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# **Constructing Victimhood at the Khmer Rouge Tribunal: Visibility, Selectivity and Participation**

## **Abstract**

*This paper considers the actors and contexts which frame victimhood within transitional justice mechanisms, using the Khmer Rouge Tribunal as a case study. Drawing on critical victimology's concern with the cultural, political and legal construction of victimhood, this paper explores how heterogeneous legal and political elites can create layers of exclusion, shaping which victims are seen, and which are unseen, within official responses to atrocity. While the politics of victimhood in domestic and transitional contexts has been acknowledged within the literature, this paper's actor-oriented approach contributes a thicker understanding of how 'worthy' victims are selected from all those who have suffered from mass atrocity. In particular, it considers how political compromises, jurisdictional limits, prosecutorial choices, and the creation of a civil party participation system have shaped victim visibility within the Khmer Rouge Tribunal.*

## **Key Words**

International criminal law; critical victimology; victimhood; selective justice; Khmer Rouge Tribunal

## **1. Introduction.**

Since World War Two highlighted the grave harm so frequently inflicted on civilians during times of conflict, there has been a growing willingness to prosecute atrocities under international criminal law (ICL). This has been reflected in the proliferation of ICL mechanisms, including ad hoc Tribunals, hybrid institutions and the permanent International Criminal Court (ICC). Such institutions have often been analysed for their ability to bring 'justice' to victims, and an ever-growing literature has developed in relation to victim-related issues, including reparations (Moffett, 2017; McCarthy, 2012), complex political victims (e.g. Bernath, 2015; Meyers, 2011), the role of the victim within the courtroom (Trumbull, 2008; McGonigle Leyh, 2011), and victims' perceptions of justice (Stover, 2005; Hodžić, 2010). Parallel developments in victim-centric discourse and practice can be seen within ICL institutions. Victims have become a progressively central figure in courts' legitimising

practices,<sup>1</sup> while the inclusion of victim participation provisions in several courts have been heralded as signalling a move towards a more ‘victim-orientated justice’ (Vasiliev, 2009). Such developments have been accompanied by increased recognition within international human rights law of victims as holders of rights, including the rights to protection, participation, representation and reparation.<sup>2</sup>

Despite this nominal move towards ‘victim-centrism’, the extent to which victims are rendered visible within these processes remains contested (McEvoy and McConnachie 2013; Kendall and Nouwen, 2013; Fletcher, 2015), and courts have found their ability to deliver justice subjected to criticism from victimised populations (Kutnjak Ivković and Hagan, 2011; Killeen, 2016). This disjuncture between victim discourse and the delivery of ‘justice’ can in part be attributed to the selective delivery of justice offered by legal institutions (Robins, 2017: 45). Only a small number of atrocities fall within the scope of ICL, and of those only some will be acknowledged as such by the international community (Cryer, 2005; Simpson, 1997). Even those victims whose atrocities fall within ICL may be excluded from recognition and redress (Robins, 2017), as prosecutorial strategies prioritise specific harms and perpetrators over others (Pritchett, 2008; Côte, 2005). Those whose victimisations are prosecuted may continue to find themselves excluded from or marginalised by the trial process, as adversarial procedures may reduce their visibility within the courtroom (Dignan, 2005). These institutional choices with regards to jurisdictional limits, charges, and modes of victim participation, create what Kendall and Nouwen (2013) have termed a ‘pyramid’ of victimhood, with victims of harm at the bottom, and those recognised by ICL institutions as worthy of redress at the top.

This paper situates these institutional choices, the pyramid of victimhood they create and the selective justice they shape within broader criminological and victimological debates, drawing from critical victimology in particular. Rising out of a desire to critique definitions of symbolic or ‘ideal’ victims and perpetrators (Christie, 1986: 18), this branch of victimology is concerned with who has the power to apply the label ‘victim’ and what considerations influence that

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<sup>1</sup> See e.g. International Criminal Tribunal for the Former Yugoslavia, First Annual Report to the UN General Assembly, a/50/365-s/1995/728, 1995, paras. 1 and 198–199; International Criminal Tribunal for Rwanda, Third Annual Report to the UN General Assembly a/53/429-s/1998/857, 1998, para. 160.

<sup>2</sup> See e.g. *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UNGA Res. 40/34, 29 November 1985; UNOHCHR, *The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Final Report of the Special Rapporteur, Mr M.Ch Bassiouni*, UN Doc. E/CN.4/2000/62, 5 March 1993; UNOHCHR, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN Doc. E/CN.4/2005/102/Add.1, 18 February 2005; *UN 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*, UNGA Res. 60/147, 16 December 2005.

determination (Miers, 1989; Mawby and Walklate, 1994). Highlighting ‘hierarchies of victimhood’ (Carrabine et al., 2004: 117), which distinguish between those victims who are ‘innocent’ (McEvoy and McConnachie, 2012: 531-2) ‘good’; (Madlingozi, 2007) or ‘worthy’ (Tilly, 2008) and those that are not, victimologists have demonstrated that who acquires the label of victim depends not only on the victims’ characteristics, but on the reactions of others (McAlinden, 2014). Thus, there is a political dimension to the hierarchy of victim legitimacy, with the very term ‘victim’ being open to manipulation by political and legal elites in the pursuit of other goals (Dignan, 2005; Walklate, 2011: 189). In response, critical victimologists have sought to uncover victimizations that may be rendered invisible due to the political climate, social factors, or the marginalised status of the victims (Holstein and Miller, 1990; McGarry and Walklate, 2015).

Although critical victimology developed in the context of Western domestic criminal justice, in recent years it has provided a framework for exploring the role of states in perpetrating crime (Kauzlarich, Matthews and Miller, 2001) international responses to atrocity (Letschert et al. 2011) and the emergence of victim hierarchies within transitional justice contexts (van Wijk, 2013; McEvoy and McConnachie, 2013). International criminal courts are increasingly acknowledged as having the power to produce and legitimise categories of victims, condemn perpetrators and shape understandings of conflicts (Mibenge, 2013). While the creation of such narratives is nominally based on issues of fact and law, hegemonic power relations contribute to the collation and interpretation of those issues (Mibenge, 2013: 4). Legal professionals, victor governments, other states, international organisations and donors all take part in the negotiating of law and fact, thus shaping which victims are legitimised within justice processes.

While the literature has acknowledged the political and legal construction of victimhood within both domestic and transitional contexts, the precise processes through which some victims are selected as worthy of recognition and redress is a relatively neglected dimension within current discourse. This paper seeks to address this gap, providing a ‘thicker’ understanding of victim visibility within ICL (Geertz, 1993; McEvoy, 2007) by exploring a) how victim recognition is shaped by the specific political context within which a court operates, and b) how victimhood continues to be ‘produced, perceived and interpreted’ by the various actors engaged in the work of the court (Geertz, 1993: 7). This actor-oriented approach allows for an exploration of the different stakeholders within ICL, their heterogeneous interests, and their influence over responses to victimisation. Institutions cannot think for themselves, but are shaped by the approaches of those engaged in their work (Douglas, 1987). Indeed, the new, evolving and

often ad hoc nature of ICL grants its practitioners an influence beyond what would be found within domestic jurisdictions. Thus, an analysis of how the pyramid of victimhood has been shaped by various actors can highlight law ‘as a dynamic and, in some ways, even contingent process’ (Palmer, 2015:15). As will be explored through this paper, what is revealed through this analysis is a ‘layered’ process of victim selectivity, as political actors, lawyers, judges and civil society actors have constructed and interpreted responses to mass victimisation.

To conduct this analysis, this paper focuses on the Extraordinary Chambers in the Courts of Cambodia, or ‘Khmer Rouge Tribunal’ (KRT) as a case study. The Khmer Rouge Tribunal is a hybrid court (Raub, 2008-2009) established through an Agreement between the UN and the Royal Government of Cambodia (RGC) to prosecute atrocities perpetrated during the Khmer Rouge regime (1975-1979). To date, two cases have been tried at the KRT. Case 001 concerned the former chairman of the S-21 detention centre, KAING Guek Eav, who was sentenced to life imprisonment in 2012.<sup>3</sup> Case 002 relates to crimes ranging across Cambodia, and the original accused were four former high ranking Khmer Rouge: NUON Chea, KHIEU Samphan, IENG Sary, and IENG Thirith. However, IENG Thirith was found unfit to stand trial in 2011, and the case was terminated against both her and IENG Sary following their deaths in 2015 and 2013 respectively.<sup>4</sup> Due to fears about trial management and the advanced age of the remaining defendants, Case 002 was split into a series of sub-trials. The first concluded in 2016, finding the accused guilty of crimes against humanity,<sup>5</sup> and a judgment in the second is expected in 2018.

The KRT is expected to deliver somewhat broader social goals than are usually expected of a court. There is a high expectation that it will contribute to ‘national reconciliation, stability, peace and security’,<sup>6</sup> and the Court is therefore expected to be ‘closer to the victims and the general population in Cambodia’ (Zhang, 2016: 521). Yet, despite these expectations of long-term and general benefit, institutional choices with regards to jurisdictional limits, charges, and

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<sup>3</sup> Case 001, Appeal Judgement, 001/18-07-2007-KRT/SC, 3 February 2012.

<sup>4</sup> Case 002, Decision on IENG Thirith's Fitness to Stand Trial, 002/19-09-2007/KRT/TC, 17 November 2011; Case 002, Termination of the Proceedings Against the Accused IENG Sary, KRT Trial Chamber, 002/19-09-2007/KRT/TC, 14 March 2013; Case 002, Termination of the Proceedings Against the Accused IENG Thirith, 002/19-09-2007/KRT/TC, 27 August 2015.

<sup>5</sup> Case 002/01, Trial Judgement, 002/19-09-2007/KRT/TC, 7 August 2014; Case 002/01, Appeal Judgment, 002/19-09-2007/KRT/SC, 23 November 2016.

<sup>6</sup> See Letter from the Secretary-General addressed to the President of the General Assembly, UN Doc. A/52/1007, 31 July 1998.

access to victim participation have inevitably produced Kendall and Nouwen's pyramid of victimhood, acknowledging, but also excluding a range of victimisations.

This paper proceeds as follows. Section two explores the role of political and legal elites in framing which victimisations are acknowledged as international crimes and subjected to prosecution within the KRT. To do so, it highlights the limits that have been placed on the Court's temporal and personal jurisdiction, the political contexts behind those limitations, and how prosecutorial discretion has further shaped the selective justice offered by the Tribunal. Section three then turns to the visibility of victims within the courtroom. The Court's creation of a civil party system gives victims the opportunity to participate in its work as parties with similar rights to the prosecution and defence. Thus, the question of who is recognised as a victim takes on significant practical relevance, as recognition may entitle individuals to a number of procedural and substantive rights. Section three explores the crucial role played by the judiciary in the creation and implementation of this system, and considers the extent to which victims have been rendered visible through direct participation, and through their legal representatives. The analysis adopts a critical victimological lens throughout, while also drawing from broader transitional justice and socio-legal literature to enhance its analysis. It also draws from interviews conducted in Cambodia in 2013 and 2014 with court practitioners (18) and civil society actors (7), who were asked to reflect on the mandate and practice of the Tribunal, as well as the role of victims within it.<sup>7</sup> Through this analysis, it seeks to expose how heterogeneous actors pursuing a variety of not necessarily aligned goals, have contributed to a layered process of selectivity, which each layer shaping the pyramid of victims who are able to access recognition and redress, and determining the victimisations we 'see' as opposed to that which we do not 'see' (Mawby and Walklate, 1994: 19).

## **2. Selective Justice and the Construction of Victimhood**

Critical victimology acknowledges criminal law as something created and enforced on the basis of social convention and political considerations (Doak, 2008). Thus, while most of us will suffer harm of some kind throughout our life, only some of these harms will be defined as criminal (Hillyard et al, 2004), and only some of those who perpetrated criminal acts will find themselves prosecuted. While selective enforcement of law and prosecutorial discretion is established in many legal systems, issues arise when the selectivity is arbitrary or

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discriminatory (Gelsthorpe and Padfield, 2003: 5). From a victim-centric perspective, selective enforcement renders certain harms unrecognised and without redress (Cryer, 2005: 193).

This critique of selectivity in criminal law is mirrored within the transitional justice literature (Cryer, 2005; Damaska, 2008; McCormack, 1997, Simpson, 1997). As McCormack (1997, 683) has noted, selectivity can be ‘found in relation to the acts the international community is prepared to characterise as “war crimes”, and secondly, in relation to the particular alleged atrocities the international community is prepared to collectively prosecute.’ Such critiques are linked to the concept of victors’ justice, and the argument that only ‘weak states’ or the losers of a conflict will find themselves subjected to prosecution (Damaska, 2008, 361). While noting that the very definitions given to international crime naturally already exclude a multitude of grave harms (e.g. harm caused by financial crises or poverty) (Kendall and Nouwen, 2013: 242) this section focuses on McCormack’s definition of selectivity as limiting the acts that will be identified as falling within the definitions of international crimes, and the acts that will then be prosecuted. In doing so, it considers how the pyramid of victims has been shaped first by the limitations placed on the KRT’s jurisdiction, and then by prosecutorial decisions around which suspects and crimes to prosecute.

### *The Politics of Victim Recognition*

The Khmer Rouge era in Cambodia perpetrated harm against millions of individuals, through a range of criminal acts. However, the years leading up to the Khmer Rouge regime also saw civilians suffer the brunt of armed struggle between a repressive monarchy and communist insurgents (Form, 2009), a four-year US bombing campaign (Kissinger, 1979; Owen and Kiernan, 2006), and the authoritarian violence of a US-backed right-wing military government (Chandler, 1991). While Vietnam’s toppling of the Khmer Rouge in 1979 may have ended one violent regime, it was not until the 1990s that a tentative peace returned to Cambodia (Ciorciari and Heindel, 2014). This is in part attributable to the Cold War politics which saw the Khmer Rouge recognised as the legitimate government of Cambodia long after their defeat, while aid flowed in from states fearing a Vietnamese expansion (Fawthrop and Jarvis, 2005; Kunst, 2013). Thus, there has been a continuation of harm which cannot be attributed to the Khmer Rouge alone. Yet, while other acts of violence perpetrated against Cambodians arguably fall within the parameters of ICL (Owen and Kiernan, 2006; Fawthrop and Jarvis, 2005), they are not captured by the jurisdiction of the KRT, nor has legal accountability been pursued through other means.

This selectivity can in part be attributed to political interests. Although the new government prosecuted two Khmer Rouge leaders in the immediate aftermath of the regime (Gottesman, 2003), domestic policies developed to focus on encouraging the defection of Khmer Rouge cadres through amnesties, and reconciliation through ‘burying the past’ (Linton, 2004). Internationally, Cold War considerations prevented most states from engaging with Cambodia’s violent past for many years (Fawthrop and Jarvis, 2005). With the thawing of the Cold War came new political agendas, and an increased international wish to hold the Khmer Rouge accountable. Domestically, trials were viewed by the newly formed government as a means of gaining foreign credibility, and threatening remaining Khmer Rouge into defecting (Ratner, 2007: 215; Strangio, 2014: 241). Yet a desire to limit the extent of this accountability was evident from early in this process. The initial idea of a truth commission received little support internationally or domestically, arguably due to fears about whether too much ‘truth’ might be revealed (Klosterman, 1998). A limited number of prosecutions suggested a means of both delimiting accountability and creating a politically acceptable narrative (Ciorciari and Heindel, 2014: 20-21), and negotiations commenced between the UN and the RGC in 1997, eventually culminating in the KRT.<sup>8</sup>

The Tribunal’s mandate is specifically limited to trying senior leaders of the Khmer Rouge and those most responsible for domestic and international crimes committed during the period from 17 April 1975 to 6 January 1979.<sup>9</sup> By restricting the time frame, and referencing the Khmer Rouge specifically, the drafters of the KRT’s Law made a clear statement as to which victimisations would have their harm recognised through criminal proceedings. Despite the various harms perpetrated against the Cambodian population, these jurisdictional limits exclude atrocities perpetrated before and after the regime, as well as crimes perpetrated by foreign actors (Bates, 2007). Such a selective response to atrocity is in part a pragmatic move to avoid overburdening an institution with unmanageable caseloads (White, 2017: 138). However, in the case of the KRT it is also in part reflective of the agenda of political elites: for the RGC, the limited jurisdiction prevented a focus on crimes committed by those who overthrew the Khmer Rouge regime or during the war that followed (Heder, 2011), while the US, who played a significant role in the KRT negotiations, avoided attention being drawn to their bombing campaign and support for the military government (Strangio, 2014: 243). Such

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<sup>8</sup> *Agreement between the UN and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea*, 6 June 2003.

<sup>9</sup> *Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea*, Law NS/RKM/0801/12, 10 August 2001



jurisdictional restrictions reflect McCormack's first element of selectivity: the limiting of acts identified as international crimes. Indeed, they have been cited by members of the KRT's defence teams as impacting on the overall legitimacy of the process:

*The legitimacy of this tribunal can be questioned, first of all because of the temporal jurisdiction; nothing before 1975 or after 79 is subject of any debate, where it is obvious that crimes against humanity were committed.*<sup>10</sup>

Mawby and Walklate's (1994) seminal work in critical victimology places state actors in a central role in contributing to the victims who are seen compared to those who are not, while subsequent critical work has continued to highlight the role of political motivations in what is deemed criminal (Doak, 2008: 23). Within transitional justice, critiques that international courts provide selective justice and are influenced by political considerations are not unique to the KRT, but are made throughout criminal courtrooms and the literature (Meernick, 2003; Cryer 2005; Schabas, 2009-2010; Kramer and Killeen, 2012). Indeed, 'each war crimes trial is an exercise in partial justice to the extent that it reminds that the majority of war crimes go unpunished' (Simpson, 1997). Yet such critiques are worth reiterating. While the focus is often on the implications of selectivity for the legitimacy of the ICL project (Cryer, 2005; Brownlie, 2003; Wilkins, 2001, Damaska, 2008), such limitations also have very real implications for those most affected by mass atrocity: the victims themselves. In Cambodia, this has been demonstrated through many years of impunity, through the explicit rejection of a truth recovery mechanism, and through the exclusion of judicial consideration of the harms perpetrated by foreign actors, by lower-level cadres, or pre-1975 and post-1979.

### *Prosecutorial Selectivity and the Visibility of Harm*

McCormack's second element of selectivity, relating to 'the particular alleged atrocities the international community is prepared to collectively prosecute', also has resonance within the KRT. As with many domestic criminal systems, international criminal prosecutors are not under an obligation to investigate or prosecute every allegation of crime which falls within their mandate. Such an approach would overburden and potentially paralyse institutions and the graver the crimes and higher the number of perpetrators and victims, the more selective they are expected to be (Jallow, 2005). This 'sordid paradox' (Aptel, 2012: 1360) has serious implications for the victimisations rendered visible by courts: prosecutions have significant

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<sup>10</sup> Interview with Lawyer (Defence) 8 November 2013. See also Closing Statement of Co-Defence Counsel, Koppe, Trial Transcript Day 224, 002/19-09-2007-ECCC/TC, 31 October 2014, at 45.

weight in shaping accepted narratives of a conflict or regime, and thus determining which victims are acknowledged as worthy of redress, and which are ‘symbolically rejected’ (Aptel, 2012: 1372). However, despite the importance such decisions may have for victims, critical victimologists have noted that since the legal profession’s ‘theft of the conflict’ from victims (Christie, 1977), victims’ wishes are often considered a ‘secondary topic’ (Fattah, 1992, 198) in decisions around who and what to prosecute. In relation to *who*, there is a tendency within ICL to prioritise individuals who held positions of power (Damaska, 2008), while victims may also find their perpetrators excluded from prosecution due to political considerations (Gelsthorpe and Padfield, 2003: 5). In relation to *what*, prosecutors have normally focused on a few ‘illustrative’ or ‘representative’ events (Waldorf, 2011; Côte, 2005) due to factors such as jurisdictional limits, evidentiary sufficiency, resource constraints, legal principles, and the comparative gravity of different crimes (Jallow, 2005: 149-153). While such prosecutorial strategies may reflect legitimate concerns, they also reveal attitudes towards which harms should be condemned, and which victimisations should be included within the pyramid of victimhood.

In relation to *who* should be prosecuted, the influence of political considerations is highly visible within the KRT. During the Tribunals negotiations, while the UN negotiators had hoped for between 20 and 30 prosecutions, the RGC consistently argued that too wide a net would ‘invite social unrest’ (Ciorciari, 2009, 72). As part of the government’s ‘reconciliation’ process had involved offering former cadres informal amnesties, the negotiators may have initially had legitimate concerns about a re-ignition of civil war (Ciorciari, 2009, 72). However, this position has also been described by interviewees as ‘designed to protect the present people in power’.<sup>11</sup> Certainly, several members of Cambodia’s ruling party were Khmer Rouge cadres, and it is unlikely there was any wish to see liability stray too close to home (Strangio, 2014: 241). This perspective has arguably gained credence with the passage of time; while little evidence has emerged suggesting that prosecutions could cause social unrest, the RGC has continued to oppose any cases beyond Cases 001 and 002, resulting in tensions within and outside the KRT in relation to Cases 003 and 004.

These cases concern the actions of former Navy Commander MEAS Muth, and three former mid-level Khmer Rouge, Ao An, Yim Tith and Im Chaem (DeFalco, 2014). Although it is undisputed that all four were Khmer Rouge ‘officials’, and although researchers have linked

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<sup>11</sup> Interview with Lawyer (Defence) 8 November 2013.

them to the deaths of hundreds of thousands of people (Petit, 2010; Gillison, 2012), investigations in the two cases have been characterised by disagreements between national and international staff<sup>12</sup> as to whether the suspects should fall within the court's personal jurisdiction of 'senior leaders' and 'those most responsible' (Kunst, 2013: 17). Outside the court, Hun Sen has publically stated that Case 002 should be the KRT's last (Se, 2010), leading to speculation that the RGC is actively opposing subsequent cases from progressing (DeFalco, 2014). Although official charges were eventually made,<sup>13</sup> the case against Im Chaem was dismissed in February 2017, due to a finding that she was neither 'a senior leader or one of those most responsible officials' of the Khmer Rouge regime.<sup>14</sup> This has led commentators to critique the KRT for its failure to acknowledge the role of politics, describing the dismissal as a 'farce and pretence of justice' (Wallace, 2017). Concerns that the remaining cases will never make it to trial were raised again in May 2017, when a leaked document revealed that the Co-Investigating Judges were considering a 'permanent stay on proceedings' due to 'lack of funding', and that such a move would be 'prevent any re-opening of the investigations'.<sup>15</sup> Funding has certainly been a consistent issue for the KRT, and one that has been interpreted by staff as a direct interference with Tribunals' ability to deliver on its mandate.<sup>16</sup> As expressed by one interviewee 'if the judges are dependent, if their work is frustrated by just lack of funding, there is no independence, there is no continuity, it impacts on many principles.'<sup>17</sup> However, some commentators have expressed scepticism that funding provides a full explanation for the Co-Investigating Judges' position.<sup>18</sup> As a result of these prosecutorial choices and challenges, the KRT's recognition of the victimisations which occurred under the Khmer Rouge are currently limited to those captured by Cases 001 and 002.

While Case 002 would seem to offer broad recognition of harm, due to its focus on the policies of the Khmer Rouge, and crimes perpetrated across the country, limitations on victim visibility

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<sup>12</sup> See e.g. 'Press Release from the International Reserve Co-Investigating Judge' (KRT Website, 19 March 2012) < [www.eccc.gov.kh/en/articles/press-release-international-reserve-co-investigating-judge](http://www.eccc.gov.kh/en/articles/press-release-international-reserve-co-investigating-judge)>

<sup>13</sup> 'Mr Meas Muth charged in Case 003' (*KRT Website*, 14 December 2015) <[www.eccc.gov.kh/en/articles/mr-meas-muth-charged-case-003](http://www.eccc.gov.kh/en/articles/mr-meas-muth-charged-case-003)>; 'The International Co-Investigating Judge charges Ao An in Case 004' (*KRT Website*, 27 March 2015), <[www.eccc.gov.kh/en/document/public-affair/international-co-investigating-judge-charges-ao-case-004](http://www.eccc.gov.kh/en/document/public-affair/international-co-investigating-judge-charges-ao-case-004)>; 'The International Co-Investigating Judge charges Im Chaem in absentia in Case 004' (*KRT Website*, 3 March 2015) <[www.eccc.gov.kh/en/document/public-affair/international-co-investigating-judge-charges-im-chaem-absentia-case-004-0](http://www.eccc.gov.kh/en/document/public-affair/international-co-investigating-judge-charges-im-chaem-absentia-case-004-0)>.

<sup>14</sup> Although the case is confidential, a public summary of the decision is expected to be released.

<sup>15</sup> 'Staying Khmer Rouge tribunal cases mulled' (Phnom Penh Post, 8 May 2017) < [www.phnompenhpost.com/national/staying-khmer-rouge-tribunal-cases-mulled](http://www.phnompenhpost.com/national/staying-khmer-rouge-tribunal-cases-mulled)>

<sup>16</sup> Interview with Judge 1, 7 November 2013.

<sup>17</sup> Interview with Lawyer 1 (Chambers) 11 November 2013.

<sup>18</sup> *PP Post*

result from strategies around *what* crimes to prosecute. This manifests both in the focus on specific crime sites, and specific categories of crime. As has been in the case in previous tribunals (Waldorf, 2011;) investigations at the KRT have focused on a limited number of specific crime sites. By way of example, the Case 002 Closing Order acknowledges that by the end of the regime approximately 200 security centers and countless execution sites had been established throughout Cambodia, yet less than 10% are the focus of investigation.<sup>19</sup> As noted above, such choices may reflect legitimate issues around evidentiary sufficiency and resource constraints. However, the use of representative sites may go against the wishes of victims, who may seek a more exhaustive form of accountability, and who may have no other official mechanism from which to seek recognition and redress (Aptel, 2012: 1367). This was evidenced during Case 002's investigations, when a number of ethnic Vietnamese civil party applicants expressed consternation on learning that investigations into crimes committed against their ethnic group were limited to certain geographical areas (Nguyen and Sperfeldt, 2014). In response, their lawyers requested additional investigations, noting that 'it is critically important to our clients' that additional sites be investigated.<sup>20</sup> This request was rejected as being raised too late, and the applicants were initially excluded from participating as civil parties. As Nguyen and Sperfeldt (2014: 110) note, such exclusions demonstrate how prosecutorial selectivity can impact on the representativeness 'within and among the victim compositions participating in the judicial proceedings'. While the impact of this geographical selection has been mitigated to some extent by the broad definition given to civil parties (see below), decisions as to what *categories* of crime to prosecute have continued to have a significant impact on the visibility of victims at the KRT.

The visibility and prosecution of certain crimes over others has long featured in critical criminological and victimological analysis, which has sought to dissect why certain types of harm so frequently go unacknowledged and uncontrolled (Davies, Francis and Jupp, 1999, 2014). Although seeking to avoid a reduction of 'oppression to patriarchy' (Spencer and Walklate, 2016), critical victimology has drawn significantly from feminist scholarship in problematizing the persistent invisibility of SGBV (Mawby and Walklate, 1994:19). While feminist and critical interventions into ICL have succeeded in bringing about legal and policy developments enabling greater recognition of SGBV (Askin, 2003), efforts to acknowledge

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<sup>19</sup> Case 002, Closing Order, Co-Investigating Judges, Case No. 002/19-09-2007- ECCC-OCIJ, 15 September 2010, 48.

<sup>20</sup> Civil Party Co-Lawyers, 'Civil Parties' Request for Supplementary Investigations Regarding Genocide of the Khmer Krom and the Vietnamese', Document D250/3, 3 December 2009.

this type of harm continue to be critiqued as inconsistent and selective (Pritchett, 2008; SáCouto and Cleary, 2009). As has been the case in previous ICL courts (Askin, 2003; O'Rourke, 2013), the KRT has been criticised for its failure to adequately prosecute SGBV crimes (Williams and Palmer, 2015; Killean, 2015; Studzinsky 2011). This failure has been attributed to a number of interlinked factors, including the prevalence of a myth that the regime prohibited and punished SGBV (Savorn, 2011; Anderson, 2005), resource constraints leading to a focus on those crimes most easily proven (Ciorciari and Heindel, 2014: 100-101; Williams and Palmer, 2015), a lack of female interpreters, analysts and investigators (Poluda, 2015), a lack of sufficient training to enable effective and sensitive interviewing of victims (Killean, 2015), and a lack of awareness of the stigmatization that faced victims of SGBV (DeLangis and Studzinsky, 2012). As a result of these interlinked, Case 001's indictment included only one incident of rape,<sup>21</sup> and the prosecutors' initial submissions in Case 002 contained no reference to SGBV at all.<sup>22</sup>

This initial invisibility was contested by civil society actors, who published reports documenting multiple incidents of rape, forced nudity, sexual mutilation, abuse of pregnant women and forced marriage (e.g. Natale, 2011; Jacobsen, 2008; Nakagawa, 2008), hosted student forums and radio shows (Ye, 2011), and organised 'women's hearings', at which victims of SGBV shared their experiences.<sup>23</sup> This work challenged the KRT's narrative of the past, and resonates with critical and feminist victimologies, which refute criminal law as the correct framework for identifying victimhood (Mawby and Walklate, 1994), and place victims' voices and experiences at the centre of their methodologies (McGarry and Walklate, 2015).

Within the KRT framework, victims and their advocates (Lilja, 2013) filed petitions and requested further investigations, with varied results.<sup>24</sup> In the context of forced marriage, civil party representatives successfully requested further investigations, leading to two charges being included in Case 002.<sup>25</sup> While this development has been applauded as a 'significant positive development' (Oosterveld, 2011), the KRT's legal framework has continued to act as a limitation on victims' ability to render themselves visible. Civil parties are unable to initiate

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<sup>21</sup> Case 001, Decision on Parties' Requests to Put Certain Matters before the Chamber Pursuant to Rule 87(2), 001/18-07-227/KRT/TC, 28 October 2009.

<sup>22</sup> Case 002, Introductory Submission, Office of the Co-Prosecutor (confidential) 18 July 2007.

<sup>23</sup> CDP, Reports on the 2011, 2012 and 2013 Proceedings of the Women's Hearings on Sexual Violence Under the Khmer Rouge Regime, all available online at [gbvkr.org/publications-and-materials/reports/](http://gbvkr.org/publications-and-materials/reports/)

<sup>24</sup> Cited in Case 002, Forwarding Order to the Office of the Co-Prosecutors, 002/19-09-2007-KRT/OCIJ, 13 March 2009; Case 002, Closing Order, paras. 216 - 220.

<sup>25</sup> Case 002, Closing Order, at 1430, 1442.

investigations themselves,<sup>26</sup> and civil society organisations cannot compel the KRT to investigate specific crimes. This limitation was evidenced by the repeated exclusion of rape outside the context of forced marriage within Case 002, despite sustained advocacy.<sup>27</sup> Yet, investigations into SGBV both inside and outside forced marriage have been undertaken in Cases 003 and 004, with civil parties' evidence cited as a motivating factor.<sup>28</sup> This 'shift in attitude' (Palmer and Williams, 2017) demonstrates how engagement with diverse actors can combat 'elitist blind spots' (Rajagopal, 2002; Haslam, 2011; Haslam and Edmunds, 2013) and how victims and their advocates can contribute to the critical victimological goal of uncovering victimizations that may be rendered invisible due to the political climate, social factors, or the marginalised status of the victims (Holstein and Miller, 1990; McGarry and Walklate, 2015).

The importance of this engagement has also been demonstrated in the context of minority rights. Civil parties and their advocates have successfully contributed to the inclusion in Case 002 of allegations of genocide, deportation and other crimes specific to the treatment of the Vietnamese (Nguyen and Sperfeldt, 2014),<sup>29</sup> while the advocacy of the Khmer Krom ethnic minority group and their representatives has drawn attention to the crimes perpetrated against that group (Mohan, 2010). As the crimes committed against the Khmer Krom appear most prominently within Case 004, that case's uncertain future risks excluding their harm from the KRT's jurisprudence. Indeed, as explored by Mohan (2010), much experienced by this group remains underexposed. It may be that the difficulties these groups have faced in comparison to the relative success of SGBV advocacy is in part reflective in part of international funding priorities. There is undoubtedly a current momentum behind initiatives address conflict-related SGBV,<sup>30</sup> as noted by a former civil party lawyer:

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<sup>26</sup> ECCC Internal Rules, Rule 49(1); Case 002, Order on the Admissibility of Civil Party Applicants from Current Residents of Svay Rieng Province, Case No. 002/19-09-2007- ECCC-OCIJ, 9 September 2010.

<sup>27</sup> Case 001, Decision on Parties' Requests to Put Certain Matters before the Chamber Pursuant to Rule 87(2), 001/18-07-2007-ECCC-TC, 28 October 2009; Case 002, Closing Order, at para 1426.

<sup>28</sup> ECCC Press Release, 'International Co-Prosecutor requests investigation of alleged sexual and gender-based violence in Case 004', 24 April 2014, [www.eccc.gov.kh/en/articles/international-co-prosecutor-requests-investigation-alleged-sexual-and-gender-based-violence](http://www.eccc.gov.kh/en/articles/international-co-prosecutor-requests-investigation-alleged-sexual-and-gender-based-violence); 'International Co-Prosecutor Files Supplementary Submission in Case 003' *ECCC Website*, 4 November 2014, [www.eccc.gov.kh/en/articles/international-co-prosecutor-files-supplementary-submission-case-003](http://www.eccc.gov.kh/en/articles/international-co-prosecutor-files-supplementary-submission-case-003).

<sup>29</sup> Case 002, Closing Order, at 778-814.

<sup>30</sup> See e.g. UN Security Council Resolutions 1325 (2000); 1820 (2008); 1888 (2009); 1889 (2009); 1960 (2010); 2106 (2013); 2122 (2013); *CEDAW General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations*, UN Doc. CEDAW/C/GC/30, 18 October 2013.

*When you combine the words transitional justice and SGBV, doors are opened, funding is there from the UN, from everybody. These are the key words and it is a little bit unfortunate for victims of other harms.*<sup>31</sup>

In contrast, staff from a minority rights NGOs spoke of difficulties in obtaining funding, and of trying to advocate on behalf of minorities who continue to face discrimination within Cambodia.<sup>32</sup> Thus, the popularity of the cause may also impact on the ability of victims and civil society actors to raise awareness of overlooked crimes, impacting on the visibility of such harms within transitional justice narratives.

### **3. Judicial Selectivity and the Civil Party System**

The analysis thus far has focused on the processes of selectivity which have shaped the victimisations that are rendered visible through their prosecution as crimes. This section moves to consider the ‘visibility’ of victims within the courtroom, both through the delivery of testimony, and through the presence of legal representatives within the courtroom. The KRT features a unique civil party participation system, which in theory allows victims’ rights similar to the prosecution and defence. Its introduction was heralded as a ‘historical achievement in international criminal law’ as victims would be ‘fully involved in proceedings at the ECCC’.<sup>33</sup> However, an analysis of *which* victims are ‘fully involved’, and *what form* that involvement takes reveals that even those victims whose harms are included within indictments will find their visibility shaped by professional elites, legal rules, and the extent to which they have the capacity to engage with the trial process. As a result, recognition of victimhood continues to be dependent on both the victims’ own characteristics, and the reactions of others (McAlinden, 2014).

In analysing victim visibility through participation, this section focuses particularly on the Tribunal’s judiciary. Civil party participation is not contained in either of the Court’s founding documents. Instead, the civil party system’s creation is a result of judicial policy-making (Rasmussen, 1986). This section therefore focuses on the role of judges in both creating and subsequently implementing civil party participation, drawing on theories of judicial behaviour to do so. While judicial behaviour within domestic contexts has been subjected to significant

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<sup>31</sup> Interview with Lawyer (Former CP Team member), 11 September 2015.

<sup>32</sup> Interview with Legal Assistant (CP Team), 10 December 2013.

<sup>33</sup> ‘Historic Achievement in International Criminal Law: Victims of Khmer Rouge Crimes Fully Involved in Proceedings of the ECCC’ Statement by the Victims Unit, ECCC Website, 4 February 2008, <[www.eccc.gov.kh/sites/default/files/media/Victim\\_Unit\\_Press\\_Release.pdf](http://www.eccc.gov.kh/sites/default/files/media/Victim_Unit_Press_Release.pdf)>

analysis, the role of ICL judges has received relatively little scholarly attention (exceptions include Jodoin, 2010; Wessel, 2006). Yet judicial discretion can be used to further a variety of political and legal agendas, with the developing nature of ICL arguably granting even greater space for judicial discretion and innovation (Jodoin, 2010). Dominant models of judicial behaviour include the strategic model, which perceives judges as motivated by specific political and legal goals (Epstein and Knight, 2000), and the attitudinal model, which views the ideas, attitudes and values of judges as key influencing factors (Tarr, 2003). While these models consider judicial motivations, Baum's (1995) hierarchal model notes that judges will also be constrained by legal rules, other participants, and their own political environments. Rather than committing to one specific model, I would argue that these factors are interlinked, and that consideration of the goals, attitudes and constraints that arguably shaped the KRT judiciary's attitude to victim participation assists in an analysis of the role legal elites play in shaping victim visibility.

In keeping with Baum's hierarchal model, it is arguable that the judges' initial decision to create a civil party system was influenced in part by their legal environment. Concerns around the appropriateness of using Cambodia's domestic criminal procedures led the judges to broadly interpret their right to seek guidance from international procedure, and draft their own Internal Rules (Acquaviva, 2008: 129). In doing so, they would have observed the growing international recognition of victims' rights, as evidenced by the ICC's Rome Statute and numerous international human rights declarations. Indeed, their drafting was accompanied by intense lobbying from victims' advocates, experts and NGOs, who cited such developments and promoted the creation of an expansive victim participation system (Saliba, 2009a). Wessel (2006) has noted that the role of a 'humanitarian technocrat' is often placed on international judges, who are encouraged to adopt professional customs and ethics which further humanitarian goals. Awareness of such expectations, when combined with the victim-centric developments in ICL, may have influenced the judges' approach.

Reflecting Tarr's attitudinal model, it has also been suggested that the judges' personal attitudes towards victim participation, as informed by their own domestic legal backgrounds, shaped their approach. Reportedly, most common-law judges favoured a lesser form of participation, while the French judge and his legal officer pressed for a French/Cambodian styled model, and the national judges favoured the scheme as a way of incorporating Cambodian law (Ciorciari and Heindel, 2014: 204). The result was the creation of a system which drew from, but also differed from the Cambodian model (Boyle, 2006: 310) and which



originally provided for some of the most expansive victims' rights granted by an ICL court (Mohan, 2009). However, the judges' determination that their Rules constitute the 'primary instrument... in determining procedures'<sup>34</sup> and can be amended by the judges themselves, has allowed changing judicial strategies and attitudes to exert significant influence over who can be considered a victim entitled to participate as a civil party, and what form that participation takes. Their approach to these issues will be considered in turn.

### *Recognizing Victimhood*

Judicial attitudes towards who should be admitted as a civil party have differed as the KRT has proceeded with Cases 001 and 002. The Rules initially required applicants to demonstrate that they were 'victims of a crime coming *within the jurisdiction of the KRT*, and that their injury was 'physical, material or psychological' and 'the direct consequence of the offence, personal and have actually come into being.'<sup>35</sup> Thus, applications could be submitted in relation to any crimes that fell under the Court's jurisdiction.<sup>36</sup> Applications were also allowed from indirect victims, and in certain cases the successors of a deceased applicant.<sup>37</sup> However, in 2010 the judges amended the Rules, requiring applicants to 'demonstrate as a direct consequence of at least one of the crimes *alleged against the Charged Person*, that he or she has in fact suffered physical, material or psychological injury'.<sup>38</sup> This amendment followed an announcement on the scope of Case 002, and with Case 002 encompassing complex crimes and multiple defendants, the judges were undoubtedly aware of the impact incorporating large numbers of victims might have on trial expediency (McGonigle Leyh, 2011). It is therefore arguable that the amendment was an attempt to limit applications to victims connected to Case 002's specific crimes and sites (Studzinsky, 2011), furthering a strategy of trial expediency, rather than victim inclusion.

The changes were made a few months before the Case 001 judgment, and after the deadline for Case 002 applications. However, they were retrospectively applied, contributing to 23 civil party applicants having their status revoked in the Case 001 trial judgment.<sup>39</sup> The applicants had participated throughout the trial, and had not been informed that their status was provisional. The decision caused extreme distress (Ciorciari and Heindel, 2014: 62); with the

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<sup>34</sup> Case 002, Decision on Nuon Chea's Appeal against Order Refusing Request for Annulment, 002/19-09-2007-ECCC/OCIJ, 26 August 2008. Emphasis added.

<sup>35</sup> Internal Rules, Revision 3, 6 March 2009, Rule 23(2)

<sup>36</sup> KRT Law, Arts. 2, 4, 5, 6, 7 and 8.

<sup>37</sup> Case 001, Trial Judgment.

<sup>38</sup> Internal Rules, Revision 5, 9 February 2010.

<sup>39</sup> *Case 001, Trial Judgment*, paras. 647 – 649.

applicants perceiving the revocation of civil party status as a rejection of their experiences of harm (O'Toole, 2010). While the status of ten individuals was restored on appeal,<sup>40</sup> these strong reactions demonstrate the potentially harmful processes of exclusion that can result from linking victim recognition to legal institutions. The decision has since been critiqued by other judges as 'insensitive', and of being a reaction to the 'obscure' nature of the legal framework.<sup>41</sup> Certainly, the civil party system's unique and 'experimental' nature limited the external guidance available to judges,<sup>42</sup> which may also have influenced the changeable nature of its implementation.

The issue of civil party eligibility also proved divisive in Case 002. Applicants were initially required to show 'personal'<sup>43</sup> harm which resulted from material facts for which a judicial investigation had been opened.<sup>44</sup> This excluded applicants who had suffered from identical conduct at geographical sites not included within investigations. Of the 3,970 applications considered, 2,123 were admitted, and of the rejected applicants, 1,747 appealed.<sup>45</sup> The appeal decision revealed significantly different judicial attitudes, as the majority admitted applicants who claimed harm related to crimes alleged against the accused in locations excluded from investigations.<sup>46</sup> The majority further found that Cambodia's social and cultural context during the regime required a broader consideration of victimization, allowing for injury to be caused through the death of members of the appellant's community, through the witnessing of direct victimization, through the knowledge of a direct victims' fate, and through the fear of a similar fate that the policies instilled.<sup>47</sup> As a result, 1,728 appeals were granted, increasing the number of civil parties to 3,866.

In addition to highlighting the role legal institutions play in shaping victimhood through jurisdictional limits and substantive criteria (Robins, 2017; Kendall, 2015), these decisions demonstrate how victim recognition can fluctuate as a result of changing case law and judicial strategies (Kendall and Nouwen, 2013: 246). Interviews conducted with judges and judicial officers highlighted how divisive this issue had been. Reflecting the attitudinal model,

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<sup>40</sup> Case 001, Appeal Judgement, at 252 – 280.

<sup>41</sup> Interview with Judge 1, 7 November 2013 and Judge 4, 13 January 2014.

<sup>42</sup> Interview with Judge 1, 7 November 2013.

<sup>43</sup> Case 002, Order on the Admissibility of Civil Party Applicants from Current Residents of Oddar Meanchey Province, 002/19-09-2007-KRT-OCIJ, 26 August 2010, at 13.

<sup>44</sup> Case 002, Closing Order, at 10 -12.

<sup>45</sup> Case 002, Decision on Appeals against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, 002/19-09-2007-ECCC-PTC, 24 June 2011.

<sup>46</sup> *Ibid* at 76 – 77.

<sup>47</sup> *Ibid* at 83 – 92.

interviewees appeared to be influenced by their own legal traditions, but also by their understandings of what the court's role should be in recognising and responding to victims. Thus, some interviewees from civil law backgrounds disagreed with the majority's expansive interpretation of victimization, which shifts away from civil law's required link with the specific crimes charged.<sup>48</sup> Indeed, French Judge Machi-Uhel issued a dissenting judgment, arguing that the inclusive approach would frustrate those who satisfied the original narrower criteria, while disappointing those who were admitted but did not subsequently see their specific harms reflected in the Court's work.<sup>49</sup> In contrast, those who supported the majority position spoke of the importance of acknowledging the nature of harm under the regime<sup>50</sup> and avoiding 'inappropriate re-victimization...by their exclusion'.<sup>51</sup>

While exclusions arise whenever legal institutions are used as the basis for recognising victimhood (Mawby and Walklate, 1994), the grave harms which form the subject matter of ICL courts render such exclusions particularly emotionally charged (McEvoy and McConnachie, 2013), as illustrated by the distress expressed by rejected applicants. However, even a broad policy of recognition will exclude some. This reality is demonstrated by Case 002, which focuses on criminal policies which arguably harmed the entire Cambodian population. While the majority decision eliminated the distinction drawn between those who had been harmed in one location from those harmed in another, the policy of broad recognition did not dispel arbitrary distinctions. Instead, the distinction became between those with the means to apply for civil party status, and those without. This distinction reflects what Rombouts and Vandeginste (2003) term the 'public recognition selection process', in which only some have the 'power' to pursue recognition of their victimhood. Indeed, the argument has been made that justice is predominantly pursued by 'urban elites and high-profile victims, who have a strong moral voice and an ability to clearly articulate demands' but who may not be representative of all who have suffered harm (Van der Merwe, 2014: 200).

Access to assistance may also create distinctions. In addition to requiring the energy and time to engage with the Tribunal, which victims who are struggling to meet their basic needs may not have (Kendall and Nouwen, 2013), victims may face practical barriers, such as limited

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<sup>48</sup> Interview with Judge 4, 13 January 2014; Interview with Lawyer 2 (Chambers), 11 November 2013.

<sup>49</sup> Case 002, Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, Separate and Partially Dissenting Opinion of Judge Marchi-Uhel, 002/19-09-2007-ECCC/PTC, 24 June 2011.

<sup>50</sup> Interview with Judge 2, 11 November 2013.

<sup>51</sup> Interview with Judge 1, 7 November 2013.

internet access or literacy skills,<sup>52</sup> which make them dependent on outside assistance. Indeed 84% of civil party applications were submitted through intermediary NGOs (Sperfeldt, 2012). Such statistics evidence the arbitrary distinctions between recognised and unrecognised victimhood: while evidence suggests that nearly all Cambodians who lived through the regime consider themselves victims (Pham et al., 2011), only a small fraction can pursue recognition and redress at the KRT (Ciorciari and Heindel, 2014: 207). As Robins (2017: 54) has noted, ‘rights are mediated by the actors who articulate them’, and ‘become something that are largely claimed on behalf of victims rather than by victims themselves.’ The result is that victim recognition is often dependent on expert assistance, enhancing the control elites exercise over victim recognition, and potentially excluding those victims who may be unable to access assistance due to geographical isolation, structural inequalities, or social marginalisation (Van der Merwe, 2014).

### *Visibility through Participation*

This final sub-section analyses the attitudes, strategies and constraints that arguably influenced the judges’ approach towards victim visibility through representation and through the provision of testimony. Reflecting Epstein and Knight’s (2000) strategic model, this section demonstrates that balancing the multiple strategies of ensuring expeditious proceedings, protecting the rights of civil parties, securing ‘local legitimacy’ (Mégret, 2009) and following international fair trial standards (White, 2017, 206) made implementing civil party participation a complex task. Members of the judiciary have acknowledged that giving effect to these diverse principles raised numerous practical challenges as the trials progressed,<sup>53</sup> challenges which ultimately resulted in restrictions being placed on the rights available to civil parties.

With regards to visibility through testimony, civil parties were offered a number of opportunities to directly express their sense of victimisation to the courtroom. In addition to providing testimony, civil parties were given opportunities to make ‘statements of suffering’ and participate in separate victim impact hearings. The two latter modes of participation were the result of innovations by the Trial Chamber,<sup>54</sup> and allowed civil parties space to render their victimisations visible within the proceedings without being constrained by specific questions

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<sup>52</sup> ‘Cambodia Statistics’, *World Bank Website*, data.worldbank.org/country/Cambodia

<sup>53</sup> Decision on Civil Party Lawyer’ Joint Request for a Ruling on the Standing of Civil Party Lawyers to make Submissions on Sentencing and Directions Concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character ‘Duch’, 001/18-07-2007/ECCC/TC (9 October 2009), Lavergne Dissent, para 3.

<sup>54</sup> Case 002, Decision on Request to Recall Civil Party TCCp-187, for Review of Procedure Concerning Civil Parties’ Statements of Suffering and Related Motions and Responses, 002/19-0902007-ECCC-TC, 2 May 2013;

related to the charges. While this reflected a strategy of victim inclusivity, the retributive culture of the trial proved ‘not at all conducive to listening to the accounts of individuals’ (Doak, 2005: 298); and testifying civil parties also occasionally faced requests that they limit themselves to facts relevant to the trial,<sup>55</sup> reminders that they be brief,<sup>56</sup> and rebukes for showing emotion in a courtroom setting.<sup>57</sup> As has been argued by Doak and Tayler (2013: 25) the constraints of a trial may result in victims delivering only a ‘sanitized and innocuous version of events’, rather than being able to fully render their harm visible to the court. The judicial approach to these forms of testimony displayed an inherent tension between a desire to maintain the legal structure of a trial, and allowing victims to express their harm (Dembour and Haslam, 2004).

It must also be acknowledged that few victims were able to participate in this way. Although the number of civil parties who have addressed the court directly has increased with each trial (22 in Case 001, 31 in Case 002/01, and 63 in Case 002/02),<sup>58</sup> the percentage of civil parties given an opportunity to speak has remained low, with less than 2% participating directly in Cases 002/01 and 002/02 (Cohen, Hyde and van Tuyl, 2015: 28). Decisions as to which victims would be rendered visible through direct participation were also constrained by the format of the trial: each civil party who appeared as a witness was chosen for substantive evidential purposes, while those who participated in the impact hearings were chosen based on their ability to assist the Chamber with assessing ‘the gravity of the crimes, in their proper context and determining the appropriateness of the reparations claimed’.<sup>59</sup> The implications of such choices on victim visibility were particularly illustrated by the decision to split Case 002 into sub-trials, with only those victims whose harms fell within the factual scope of the sub-trials able to participate (Heindel, 2013). Thus, while opportunities for expression were greater than those granted to a witness, victims’ voices continued to be ‘picked out, appropriated and then re-presented to suit’ the particular structure and goals of the trial (McEvoy and McConnachie, 2012, 495).

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<sup>55</sup> Case 001, Trial Transcript, 20 June 2009 at 13; 1 July 2009 at 14; 20 August 2009 at 64; 24 August 2009 at 71.

<sup>56</sup> Case 002, Trial Transcript, 29 August 2012 at 28-30.

<sup>57</sup> Case 001, Trial Transcript, 30 June 2009, at 12.

<sup>58</sup> ‘Highlights of Issues Related to Civil Party Participation’, *Khmer Rouge Trial Monitor*, 9 October 2013, [krtmonitor.org/2013/10/09/highlights-civil-party-participation/](http://krtmonitor.org/2013/10/09/highlights-civil-party-participation/); ‘KRT Monitor Case 002/02 – Issue 79 (9-11 January 2017)’, *Khmer Rouge Trial Monitor*, 9 February 2017, [krtmonitor.org/2017/02/09/krt-monitor-case-00202-issue-79-9-11-january-2017/](http://krtmonitor.org/2017/02/09/krt-monitor-case-00202-issue-79-9-11-january-2017/)

<sup>59</sup> ‘The Purpose of Hearing Victims’ Suffering’ ECCC Website, [www.eccc.gov.kh/en/blog/2013/07/07/purpose-hearing-victims-suffering](http://www.eccc.gov.kh/en/blog/2013/07/07/purpose-hearing-victims-suffering)

A strategy of protecting the legal structure of the trial is also evident in judges' attitudes towards victims who attempted to engage in more direct forms of participation. Following repeated attempts by one civil party to address the Court directly and question the accused, a decision was made that to ensure 'expeditious proceedings and relevant submissions, and to avoid disruptions', civil parties should only participate through their lawyers.<sup>60</sup> The reality of a victim wishing to speak for herself in this way appeared to contrast with how the judges envisioned civil party participation, as demonstrated by Mohan's (2009) interviews with staff in the aftermath of these events:

*... individual victims cannot be allowed to speak in court as they are emotional. Judges do not want to hear only about their mental anguish alone, that is for a psychiatrist, not a court of law.*

This rejection of 'emotional' victims and the distinction made between the 'psychiatrist' and the 'court of law' arguably illustrates a desire to limit civil party visibility to that required to pursue the court's retributive goals. Thus, attitudinal theories of judicial behaviour find traction, as attitudes towards one specific civil party combined with broader understandings of what a trial can 'hold' (Elander, 2013), leading to a significant shift in judicial strategy, and a curtailment of civil party rights.

Due to the low percentage of civil parties who provided testimony or statements, participation for the majority has been predominantly enacted through their legal representatives. The introduction of victim representatives within a number of ICL institutions has been praised as signalling a shift towards more 'victim-oriented justice' (Vasiliev, 2009) and for enabling victims' interests to be protected and represented within proceedings (Moffett, 2014). However, the use of representatives inevitably raises its own challenges around victim visibility, as legal representatives play a central role in shaping which victimisations are rendered visible through participation, which voices are re-produced within their submissions and statements, and what strategies are pursued within the courtroom (Killeen and Moffett, 2017; Mazzei and Jackson, 2012; Madlingozi, 2010). This role is arguably amplified within the context of ICL: lawyers may be attempting to represent a large multitude of victimised individuals, and the power dynamics that may exist between victimised communities and legal elites may enhance the control representatives have over what narratives are portrayed (Killean

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<sup>60</sup> Case 002, Written Version of Oral Decision of 1 July 2008 on the Civil Party's Request to Address the Court in Person, Pre-Trial Chamber, 002/19-09-2007-ECCC/OCIJ, 3 July 2008.

and Moffett, 2017). Thus, it must be remembered that even those engaged in promoting the visibility of victims may misappropriate their voices, or overlook those who may be particularly disenfranchised due to their race, gender, or social status (McEvoy and McConnachie, 2013; Mohan, 1999, 46).

Representatives can also find their own ability to render their clients' interests visible within proceedings subject to restrictions, and while being cognisant of the role representatives play in shaping the pyramid of victimhood, the rest of this section focuses on the ways in which visibility through representation has been shaped by judicial attitudes, strategies and constraints. Although during Case 001 the trial judges initially showed support for broad participatory rights, they quickly began to show irritation towards civil party representatives, chastising them for repetitive questioning<sup>61</sup> and limiting the situations in which they could question witnesses and the accused.<sup>62</sup> In the lead up to Case 002, the judges amended the Rules on representation, introducing two Lead Co-lawyers tasked with the overall advocacy, strategy and in-court representation of civil parties. As a result, civil parties no longer participate as individual 'parties', but as one consolidated group (Diamond, 2010-2011). The change in representation resulted in a significant curtailment of the visibility of victims within the courtroom, with the proportion of time utilised by civil party representatives constituting just 15% of Case 002/01, compared to 41% of Case 001 (Cohen, Hyde and van Tuyl, 2015: 27-28). The Lead Co-Lawyers also had their ability to speak restricted, with the Trial Chamber excluding them from making opening statements, and expressing irritation when they intervened separately from the prosecution, stating that the two parties should cooperate in order to make proceedings efficient.<sup>63</sup>

This statement is illustrative of one of the primary factors that has arguably shaped judicial approaches to victim representation: a desire for expediency. As with other courts, the KRT is tasked with conducting trials in a fair and expeditious manner,<sup>64</sup> but expediency has acquired particular importance in the Cambodian context due to the time which has passed since the crimes charged, and the advanced age of the accused (Brinkley, 2013). Indeed, the death of two accused during Case 002 poignantly highlighted the impact prolonged proceedings can have on the KRT's ability to deliver accountability. In addition, the KRT relies predominantly on donor funding from states, and has faced increasing donor fatigue and resulting financial

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<sup>61</sup> Case 001, Trial Transcripts, 29 July 2009 at 88 – 90.

<sup>62</sup> Case 001, Trial Transcript, 27 August 2009.

<sup>63</sup> Case 002, Trial Transcript, 2 February 2012, at 30.

<sup>64</sup> Internal Rule 79 (7)

constraints (Sperfeldt, 2012: 154). The judges therefore faced the challenge of balancing an unprecedented victim participation system and the associated legal teams, with external pressure to deliver expedient judgements. The priority given to trial management and expediency was reflected in interviews: one judge conceded that the introduction of the Lead Co-Lawyers was a result of being unable to ‘live up to the promise of the legal framework...we couldn’t handle it otherwise’,<sup>65</sup> while another argued that ‘to have retained individual representation would have meant that the case would never finish and therefore our primary remit wouldn’t have been discharged’.<sup>66</sup> With little experience of large ICL trials to draw on (Ciorciari and Heindel, 2014:380), the judges attempted to deal with trial management issues as they arose, adopting a strategy that increasingly prioritised expediency and efficiency as the two trials proceeded.

This approach has not escaped criticism. Restrictions imposed during Case 001 caused dismay amongst civil parties (Saliba, 2009b), and the judges’ overall approach has since been critiqued by commentators as ‘reactive and unpredictable’ (Cohen, Hyde and van Tuyl, 2015). Nor were decisions to restrict the rights of civil party representatives unanimous. In a notable dissenting opinion, the French Judge Lavergne criticized the decision to exclude civil parties from giving character evidence. Whilst acknowledging the challenges associated with balancing the rights of victims with expedient trials and the rights of the defence, he questioned ‘[h]ow far one can go without breaching the spirit of the law, or fundamentally distorting the meaning of the involvement of civil parties...?’<sup>67</sup> Such decisions demonstrate the different judicial attitudes towards the purposes of the trial and the role of civil parties within it, as well as the continued influence of domestic legal jurisdictions. The introduction of the Lead Co-Lawyers has also been criticized as effectively severing the civil parties’ attorney-client relationship, and limiting victims’ ability to exercise agency through their representative’s courtroom strategy (Ciorciari and Heindel, 2014: 222). The introduction of collective representation also has significant implications for the visibility of those victims whose experiences appear contradictory or outside the focus of proceedings, who may find their experiences excluded from the official victims’ narrative (Killeen and Moffett, 2017). This does not reflect the reality of individual experiences of harm, as acknowledged by one judge, ‘the collective representation here has had some difficulties, and that’s because victims are not homogenous as a group’.<sup>68</sup>

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<sup>65</sup> Interview with Judge 4, 13 January 2014.

<sup>66</sup> Interview with Judge 1, 7 November 2013.

<sup>67</sup> Lavergne Dissent, *supra* n.52, para. 4.

<sup>68</sup> Interview with Judge 1, 7 November 2013.



This section has demonstrated how judicial behaviour has acted as a final narrowing of the pyramid of victim visibility at the KRT. Diverse legal backgrounds, differing attitudes towards the purposes of the Court, an unprecedented approach to victim participation in an ICL court and pressures from inside and outside the Court have influenced judicial strategies in a way that has led to the curtailment of victim visibility. While the KRT has provided victims with space to share their stories within the courtroom, this is available to only a small percentage of victims, and has been constrained by the judges' focus on the retributive goals of a trial. As a result, even those at the 'apex of the pyramid' (Kendall and Nouwen, 2013: 251) are faced with processes of exclusion. It has been argued that more effective trial management from the start would have allowed the judges to avoid placing restrictions on civil party representatives and enabled, enabling greater victim-visibility to be maintained (Zhang, 2016: 529). However, while the judges' role in limiting victims' role at the KRT has been the subject of this section, the inherent limitations of responding to victimisation through a criminal trial must continue to be acknowledged. The 'theft of the conflict' from the victims, the dominance of legal professionals and legalese, the retributive focus of the trial, the rights of the accused and the pressures of expedient justice create barriers a truly victim-centric process. Thus, as has been argued within domestic contexts (Mawby and Walklate, 1994: 189-198) participation in criminal proceedings should not be the only 'right' offered to those who have suffered victimisation, but should fall within the context of a broader response.

#### **4. Conclusion.**

As Miers (1989) has noted, many groups and individuals can claim the label of 'victim', but the key questions for a critical victimologist are who has the power to apply the label and what considerations are significant in that determination. Drawing from this critical starting point, this article has made the argument that in the context of the KRT in Cambodia, as in other contexts (Mawby and Walklate, 1994), recognition of victimhood has been narrowed by a myriad of heterogeneous actors pursuing a variety of political, legal and social goals. Applying the critical victimological argument that terms such as 'victim' and 'victimization' are contested and open to manipulation (Dignan, 2005), it has explored how both the initial creation of the KRT and the way its practitioners have approached their work have excluded numerous individuals who have suffered harm from its remit, leaving many outside Kendall and Nouwen's pyramid of victimhood.

To conclude, I would argue that there is a need within ICL scholarship and practice to greater acknowledge the role of actors and contexts in shaping responses to victimization. Such

responses are sites of contestation (Haslam, 2007), in which the agendas of different transitional justice practitioners and other elites often play a significant role in demarcating the extent to which the real needs of victim populations in the aftermath of atrocity are addressed by transitional justice mechanisms. This can lead to restrictions being placed on the kind of victimisations which are rendered visible and worthy of redress, as evidenced by the compromises struck between the international community and RGC in creating and limiting the jurisdiction of the KRT. However, it can also lead to innovative processes which enhance victim visibility, for example through the creation of the civil party system and the work of civil society in expanding the Court's investigations and prosecutions to include greater acknowledgment of SGBV and crimes against minority groups. Acceptance of justice as a place of constraints and contest may contribute to greater honesty and humility in the discourse surrounding transitional justice (McEvoy, 2007). Such an increase in honesty and humility would provide welcome balance to the increased use of 'justice for victims' as legitimising rhetoric (McEvoy and McConnachie, 2013). By acknowledging the inherent limitations associated with using a criminal legal framework to define and recognise victimhood, trials can be more appropriately understood as one element of broader responses to grave victimisations. Unfortunately, when a small number of selective criminal trials form the only official response to atrocity, as has been the case in Cambodia, these layered processes of exclusion leave many harms invisible and many victims ultimately without redress.

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