute negotiated in 1998 and the creation of the permanent International Criminal Court (ICC) had been assumed, at least by some, to put an end to the practice of setting up temporary courts to deal with the international crimes of genocide, crimes against humanity, and war crimes, several hybrid institutions appeared in the new millennium (e.g., Timor Leste). Legitimized as being able to bring justice closer to domestic communities,¹ the hybrids even seem to be making a comeback in recent years.² These courts are characterized by different types and degrees of hybridity, meaning that the balance between internationalization and elements from the relevant domestic settings vary.³ Established through agreements between national governments and international actors,

of Ethics and Human Rights, Indiana University Graduate School & Department of Philosophy, Indiana University Northwest, United States. Professor Anja Mawijkiw directed the research for this chapter, whose other authors are listed alphabetically and not in an order that reflects a particular percentage of the overall research contribution. M.J. Christensen & A. Kjeldgaard-Pedersen co-authored sections II, III; A. Matwijkiw & B. Matwijkiw co-authored sections IV, V; C. Fournet authored section VI; and all the authors share the responsibility for sections I, VII. Acknowledgments: the authors wish to thank Director Hanna Johnsson from the Cambodia Office of the Raoul Wallenberg Institute of Human Rights and Humanitarian Law for the information she provided for the joint research project. Disclaimer: the views expressed in this chapter are solely the responsibility of the authors.

¹ Frederic Megret, *In Defense of Hybridity: Towards a Representational Theory of International Criminal Justice*, 38(3) CORNELL INTERNATIONAL LAW JOURNAL 725 (2005).

² Mark Kersten, *As the Pendulum Swings: The Revival of the Hybrid Tribunal*, in INTERNATIONAL PRACTICES OF CRIMINAL JUSTICE: SOCIAL AND LEGAL PERSPECTIVES (Mikkel Jarle Christensen & Ron Levi eds., 2018).

³ Astrid Kjeldgaard-Pedersen, *What Defines an International Criminal Court?: A Critical Assessment of "the Involvement of the International Community" as a Deciding Factor*, 28(1) LEIDEN JOURNAL OF INTERNATIONAL LAW 113 (2015).

typically the United Nations, these institutions are often embedded in the domestic court system and/or staffed by a mix of national and international staff.

The hybrid criminal courts are part of a wider field of international criminal justice⁴ that includes those established *ad hoc* (whose mandate has now expired) and the ICC, in addition to the war crimes units and criminal justice systems of domestic systems. While the hybrids form a distinct category of institutions, there are considerable differences between them both with regard to their legal mandate, their organizational setup and dynamics, and the political context in which they operate.

As already highlighted, the original creation of the ECCC was characterized by contentiousness which, in turn, influenced the legal framework of the Chambers. As a result of this, the ECCC faces serious challenges in its delivery of justice. In fact, investigating the socio-legal and political context of the ECCC can lead the observer to question whether the delivery of justice is actually the goal of this institution, and, if not, how that reflects on the overall mission of international criminal justice to end impunity.

This chapter will provide a critical overview of the ECCC while attempting to cover a variety of important aspects for analytical purposes. The text is divided into thematic main sections. Sections II–III (by Mikkel Jarle Christensen and Astrid Kjeldgaard-Pedersen) contribute a fact-based account of the history and development of the ECCC, focusing on the interplay between its mandate, international and Cambodian politics, and the professional mobilization around the Chambers. These raise issues as regards victims' rights in the course of the proceedings; issues which are further developed in the subsequent sections. Sections IV–V (by Anja Matwijkiw and Bronik Matwijkiw) identify some of the key issues for the justice process in Cambodia by exploring the twofold question of (moral and collective) reparations and victim participation. Against this background, section VI (by Caroline Fournet) takes a look into the future and reflects on the (mixed) legacy of the ECCC as regards victims of crimes of sexual violence. Finally, section VII consists of a conclusion wherein the various authors try to arrive at some final thoughts and reflections.

II. THE HISTORY AND DEVELOPMENT OF THE ECCC

The ECCC was created to adjudicate criminal responsibility for crimes committed during the Khmer Rouge regime between 1975 and 1979. During their relatively short rule in Cambodia, the Khmer Rouge engaged in a comprehensive attempt at socially engineering the ideal communist society. This experiment led to the death of around 25 percent of the population (an estimated 1.7 million people). Some were killed by the Khmer Rouge as enemies of the new system (for instance, in the Tuol Sleng prison whose leader, Kaing Guek Eav (aka Duch), was convicted in Case 001 before the ECCC),⁵ and others perished due to the extremely poor life conditions created by forced transfer, re-education and labour programs: integrative parts of an overall agenda to collectively ruralize what was known as Democratic Kampuchea.⁶

⁴ John Hagan & Ron Levi, *Crimes of War and the Force of Law*, 83(4) SOCIAL FORCES 1499 (2005); Mikkel Jarle Christensen, *From Symbolic Surge to Closing Courts: The Transformation of International Criminal Justice and Its Professional Practices*, 43(4) INTERNATIONAL JOURNAL OF LAW, CRIME AND JUSTICE 609 (2015).

⁵ Trial Chamber, Case 001, Prosecutor v. Kaing Guek Eav, Judgment (July 26, 2010); Appeals Chamber, Judgment (Feb. 3, 2012).

⁶ BEN KIERNAN, *THE POL POT REGIME: RACE, POWER, AND GENOCIDE IN CAMBODIA UNDER THE KHMER ROUGE, 1975–79* (2002); NHEM BORADEN, *THE KHMER ROUGE: IDEOLOGY, MILITARISM, AND THE REVOLUTION THAT CONSUMED A GENERATION* (2013).

In a larger historical context, which also became important for negotiating the ECCC, the rule of the Khmer Rouge was linked to geopolitical conflicts. As such, most global powers had interests in Cambodia and had supported either the Khmer Rouge and/or the political elites that preceded and succeeded it. When the Khmer Rouge came into power, it was through an armed toppling of the regime of Lon Nol. When ousting Nol, the Khmer Rouge was supported by the USSR through its allies in Vietnam where the United States was engaged in an intense war. Nol himself was supported by the United States, which had also bombed parts of Cambodia between 1969 and 1975; campaigns causing, at a low estimate, 125,000 deaths.⁷ Internally, the Khmer Rouge would gravitate towards the communism of Maoist China,⁸ thereby considering the Soviet form of communism to be revisionist, and the alliance with the USSR backed Vietcong in North Vietnam dissipated as a consequence. The Khmer Rouge rule over Cambodia in its entirety came to an end in 1979 when the regime was ousted from the capital of Phnom Penh by Vietnamese forces and driven into the western part of the country bordering to Thailand. Here the Khmer Rouge retained control and remained the country's official representative in the United Nations; and did not dissolve as an organization until 1999, i.e., two years after the ECCC negotiations had begun.

During the ECCC negotiations, the United States played an important part in advocating a court⁹ amid growing tensions between Cambodia and the United Nations. Formally, the negotiations began with a 1997 request for UN assistance—issued by the Cambodian government and signed by then co-prime ministers Hun Sen and Prince Norodom Ranariddh. However, following internal disputes, Sen, himself a defector from the Khmer Rouge to Vietnam in 1977, launched a coup that ousted the Prince in 1997. Sen's government therefore negotiated the ECCC on behalf of Cambodia, and remains in power. Negotiations between the government and the UN collapsed in 2002, when the UN Office for Legal Affairs withdrew from these, criticizing the Cambodian side for advocating a solution that did not live up to international standards of justice upheld for other hybrid courts, such as the Special Court for Sierra Leone (SCSL).¹⁰ The Cambodian side had close connections to the US State Department and a wider coordination effort led to the UN General Assembly passing Resolution 57/228 that instructed the Office for Legal Affairs to restart negotiations.¹¹ The politics of the process eventually led to a model for justice that was very accommodating to the extent of national control advocated by the Cambodian government.¹² As will be shown in the next subsections, the political battle leading up to the establishment of the ECCC is not only apparent from its legal framework and the formal organization of the Chambers. It continues to influence the day-to-day cooperation between

⁷ Taylor Owen & Ben Kiernan, *Bombs over Cambodia. Third World Resurgence*, 201, 41 (2007), at <http://migs.concordia.ca/links/documents/Bombs_over_Cambodia_Kiernan.pdf>.

⁸ ANDREW C. MERTHA, *BROTHERS IN ARMS, CHINESE AID TO THE KHMER ROUGE, 1975–1979* (2014).

⁹ DAVID SCHEFFER, *ALL THE MISSING SOULS: A PERSONAL HISTORY OF THE WAR CRIMES TRIBUNALS* (2013).

¹⁰ Hans Corell, *Why the UN Backed Off: No Justice for Victims of the Khmer Rouge*, INTERNATIONAL HERALD TRIBUNE, June 19, 2002, at <<https://www.nytimes.com/2002/06/19/opinion/IHT-why-the-un-backed-off-no-justice-for-victims-of-the-khmer-rouge.html>>.

¹¹ Mikkel Jarle Christensen & Astrid Kjeldgaard-Pedersen, *Competing Perceptions of Hybrid Justice: International v. National in the Extraordinary Chambers of the Courts of Cambodia*, 18(1) INTERNATIONAL CRIMINAL LAW REVIEW 127 (2018).

¹² JOHN D. CIORCIARI & ANNE HEINDEL, *HYBRID JUSTICE: THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA* (2014).

national and international staff, and raises repeated problems within the wider political context in which the Chambers operate.

A. The Legal Framework of the ECCC

The ECCC Agreement¹³ was signed on 6 June 2003 by Under-Secretary-General for Legal Affairs and UN Legal Counsel, Hans Corell, and then Senior Minister in Charge of the Council of Ministers, Sok An. In the end, the ECCC was not—as originally sought by the UN Office for Legal Affairs looking to the model of the SCSL—established under an international agreement between the United Nations and the government of Cambodia. Instead, the Agreement governs the cooperation between the Cambodian government and the United Nations, whereas the ECCC, in accordance with Article 2(2) of the Agreement, is established “. . . in Cambodia through the Law on the Establishment of the Extraordinary Chambers. . . .”¹⁴ Article 2(2) of the Agreement further provides that “[the] Vienna Convention on the Law of Treaties, and in particular its Articles 26 and 27, applies to the Agreement.” This restatement of *pacta sunt servanda* as well as the core principle that “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty” was inserted at the request of the UN negotiators, and features as a last attempt on the part of the United Nations to insist on international standards.¹⁵ Nevertheless, the fact remains—and this is the key factor separating the ECCC from other judicial bodies in the international justice system—that the Chambers are set up under domestic Cambodian law.

The ECCC Law (as well as the ECCC Agreement) provides for a division of the ECCC into two separate sections, one national and one international, within the Chambers. International personnel is recruited by the United Nations, and their terms of employment differ considerably from their national colleagues, whose salaries are financed by the Royal Government of Cambodia.¹⁶ The system of dividing the work between international and national co-investigating judges, prosecutors, and judges at the Pre-Trial Chamber, Trial Chamber, and Supreme Court was one of the primary causes of disagreement during the negotiations, and it has continued to be highly controversial after the ECCC began operations.

Following Article 14 new and Article 20 new, decisions can only be made by a so-called “supermajority,” which means that—although the national judges are in majority in both the Trial Chamber and the Supreme Court Chamber—decisions at all levels of the Chambers require an affirmative vote of at least one “international” judge.¹⁷

¹³ 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, at <<https://www.eccc.gov.kh/en/documents/legal/agreement-between-united-nations-and-royal-government-cambodia-concerning-prosecutio>> [hereinafter the ECCC Agreement or the Agreement].

¹⁴ The Law on the Establishment of the Extraordinary Chambers as amended (Oct. 27, 2004), at <https://www.eccc.gov.kh/en/documents/legal/law-establishment-extraordinary-chambers-amended> [hereinafter the ECCC Law or the Law].

¹⁵ *Ibid.*

¹⁶ See the Agreement, *supra* note 13, arts. 15 and 16.

¹⁷ Notably, however, the Cambodian authorities are legally obliged to implement measures related to the investigation, even if they are unilaterally adopted by the international prosecutor, because it follows from Article 20 new that “[if] there is no majority as required for a decision, the prosecution shall proceed.”

Many experts have commented on the bifurcation of the Chambers into two very distinct systems each with their own administration and, often, professional perspectives on the trials.¹⁸ The (labour) division between internationals and nationals, however, is not only a “birth defect” in the legal foundation of the Chambers. As will become apparent in the following, it is reproduced by the groups themselves for specific ends related to their position on the national and international professional markets outside of the institution. In other words, the perceived success of the jurisprudence and policies of the ECCC are linked to the professional value of its international staff as they embark, or hope to embark, on other career ventures. Highlighting particular innovations, such as victim participation, is relevant for the attempt to build legitimacy and a positive legacy of a hybrid court constantly faced with critique.¹⁹

B. The Professional Workings of the ECCC

As previously pointed out, the Chambers are staffed with both domestic and international staff as a consequence of the legal mandate and organizational setup of the ECCC. Formally, the power balance between these groups is governed by the supermajority principle that structures legal decision-making. In addition, working relations within the ECCC are often made difficult by the language barrier and a professional environment or culture that relies on the separation of nationals and internationals. Outside of these conditions and formal rules of supermajority, the national and the international staff have very different conceptions of internationalized criminal justice and what it means in the context of Cambodia. This was clear from the very outset of the ECCC’s activities, where the number of indictees was disputed,²⁰ a phenomenon that would continue to mark the work of the Chambers.

The national staff, most of whom do not speak English, are still part of the domestic justice system, and most are also members of Sen’s Cambodian People’s Party (CPP). The domestic system is characterized by a strong hierarchy in which the opinion of senior judges and prosecutors takes precedent and is often closely aligned with political preferences.²¹ The court system of Cambodia is also known for its corrupt practices.²² The national prosecutors and judges working in the ECCC remain part of the rotation of this system and also work on other cases. Their perspective on international criminal law and justice is not only influenced by the domestic system, its hierarchy, and close connection to politics; their continued success in this system must to a certain extent be assumed to depend on how they perform in the ECCC. The ways in which the perspective of the national side is distinct from that of the international is clear, for instance, in the controversy over Cases 003 and 004. It is the mandate of the ECCC to adjudicate criminal responsibility for the “senior leaders” and “most responsible” for crimes committed during the Khmer Rouge era. The difference between the national and international side

¹⁸ These voices include UN-appointed experts who evaluated the work of the chambers in 2007 and former special expert to the Secretary General on United Nations Assistance to the Khmer Rouge Trials, David Tolbert. See also CIORCIARI & HEINDEL, *supra* note 12.

¹⁹ RACHEL KILLEAN, *VICTIMS, ATROCITY AND INTERNATIONAL CRIMINAL JUSTICE: LESSONS FROM CAMBODIA* (2018).

²⁰ CIORCIARI & HEINDEL, *supra* note 12.

²¹ Duncan McCargo, *Politics by Other Means? The Virtual Trials of the Khmer Rouge Tribunal*, 87(3) *INTERNATIONAL AFFAIRS* 613 (2011).

²² ALEXANDER HINTON, *THE JUSTICE FACADE: TRIALS OF TRANSITION IN CAMBODIA* (2018).

is especially clear-cut in their interpretation of who can be defined as “most responsible.” For the nationals, the death toll attributed to the accused of the two cases (estimated at around 100,000)²³ does not place them among the “most responsible” in a country that saw 1.7 million deaths.²⁴ As a result, the national co-prosecutors have voted against opening Cases 003 and 004, just as the Cambodian system as such has stifled the process by referring to budgetary restraints as well as the risk of inciting unrest in parts of the country²⁵—thereby underscoring once again the close relationship between judicial and political position taking.

Working amid ongoing accusations of political interference from the national side, the international staff of the ECCC typically have contrasting perspectives on international criminal law and justice, at least when it comes to Cases 003 and 004.²⁶ Professionally, most international staff is part of this wider field of law and have circulated between international positions in other hybrids or rule of law missions. As agents in this wider space, they mirror wider perspectives on international crimes developed here. As such, they maintain that the accused in Cases 003 and 004 must be seen as either “senior leaders” or as “most responsible” due to their role in particular crimes that occurred under their command or control, arguing also against the government-held idea that proceeding with the case could compromise national reconciliation and cause instability.²⁷ The international staff applies a more internationalized scale to measure the concept of most responsible, referring for instance to Srebrenica, where approximately 8,372²⁸ boys and men were killed, as a point of comparison.²⁹ Aiming to contribute to the broader and dynamic development of international criminal law, Cases 003 and 004 are highly controversial among international staff. The resignations of International Co-Investigating Judge Sigfried Blunk and his successor, French judge Kasper-Ansermet, were directly related to the claims of political interference

²³ CIORCIARI & HEINDEL, *supra* note 12.

²⁴ E.g., see the ECCC, Statement by the Office of the National Co-Prosecutor on Case 003, 30 November 2017, at <<https://www.eccc.gov.kh/sites/default/files/media/Press%20Release%20National%20Co-Prosecutor%20on%20Case%20003%20ENG.pdf>>.

²⁵ CIORCIARI & HEINDEL, *supra* note 12. For reparations and a discussion of economic realism, see *infra*, sections IV–V.

²⁶ The accused in Case 003 were Meas Muth and Sou Met, who as army commanders allegedly controlled the arrests and transportation of prisoners to the infamous Tuol Sleng prison. The case against Sou Met terminated in 2015 following the death of the accused. In the case against Meas Muth, oral appeal hearings against the Closing Orders took place in November 2019, and the decision of the Pre-Trial Chamber is expected for 2020. Three persons have been charged in Case 004—Im Chaem, Ao An, and Yim Tith—who as former mid-level Khmer Rouge commanders allegedly ran a forced labor camp. On 28 June 2018, The Pre-Trial Chamber ruled that the ECCC had no jurisdiction over Im Chaem; see ECCC, Case 004-01, Considerations of the International Co-Prosecutor’s Appeal of Closing Order (Reasons), Pre-Trial Chamber, 28 June 2018. On 4 March 2020, the case against Ao An (Case 004-02) also came to an abrupt end: following the submission of two opposite Closing Orders by the Co-Investigating Judges, the Trial Chamber decided that the defendant should not be tried; see <<https://www.eccc.gov.kh/en/articles/statement-judges-trial-chamber-eccc-regarding-case-0042-involving-ao>>. At present, only the judicial investigation against Yim Tith in the residual Case 004 continues. The appeals proceedings against the Closing Orders in this case are expected to come to completion in 2020.

²⁷ E.g., see the ECCC, Statement by the International Co-Prosecutor in Case 003, 30 November 2017, at <<https://www.eccc.gov.kh/en/document/public-affair/statement-international-co-prosecutor-case-003>>.

²⁸ This is the number engraved on the memorial stone in Potočari.

²⁹ Christensen & Kjeldgaard-Pedersen, *supra* note 11.

in the cases.³⁰ These resignations further emphasized the distinct perspectives of nationals and internationals on crucial aspects of the interpretation of the mandate of the ECCC. For the internationals, the work of the Chambers was part of a wider international fight against impunity. This perspective, embedded in the trajectories of this staff, has continuously come into conflict with that of the Cambodian system, in particular with regard to Cases 003 and 004.

III. KEY CHALLENGES FOR JUSTICE IN CAMBODIA

As should be obvious from the outline of the history, legal mandate, and politically contentious interpretation of key concepts in the ECCC, there are numerous key challenges for justice in Cambodia. One central challenge is how to understand justice in a hybrid institution that is arguably the most flawed of its kind. While Cases 001 and 002 were conducted in a manner that seems to correspond more or less to international standards, Cases 003 and 004 discussed briefly above seem to be exemplary of the political compromise that also characterized the negotiations for the ECCC. This compromise gave the Cambodian government significant control with the Chambers to the point where it can be discussed whether the ECCC was set up to serve justice or merely was a justice façade.³¹ At the very least, it is clear that the perception of many international stakeholders, including the international staff at the ECCC, on what kind of justice the Chambers were supposed to deliver is very different from that of the Cambodian government who may have been more concerned with sending a signal to attract international investments than ensuring justice for victims.

Working in a politically fraught context in which the number of indictees was very limited, the ECCC sought other ways to impact perceptions of justice in Cambodia. One initiative was the development of an extensive victim participation scheme. This program brought more than 8,000 victims in to participate in court proceedings at the Chambers.³² In addition to victims, more than 150,000 people are estimated to have witnessed the trials since the opening of the ECCC. This work was supported by NGOs, a cooperation that allowed the ECCC to extend its reach among victim populations, but also carried its own risks and challenges, in particular in relation to outsourcing judicial tasks to non-judicial intermediaries. The ECCC also has a reparations mandate that is linked to its victim participation program. Both of these mechanisms exemplify a wider conjuncture in the field of international criminal justice, where criminal law technologies and ideas have increasingly been supplemented, and at times even challenged, by other initiatives typically centered on victims. This is evident, for instance, in the ICC's Trust Fund for Victims (TFV). In Cambodia as elsewhere, the Chambers have struggled to find the right recipe for effectively

³⁰ CIORCIARI & HEINDEL, *supra* note 12. See also Seth Mydans, *Judge Quits Tribunal in Khmer Rouge Inquiry*, THE NEW YORK TIMES, Oct. 10, 2011, at <https://www.nytimes.com/2011/10/11/world/asia/judge-quits-cambodia-tribunal.html?mtrref=www.google.com&gwh=3DCE54CFBF2D24A18240D460604132F4&gwt=pay&assetType=REGIWALL>; the ECCC, Press Release from the International Reserve Co-Investigating Judge, at <<https://www.eccc.gov.kh/en/articles/press-release-international-reserve-co-investigating-judge>>.

³¹ HINTON, *supra* note 22.

³² Christoph Sperfeldt, *The Role of Cambodian Civil Society in the Victim Participation Scheme of the Extraordinary Chambers in the Courts of Cambodia*, in VICTIMS OF INTERNATIONAL CRIMES: AN INTERDISCIPLINARY DISCOURSE (Thorsten Bonacker & Christoph Safferlinf eds., 2013).

implementing its reparations mandate, in particular in relation to setting up the right institutional framework to handle it.³³

Studies of public opinion concerning the proceedings in Cambodia point to a favorable evaluation of the first trial, with around 80 percent of the population supporting the Chambers.³⁴ However, while the general population supported the idea of bringing perpetrators to justice, a majority would rather spend resources on problems with a closer relation to everyday life (63 percent in 2010).³⁵ While these studies were conducted before the controversy about Cases 003 and 004 discussed above, they point to certain dynamics. While the support for trials is, of course, important in countries where the general population suffers economically, reparations and support for victims and their communities in the form of health care and education are often in high demand. By the same token, part of the success of the victim participation schemes of the ECCC may be attributed to the fact that the Chambers provided medical checks for participants bussed in to attend legal proceedings. In a national context where large parts of the population live under the poverty line as well as under a repressive political system whose judiciary is characterized by corruption, it is questionable whether the ECCC will have any lasting effect. In particular, the activities of the Chambers appear clearly to be impacted by politics in Cases 003 and 004, and many commentators cast a negative light on the endeavor to ensure justice in Cambodia for the same reason. The wider social effects and the legacy of the ECCC *per se*³⁶ are bound to be affected by the obvious implications of a close affinity to politics and professional divisions, namely, a system that leaves much to be desired.

IV. AN APPRAISAL OF VICTIMS' RIGHTS IN TERMS OF REPARATIONS: DOOMED TO FAILURE OR RISING ABOVE RESTRICTIONS?

Experts on post-conflict justice are aware of the implications and challenges of broad definitions and interpretations of victims' rights in the aftermath of crimes against humanity, genocide, and war crimes. Cambodia is no exception.³⁷ The circle-concentric enormity of

³³ Christoph Sperfeldt, *Collective Reparations at the Extraordinary Chambers in the Courts of Cambodia*, 12(3) INTERNATIONAL CRIMINAL LAW REVIEW 457 (2012).

³⁴ Patrick Vinck, Phuong N. Pham, Mychelle Balthazard et al., *After the First Trial: A Population-Based Survey on Knowledge and Perceptions of Justice and the Extraordinary Chambers in the Courts of Cambodia* (UC Berkeley report of 1 June 2011), at <<https://pdfs.semanticscholar.org/d5d9/6df83c0e766d3eeb5adade975742bb0ae818.pdf>>.

³⁵ *Ibid.*

³⁶ Viviane E. Dittrich, *The Legacy of the ECCC*, in THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA 123–156 (Simon M. Meisenberg & Ignaz Stegmüller eds., 2016); John Coughlan, Sana Ghose, & Richard Smith, *The Legacy of the Khmer Rouge Tribunal: Maintaining the Status Quo of Cambodia's Legal and Judicial System*, 4(2) AMSTERDAM LAW FORUM 16 (2012).

³⁷ A 2010 world study shows that the post–World War II transitional justice management trend is to, on the one hand, recognize the appropriateness of a holistic “combination of measures of accountability and redress . . . rather than any single mechanism, be it a truth commission, prosecutions, or something else” and, on the other hand, to recognize victims' needs for several “types of interventions” in order to increase effectiveness:

Truth—whether uncovered through trials, truth commissions or both—not followed up with concrete, tangible action to make amends, will leave many victims frustrated and feeling ignored or betrayed, while reparations alone, without truth-telling or justice, will be seen as payment for silence or “blood money.”

the victimization seems to predestine post-conflict managers to embark on an experiment, which, in turn, seems equally predestined to be perceived as a compromise by the Khmer Rouge regime's victims . . . at the expense of justice. However, in the opinion of M. Cherif Bassiouni, "core international crimes" (*cf.* crimes against humanity, *etc.*) are directly linked with the "special status" of victims by virtue of the very nature and harmful consequences of the crimes *per se* and, therefore, no excuse for abandonment can be tolerated.³⁸

On a historical note, Naomi Roht-Arriaza points to various paradigm-shifts, *e.g.*, "[d]espite some notable exceptions, until recently reparations to individuals and communities had not been paid" in post-conflict justice situations. Furthermore, reparations have been more common in relatively wealthy states, or where the number of victims is relatively small; but, since 2005, poorer states with large numbers of victims have also initiated government reparations.

However, the trend is increasingly to consider reparations in the reports of truth commissions and in peace agreements, even if implementation has been spotty. In addition to these administrative reparations programs, regional human rights courts have routinely ordered reparations in individual cases, and in a few cases of large-scale massacres or other collective harm.

In the case of Cambodia, it follows that the ECCC differs from other courts in other regions, *inter alia*, the Inter-American Court of Human Rights (IACtHR), as emphasized by Renée Jeffery. Concerning Democratic Kampuchea, the above-mentioned world study also highlights the politicized effort to allow Khmer Rouge to enjoy impunity by offering amnesty to guerillas—if they would defect to the government within a six month time window—for a "non-exhaustive list of crimes against civilians" in return for "land, financial assistance, 'physical safety and survival, the right to work and to carry out their professions, and the security of their property.'" The 1994 law did not apply to leaders, but a royal decree pardoning former Khmer Rouge Deputy Prime Minister Ieng Sary was issued in 1996. The general policy of inaction as regards justice ended in 1997 when the Cambodian government sought the United Nations' assistance, only to "unilaterally" pass the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the period of Democratic Kampuchea; a law in which "significant amendments" were made to the 2000 Tribunal Memorandum of Understanding Between the United Nations and the Royal Government of Cambodia. The dispute was settled in circumstances where a (2004) provision of Ieng Sary's pardon "as a matter to be decided by the Extraordinary Chambers" did not restrict the king's constitutional powers under Article 27, thereby problematizing, if not muting, the jurisdiction of the ECCC. See Naomi Roht-Arriaza, *Reparations in International Law and Practice*, in *THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE* VOL. I 655 (M. Cherif Bassiouni ed., 2010); Louise Mallinder, *Amnesties*, in *THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE* 854 (M. Cherif Bassiouni ed., 2010); Renée Jeffery, *Beyond Repair?: Collective and Moral Reparations at the Khmer Rouge Tribunal*, 13 *JOURNAL OF HUMAN RIGHTS* 103, 109–112 (2014) [hereinafter *Beyond Repair?*].

³⁸ M. Cherif Bassiouni, *Perspectives on International Criminal Justice*, 50 *VIRGINIA JOURNAL OF INTERNATIONAL LAW* 269, 280 (2010); INTERNATIONAL HUMAN RIGHTS LAW INSTITUTE ET AL., *THE CHICAGO PRINCIPLES ON POST-CONFLICT JUSTICE* 16 (2007) [hereinafter *THE CHICAGO PRINCIPLES*].

Note that the International Criminal Court (ICC), as established under the Rome Statute (which Cambodia ratified in 2002), accommodates complementarity, universal jurisdiction, and cooperation in connection with core international crimes (*cf.* genocide, crimes against humanity (which includes apartheid), war crimes, and crime of aggression) while reaching the compromise whereby "the ICC wields no primary jurisdiction over national courts. Instead, States are vested with the primary responsibility, or right, to prosecute such crimes. The ICC can only assume jurisdiction if national systems are 'unwilling or genuinely unable to carry out the investigation or prosecution.'" See Sascha D.D. Bachmann & Eda N. Nwibo, *Pull and Push—Implementing the Complementarity Principle of the Rome Statute of the ICC Within the African Union: Opportunities and Challenges*, 43 *BROOKLYN JOURNAL OF INTERNATIONAL LAW* 457,

By extension, victims' special rights to justice, truth, and redress must and, *mutatis mutandis*, should accommodate context-specific accountability-securing measures. Doctrinally, these function as analogies to the global imperatives that describe the basic human rights that were violated in commissions (e.g., persecution, torture, and extermination) or omissions (e.g., starvation); some of which reach the level of *jus cogens* criminality.³⁹ As long as the discretionary remedial choices (of the wronged stakeholders) are consistent with applicable international human rights standards, post-conflict success *as opposed to* failure requires "a victim-centered approach."⁴⁰ The "enhanced recognition" that the victims of the Khmer

463 (2018); Rome Statute of the ICC, 17 July 1998, 2187 U.N.T.S. 3-9, 13-16, corrected by *procès-verbaux* of 16 Jan. 2002 (entered into force on 1 July 2002), arts. 6–8, 17, 19 [hereinafter Rome Statute].

³⁹ In other words, consideration of victims' demands as *relativized* to culture and/or group preferences constitutes the guideline for post-conflict justice management in any place P. See THE CHICAGO PRINCIPLES, *supra* note 38, at 3, 16, 22–23, 37, 44, 54; see also Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, GA Res. 60/147, 2(b), 3(c), 5, 10, 11(a), 12, 12(b), 13, 15, 22(b), 24 (Dec. 16, 2005), at <<https://www.ohchr.org/en/professionalinterest/pages/remedyandpreparation.aspx>> [hereinafter *Basic Principles*].

Note that an independent study that Diane Orentlicher conducted in 2004 cites Bassiouni as a source of "recent jurisprudence" on the right to reparation/s. See U.N. Commission on Human Rights, Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening their Domestic Capacity to Combat All Aspects of Impunity, 60th Sess., Item 17, at 5, 19, U.N. Doc. E/CN.4/2004/88 (Feb. 27, 2004).

Note also that categorizing starvation in terms of *jus cogens* criminality is highly controversial and unusual even in legal doctrines that otherwise treat *jus cogens* norms as "intrinsically superior norms" (cf. higher *cum* ethical norms), such as American Legal Process Theory. On the premises of this, *jus cogens* norms preclude positive or "affirmative" rights *because* these "require a commitment to resources." However, if the dual rationale that the International Military Tribunal at Nuremberg (IMT) used for norm-recognition is reinterpreted so as to place an emphasis on violations that "shock the conscience of mankind" rather than the way these adversely affect the interests of the community as a whole because they threaten peace and security, an argument can be made in favor of inclusion. See M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW AND CONTEMPORARY PROBLEMS 63, 69 (1997); DONALD E. CHILDRESS III, THE ROLE OF ETHICS IN INTERNATIONAL LAW 86, 97 (2012).

⁴⁰ Secretary-General, Report of the Secretary-General to the Security Council: Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, at 2 (*Summary*), U.N. Doc. S/2004/616 (Aug. 23, 2004) [hereinafter 2004 Report of the Secretary-General].

Note that relativization to *that particular person* and his/her corresponding (demands for) individual reparations is accommodated in the report in connection with truth-telling (cf. "personal stories"). See *id.*, at para. 50.

On comparison, *The Chicago Principles* can be interpreted as an instrument that integrates individual reparations as an explicit premise since it is made to hold—*without any further qualification*—that "[v]ictims have the right to reparations for violations of human rights and humanitarian law"). See THE CHICAGO PRINCIPLES, *supra* note 38, at 39 (for "understandings of 'truth' that include subjective and experiential meaning"), 45; *Basic Principles*, *supra* note 39, at VIII.13 (for "In addition to individual access to justice, States should endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation, as appropriate").

Note also that one part of the explanation as to why "individual needs" could not be accommodated in the case of Cambodia owes to the originally non-essential link between the ECCC and direct relief for the victims, according to the Open Society Foundations. The point is that it is no coincidence that the role of victims as witnesses is primary:

Rouge era are owed according to the ECCC's own website not only accords with the United Nations' 2004 general policy recommendation (*cf.* victim-centered approach) for post-conflict societies but also with its more recent pro-democracy measures, especially those that serve to increase inclusiveness on behalf of members of the civil society.⁴¹ For example, the 2012 *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels* emphasizes the importance of "wide stakeholder participation" as regards the rule of law, just as national civilian capacity-building or development is seen to depend on peace and security *broadly construed*, thereby making "all human rights"—*both* civil/political *and* social/economic human rights—integral parts of sustainable *qua* just post-conflict outcomes.⁴² Using basicness as a measurement for an adequate approximation to (re)distributive fairness entails, of course, that the implied freedom (*cf.* civil/political rights) and welfare (*cf.* economic/social rights) are limited to the kind of interests or stakes that, if ignored, adversely affect life, liberty, safety, and integrity *broadly construed*.⁴³ Exponents of Stakeholder Jurisprudence may also argue for the general inclusion

Under the ECCC's *Internal Rules* (Rev. 8), Rule 23 *bis* 1, in order to be granted civil party status, an individual must "demonstrate as a direct consequence of at least one of the crimes alleged against the [suspect or accused] that he or she has in fact suffered physical, material or psychological injury upon which a claim of collective and moral reparation might be based."

Rule 23 states that the purpose of civil party action before the ECCC is to: "(a) participate in criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC by supporting the prosecution; and (b) seek collective and moral reparations."

See Open Society Foundations, *Performance and Perception: The Impact of the Extraordinary Chambers in the Courts of Cambodia*, 41, 117–118 (2016), at <<https://www.opensocietyfoundations.org/reports/performance-and-perception-impact-extraordinary-chambers-court-cambodia>> [hereinafter *Performance and Perception*]; the ECCC, Victims' Support Section (VSS), at <<https://www.eccc.gov.kh/en/organs/victims-support-section>>.

⁴¹ The ECCC, VSS, at <<https://www.eccc.gov.kh/en/organs/victims-support-section>>.

⁴² UN General Assembly, *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, A/RES/67/1, paras. 19, 38, 41 (Nov. 30, 2012) [hereinafter 2012 Rule of Law Declaration]; THE CHICAGO PRINCIPLES, *supra* note 38, at 7–8 (for justice as a prerequisite for long-term peace), 11 (for "participation of diverse [stakeholder] constituencies").

Notwithstanding, some commentators view the ECCC's victim participation as "a reactionary rather than a truly revolutionary legal mechanism." One argument is:

The only pertinent reference to the concept of civil party participation can be found in Article 36 of the ECCC Law, which grants *victims* a right of appeal to the Supreme Court Chamber. It is arguably no more than a stray word in the foundational legal text.

See Impunity Watch, *Victim Participation and Transitional Justice in Cambodia: The Case of the Extraordinary Chambers of the Courts of Cambodia (ECCC)*, at 19, 22, April 2016 (research report by Rudina Jasini).

⁴³ It is noteworthy that Bassiouni's liberal outlook is *too traditional* to broaden the scope of the basic rights that underpin all branches of public international law, because his definition is limited to negative freedoms, such as freedom from arbitrary killing and torture (*cf.* survival, safety, physical/psychological integrity) or interference with individual freedom/s of expression (*cf.* liberty). Exponents of Stakeholder Jurisprudence, on the other hand, treat human needs as one of the main criteria for the definition of basic rights (to life, liberty, safety/security, and integrity) and, therefore, core economic/social rights (*cf.* freedom from want) acquire special importance. Bassiouni's accommodation of socioeconomic measures, that is, material reparations makes no difference doctrinally speaking. This is to say that post-conflict justice management that honors socioeconomic demands for satisfaction in practice derive their ethical force and pull from the victim-centered approach. Paradoxically enough, however, *The Chicago Principles*,

of moral as well as physical and psychological dimensions of integrity because decency, dignity, and respect on the basis of humanity may necessitate a response to stakeholder vulnerabilities through a (potential) lack of sincerity on behalf of (accused) perpetrators who, for example, invested their own autonomy and value authenticity and credibility in a public apology, as already delivered in several instances in Cambodia.⁴⁴ The task of assessing whether sincerity has been secured is a difficult one. Unless sincerity is secured, however, the suffering of the victims goes unacknowledged as a (morally) logical implication.⁴⁵ In turn, this would result in the non-recognition of victims as ends in themselves and, *eo ipso*, as equal right-holders. Such disrespect would subtract from the spectrum and scope of the part of justice that concerns the restoration of the dignity of victims. In the case of Cambodia and the ECCC, the effort to realize post-conflict justice has been premised on and aligned with the United Nations' dual-track commitment to a policy of zero-tolerance towards impunity for crimes against humanity, genocide, and war crimes.⁴⁶ This is to say that the notion of accountability-securing measures is extended, *expressis verbis*, beyond prosecution/punishment or extradition, more precisely, to "a comprehensive approach to

which are not designed under the auspices of the UN, are arguably more progressive—at least in some respects—than the *Basic Principles*. See M. CHERIF BASSIOUNI, *THE PROTECTION OF HUMAN RIGHTS IN THE ADMINISTRATION OF CRIMINAL JUSTICE: A COMPENDIUM OF UNITED NATIONS NORMS AND STANDARDS*, xxvi (1994); Anja Matwijkiw & Bronik Matwijkiw, *Post-Conflict Justice: Legal Doctrine, General Jurisprudence, and Stakeholder Frameworks*, in *GLOBAL TRENDS: LAW, POLICY & JUSTICE: ESSAYS IN HONOUR OF PROFESSOR GIULIANA ZICCARDI CAPALDO* 345–370 (M. Cherif Bassiouni et al., 2013); Anja Matwijkiw & Bronik Matwijkiw, *A Modern Perspective on International Criminal Law: Accountability as a Meta-Right*, in *THE THEORY AND PRACTICE OF INTERNATIONAL CRIMINAL LAW: ESSAYS IN HONOR OF M. CHERIF BASSIOUNI* 19–79 (Leila N. Sadat & Michael P. Scharf eds., 2008) (for a comparison of *The Chicago Principles* and *Basic Principles*) [hereinafter *A Modern Perspective*]; *THE CHICAGO PRINCIPLES*, *supra* note 38, at 4, 8, 9, 46 (for social/economic compensation), 60 (for post-conflict social/economic reform—that also targets "endemic poverty").

⁴⁴ E.g., in 1998, former Khmer Rouge leaders Khieu Samphan and Nuon Chea apologized to the Cambodian people for the nearly two million people killed from 1975 to 1979. In 2011, former Khmer Rouge leader Khieu Samphan also apologized for the loss of life but denied having knowledge of atrocities, saying "My mistake was that I was too naïve and was out of touch with the real situation." On May 18, 2012, The Public Affairs Section and VSS distributed copies of a *Compilation of statements of apology made by Kaing Guek Eav alias Duch during the proceedings*. See the ECCC, *Duch Apology*, available at <<https://www.eccc.gov.kh/en/publication/duch-apology-high-resolution>>; ALEXANDER L. HINTON, *DUCH'S APOLOGY. MAN OR MONSTER?: THE TRIAL OF A KHMER ROUGE TORTURER* 168 (2016); Keith B. Richburg, *A Small Apology to the Dead*, *WASHINGTON POST*, Dec. 30., 1998, at <https://www.washingtonpost.com/archive/politics/1998/12/30/a-small-apology-to-the-dead/f9cbfdad-48b9-483b-92b8-85d2b5b54d5d/?utm_term=.d613a5154af4> (for claims of insincere apologies and for Hun Sen's statement that the Khmer Rouge leaders should not be welcomed "with guns, bullets, prison or handcuffs, but a bunch of flowers for the spirit of national reconciliation"); MARTHA MINOW, *VENGEANCE AND FORGIVENESS* 40 (1998) (for an emphasis on individual responsibility to avoid "the cycles of blame that lead to revenge"); Matwijkiw & Matwijkiw, *A Modern Perspective*, *supra* note 43, at 75 (for sincerity as a condition in ethics); *THE CHICAGO PRINCIPLES*, *supra* note 38, at 39 (for moral integrity as a requirement for (truth) commissioners), 47 (for apologies as forgiveness enablers "on the part of victims and their families").

⁴⁵ The ECCC, *Internal Rules* (Rev. 9), Rule 23 *quinquies* 1(a) (Jan. 16, 2015) (for acknowledgment of the harm suffered by Civil Parties); *THE CHICAGO PRINCIPLES*, *supra* note 38, at 11 (for societies and governments' acknowledgment of past suffering); *Basic Principles*, *supra* note 39, at IX.22(e) (for "[p]ublic apology, including acknowledgement of the facts and acceptance").

⁴⁶ 2012 Rule of Law Declaration, *supra* note 42, at para. 22.

transitional justice incorporating the full range of judicial and non-judicial measures to ensure accountability, serve justice, provide remedies to victims, promote healing and reconciliation.”⁴⁷ Summarizing a broad *best practices* parameter for the ECCC, this translates into, respectively, *aut dedere aut judicare* for serious criminality, in effect, juridical accountability for defendants (three in total, viz., Kaing Guek Eav alias Duch (Case 001), Nuon Chea, and Khieu Samphan (Cases 002/01-02)) and “collective and moral reparations” for victims *cum* civil parties, according to the ECCC’s Victims Support Section (VSS).⁴⁸

Socioeconomically, reparations are mediated by bridge-terms like the “eradication of poverty,” which informs the bottom line of the category of collective reparations which the ECCC intended to secure but allegedly “did not have a clear understanding of,” at least not in Jeffery’s opinion.⁴⁹ Given the nature and consequences of the crimes that were committed in Cambodia, restitution is typically precluded beforehand and, therefore, the relevant material reparations for quantifiable losses (e.g., through “direct harm” to property, income, or physical/psychological integrity) must and, *mutatis mutandis*, should take the form of “compensation, rehabilitation, satisfaction and guarantees of non-repetition.”⁵⁰ Among other forms of non-judicial measures which the ECCC incorporated into its reparations package or, perhaps more to the point, intended set of responses to victims, are moral reparations for dignity-deprivations that entail qualitative value components and, with these, normative variables in the truth and justice equation.⁵¹ Together with apologies—accompanied by expressions of responsibility—examples include memorials, museums, and plaques,

⁴⁷ *Id.*, at paras. 21–22.

⁴⁸ The ECCC, VSS, at <<https://www.eccc.gov.kh/en/organs/victims-support-section>>; the ECCC, Internal Rules (Rev. 9), Rule 23 *quinquies* 1–3 (for collective and moral reparations).

⁴⁹ Jeffery, *Beyond Repair?*, *supra* note 37, at 105, 108, 117; for innovative and cutting-edge analysis of various aspects of justice, see EEEIC International Co-Investigating Judge and legal scholar and general editor of *International Criminal Law Review* Michael Bohlander, *International Criminal Defence Ethics: The Law of Professional Conduct for Defence Counsel Appearing before International Criminal Tribunals*, 1 SAN DIEGO INTERNATIONAL LAW JOURNAL 75 (2000); MICHAEL BOHLANDER, *INTERNATIONAL CRIMINAL JUSTICE: A CRITICAL ANALYSIS OF INSTITUTIONS AND PROCEDURES* (2007); Michael Bohlander, *Separation of Powers and the International Judiciary—A Vision of Institutional Judicial Independence in International Law*, in *CULTURE OF JUDICIAL INDEPENDENCE: CONCEPTUAL FOUNDATIONS AND PRACTICAL CHALLENGES* (Shimon Shetreet & Christopher Forsyth eds., 2011); *GLOBALIZATION OF CRIMINAL JUSTICE* (Michael Bohlander ed., 2017).

⁵⁰ Note that the notion of “direct harm,” according to the definition and scope that the ECCC established in its proceedings in 2010, is fully consistent with treating both immediate and extended family members of the victims of a crime “as being a separate category of direct victims themselves.” See Jeffery, *Beyond Repair?*, *supra* note 37, at 108; THE CHICAGO PRINCIPLES, *supra* note 38, at 44 (for “[v]ictims are those who have suffered harm, individually or collectively, including physical injury, mental injury, emotional suffering, economic loss, or the significant impairment of basic legal rights”); *Basic Principles*, *supra* note 39, at V.8 (for “. . . victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term ‘victim’ also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization”), IX.18 (for forms of reparation).

⁵¹ Whereas *The Chicago Principles* explicitly require consideration of “democratic values” as an integral part of respect for human rights, the *Basic Principles* do not make mentioning of democracy. In the case of Cambodia, this could have the effect of creating associations with the past Democratic Kampuchea, a dictatorial regime. As regards the ECCC, one provision is made for victims. *Qua* witnesses, these are held

the identification and reburial of victims, the preservation of archives or of repressive sites as museums, and “other similar measures,” again according to Jeffery.⁵² Here it should be stressed that the additional examples necessitate a distinction between general doctrine and Cambodia as a post-conflict society, where forensic evidence and the effort to identify victims were minimal and where cremation of the remains of victims was requested by parts of the extended victim community (*cf.* survivors *cum* relatives, *etc.*).

A. The “But” About Reparations

Despite the ECCC’s “unique and distinct mandate on civil party action,” the Court apparently failed to take advantage of the opportunity to develop international jurisprudence on reparations and at the same time pave the path for significant advances as far as the practical provision of victims’ rights (in international criminal trials) is concerned.⁵³ Following Jeffery, the failure can be traced to Case 001.⁵⁴ Besides yielding to various types of pressures in a context of financial constraints, the ECCC deviated from international standards whereby states and *not the accused* (if convicted) assume the responsibility for the provision of reparations, “but makes reparation orders reliant on the recovery of assets held by those found guilty.”⁵⁵

Even victims whose demands for satisfaction were so moderate as to consist in recognition of unjust suffering and the acceptance of their story or, *per* Bassiouni, “subjective and experiential meaning,” were rejected as Civil Parties; and “in the end” sixty-four civil parties were named in the judgment for Case 001.⁵⁶

As a minimum, this suggests that there is much more to the explanation of post-conflict failure than an attempt to shift the emphasis to merely symbolic measures for reasons that are “primarily financial.”⁵⁷ Certainly, if victims have been “conditioned to think” that broad post-conflict justice in the form of collective socioeconomic measures (*e.g.*, poverty reduction, improvements to healthcare, education, and infrastructure) falls outside the remit of the ECCC in spite of the fact that the relevant measures describe the victims’ preferences, the Blame Game has to be redirected.⁵⁸ More precisely, it has to be directed *away* from the lack of a clear understanding and instead *towards* the lack of a will to negate *realpolitik*.⁵⁹ In other words, the “interests of political expediency” have *been made to matter more than*

accountable for their own values as a foundation for truth-telling. See THE CHICAGO PRINCIPLES, *supra* note 38, at 52, 55 (for values and victims), 59; the ECCC, Internal Rules (Rev. 9), Rule 24.1 (for “Before being interviewed by the Co-Investigating Judges or testifying before the Chambers, witnesses shall take an oath or affirmation in accordance with their religion or beliefs to state the truth”).

⁵² Jeffery, *Beyond Repair?*, *supra* note 37, at 104; for examples of “other similar measures” (and the authors thank Caroline Fournet for these important additions and considerations), see Wynne Cougill/Documentation Center of Cambodia, Buddhist Cremation Traditions for the Dead and the Need to Preserve Forensic Evidence in Cambodia, at <https://www.dccam.org/Projects/Maps/Buddhist_Cremation_Traditions.htm>; Melanie Klinkner, *Forensic Science for Cambodian Justice*, 2 INTERNATIONAL JOURNAL OF TRANSITIONAL JUSTICE 227–243 (2008).

⁵³ Jeffery’s main criticism of the ECCC is that the Court has a “retrograde and restrictive understanding”—which is different from an unclear understanding, as otherwise claimed to be the case. *Id.*, at 104–105.

⁵⁴ *Id.*, at 105.

⁵⁵ *Id.*

⁵⁶ *Id.*, at 108.

⁵⁷ Jeffery, *Beyond Repair?*, *supra* note 37, at 112.

⁵⁸ *Id.*

⁵⁹ *Id.*, at 105, 109, 112.

the stakes in justice; and the weight scales cannot be tilted unless the various instances of legal instrumentalism (whereby standards are defined in non-conformity with the victim-centered approach) are corrected. Furthermore, the premise that “You get as much justice as can be afforded” has to be *critically assessed* and subjected to scrutiny with a specific view to determining if, for example, grand corruption (cf. “vast quantities of assets” that are obtained through wrongful practices, thereby harming the economy of a country), may be a factor in Cambodia.⁶⁰ If so, ethics, that is, the type of substantive morality that prescribes the rules for a fair distribution of resources, should also be applied as a tool that helps to clarify the relationship between rights and obligations in general and as an antidote to the myth of so-called economic realism in particular. On the premises of the position in question, prescriptions that entail (obligations of) performance, meaning that A “should” provide X for B presuppose that A “can” (afford X) *without any further examination or investigation of “can.”* In other words, a given budget may make provisions impossible because of its (arbitrary) separation from the external context where the wealth is concentrated. It follows that economic realism is uncritical about the current state of affairs while presenting its realistic view of reasonable demands.

In all circumstances, there is no basis for automatic inferences from the ECCC’s Internal Rules whereby collective and moral reparations cannot be individually oriented or be awarded in the form of financial compensation to a non-possibility of including collective socioeconomic measures. The fact that the (r)evolutionary jurisprudence potential of such measures was undermined comes with a number of spillover effects. All of these negatively affect already vulnerable stakeholders in that the VSS contributed to the politically correct shaping of the interpretation of the link between pragmatism and idealism, which underpins the discussion about effective means/instruments *cum* reparations and goals/expectations *cum* standards.⁶¹

⁶⁰ Jeffery mentions “corruption” in connection with the ECCC, but he does not discuss this phenomenon in a broader context. See Andrew Nachemson, “Grand Corruption” Drives Perceptions, THE PHNOM PENH POST, Mar. 1, 2017, at <<https://www.phnompenhpost.com/national/grand-corruption-drives-perceptions>>; UN Convention against Corruption GA Res. 58/4, at 5 (Oct. 32, 2003); Jeffery, *Beyond Repair?*, *supra* note 37, at 106; THE CHICAGO PRINCIPLES, *supra* note 38, at 10 (for a liberal concession to economic realism, cf. “You get as much justice as can be afforded”), 59 (for combating corruption as a post-conflict measure); Aun Chhengpor, UN “Apologizes” to End Row with Cambodia over Poverty Level Measurement, VOA KHMER, Oct. 10, 2018, at <<https://www.voacambodia.com/a/un-apologizes-to-end-row-with-cambodia-over-poverty-level-measurement/4607615.html>> (for 2018 political controversy over the claim that “more than a third of Cambodians live in poverty”); Estelle Bockers, Nadine Stammel, & Christine Knaevelsrud, *Reconciliation in Cambodia: Thirty Years after the Terror of the Khmer Rouge Regime*, 2 TORTURE 71 (2011) (for a link between endemic poverty and corruption in Cambodia).

⁶¹ In the event of success, the ECCC would have been a “historical First” in Southeast Asia as far as the implementation of moral and collective reparations (including socioeconomic measures) is concerned. Consequently, the ECCC would have become (more of) an analogy to the IACtHR. This paved the path for dynamic developments in the relevant region, *inter alia*, with cases like *Velásquez-Rodríguez v. Honduras* (1988), *Aloeboetoe et al. v. Suriname* (1993), *Neira-Alegria et al. v. Peru* (1996), *Cantoral-Benavides v. Peru* (2001), *Villágran Morales et al. v. Guatemala* (2001), and *Moiwana Community v. Suriname* (2005). The implied progressive evolution in the case law accommodates not only an expansive or broad notion of harms (that includes moral and emotional harms) and victims (that includes direct and indirect victims) but also precedents for awarding reparations in the form of public apologies and acknowledgement of responsibility, impairment of values, memorialization, and material reparations that include collective socioeconomic measures for the purpose of addressing moral harms. See Jeffery, *Beyond Repair?*, *supra* note 37, at 109–122.

Certainly, measures like “orders to publish the court’s judgment in the mass media at the expense of the convicted person” are more likely than not to put pragmatism in the service of *realpolitik* as opposed to idealism. Why? Because the current regime can arguably state that “This shows that we have done something” *without having addressed* the other types of interventions that accompany holistic post-conflict justice.⁶² Setting aside the question of whether particular constellations of measures (such as “orders to fund non-profit services or other activities that aim to benefit Victims; or the creation of a memorial”) serve to manipulate victims’ expectations by pushing these in the direction of symbolic *as opposed to* material reparations, a so-called “benchmark” comparison with the Inter-American Court of Human Rights (IACtHR) (as proposed by Jeffery) is bound to misfire on account of the fact that while this Court has jurisdiction over the state signatories of the American Convention on Human Rights, the ECCC has *no analogous jurisdiction* over the government of Cambodia.⁶³

In the words of the German poet Heinrich Heine, “*Es ist eine alte Geschichte, doch bleibt sie immer neu.*”⁶⁴ Irrespective of how dynamically progressive and pro-reform friendly the ECCC set out to be with its (regionally innovative) victim participation program, and irrespective of the Court’s own aspirations and expectations to “break new ground” in the provision of victims’ rights in international criminal trials and to significantly advance the international reparations agenda in the process of securing this goal, the actual *de jure* narrowing of the five key aspects from the *Basic Principles*—to “minimal reparations that fell within the confines of its political and financial constraints,” ironically relied on the line of reasoning from economic realism.⁶⁵ By presupposing enforceability, the view that justice for serious human rights violations (that followed from criminality in the form of crimes against humanity, *etc.*) is conditional on the availability of resources here and now at time T (*cf.* economic realism) also promoted legal positivism as a doctrinal clause for (legally correct) interpretation.⁶⁶ A paradigm-shift from the ECCC’s adaptation to Cambodian civil law (in which the guilty party is responsible for reparations) to international standards would have made the government of Cambodia the bearer of the obligation (to provide a remedy). However, the precarious balancing of law in the context of the ECCC’s lack of jurisdiction over the government of Cambodia resulted in rejections of the appeals for (reparations in the form of) state apologies, development assistance, and memorials.⁶⁷

⁶² Jeffery, *Beyond Repair?*, *supra* note 37, at 112.

⁶³ *Id.*, at 112, 114, 116.

Note that Jeffery’s comparison can be challenged by experts on international law, who, for example, may argue that the disanalogy applies to all international and internationalized courts and tribunals which deal with individual criminal responsibility, and not state violations of human rights (as human rights courts do).

⁶⁴ The quote, “It is an old story, but it always remains new” in English, is from the poem *Ein Jüngling liebt ein Mädchen* (1822).

⁶⁵ *Id.*, at 113–114.

⁶⁶ *Id.*, at 115.

Note that economic realism makes no exception to its reasoning (if and only if the resources already are available is it (realistically) possible to secure justice. In other words, economic realism is blind to (idealist) arguments whereby “Let’s save on military expenses and then make resources available for protection of basic rights (to life, freedom, and (analogous *meta*-rights to) justice, *etc.*)” because they are *not concerned* about “How things ought to be” but only with “The way the real world is”).

⁶⁷ Thus, “the Supreme Court based its decision on the assumption that no reparations would be preferable to unfulfilled reparation orders.” According to Jeffery, the ECCC should have made “requests” (however reluctantly as a consequence of the “complicated political relationship between the Court and the Hun Sen government”) to step in and make funds available. See Jeffery, *Beyond Repair?*, *supra* note 37, at 116–117.

Left with the “inclusion of the names of admitted Civil Parties and their deceased family members in the Final Judgment” and the Trial Chamber’s order of the “compilation and publication of all statements of apology and acknowledgement of responsibility made by Duch,”⁶⁸ the Supreme Court’s minimalism in Case 001 admittedly creates an achievement gap in the light of the *Basic Principles* as well as the precedents from the IACtHR.⁶⁹ However, rather than blaming the final outcome on the lack of a clear understanding with “wiggle room to redefine the reparations agenda” in (insincere) responses to pressures and constraints, it seems a better approximation to the truth to claim that the post-conflict justice experiment in Cambodia was *set up* for failure. In an environment that does not welcome any (innovative) effort to make international standards (like the *Basic Principles*) “fit the context” in the first instance, pro-justice managers must essentially fight just as hard for their own continuation as (impartial) legal professionals as they do for the legal mission at hand.⁷⁰ For that is the single most important insight about *realpolitik*: if this phenomenon is in the post-conflict equation *at all*, it is in the service of power-conservation. For the same reason *realpolitik* is tailored to certain instrumentalities, such as “trafficking in influence” and controlling and restricting access to resources.⁷¹ The opposite of state apologies and forgiveness from victims, namely, vetting or lustration, seems to be the only measure that can put an end to *realpolitik*.

V. A SILVER LINING FOR LIMITED SUCCESS?

The question is if any other cases might have introduced game changers, which warrant an unambiguously favorable conclusion on behalf of the ECCC. Concerning Case 002, the final appeal proceedings are projected to conclude in 2020.⁷² As for Cases 003 and 004, it “was revealed in May 2017” that the Co-Investigating Judges had sought submissions from the parties on the continuation of those cases in the light of the ECCC’s budgetary

⁶⁸ *Id.*, at 114; the ECCC, Case 001, at <<https://www.eccc.gov.kh/en/case/topic/90>>.

⁶⁹ Legally-causally, The Open Society Justice Initiative, presents the following explanation:

In accordance with the very limited provisions for reparations in the court’s internal rules, only nominal reparations were awarded to the victims, including listing the names of civil parties and publishing the statements of apology and remorse made by Duch.

See Performance and Perception, *supra* note 40; Jeffery, *Beyond Repair?*, *supra* note 37, at 113.

Note, once again (as in footnote 61) that experts on international law may disagree with Jeffery’s approach whereby different courts (international criminal courts and human rights courts) are compared *without* an account of their intrinsic differences, their jurisdiction and aims (to nuance the comparison).

⁷⁰ Jeffery, *Beyond Repair?*, *supra* note 37, at 117.

⁷¹ Whether the staff and judiciary at the ECCC is “dogged by allegations” of corruption (*cf.* nepotism in hiring, kickbacks to governmental officials) or whether it is possible to conclusively corroborate cases of censorship (that can be traced to Prime Minister Hun Sen’s priority for stability in Cambodia) is not addressed here, nor is the concrete manifestations of the political interference behind the national *versus* international judges split. *See* Open Society Foundations, at <<https://www.opensocietyfoundations.org/reports/performance-and-perception-impact-extraordinary-chambers-court-cambodia>>.

⁷² More precisely, an Appeals Chamber judgment can be expected “by the fourth quarter of 2020.” *See* International Justice Monitor: A Project of the Open Society Justice Initiative, at <<https://www.ijmonitor.org/2019/05/extraordinary-chambers-in-the-courts-of-cambodia-developments-and-completion-timeline/>>.

situation.⁷³ While this looks like a business-as-usual scenario (*cf.* financial constraints) with a corresponding (poor) outcome, appearances are in fact somewhat deceptive in the transition from Case 001 to Case 002.⁷⁴

Apart from hosting “stakeholders consultations” to discuss lessons learned in the area of reparations with a view to identifying and designing civil party requests for reparations, the Eighth Plenary Session—after the Duch verdict in February of 2010—resulted in the adoption of amendments to allow reparations projects to be funded by external or third-party donors.⁷⁵ Reparations continued to be contingent on the conviction of the accused, but an analysis of Case 002 clearly demonstrates a mutually reinforcing effect between the Trial Chamber’s mandate to grant moral and collective reparations to Civil Parties *if* certain conditions are fulfilled, *inter alia*, the requirement for documentation of sufficient external funding for each proposed project and, on the other hand, a positive and broad community response. It appears that where funding was needed for reparations, sufficient voluntary financial contributions have been secured, except for one project.

As a result, thirteen reparations projects were accepted, and the majority of funding came from German sources.⁷⁶ Comparatively speaking, this is a qualitative leap, of course. Furthermore, the example of post-conflict success shows that balancing justice and reality does not imply a defeat for a reparations package as long as there is empathy for victims’ rights and the underlying losses and deprivations (*cf.* violations of basic human rights); the very *reasons why* something must and, *mutatis mutandis*, should be done.⁷⁷ Hence,

⁷³ NINA H.B. JØRGENSEN, *THE ELGAR COMPANION TO THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA* 159 (2018) [hereinafter *THE ELGAR COMPANION*]; the ECCC, *Co-Investigating Judges Issue Decision on the Impact of the Funding Situation on Cases 003, 004 and 004/02*, at <<https://www.eccc.gov.kh/en/articles/co-investigating-judges-issue-decision-impact-funding-situation-cases-003004-and-00402>>. For comments on the status of Cases 003 and 004, see *infra* (end of section V).

⁷⁴ In Case 002, Khieu Samphan and Nuon Chea were convicted on crimes against humanity on 7 August 2014 (Case 002/01), and while the Supreme Court reversed some of the convictions, it upheld the rest together with the life sentences of life imprisonment on 23 November 2016. On 16 November 2018, Khieu Samphan and Nuon Chea were found guilty of additional charges (in Case 002/02) related to crimes against humanity (*cf.* Articles 5 and 29 of the ECCC Law), grave breaches of the Geneva Conventions (*cf.* Articles 6 and 29), and genocide (*cf.* Articles 4 and 29). According to Jørgensen, the proceedings in Case 002 as well as Case 001 tested the Court’s functionality and legitimacy. The same conclusion holds for Case 003 and Case 004 in the light of the fact that “[t]he International and national Co-Prosecutors filed separate Final Submissions on 14 November 2017, expressing opposing views as to whether Meas Muth should be indicted” (*cf.* Case 003) and, moreover, the fact that there was disagreement about whether Ao An did or did not “fall within the ECCC’s personal jurisdiction” (*cf.* Case 004). See the ECCC, Case 002/01, at <<https://www.eccc.gov.kh/en/case/topic/1295>>; the ECCC, Case 002/02, at <<https://www.eccc.gov.kh/en/case/topic/1298>>; Summary of Judgment in Case 002/02 against NUON Chea and KHIEU Samphan, at <<https://www.eccc.gov.kh/en/document/court/summary-judgement-case-00202-against-nuon-chea-and-khieu-samphan>>; the ECCC, Case 003, at <<https://www.eccc.gov.kh/en/case/topic/287>>; the ECCC, Case 004, at <<https://www.eccc.gov.kh/en/case/topic/120>>; *THE ELGAR COMPANION*, *supra* note 73, at 157, 159, 161–204.

⁷⁵ The ECCC, *Eighth Plenary Session Concludes*, at <<https://www.eccc.gov.kh/en/articles/eight-eccc-plenary-session-concludes>>.

⁷⁶ Lauren Crothers, *Most ECCC Projects Secure Funding*, *THE CAMBODIA DAILY*, Apr. 22, 2014, <<https://www.cambodiadaily.com/news/most-eccc-reparations-projects-secure-funding-56910/>>.

⁷⁷ Empathy entails a cognitive exercise whereby A recognizes the human point of view of B, meaning that the dialectics of brutality and sentimentality (that led to the Never Again! slogan after the Holocaust) is replaced by the realization that a value-neutral approach is impossible and that deference to “that which is given (politically, economically, etc.)” is tantamount to amoralism.

victims' rights entail *meta-obligations to try to create the conditions* that make fulfilment and enforcement practically possible; and this is exactly the kind of law-and-ethics symbiosis or synergy that the ECCC implemented. The package, requested by the Co-Lead Lawyers representing the civil parties at trial contained the following:

1. The institution of a National Remembrance Day. (No funding required).
2. A Public Memorials Initiative.
3. Construction of a Memorial in Phnom Penh for Khmer Rouge Victims (of forced evacuations): "For Those Who Are No Longer Here."
4. A Testimonial Therapy Project.
5. A project facilitating Self-Help Groups for Rehabilitation.
6. A Monument for Khmer Rouge Victims (of crimes against humanity) in Paris, France.
7. Permanent Exhibitions in five provinces to educate the public about the Khmer Rouge.
8. A Mobile Exhibition and Education Project related to transitional justice.
9. The Inclusion of a Chapter on Forced Transfer and Executions at Tuol Po Chrey within the Cambodian school curriculum.
10. The construction of a Community Peace Learning Center in Samron Khnong.
11. Publication of an Illustrated Booklet on adjudicated facts and civil party participation at the ECCC.
12. Publication of two Editions of the Case 002/01 Judgment.
13. Publication of and Inclusion of Civil Party Names on the ECCC's Website. (No funding required).⁷⁸

In 2019, the ECCC had been in operation for almost fourteen years. During this time period, it has charged, convicted and sentenced three defendants (thereby completing two cases (001 and 002/01-02) in the aftermath of Democratic Kampuchea (DK).

The retributive justice component has been affected numerically, in part, as a consequence of the age factor on behalf of the accused. Notwithstanding, the value of prosecutions of high-level perpetrators remains intact, although it is difficult to determine the exact extent to which *realpolitik* co-opted the ECCC. In 2018, Nina H.B. Jørgensen, an expert on the ECCC, wrote:

The Co-Prosecutors indicated that the last two of the cases, i.e., Case 003 and 004, would lead to a more comprehensive accounting of the crimes committed under the DK regime in the period 1975 to 1979. The snippets of publicly available information concerning the factual allegations in the latter cases certainly point to the validity of this statement but many factors both within and outside the control of the ECCC will influence the Court's willingness and ability to see this commitment through.⁷⁹

The doctrinal logic remains the same, though. On condition that more stakeholder consultations and learning lessons follow in the wake of a more comprehensive accounting of the crimes, the bar for expectations as regards reparations may be raised

⁷⁸ *Performance and Perception*, *supra* note 40, at 24.

⁷⁹ THE ELGAR COMPANION, *supra* note 73, at 160.

accordingly—thereby also introduce changes as regards what falls inside and outside the ECCC’s remit.⁸⁰ Without the anticipated post-justice measure, the call for “adequate, effective and prompt” reparations (*cf. Basic Principles* VII.11(b)) is probably going to mix frustration with controversy. Admittedly, the Court established a civil party participation scheme for mass crimes “essentially from scratch” (and so flaws seem inevitable).⁸¹ As for the participants themselves, they “expressed general satisfaction with their experience.”⁸² This is the kind of outcome that matters for the victim-centered approach and which therefore has to be put on the ECCC’s scoreboard—to be objectively fair. However, 2018 was also the year where the Pre-Trial Chamber issued its Closing Order declaring that the ECCC has no jurisdiction over Im Chaem (Case 004/01), thereby also concluding Case 004/01 (on June 28)—by dismissing it.⁸³ The status of the remaining cases is best described as a legal deadlock. This is to say that on 16 August 2018, the Co-Investigating Judges issued two separate Closing Orders in the case against Ao An (Case 004/02), due to a disagreement about whether Ao An is subject to the ECCC’s personal jurisdiction as a senior leader or one of the persons most responsible for crimes committed during the period of Democratic Kampuchea (DK).⁸⁴ Conflicting Closing Orders (of 31 May and 4 June 2018) were also issued for Yim Tith (Case 004)—with the Cambodian judge seeking to dismiss the charges—a pattern that is repeated in the other mentioned cases too.⁸⁵ Furthermore, after having received the Final Submissions of the National and International Co-Prosecutors, Meas Muth (Case 003) filed his response to these (on 12 April 2018).⁸⁶

The court’s tentative schedule calls for those three cases to be completed by March 2020, but so far there is no decision to move forward with any of them . . .⁸⁷

In the light of this, only one conclusion is possible: there are factors that influence the Court’s willingness and ability to deliver a more comprehensive accounting of the DK regime’s crimes. Meanwhile, some of the more progressive members of the judiciary, such as International Co-Investigating Judge Michael Bohlander, resigned from the ECCC after completion of Case 004 against Yim Tith.⁸⁸ It appears that the supermajority makes the

⁸⁰ Here assuming that the agenda of external donors is an honorable one, reflecting a high moral character. See 2004 Report of the Secretary-General, *supra* note 40, at para. 10.

⁸¹ *Performance and Perception*, *supra* note 40, at 42.

⁸² *Id.*

⁸³ The ECCC, Case 004/01, at <<https://www.eccc.gov.kh/en/case/topic/case0401>>.

⁸⁴ The ECCC, Case 004/02, at <<https://www.eccc.gov.kh/en/case/topic/1691>>.

⁸⁵ The ECCC, *Co-Investigating Judges Issue Two Separate Closing Orders in the Case against Meas Muth*, at <<https://www.eccc.gov.kh/en/articles/co-investigating-judges-issue-two-separate-closing-orders-case-against-meas-muth>>; the ECCC, Case 004, at <<https://www.eccc.gov.kh/en/case/topic/120>>.

⁸⁶ The ECCC, Case 003, at <<https://www.eccc.gov.kh/en/case/topic/287>>.

⁸⁷ Furthermore, final appeals for the three individuals already convicted are scheduled for late 2020. See Sok Khemara, *Procedural Deadlock Leaves Future of Khmer Rouge Tribunal in Doubt*, VOA CAMBODIA, June 21, 2019, at <<https://www.voacambodia.com/a/procedural-deadlock-leaves-future-of-khmer-rouge-tribunal-in-doubt/4967302.html>>; Open Society Justice Initiative, Briefing Paper (Jan 2019), at <<https://www.justiceinitiative.org/publications/recent-developments-extraordinary-chambers-courts-cambodia-january-2019>>; Updated Completion Plan, at <<https://www.ijmonitor.org/2019/05/extraordinary-chambers-in-the-courts-of-cambodia-developments-and-completion-timeline/>>.

⁸⁸ See <<https://www.eccc.gov.kh/en/articles/international-co-investigating-judge-resigns-upon-completion-case-004>>.

final outcome too predictable, because of the supermajority. Concerning reparations, this means that the deliberative equation is bound to contain one constant, *viz.*, politics that determine variables like law, economics, and ethics.

While making it realistic to infer that the cases are closed and that the ECCC has been generally “unsuccessful,” one 2019 observer wrote:

While the pursuit of justice for the genocide that occurred under Cambodia’s brutal Khmer Rouge continues to be a challenging process legally, a more encouraging sign is the fact that a new generation of scholars are continuing to shed light on what happened so that the memory of that period is still kept alive.⁸⁹

VI. THE MIXED LEGACY OF THE ECCC ON CRIMES OF SEXUAL VIOLENCE

At the ECCC, victims of sexual violence were not omitted from participation in the proceedings. As Silke Studzinsky notes, those “who apply to become a civil party and, therefore, a party to the proceedings, have to a large extent equal rights as appropriate like the prosecution and the defense.”⁹⁰ As civil parties, they “have a right to legal representation (. . .). They have full access to the electronic case files, including confidential materials, and can respond to all applications submitted by the other parties to raise any legal or factual matters *proprio motu*. (. . .) Most importantly in this context is the right during the investigation phase to submit investigative requests to the co-investigating judges in order to get cases of sexual violence addressed and investigated at the ECCC to get an appropriate indictment.”⁹¹

Perhaps in contrast to these procedural rights, the substantive law of the ECCC on crimes of sexual violence is succinct, if not to say deficient. It is indeed striking that, unlike the Statute of the ICC, which encapsulates a wide list of acts of sexual violence as crimes against humanity and war crimes and which predates it,⁹² the ECCC law only includes one sexual crime: the crime of rape as a crime against humanity.⁹³

Far from remedying what is admittedly a defective law, the ECCC seems to have erred on the side of caution—if not ultra-conservatism—in its adjudication of the crime of rape so much so that, to use Katrina Anderson’s words, the Chambers have probably contributed to further “[bury the] history of sexual crimes.”⁹⁴ In a 2004 analysis, she had predicted that:

⁸⁹ See Luke Hunt, THE DIPLOMAT, July 30, 2019, at <<https://thediplomat.com/2019/07/cambodia-and-the-khmer-rouge-between-justice-and-memory/>>.

⁹⁰ Silke Studzinsky, *Victims of Sexual and Gender-Based Crimes before the Extraordinary Chambers in the Courts of Cambodia: Challenges of Rights to Participation and Protection*, in SEXUAL VIOLENCE AS AN INTERNATIONAL CRIME: INTERDISCIPLINARY APPROACHES 175 (Anne-Marie De Brouwer, Charlotte Ku, Renée Römkens, & Larissa van den Herik eds., 2013).

⁹¹ *Ibidem*.

⁹² See Rome Statute, *supra* note 38, art. 7 (crimes against humanity) and art. 8 (war crimes).

⁹³ LAW ON THE ESTABLISHMENT OF EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA FOR THE PROSECUTION OF CRIMES COMMITTED DURING THE PERIOD OF DEMOCRATIC KAMPUCHEA, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), art. 5, available at <https://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf>.

⁹⁴ Katrina Anderson, *Turning Reconciliation on Its Head: Responding to Sexual Violence Under the Khmer Rouge*, 3(2) SEATTLE JOURNAL FOR SOCIAL JUSTICE 785, 788 (2004). For analyses of the ECCC’s narrow

[s]uch crimes will not figure prominently in the prosecutions for four principal reasons. First, as mentioned above, the EC's narrow mandate precludes the possibility of prosecuting those who actually perpetrated the sexual crimes—the lower-level cadre. Second, gaps in the EC Statute, such as the omission of rape as a domestic crime and the use of outdated terminology, would make the EC prosecutor's task extremely difficult if such prosecutions were undertaken. Third, the EC cannot possibly be immune from the hostility towards prosecutions on the basis of sexual violence that exists in Cambodia's legal system. Finally, the collection of evidence—always difficult in the case of sexual crimes—will be particularly challenging for the EC prosecutors given the passage of time between the commission of the crimes and the establishment of the tribunal, compounded by the emotional and psychological impact of testifying for victims.⁹⁵

Her analysis proved prophetic, and the judgments issued so far by the ECCC, in Cases 001 and 002, constitute ample evidence of the hurdles of prosecuting rape committed during the Khmer Rouge regime.

In Case 001, the accused—Kaing Guek Eav alias Duch—was convicted of one case of rape.⁹⁶ It is not the purpose here to discuss whether he should have been convicted of further cases and/or whether there was enough evidence to do so. Rather it is to reflect on the reasoning of the ECCC, which gave precedence to the principle of legality, admittedly to the detriment of an effective prosecution of rape as a crime against humanity. In this case, the Trial Chamber had considered that the alleged conduct “clearly satisf[ied] the legal ingredients of both rape and also of torture.”⁹⁷ On appeal, the Supreme Court Chamber addressed the “question of whether the Trial Chamber erred in holding that rape was a distinct crime against humanity within the ECCC's subject matter jurisdiction.”⁹⁸ In so doing, the Supreme Court Chamber referred extensively to the principle of legality to assess “whether rape existed *as a crime against humanity* under international law, Cambodian municipal law, or general principles of law at the time of the alleged criminal conduct during the period 1975–1979.”⁹⁹

The Supreme Court Chamber found that the “recognition of rape as a crime against humanity [under international law] did not begin to take shape until the 1990s”¹⁰⁰ and, in an extremely strict reading of the principle of legality, used this finding to refute the qualification of rape under international law to acts committed during the Khmer Rouge regime (1975–1979). Equally stringent was the Chamber's consideration of Cambodian domestic

understanding of crimes of sexual violence, see, e.g., THE ELGAR COMPANION, *supra* note 73, at 242–252; Rachel Killean, *An Incomplete Narrative: Prosecuting Sexual Violence Crimes at the Extraordinary Chambers in the Courts of Cambodia*, 13 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 331 (2015); Valerie Oosterveld & Patricia Viseur Sellers, *Issues of Sexual and Gender-Based Violence at the ECCC, in THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA—ASSESSING THEIR CONTRIBUTION TO INTERNATIONAL CRIMINAL LAW* 321–351 (Simon M. Meisenberg & Ignaz Stegmillner eds., 2016); Studzinsky, *supra* note 90.

⁹⁵ Anderson, *supra* note 94, at 787.

⁹⁶ The ECCC, Case 001, 001/18-07-2007-ECCC/TC, D188, Trial Chamber, Judgment, July 26, 2010, para. 567.

⁹⁷ *Ibid.*, para. 366.

⁹⁸ The ECCC, Case 001, 001/18-07-2007-ECCC/SC, Supreme Court Chamber, Judgment, Feb. 3, 2012, para. 174.

⁹⁹ *Ibidem*. Emphasis added.

¹⁰⁰ *Id.*, para. 179.

law. Invoking a “discrepancy between the elements of the crime of rape under municipal criminal codes, including the 1956 Penal Code of Cambodia, and the elements of crimes against humanity in 1975–1979,”¹⁰¹ the Supreme Court Chamber, while recognizing that “rape was criminalised under Cambodia’s 1956 Penal Code, which was in effect during the ECCC’s temporal jurisdiction”¹⁰² and that “rape had been widely criminalised in other municipal jurisdictions by 1975,”¹⁰³ concluded that “municipal law cannot provide relevant authority in this case.”¹⁰⁴ With the same rigour, the Chamber moved on to general principles of law and found that “proscriptions against rape at the municipal level are insufficient to show the emergence of rape as a category of crimes against humanity by recourse to the general principles of law recognised by the community of nations.”¹⁰⁵

This inflexible legalistic approach led the Supreme Court Chamber to the conclusion that:

[t]he Trial Chamber erred in holding that rape was a distinct crime against humanity under customary international law from 1975–1979. Accordingly, the Trial Chamber erred in subsuming rape as a distinct crime against humanity under the crime against humanity of torture. However, the Trial Chamber did not err in concluding that an instance of rape was covered by the definition of torture that existed under customary international law by 1975, as articulated in the 1975 Declaration Against Torture. Furthermore, given that rape as a crime against humanity had not yet crystallised at the time, the Trial Chamber did not err when it did not cumulatively convict the Accused for torture and rape as separate crimes against humanity.¹⁰⁶

The ECCC’s reasoning may be seen as legally convincing and, ultimately, the Court did prosecute the crime of rape as an act of torture. Yet, its absolute refusal to recognize the criminality of rape as a crime against humanity in 1975 is by and of itself problematic. First, the Court relies on too strict a reading of the principle of legality: had such an interpretation been made by the Nuremberg Tribunal, crimes perpetrated by the Nazis would not have qualified as crimes against humanity, and it is very likely that international criminal

¹⁰¹ *Id.*, para. 182.

¹⁰² *Id.*, para. 181.

¹⁰³ *Ibidem.*

¹⁰⁴ *Ibid.*, para. 182.

¹⁰⁵ *Ibidem.*

¹⁰⁶ *Ibid.*, para. 213. See also *ibid.*, paras. 183 and 207. For further analysis of this judgment, see Sarah Deibler, *Rape by Any Other Name: Mapping The Feminist Legal Discourse Regarding Rape in Conflict onto Transitional Justice in Cambodia*, 32(2) AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 501 (2015).

Finding that the instance of rape in Case 001 involved government participation and had as its purpose a nexus to extracting confessions or inflicting punishment, the Supreme Chamber upheld the prosecution of the act of rape as torture, but overturned the subsuming of the distinct crime of rape within that conviction. At the ECCC, rape may not be subsumed by, but may be the *actus reus* of torture when the other elements of torture as defined in customary international law of 1975 are present. Problematically, the ECCC’s reading of the crime against humanity of torture as it existed in 1975 means that torture at the ECCC has a less expansive definition than it enjoys today under the Convention Against Torture.

See *id.*, at 523 (footnotes omitted).

law as a whole would have remained dormant.¹⁰⁷ Second, its reasoning seems at odds with the evolution of international criminal law, which tends to recognize the prohibition of rape as a peremptory norm of international law, and thus as one that transcends both time and place.¹⁰⁸ Third, and as noted by Valerie Oosterveld and Patricia Viseur Sellers, “the judges implicitly and explicitly collapsed their analysis of rape under other more gender-neutral provisions of crimes against humanity, thereby losing some of the expressive and legal value of naming rape as a crime against humanity.”¹⁰⁹

By contrast, and admittedly in line with its more “relaxed approach”¹¹⁰ to the legality principle, the Trial Chamber in Case 002/02 against Nuon Chea and Khieu Samphan recognized the criminality of forced marriages, even in the complete silence of the law, holding that “the crime against humanity of other inhumane acts was committed nationwide through conduct characterized as forced marriage.”¹¹¹ Going further, the Trial Chamber also qualified as other inhumane acts as crimes against humanity the rapes perpetrated in the context of these forced marriages,¹¹² finding that: “the Party’s policy to regulate family-building and marriage in an attempt to control the people and increase DK’s population resulted in a nationwide system, implemented by the CPK’s entire administrative network of zone, sector, district and local-level secretaries, CPK cadres and RAK forces, which involved *widespread forced marriage and rape*.”¹¹³ This dual criminalization of forced marriages and rapes as other inhumane acts as crimes against humanity is to be welcomed. Yet, its scope is limited in two ways. First, the Trial Chamber invoked its own definition of rape to exclude men from its ambit, specifying that “men could not be the victims of rape in the context of forced marriage.”¹¹⁴ Second, only rapes perpetrated within forced marriages are here criminalized. Maria Elander offered the following explanation for this restriction:

Whereas the Closing Order made possible a hearing of the marriages during trial, no such thing occurred for the many documented rapes outside of marriage. This was not because the co-investigative judges did not believe rape had occurred, but because they struggled to see a link between these rapes and the surviving former leaders of the regime who were being charged. According to the co-investigative judges, “Intimate

¹⁰⁷ See Caroline Fournet, *The Judicial Development of the Law of Defences by the ICTY and the ICTR*, in JUDICIAL CREATIVITY AT THE INTERNATIONAL CRIMINAL TRIBUNALS 229, 231–232 (Shane Darcy & Joseph Powderly eds., 2010).

¹⁰⁸ See The ICC, Prosecutor v. Bosco Ntaganda, ICC-01/04-02/06, Trial Chamber VI, Second decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9, 4 January 2017, paras. 51–52.

¹⁰⁹ Oosterveld & Viseur Sellers, *supra* note 94, at 335.

¹¹⁰ The expression is from William Schabas, here analyzing the *ad hoc* tribunals:

Although formally professing rigid adherence to the *nullum crimen* principle, in practice judges at the *ad hoc* tribunals have taken a relatively relaxed approach, much in the spirit of their predecessors at Nuremberg.

See WILLIAM A. SCHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS—THE FORMER YUGOSLAVIA, RWANDA, SIERRA LEONE 63 (2006).

¹¹¹ The ECCC, Case 002/02, 002/19-09-2007/ECCC/TC, Trial Chamber, Judgment, Nov. 16, 2018, para. 3694.

¹¹² *Ibid.*, paras. 3698–3700. For an analysis, see Oosterveld & Viseur Sellers, *supra* note 94, at 321.

¹¹³ *Ibid.*, para. 279. Emphasis added.

¹¹⁴ *Ibid.*, para. 3701.

relationships outside of marriage were considered to be against the collectivist approach of the CPK and therefore deemed ‘immoral’ and associated with behaviours from the old regime”.¹¹⁵ As justification for this view, the judges pointed to the existence of certain moral codes, which they translated as “Do not take liberties with women” and “We must not do anything detrimental to women”.¹¹⁶ Furthermore, despite the fact that the status and position of the codes during the Khmer Rouge regime is disputed, the co-investigative judges considered them to reflect the official policy of the CPK. On that basis, they concluded the policy “was to prevent its [rape’s] occurrence and to punish the perpetrators. Despite the fact that this policy did not manage to prevent rape, it cannot be considered that rape was one of the crimes used by the CPK leaders”.¹¹⁷ And so, no charges were brought against the leaders in relation to these rapes.¹¹⁸

This explanation is most probably the correct one. Indeed, in its judgment, the Trial Chamber referred to some form of “moral code,”¹¹⁹ which, under the Khmer Rouge, prohibited extramarital relationships and rape. As noted by Anderson, “the Khmer Rouge was widely known to have espoused a policy strictly forbidding rape and even went so far as to outlaw sexual relations of any kind outside of marriage. The regime viewed sex as subversive behavior that would distract people from what ought to have been the focus of their work, the agrarian revolution.”¹²⁰ Be that as it may, the judicial understanding that such a prohibition is to be equated with non-occurrence is concerning. Prohibition of a particular conduct has never stopped its commission and judges—perhaps even more when sitting in an international criminal tribunal—should be particularly aware of this reality. Furthermore, prohibition can have adverse consequences. With respect specifically to the Khmer Rouge, Anderson reports that:

[a]s researcher Kalyanne Mam concluded after conducting the most extensive set of interviews of women survivors to date, *the Khmer Rouge policy had the perverse effect of encouraging sexual crimes against many women*. In effect, the Khmer Rouge policy “drove the practices underground.” In order to conceal evidence, soldiers killed women immediately after raping them.¹²¹

In any event, it is unsettling—to say the least—that, to justify the non-inclusion of certain crimes within its jurisdictional scope, an international(ized) criminal court invokes the “moral codes” of perpetrators of atrocities. In the words of Edward Weisband, “[t]o assume that perpetrators act according to a moral code, however, compounds the original harm.”¹²² The judicially operated linkage between morality and the perpetration of

¹¹⁵ The ECCC, Case 002/02, 002/19-09-2007-ECCC-OCIJ, Office of the Co-Investigating Judges, Closing Order, Sept. 15, 2010, para. 191. Footnote in original.

¹¹⁶ *Ibidem*. Footnote in original.

¹¹⁷ *Ibid.*, para. 1429. Footnote in original.

¹¹⁸ Maria Elander, *In Spite: Testifying to Sexual and Gender Based Violence during the Khmer Rouge Period*, in *QUEERING INTERNATIONAL LAW* 110 (Dianna Otto ed., 2017).

¹¹⁹ See, e.g., the ECCC, Case 002/02, Judgment, *supra* note 111, para. 3562, notes 11.954, 11.956.

¹²⁰ Anderson, *supra* note 94, at 789.

¹²¹ *Id.*, at 790. Emphasis added.

¹²² EDWARD WEISBAND, *THE MACABRESQUE—HUMAN VIOLATION AND HATE IN GENOCIDE, MASS ATROCITY, AND ENEMY-MAKING* 324 (2019).

atrocities is disconcerting, and it can only be hoped that it will remain a regrettable—but single—occurrence.

VII. CONCLUSION

Reflecting on the effects of the ECCC and the attempt to build a legacy on the basis of these effects is not an easy task, and such a reflection might admittedly be too early to be fully conclusive. In this chapter we have attempted to approach the issue from different angles, to balance (academic) expectations and (practical) outcomes, while bearing in mind that trying perpetrators of some of the most horrendous acts the world had seen decades after they had been committed was a gigantic endeavour, and perhaps one with unsurmountable difficulties.

As demonstrated in the chapter, the contentious political negotiations of the ECCC (that were also tied to the preferences of particular professional groups) had significant effects on the professional dynamics of the Chambers and also structured the interpretation of important legal questions. The ECCC has remained split into two very different professional groups that work under distinct professional conditions. On the national side, professionals in the Chambers work in a highly hierarchical system where the political preferences of the Cambodian government makes its way into the courtroom and daily work. On the international side, professionals working in Cambodia are under a double pressure from being marginalized by the mainstream of international criminal law and being structurally embedded in a court system that works against them. As a result of this, the international group deploys different professional strategies aimed at having or projecting impact in and beyond the Cambodian context. This effort of creating and showcasing effects and innovations targeted in particular the broader field of international criminal law. These dynamics are also visible in some of the key challenges to justice where the national and international side hold very different perceptions of what justice, in fact, means in the context of Cambodia. Such differences are especially clear in the controversies over Cases 003 and 004. One way to mediate this divide has been to establish and promote particular initiatives that could demonstrate the value of justice efforts in Cambodia to stakeholders both within and outside the country, such as witness and civic participation in trials. The divide between national and international perceptions of justice, inscribed in the professional groups working in the ECCC, can also be observed with regard to sexual violence and rape, and the approach to reparations.

With respect to the prosecution of crimes of sexual violence and of rape, the ECCC leaves a mixed heritage. If the Court proved pro-active in recognizing the criminality of forced marriages despite the lack of explicit prohibitions, it showed—as this chapter has argued—more conservatism in its adjudication of the crime of rape. Its reasoning on the matter raises the issue of the *ethics* of judicial reasoning, regardless of the outcome (*i.e.*, acquittal or conviction). One can indeed meet with skepticism the 2018 judicial affirmation by an international(ized) criminal court that rape cannot be considered as a crime against humanity under international law prior to the 1990s. Not only can this be debated from a strictly legal point of view, but it can be viewed as unduly strict and perhaps unethical. Likewise, the 2018 judicial assertion by an international(ized) criminal court that men cannot be considered as victims of rape is problematic. Finally, the judicial reliance by an international(ized) criminal court on the perpetrators' code of moral conduct further raises the issue of ethics. This is not to say that international criminal trials could, or indeed should, be held for other purposes than to prosecute individuals and assess their individual criminal responsibility. Still, even when understood *stricto sensu*, judgments outlive

the cases and constitute judicial precedents. In the case of the prosecution of rape before the ECCC, such precedents could lead to questionable considerations and assumptions.

In a court characterized by diverging interpretations of justice, compromises with regard to post-conflict reparations seemed inevitable. In the context of the ECCC, its broad notion (encompassing judicial and non-judicial measures) was accompanied by a “unique and distinct mandate on civil party action.” Despite having a principle to “break new ground” in its provision of victims’ rights, mixing *realpolitik* and economic realism was not a recipe for success. The adoption of amendments to allow reparations to be funded by external and third-party donors pulled in the opposite direction of what was intended in ECCC provisions. Instead, a silver lining was referred to in the general satisfaction of the civil party participants. However, this more subjective *cum* experiential aspect has to be assessed in a larger and country-specific context of culturally internalized low expectations. From the perspective of ethics alone, objective needs would determine victims’ rights in terms of reparations, and not perceptions about these needs. In the case of the ECCC, it is nevertheless important to ascertain the discrepancy between the (comparatively) modest accommodation of the priorities and preferences that victims expressed for socioeconomic measures (poverty reduction, improvements to healthcare, education, and infrastructure, *etc.*) and the extremely generous license for relativism on behalf of perpetrators (*cf.* assumption that they act according to a moral code) whose in-group norms helped to get them off the hook by virtue of prohibiting the very actions they were accused of (*cf.* rape, *etc.*). The reversed “logic” was a significant impediment for the reparations regime of the ECCC.

If a similar form of relativist consideration had been extended to the priorities and preferences of victims, the stakeholder constituency that both law and ethics aim to protect (*cf.* victim-centered approach) would have benefited.

From its very inception, the ECCC has been fraught with problems. The contentious political circumstances behind the Chambers were in many ways written into its professional balances, legal framework, and two strongly opposed perceptions of what justice meant in Cambodia. This is not to say that the enterprise was bound to fail from its very inception but rather that the considerable obstacles it faced were closely related to its genesis and development. In this context, the effects of the ECCC should perhaps be seen as a reflection of its mixed legal and social composition. Despite these, professionals in and around the ECCC have worked to produce new outreach programmes and jurisprudence. The main question is if the innovations of the ECCC—in spite of inherent difficulties and complications—can have effects in the broader landscape of international criminal law, in particular in hybrid systems where international perceptions of criminal law meet domestic fields of law and criminal justice.