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By Glenda Mezarobba



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PRESENTATION



We have reached issue seven of Sur – International Journal on Human Rights with an excellent response from our readers and a new partnership with the International Center for Transitional Justice.

An evaluation of the journal was conducted to gain some feedback for us to improve the quality, to cater more to the interests of our readers and to make it even more accessible and critical. Of the 15% of readers who responded to an online survey, among them professors and human rights activists, 66% considered the journal to be excellent and 34% judged it to be good. The best qualities they identified were: (a) the high standard of the journal; (b) its potential to disseminate information on human rights; and (c) its broad application, both for university and non-university courses. The main challenges, meanwhile, are: (a) to address more specific thematic issues; (b) to publish new authors; and (c) to improve the dissemination of the journal. To meet these challenges, the following steps have already been taken: (a) we shall focus this and future issues on topics specifically related to the Global South, such as transitional justice, access to medicine and freedom of expression; and (b) we have staged launches in human rights centers at universities on different continents. Furthermore, we have plans in 2008 to establish a monitorial system, whereby new authors who have written promising articles will be supervised by more experienced researchers or professors. (For a more detailed account of the evaluation, please see the report at the end of this issue.)

In addition to the evaluation, we have also forged a partnership between Conectas Human Rights, which has published the journal since its first issue, and the International Center for Transitional Justice. This center was set up in 2000 with the mission to promote

justice, peace and reconciliation in societies emerging from repressive regimes or from armed conflicts, as well as to establish democracies where historical or systemic injustices remain unresolved.

The partnership was established so we could focus on a key topic for countries in the southern hemisphere: transitional justice. The balance between peace and justice and between reconciliation and retribution in post-conflict societies, or in cases of historical and persistent injustices, is dealt with by the authors from different geographical perspectives: Australia, Cambodia, Peru and Uganda. The authors, however, raise questions that often transcend these local contexts. By addressing the violated rights of aboriginal children in Australia who were forcibly taken from their families, for example, Ramona Vijayarasa questions whether Truth Commissions can help build more inclusive societies. By analyzing the Extraordinary Chambers in Cambodia, Tara Urs attempts to identify what truth commissions and extraordinary courts can realistically expect to accomplish. She also examines how culturally specific processes can help shape transitional justice and how best to respond to the interests of the victims. Looking at Peru's case, Elizabeth Salmón sheds some light on the links between conflict and poverty, and questions whether transitional justice should have a specific role beyond universalistic public policies. Finally, when addressing the situation in Uganda, Cecily Rose and Francis Ssekandi consider the role of amnesty in the consolidation of peace and question how to implement transitional justice in situations where peace agreements are still being reached.

To round off this subject, the journal is publishing an interview with Juan Méndez, director of the International Center for Transitional Justice.

This edition of the journal also carries an analysis of the recently established structure of the UN Human Rights Council (Lucia Nader) and a study on the influence of the inter-American system and "transnational legal activism" on the protection of human rights in Brazil (Cecília Santos).

We would like to thank the following professors and partners for their contribution to the selection of the articles for this issue: Glenda Mezarobba, Helena Olea, J. Paul Martin, Jeremy Sarkin, Juan Amaya Castro, Juan Carlos Arjona, Kawame Karikari, Maria Herminia Tavares de Almeida, Paula Ligia Martins, Richard Pierre Claude, Thami Ngwenya and Vinodh Jaichand.

Finally, we would like to announce that the next edition of the SUR Journal will be a special issue on access to medicine and human rights, to be published in collaboration with the Brazilian Interdisciplinary AIDS Association (ABIA). The journal will also carry articles on other topics.

The editors.

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TARA URS

Tara Urs spent two years in Cambodia, working with a local NGO staff and as a Fellow for the Open Society Justice Initiative attempting to engage ordinary Cambodians in a dialogue about the Extraordinary Chambers. She graduated *cum laude* from New York University School of Law, where she was an Arthur Garfield Hays Civil Liberties Fellow.
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ABSTRACT

This article seeks to defend three propositions. First, the Extraordinary Chambers in the Courts of Cambodia (informally known as the Khmer Rouge Trials) is unlikely to achieve any of the primary goals put forward by its proponents. Second, the Court runs the risk of doing harm. Third, it becomes apparent that other culturally-specific processes have a greater chance at making a long-term impact and satisfying victims.

RESUMO

Este artigo procura defender três proposições. Primeiramente, é improvável que as Câmaras Extraordinárias nos tribunais do Camboja (conhecidas informalmente como Julgamentos do Khmer Vermelho) alcancem os principais objetivos apresentados por seus proponentes. Em segundo lugar, esse tribunal corre o risco de causar danos. Em terceiro lugar, outros processos culturalmente específicos têm uma chance maior de causar um impacto de longo prazo e satisfazer as vítimas.

RESUMEN

Este artículo intenta defender tres propuestas. En primer lugar, es muy improbable que las Câmaras Extraordinarias de los Tribunales de Camboya (informalmente conocidas como los Juicios de los Jémeros Rojos) consigan alcanzar alguno de los objetivos fundamentales fijados por sus partidarios. En segundo lugar, la Corte corre el riesgo de hacer daño también. En tercer lugar, otros procesos de mayor especificidad cultural tendrán mayores posibilidades de influir a largo plazo y de satisfacer a las víctimas.

Original in English.

KEYWORDS

Cambodia – Khmer Rouge – Rule of Law – Reconciliation - Justice



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IMAGINING LOCALLY-MOTIVATED ACCOUNTABILITY FOR MASS ATROCITIES: VOICES FROM CAMBODIA

Tara Urs

Introduction¹

April 17, 1975 and January 7, 1979 mark the official beginning and end of the Cambodian regime that named itself “Democratic Kampuchea”, but is best known as the Khmer Rouge. Cambodians call it “the regime of three years, eight months and twenty days”, as if every single moment of that period has been permanently seared onto their memories. Under Democratic Kampuchea control, it is estimated that nearly 2 million people died as a result of killing, starvation, overwork, and disease.²

In 2005, a new criminal court known as the Extraordinary Chambers in the Courts of Cambodia (hereafter: “Extraordinary Chambers” or “the Court”) was established to try the senior leaders of Democratic Kampuchea and those most responsible for the atrocities committed. The Court is created jointly by the UN and the Cambodian government, and utilizes a complicated decision-making structure to ensure both UN and Cambodian judge participation in convictions.

The work of the Office of Prosecution began in June 2006. In June 2007 the Prosecutors submitted the names of five defendants to the Investigating Judges, according to the civil law-based procedures followed by the trials. Only one name, Kaing Guek Eav, has been publicly disclosed as of the time of writing; he is also the only suspect in custody at this time.

This new hybrid tribunal marks an evolution in the ways that international justice is practiced – allowing for more local control than ever before. In fact, the role to be played by Cambodian judges and institutions was one of the major

Notes to this text start on page 90.

points of contention during the 10-year long negotiations to set-up the court. But despite the long delays in reaching this point, the recent actions of the Prosecutors suggest that the Court is finally moving forward.

This article is the result of two years spent analyzing the Court on the ground in Cambodia, from May 2005 to April 2007. Research conducted by my team, to be discussed here, suggests that many of the claims being made about what the Court can accomplish are not founded in the reality of what is known about international justice generally and Cambodia in particular. Experts talk about using this Court to promote reconciliation and the rule of law and to provide justice to the victims. Yet, very little attention has been given to the plausibility of those claims or the mechanisms by which such aims will be achieved.

The need for plausible goals and justifications for this court is particularly pressing given research on the *ad hoc* tribunals by Eric Stover, Harvey Weinstein and others, which has documented the failure of such tribunals to have the anticipated transformative effect on the local population.³

This article seeks to defend three propositions. First, it is unlikely that the Extraordinary Chambers will be able to achieve any of the three primary goals put forward by its proponents: promoting the rule of law in Cambodia, providing justice for the victims, or fostering reconciliation. Second, whatever the Court will contribute, it runs the risk of doing harm as well; of particular concern are the possibilities that the Court will reify the flawed notion that only the leaders are responsible for the atrocities that occurred, and isolate Democratic Kampuchea's crimes from their historical context, limiting our understanding of the underlying cause. Third, once the unrealistic expectations for this process are cleared away, it becomes apparent that other culturally-specific models, rooted in the desires of the Cambodian people, have a greater chance at making a long-term impact and satisfying victims, without the risk of such significant harms.

Throughout this analysis I will rely on my own experiences and research in Cambodia as well as social science research undertaken by others. From June to December 2005 I worked with a Cambodian team on a research project that sought to identify ways to engage Cambodians with the work of the Extraordinary Chambers.⁴ This research included in-depth interviews with 117 people in the rural areas of Cambodia.⁵ In 2006, the results of that study were then put into practice at a local Cambodian NGO, The Khmer Institute of Democracy, which trained over one hundred local representatives to undertake carefully designed outreach activities on the Extraordinary Chambers in seven provinces throughout the country. The team also prepared and showed a documentary film for young Cambodians encouraging them to believe the stories they hear about the past and engage with the history of that period. The monitoring of those outreach activities, combined with the earlier research, provides one of the most comprehensive looks at Cambodians' views of the Court so far undertaken.

Unrealistic aspirations for the Extraordinary Chambers

The Extraordinary Chambers is one of only a few hybrid criminal courts: courts where local legal officials and foreign jurists sit together. These courts have been hailed by scholars for their potential to avoid the pitfalls associated with the *ad hoc* tribunals.⁶ It has been suggested that these new hybrid courts will be more connected to local society and therefore have a better chance at leaving a positive “legacy” behind.

In this section I will deal with the three most commonly offered candidates for the legacy of the Extraordinary Chambers: promoting the rule of law, providing justice for the victims of Democratic Kampuchea, and fostering reconciliation.⁷

This section proposes that the reality in Cambodia is far more complicated than the rhetoric surrounding the Court suggests. More attention to the exact mechanisms by which the Court is expected to impact on society shows that the link between the Court and its objectives is tenuous at best.

This section will present scholarship suggesting that power dynamics in Cambodian government, characterized by extreme levels of executive control, and cultural differences in dispute resolution, are likely to stand in the way of the Court’s ability to influence the rule of law. Furthermore, our research shows that prevailing notions of justice in Cambodia diverge in important ways from what the Court can be expected to accomplish. Finally, there is little evidence that Cambodians have difficulty coexisting with one another because of tensions stemming from the Democratic Kampuchea period; but even if there is a real need for reconciliation it is not clear how the Court will be able to impact on village-level dynamics.

Promoting the Rule of Law

Japanese Ambassador to Cambodia, Takahashi Fumiaki, has been quoted as saying that, “the (Extraordinary Chambers) can play an important role as a catalyst for strengthening Cambodia’s general judicial system, providing a good model in legal proceedings based on due process, efficient judicial administration and support systems”.⁸

Likewise, James Goldston of the Open Society Justice Initiative has suggested that the Extraordinary Chambers can be used to “support broader legal reform efforts in Cambodia”.⁹ If one thing is clear, Goldston says, “the (Extraordinary Chambers’) performance will have a major impact on both Cambodia and the future of international justice”.¹⁰

This section hopes to put the desired impact of the Extraordinary Chambers in the context of ongoing rule of law reform efforts in Cambodia.

The World Bank Phnom Penh has written that, “Cambodia’s justice system

has proven easy to criticize but hard to reform”.¹¹ Post-colonial law reform efforts in Cambodia are over a decade old, beginning in 1993 with the world’s first U.N. peacekeeping mission: the United Nations Transitional Authority for Cambodia (UNTAC).¹²

Today donors continue to spend tens of millions of dollars a year on rule of law promotion efforts in Cambodia and yet fail to disrupt the power structure that prevents fair trials.¹³ The failures of past efforts form an important backdrop to any discussion as to what the Extraordinary Chambers can accomplish.

Impediments to Rule of Law reform

There are many factors interacting to create the current situation in the Cambodian judiciary. A few oft-cited constraints to reform include: capacity, the strength of the executive in relation to the judiciary, and cultural differences regarding dispute resolution.

Capacity

It is uncontroversial that Cambodian judges lack the capacity to perform their duties effectively. Advocates for rule of law adherence regularly point to problems with resources and capacity in the Cambodian judicial system.¹⁴

According to the Cambodian government: “of the 120 or so judges who are actively employed in Cambodia, barely a handful of them have any proper legal qualifications”.¹⁵

In fact, in the original letter to the UN requesting help to set up a Khmer Rouge tribunal, the then-co-Prime Ministers Hun Sen and Norodom Ranariddh wrote that, “Cambodia does not have the resources or expertise to conduct this very important procedure”.¹⁶ More recently, the President of the Cambodian Bar Association has expressed concerns about the capacity of Cambodian lawyers to provide adequate defense before the Extraordinary Chambers considering it a “necessity” that Cambodian defense lawyers be assisted by at least one foreign lawyer.¹⁷

Though few, if any, doubt that capacity is a major problem for Cambodian judges, the following sections will attempt to show that it is hardly the most serious impediment to rule of law reform.

The Executive

Judges in Cambodia act almost openly as subordinates of the Executive.¹⁸ During UNTAC, UN officials noted that, “while the Courts were technically independent of the executive arms of government, they remained totally subject to executive

direction”.¹⁹ During that period, the Minister of Justice explained to UNTAC officials that judges who did not follow his instructions and thus “disobeyed the law” must be punished.²⁰

Although executive branch officials rarely speak so plainly these days, little has changed. In his 2005 report to the Human Rights Commission, UN Special Representative to the Secretary General on Human Rights in Cambodia, Peter Leuprecht said it was “increasingly obvious” that “impunity was not only the result of low capacity within law enforcement institutions and a weak judiciary; the judiciary continued to be subject to executive interference and open to corruption”.²¹ He found that, “efforts to reform the judiciary over the past decade have been ineffectual in achieving significant improvements in the administration of justice”.²²

Why has it been so hard to wrest the judiciary from the executive? One answer may be in the ways that power is understood and practiced in Cambodia.²³ Unlike Western legal bureaucracies that ideally function according to general rules, Cambodia’s patrimonial system is based in personal ties of loyalty between superiors and those loyal to them.²⁴ Although the legal rules on paper may appear similar to those in other nations, the reality is that government in Cambodia operates through “patron-client relations” – relationships of mutual assistance between those in power and their cadre of dependants, operating in pyramid fashion. Hinton notes that, “various high ranking officials may have strings of power and military units that are loyal to them (as well as strings of civil service personnel)”.²⁵

Higher status patrons protect and provide resources to their clients who in turn repay that debt through support, respect, and obedience. Cambodians talk of this relationship using familial idioms, often noting that children (clients) must obey their parents (patrons).²⁶ Deference to your superiors is unquestioned, as patrons are seen as powerful individuals who should be feared.²⁷

Cambodian judges have received their position through other more powerful officials and therefore almost certainly view themselves as the subordinates (or clients) of those executive branch officials.²⁸ These relationships often date back to the creation of the judiciary in the 1980s.²⁹ During that time the Cambodian government was isolated politically from the West, China and the UN, as such Cambodian students were generally only able to get legal training in Soviet schools. Candidates were chosen to study abroad as a reward for loyalty to the ruling party in Phnom Penh.³⁰ As a result, one can expect that some of the oldest, best-trained lawyers in Cambodia are also the closest and most faithful to the ruling party. When viewed in this way, the failure of the judiciary to act independently is not surprising.

What is surprising to many, however, is that a patron-client view of government is accepted by the people of Cambodia. In a nationwide survey, the Asia Foundation found that most Cambodians *favor* feudal or paternalistic local government over either democratic or authoritarian forms. Fifty-six percent of Cambodians said

that local government “is like a father and the people like a child”.³¹ People expect for government to operate as a mutual assistance scheme, like children obey their parents and parents care for their children.

In short, the notion of separation of powers is absolutely foreign to Cambodian thinking about government, which is based on personal ties of power between government officials. As such, executive control of the judiciary will be an enormous obstacle to any attempts to reform Cambodia’s courts.

Cultural differences in dispute resolution

In addition to the ways that power is structured, there are other cultural commitments that will complicate any rule of law promotion effort.

Professor Rosa Ehrenreich-Brooks writes, “[t]he rule of law is not something that exists ‘beyond culture’ and that can be somehow added to an existing culture by the simple expedient of creating formal structures and rewriting constitutions and statutes”.³² That criticism can be fairly applied to Cambodia. Changes in black-letter law, and constitution making have not led to impartial law enforcement or created a Western-style rule of law culture. Part of the reason may be that many laws and procedures did not emerge from Cambodian society, but were imported as part of a larger development effort. This section will argue that cultural differences, in dispute resolution principles and procedures, cannot be ignored when analyzing projects such as the Extraordinary Chambers.

Take for instance, the principle of equality. Notions of equality of individuals and equality before the law are absolutely fundamental to Western notions of justice. Yet, in Cambodia that same principal has a very different meaning. Individuals are not seen as equal to one another, rather the relative importance of individuals is constantly measured.³³ According to Cambodian anthropologists: “Social relationships in Cambodia, like those across Southeast Asia, are hierarchical. No one is considered equal to anyone else”. In fact, Ledgerwood and Vijghen write that the, “idealized notion of moral equivalence was perhaps never present in Khmer society”.³⁴

What’s more, the principle of equality has become equated by some Cambodians with the policies of Democratic Kampuchea, where people were stripped of their possessions and made to work “equally” in the fields.³⁵ In the minds of some Cambodians “equality” has become a dirty word.

Principles of fairness take on other meanings in Cambodia as well. Ledgerwood and Vijghen write about an older lady in a Cambodian village who did not receive development aid, although she was poor, because the village chief favored his kin and friends in the distribution, and she was not a member of his patronage group. They write, “contrary to Western concepts, this condition is not regarded as unfair or unjust by the villagers [...] one is expected to favor one’s kin and friends, otherwise

one would be seen as neglecting the interests of one's kin [...] in this sense it is only 'fair' to favor one's clientele”.

Furthermore, a culturally-grounded analysis of Cambodian dispute resolution practices reveals important differences between the theories of dispute resolution that have evolved in the West and those that have evolved in Southeast Asia.³⁶ A Western judicial system for managing disputes was introduced to Cambodia by the French during the colonial period,³⁷ but never actually displaced indigenous methods of resolving problems known as *somroh-somruei*, a process of “third party assisted negotiation or mediation.”³⁸

*The aim of somroh-somruei mediation in a village is to achieve a settlement of the dispute that makes a positive strengthening of the relationship between the disputing parties. A particular conflict is not viewed as an isolated event or as the struggle of intrinsically incompatible interests. Rather, the Cambodian traditional attitude toward somroh-somruei views conflict as an occurrence that naturally punctuates all long-term relationships.*³⁹

Somroh-somruei seems to reflect the unique cultural preferences of Cambodians when it comes to dispute resolution. For example, where Western traditions value an impartial adjudicator – Cambodians often seek out mediators who are familiar with the community and the disputants. UNDP found that “[i]ndividuals prefer institutions and authorities where there is a possibility for them to negotiate and participate in the resolution of the dispute. Hence there is a preference for local authorities”.

There are religious elements built into dispute resolution as well; 95% of Cambodians are Theravada Buddhists.⁴⁰ Buddhism scholar Ian Harris notes that “the ideal of the learned patrician in the East [has historically been] that of a gentleman who makes peace, not an able advocate who wins cases for others in court”.⁴¹ “Evidence suggests that the Theravada Buddhists of Southeast Asia are less assertive in their demand for ‘rights’ by virtue of a religious worldview which links such demands with illusory attempts to aggrandize the self.”⁴² Marija de Wijn writes that, “villagers often noted a preference for restorative types of justice in which people ‘become friends again’”.⁴³ Essentially, traditional dispute resolution in Cambodia operates under fundamentally different principles than a Western legal system. Yet, the ordinary Cambodian courts and the Extraordinary Chambers are based on a fundamentally Western approach.⁴⁴

Trying to achieve adherence to Western legal sensibilities would require nothing less than a paradigm shift; this is a lot to ask of the majority of Cambodians who have had little if any exposure to Western legal ideas.⁴⁵ As Ehrenreich-Brooks has suggested, the conditions for (indeed the desirability of) such a shift are not well understood.

Taken as a whole, these factors: low capacity among legal professionals, power

systems that flow through personal ties of loyalty, and cultural differences in legal principles, point to a complicated set of impediments surrounding rule of law promotion in Cambodia. The next section will discuss whether, even if increased adherence to Western legal principles is a proper aim, the Extraordinary Chambers would be able to make a meaningful contribution to such a goal.

What can the Extraordinary Chambers contribute to the Rule of Law landscape in Cambodia?

This section will analyze the claim that the Extraordinary Chambers can promote the rule of law in light of the impediments discussed in the previous section and a growing body of literature which suggests that rule of law reforms, particularly technical initiatives like passing new laws and training local judges, are not likely to generate improvements.

One can posit two general theories of how the Extraordinary Chambers may impact on local law reform initiatives: (1) because the judiciary lacks education and training, the Court can train members of the judiciary and the legal community in ways that will help them to better carry on their functions after the Court ends, and (2) ordinary Cambodian people lack information about legal processes; the Court will model a well-functioning court for them so that they can better understand courts and demand similar treatment when they have future disputes that need to be resolved.

I will take the two theories in turn:

Training

One common theme in the literature promoting hybrid tribunals is that in post-conflict societies judges and legal professionals lack training, and so providing additional training and hands-on experience will improve adherence to the rule of law.⁴⁶

Thomas Carothers, a premier scholar of rule of law development at the Carnegie Endowment, notes that, “[e]xperienced practitioners have consistently pointed [...] to the fact that judicial training, while understandably appealing to aid agencies, is usually rife with shortcomings and rarely does much good”.

That is certainly the case in Cambodia. Evan Gottesman, a legal advisor in Cambodia for the American Bar Association in early nineties, writes the following about his experiences: “What I discovered, not unexpectedly, was that the Courts, the police, the legislature, and the ministries responded to political and economic pressures put in place long before my arrival”.⁴⁷ He says, “Cambodia’s top leaders were clearly familiar with the concepts of human rights and the rule of law. Having thought through their political and legal

options and having already made what they felt were informed policy choices, they were unlikely to alter the way they governed the country merely in response to Western advisors”.⁴⁸

Gottesman arrived in Cambodia in 1994, but despite 5-7 billion (U.S.) dollars spent on aid in Cambodia over the past decade,⁴⁹ with potentially hundreds of millions spent on rule of law reform,⁵⁰ the same is true today.⁵¹

On closer inspection, the theory that the Extraordinary Chambers will promote the rule of law by training may be based on the assumption that capacity is one of the major impediments to proper functioning of the legal process in Cambodia.⁵² As discussed, problems with capacity are only one small part of the rule of law landscape. As long as power to control the courts is held by the executive, and cultural differences in dispute resolution prevail, rule of law promotion through training will not result in significant improvements in the justice sector in Cambodia.⁵³ In fact, training may simply reward party insiders.

Increasing demand for Rule of Law by modeling a well-functioning court

Proponents of using internationalized courts to enhance the rule of law often suggest that the Court will model a legal process for the local population and, in doing so, perhaps provide a goal for people to strive towards.⁵⁴ There are many assumptions built into this theory: (1) the Court will function properly, (2) internationalized tribunals are a good vehicle for teaching about a legal system, (3) once shown a Western legal system, people will prefer it and so demand it in the normal courts. Given the lack of available information about how the Extraordinary Chambers is functioning, I will deal only with the latter two elements.

Teaching law through the Extraordinary Chambers

There is reason to suspect that the Extraordinary Chambers is an especially problematic starting point through which to introduce legal systems. Not only are the words “Extraordinary Chambers” hard to understand in *Khmer* language (*ong chumnum chumria vikseaman knong tholakaa kampuchea*), but the structure and decision-making schemes at the Court are exceedingly complicated and different even from extant legal structures.⁵⁵ The names of the crimes in the Extraordinary Chambers Agreement⁵⁶ include words that many Cambodians have never heard before such as “crimes against humanity”.

These are substantial challenges in a society plagued by poverty and very low literacy. In Cambodia, 25 percent of men and 45 percent of women are completely illiterate, and 71 percent of women and 50 percent of men are functionally illiterate.⁵⁷

As discussed above, many of the presumptions built into a legal system will be unfamiliar to Cambodians. For instance, many Cambodians will hear about the concept of defense rights for the first time in the context of the rights of those believed to be responsible for killing their relatives. That is not the sort of introduction likely to win over converts to a new way of thinking about criminal processes. Equality before the law, reasonable doubt, sufficiency of the evidence, elements of crimes – all of these legal concepts are absolutely foreign to ordinary Cambodians.

One of the projects we conducted as a local NGO was to teach exceedingly simplified legal concepts and procedure through a guided set of pictures presented by a local teacher. Although people in the villages thanked us politely for coming so far, they generally had little if any interest in learning what they felt were arcane rules about who judges are or how a case progresses through court. For many, it just didn't seem relevant to their daily lives as rice farmers, struggling to make a living.

For these reasons it makes sense to question whether the Extraordinary Chambers is the right forum to be modeling a Western legal system.

*Extraordinary Chambers
as a catalyst for social change*

In meetings around Phnom Penh, it has been suggested that internationalized courts like the Extraordinary Chambers can spark social change – once people see how courts properly function they will understand how dysfunctional the national courts are and they will then demand change.

Yet, people in Cambodia already recognize that the national court system is deeply corrupt. Survey research conducted in 2003 by the Center for Advanced Study showed that “Cambodians retained little or no faith in the courts as institutions of justice. Similarly, respondents identified judges and prosecutors as the public officials whom they were *least* likely to trust”.⁵⁸ According to Collins, some common Cambodian sayings include “go to court, become poor” and “at court the rich wins, the poor loses”.⁵⁹

People do not need the Extraordinary Chambers to illuminate by contrast the inadequacies of Cambodian courts. And yet, despite this widely acknowledged problem, the lack of functioning courts has not been the subject of grassroots campaigns for reform. Case study research by the World Bank suggests that cultural impediments to social activism in Cambodia are extremely strong. Cultural prescriptions encourage people to bow out or submit when faced with a conflict involving a richer or more powerful person.⁶⁰

The World Bank research has found that those cultural barriers can be overcome in those situations where future livelihoods are at stake, but rarely in other situations.⁶¹ Therefore, while Cambodia is just now starting to see

grassroots organizing around the issue of illegal takings of land (land is livelihood in a nation of subsistence farmers), there is little reason to anticipate grassroots activism for change in the legal sphere. This shouldn't be surprising given that Cambodians already resolve most disputes, including some criminal disputes, outside the legal sphere.⁶²

In short, the international community has been trying to promote the rule of law in Cambodia since the early nineties, with little success. The impediments to the rule of law are deeply entrenched, and therefore not likely to be affected by the Extraordinary Chambers. As such, there is little reason to think that the Extraordinary Chambers will contribute anything meaningful towards the kind of social change necessary to create a "rule of law culture".

Justice for the victims

One of the most oft-cited justifications for the Extraordinary Chambers is to provide justice for victims.⁶³ A majority of victims we spoke to in our research agreed.

I used to suffer; my parents and four siblings were killed. Before I would feel sad and cry when I talked about the Khmer Rouge time, but now I feel relief. I can't say for others, what they feel, but I would feel relief if the court were to happen. (Kampot, local government official, 7th grade, approx. 50 years old, female)

In fact, the scope of victimization in Cambodia is staggering. More than twenty percent of the population was killed during the Democratic Kampuchea period and everyone in the country at that time was affected in some way – millions suffered overwork and loss of personal property.⁶⁴ In all of my research and travels I never met a single adult over 30 who did not have painful stories of that period. It is a situation that cries out for justice.

Yet, this section will suggest that the Extraordinary Chambers is not designed in such a way that it can provide what many Cambodians view as justice.⁶⁵ Our research offers an interesting look at the ways justice for international legal experts differs from what Cambodians are hoping for.⁶⁶

This concern, that Cambodians will be disappointed by the Extraordinary Chambers' ability to render "justice", is reinforced by the research in other contexts. In the former Yugoslavia, Eric Stover has found that people spoke of "justice as being highly intimate and idiosyncratic and at times, ephemeral". He found that for witnesses at the ICTY, "full justice" was larger than criminal trials and the *ex cathedra* pronouncements of foreign judges in the Hague".⁶⁷

This section will describe some of the ways in which Cambodians who say they want the Court to bring them justice, are in fact, misinformed about what the Court will do.

Wanting trials for dead perpetrators

Even though Pol Pot is dead we should bring him to trial because it is important to make a historical record, and to have a judgment against him. (Svay Rieng, Atchaa (lay religious community leader), 3rd grade, 68 years old, male)

I think Pol Pot is the most important person to say what exactly happened in that time. But I am so sad that he has died and cannot offer evidence in the case. In my opinion, however, I want the court to sentence him for whatever crimes that the court can and put that into the history books. (Kampong Thom, local government authority, High School, Mid-50's, male)

For me I want to have the court for Pol Pot because he did terrible bad things and also he followed the communist policy [...]. Also, I want this tribunal to prosecute the policy that Pol Pot followed in that time [...]. We need to put the name of Pol Pot in jail even though he has died. (woman 2). (Kampong Thom Farmer, 3rd grade, 50 years old, female)

My suggestion is that I want the court to put the names of the top leaders in the historical record after it gives the judgment in order to let the new generations know that those people are very dangerous and they should absolutely not follow those actions. (Banteay Meanchay, Group interview, Primary School teacher, 6th grade, 39 years old, male)

Government or NGOs should show a photo of Pol Pot in some places in order to tell the public that this is Pol Pot, the top leader of the Pol Pot regime and now he has died. Moreover, Pol Pot is the one who set up the policy to kill many people. So we would do this in order to find justice for the victims, even though he has died, and also to show the new generation that we have punished him for what he did. Moreover, for the new generation who one day will become the top leaders, they may do the same things as Pol Pot did because we haven't sentenced the top leaders. (Kampot, First Deputy Commune Chief, 7th grade, 62 years old, male)

One of the most difficult issues that often came up in our conversations about the Extraordinary Chambers was the question of trying people who are already dead, including such notorious leaders as Pol Pot and Ta Mok. Many people hold the assumption that dead leaders will be tried. Despite our best attempts at explaining, it strained the imagination of rural Cambodians that it was not possible to try a dead person for her crimes.

This should not be surprising given that Theravada Buddhism includes the teaching of *karma*, which holds that punishments and consequences can carry

over between lives. In addition, Cambodians believe that spirits take a corporal form and can be encountered roaming the earth.⁶⁸ These religious beliefs, coupled with gaps in legal understanding and low literacy, make legal-talk about the right to confront witnesses and *in absentia* trials extraordinarily difficult for ordinary Cambodians to understand.

People want to see a consequence for the spirit of Pol Pot, or for his name or picture. One woman we talked to suggested digging up the bodies of the dead perpetrators, putting chains around their bones, and re-burying them. Other people talked about hanging their pictures in a jail or building a statue of the leaders with their hands cuffed to display in a public place. For some, jailing a person's name, photo or bones would require that the spirit remain in a kind of purgatory creating an equivalent to punishment in this life.

Of course it would be impossible for the Court to undertake these sorts of activities; they are inconsistent with justice in a Western legal setting. Yet, not having any consequence for major perpetrators who have already died makes it hard for many Cambodians to feel that the trials will bring justice. Not having a consequence for the dead perpetrators seems like having no consequences at all.

Wanting to know about the role of foreign nations and foreign individuals in the atrocities:

It has to be that some powerful countries were involved in that regime, such as China, Vietnam, America, etc. Will the Court for the Khmer Rouge prosecute those powerful countries? I am wondering if the Court has been delayed and delayed because of those other countries, and will be delayed until the old Khmer Rouge leaders die and then the case is forgotten. (Kampot, local government official, 7th grade (old system), 60 years old, male)

In the Khmer Rouge period they had CIA spies from America. From this point we know that there was something related to America and also related to other countries which used to support Khmer Rouge. So the Khmer Rouge could have been created because of that support. So in order to sentence Khmer Rouge, we have to sentence those who support Khmer rouge as well. (Banteay Meanchay, young man at film viewing)

Now I am 65 years old. I remember clearly what happened to me. I was arrested and they ordered me to be killed because I was so so hungry and I ate a potato which belonged to Angka (the "organization" the name for the Democratic Kampuchea party). I was tortured badly. It hurts me when I talk about this. I think this regime happened only because of foreign ideologies. (Phnom Penh, old man at film showing)

I have a question. Why did Khmer kill Khmer? Why did they not kill foreigners or Chinese? [...] Pol Pot, Ieng Sary are all Khmer, so why would they kill Khmer? Maybe someone was behind them, for example foreigners (French) or the Chinese. (Pailin, Young girl at film showing)

Ordinary Cambodians often ask whether foreign nations will be prosecuted by the Court. It is not clear from the statute whether the co-Prosecutors will find they have a mandate to indict foreigners who are found to be “most responsible” for the crimes that happened during the specified period. However, given the limited time and budget, and the limitations on the temporal jurisdiction of the Court, prosecution of non-Cambodians seems unlikely.

Yet, we found that many Cambodians think that giving support to the perpetrators (political or financial support, for instance) is enough to make one responsible for what happened and therefore eligible for prosecution at the Extraordinary Chambers. Some educated Cambodians have said that this ought to include the professors in France who gave the “wrong ideas” to the Democratic Kampuchea leaders when they studied there as youth.

Present in these theories is a perhaps natural desire to shift blame away from one’s own group onto another group. The lack of information in Cambodia about the history of that period makes blame shifting seem more plausible. A highly politicized version of history was taught in the 1980s (with warring factions each teaching their own version of the story); since UNTAC only those limited number of students who reach the 9th or 12th grades get a brief instruction – just a two sentence insert in their text.⁶⁹

For adults who remember that period, they know what happened to them in their own villages, but many have no sense of the greater conflict, the global alliances, or the political forces at work. Therefore, knowing vaguely that the Chinese had some role, without knowing what it was, leads to a dangerous situation where Cambodians can absolve their group of responsibility.

One theory of international courts is that they can provide an “authoritative” rendering of the truth, and can address some of these misconceptions of history or responsibility.⁷⁰ Yet, Fletcher and Weinstein have questioned this assertion, given people’s predisposition to deny blame. They found that in trials, “[i]ndividuals, particularly bystanders of a group that committed crimes may not be ready to accept the stigmatization that trials are intended to confer”.⁷¹

Overcoming the predisposition to deny blame is difficult in any circumstance. But, this may be especially true in Cambodia where those who deserve blame, in many people’s eyes, will not face trial. Without some sort of accounting for the role of other nations, if only to absolve those nations or individuals, it is hard to see how the Extraordinary Chambers will help Cambodians reach that point of taking responsibility. What’s more, it is possible that many Cambodians will feel that the

process is merely scape-goating them without discovering, “the ones standing behind the leaders”.

Not having any sort of accountability for foreigners is another way in which the Extraordinary Chambers may not live up to Cambodian’s notions of justice.

Wanting to see consequences for greater number of defendants

If there is the Khmer Rouge court, I think that only the lower level leaders should face the trial because the top leaders didn’t know what the leaders in the commune or village level did at that time. The top leaders might not have ordered people to do such stupid things at that time but it was just an act of revenge resulting from the jealousy of the lower leaders. (Stung Treng, Fisherman, some primary school, 30 years old, male)

I think it is a good idea to bring the lower leaders to go to the court because the people whose relatives died because of the lower leaders will be happy to see this person in court. (Kampot, Head of Primary School, former KR stronghold, 34 years old, male)

Before I was afraid that I could not answer people if they asked me: why will the court not bring the lower leaders to trial? Because people have never seen Pol Pot kill anyone, they’ve just seen the lower leaders commit crimes. But now I understand. People are sad when they realize that the court will only be for the senior leaders but after I give them many reasons, they understand. (Svay Rieng, village-level NGO Staff Member conducting trainings on the Extraordinary Chambers, age: not given, female)

There is a common perception that Cambodians will be dissatisfied with the Extraordinary Chambers because local, low-level perpetrators will not be brought to justice. We encountered a number of people who held this view.

In fact, this is a problem that international justice scholars have been struggling with for some time. The scope of genocide and crimes against humanity often make it impossible to bring to trial everyone who was involved in perpetrating the crimes. “Trigger-pullers” are often let off the hook in favor of prosecuting the architects of the crimes. Yet, this can place a court in danger of credibility problems because the individuals who have been seen committing terrible atrocities go unpunished.

Yet, to be fair, in Cambodia many people feel satisfied with the Court because the idea of following orders from a superior makes intrinsic sense in a society organized around top-down patron-client relations.

For me I think that it is good to bring only top Khmer rouge leaders to the court because the others did what their leaders ordered. Of course, there is a possibility that the lower cadres doubled what their leaders said. But, those who created such an idiotic ideology are

the most responsible for the killing. (Kampot, farmer, retired teacher: primary school, 7th grade, 60 years old, male)

I think justice can still happen even though the court will send only the senior leaders to jail because the lower leaders at that time needed to follow the orders from the top and if they refused to follow, the senior leaders would kill them. (Svay Rieng, Primary School Teacher, 55 years old, female)

Notions of hierarchy, so ingrained in Cambodian society, make the notion of superior responsibility easier for many to understand. But it also leads to a sense that following orders is an excuse for committing atrocities. This issue will be discussed in greater detail, in part IIIa.

Wanting punishment to involve the death penalty and torture

I think death penalty is a correct punishment for them because my two children who I loved died in that time. (woman 3)

I also want to have death penalty because I feel really angry if I talk about or am reminded about that time again, I almost can't keep from crying. I think if I talk more about it, I will cry soon. You know many of my relatives died like animals, like dogs or cats, not like human beings because in [the minds of the leaders] they never thought that we were humans but animals. (Stung Treng, (woman 1) farmer, Adult education only, 45 years old, female, (woman 3) farmer, 5th grade, 51 years old, female)

We need the court do the same things to all these leaders as they used to do to us: for example hit them with the stick exactly as they did to us. (Kampong Thom, farmer, first grade, 45 years old, male (comment supported by group)

I want to have death penalty because I want the court to put all the wrongdoers through the same pain and hurt they did to my mother. If the KRT happens I will go to see the court because I want to see with my own eyes whether the court will give the same punishments to them as Pol Pot gave to the people. (Kampong Thom, farmer, 3rd grade, 57 years old, male)

One thing we have often heard is that the absence of the death penalty and torture as a form punishment makes people feel like there will not be justice at the Court. To many Cambodians a jail sentence seems like “forgiveness”.

This is not surprising given the scope of the crimes of Democratic Kampuchea and the very recent development of international norms prohibiting the death

penalty. Again and again, for ordinary Cambodians, it was assumed that the Extraordinary Chambers would use the death penalty.

The same has been found in the minority Cham (Muslim community) in Cambodia who suffered greatly under the Khmer Rouge. A Phnom Penh newspaper reports that one *hakem*, or *imam* said, “In the Koran, if they kill us, we need to kill them back”. When asked if the leaders of the Khmer Rouge should be killed for their crimes he said, “Yes”.⁷²

Similar problems have been noted in other contexts as well. About Rwanda, one scholar has written that, “the absence of the death penalty raised the specter of moral imperialism, especially in light of the fact that those found guilty at Nuremberg were given the death penalty”.⁷³

There is Buddhist language about ending cycles of violence that could be useful, if the Court wanted to engage in an outreach campaign on this issue. However, the absence of the death penalty will be a major reason for Cambodians not to be interested in the Court – or that it will not feel like it has provided justice to them.

The Court is the government's business

Until now we have addressed some of the areas where the Court's mandate may conflict with the expectations of the majority of people who generally support the Court. Although our research was not based on a statistically random sample, about one in five people we talked to expressed resistance to engaging with the Court at all. Although this represents a minority of our sample, it is significant, and could indicate a larger problem with perceptions of the Court.

Consistent with the notions of hierarchy discussed above, many people we interviewed felt that the Court was above them, or none of their business.

When the Khmer Rouge Trials are happening, even if someone request for me to go to see the court, I will not go to see that trial because we are so small. We know nothing about the government and we don't need to know about the court's work. It is the work of the authorities. (Stung Treng, fisherman, 30 years old, male)

I've heard about KRT for many years but nothing had been done up to now. To create a tribunal or not is the government's obligation. People always follow the government. I have no idea or commitment to this tribunal. (Kampot, farmer, 51 years old, male)

It doesn't matter to me. This is the government's problem. For me, I cannot say 'I need this court' because even if I say a thousand times that 'I need this court' sometimes it still will not happen because I have no power to create it. Only the government can do that. (Stung Treng, farmer, 55 years old, female)

I don't know about KRT. This is the government's obligation. I have no knowledge in this regard. I am a Buddhist monk. I don't want to put my nose in the government business. (Kampot, Buddhist Monk, 68 years old, male)

Some felt they had to express support for the Court because it was their duty to support the government's plans.

When I hear about this court I think: creating this tribunal is the government's duty. We are the simple people who must support the government's plans. (Banteay Meanchay, farmer, 55 years old, male)

I think this is good idea to create this court because we want to find justice for the victims who died in that regime and people will think that our government always thinks about the people who live under his control – the government is like the parent who needs to take care of the children – having this trial will also make people feel more confident in our government. (Kampot, farmer, 47 years old, female)

These comments illuminate an important phenomenon in Cambodia: people's sense of their place in society, of "big people" (which includes the government) and "small people". These people felt that the Extraordinary Chambers belongs in the realm of those higher up in the power hierarchy. Cambodia scholar Fabienne Luco writes, that:

Under cover of tradition, one accepts his/her place and condition without ever questioning the system. 'Tam pi propeyni.'[...] one must not challenge the established order. People are expected to remain in their place or face punishment.⁷⁴

Given how pervasive the underlying notions of "place" are in Cambodia, and how closely the Extraordinary Chambers is associated with the government, it is hard to imagine how the Court could unhinge itself from politics and bring itself down to the level of ordinary people. It would require strong messaging that the Court is independent of the government and for the people. Unless there is a dramatically different approach, such as this, a significant number of people will not even venture to consider the Court, let alone feel a sense of justice.

Ultimately, these conversations with Cambodians show that justice is a feeling, and one that is not automatically triggered by a fair trial. It is unsurprising, therefore, that the Extraordinary Chambers will have trouble living up to people's expectations of justice.

Although international experts in Cambodia regularly talk about the importance of "managing people's expectations", conducting outreach that will

prepare people for the reality of the trial, that overlooks the fundamental flaw in the design of the process: it was not created to meet people on their level or provide consequences consistent with their feelings of justice. The Extraordinary Chambers was always a trial in the Western mould the primary aim of which was to meet international due process standards.

Reconciliation

Another common remark about the Extraordinary Chambers is that it will promote reconciliation in Cambodia.⁷⁵ However, advocating for reconciliation presupposes a problem of community unrest that has not been shown to exist. In addition, it assumes that courts are appropriate for addressing problems of non-reconciled communities despite evidence from other international courts that suggests that this is not the case.

Before analyzing the claim that the Extraordinary Chambers can contribute to reconciliation it is important to define the term.⁷⁶ Suzannah Linton writes that reconciliation, “involves the simple process of learning how to co-exist and work together with people one does not like or is not liked by, coming to terms with personal negativity about one’s experiences whether one be victim or perpetrator [...] so that all may lead as normal lives as possible”.⁷⁷

This notion of co-existence, reflects the normal Cambodian understanding of the term. In fact, reconciliation is often translated as *somrob-somruel* (the mediation process used to resolve village level conflicts) – getting over a conflict so that the community can get along. But Linton’s definition also involves the sense of an individual “coming to terms” with the past, for which the best translation into *khmer* seems to be “reduce the heat of your anger” – but doesn’t appear to have a perfect translation.⁷⁸ Therefore, this section will separately address the two meanings: co-existence and reduced anger.

My limited research did not uncover problems with co-existence in Cambodian villages. And, there has been no systematic study of Khmer villages to determine how widespread the problem of victim/perpetrator animosity is within villages.

When I see a person who used to be a Khmer Rouge I remember that he used to be cruel to me [...] Before I used to be reminded all of the time, but now I have forgiven: it is like a glass of seawater, when you add more and more fresh water there will be less salt, until it is just water. (Kampot, farmer, age: unknown, former Khmer Rouge cadre, female)

I think in this area we never have problems with the ex-Khmer Rouge soliders because we want to live in peace and also that regime happened in the past so we only need to think about the present. We sometimes have a party with the ex-Khmer Rouge solider,

drinking beer or rice-wine together. We have a good relationship not only with the rich former Khmer Rouge soliders but also with the poor because we will not let someone die because they have no food. For me I give food to them—it is better than offering it to the monks because I think the monks have enough food from the villagers around the pagoda, so I will give the food to the poor and it also means I do a good deed. We are all Khmer people and we need to help each other. (Kampot, male, farmer, age 60+, living on the government side of an area where the Khmer Rouge fought the government until the late 90s.)

In this area, we had a former Khmer Rouge solider but now most of them moved to other area after they got married. I think the former Khmer Rouge soliders now have a good relationship with the village and we never have any conflicts. (Svay Rieng, Primary School Librarian, 55 years old, female)

Many former Khmer Rouge live in this area, but people don't think about that. People are mostly concerned with their work, and making a living. (Banteay Meanchay, local government official, 58 years old, male)

Furthermore, reintegration efforts have been ongoing for some time. NGOs such as Buddhism for Development rely on culturally specific Buddhist language about tolerance to help bring fractured communities back together.⁷⁹ According to their Executive Director, BFD has had incredible success re-integrating hold-out Khmer Rouge communities with the rest of the country – to the point where they have seen marriages between communities formerly in conflict, and at least one joint effort to build a pagoda.⁸⁰ The Executive Director of BFD does not see a need for accountability in order to move the reconciliation project forward.⁸¹

Yet, despite these efforts, many people still harbor feelings of anger.

We still have Khmer Rouges who live in this area and no conflicts happen. However, we are still angry with them because they killed our relatives. [We asked: Maybe when the court happens, it will cause people's bad feelings to wake up — do you think that will happen or no?] If the court happens it will not cause any problems because now we live under the control of the law and we let the law decide. Also, if we feel pain in our hearts we still cannot get our relatives back. (Kampong Thom, group of men and women, farmers, aged 45-57)

While this comment suggests that people do still have heated feelings of anger, getting people to talk about that anger or “process it” in a therapeutic sense may be difficult.

Anthropologist Fabienne Luco finds that in Cambodia “[p]eople are advised to rely on themselves and keep their problems inside the home”. She

cites a proverb which holds that one's heart, like one's home, must be hidden from outsiders: "Third source of evil: when people go back and forth through the door and forget to shut it. Through negligence or by mistake they forget to close the door (so that) one can see everything (inside). This is the same as holding a torch to light the thieves while they steal all your belongings".⁸² Cultural barriers such as these present a challenge to outsiders who want to help Cambodians "come to terms" with their past.

Yet, even assuming that problems of co-existence and lingering anger exist, and can and ought to be revisited at this time, it is still not clear what the Court can contribute.

As Cambodia anthropologist Alexander Hinton has written, "[i]n the end reconciliation will ultimately involve more than a trial [...] each Cambodian [must] decide what to do if a 'knot' of malice still ties him or her in anger against the Khmer Rouge".⁸³ Reconciliation is a deeply personal endeavor.

Extensive research has already been conducted in Rwanda and Yugoslavia, which suggests that international courts contribute little, if anything, to reconciliation. Stover and Weinstein put it in the starkest terms; they "suggest that there is no direct link between criminal trials [...] and reconciliation [...]".⁸⁴

Therefore, although people talk about using the Court to promote reconciliation there is not nearly enough information to evaluate that claim. It is not clear in what sense the term is being used, which groups are in conflict, which people need to "come to terms with the past", how a court process would accomplish those goals, or if it is desirable to ask Cambodians to revisit these feelings at this time. All of these questions exist against a backdrop of extensive research on the ad hoc tribunals showing that those courts contributed little if anything to the process of reconciliation.

The potential for harm

As discussed above, there is reason to be skeptical about what the Court can positively contribute to promoting the rule of law, victims' sense of justice, or reconciliation in Cambodian society. In this section, I will suggest that there are reasons to be concerned that the Court could do real harm. Some strategic choices have been made in order to make this court politically viable which can have harmful ripple effects down the line.

The two chief concerns are: (a) that the court will reinforce the flawed notion that only the leaders are responsible for the atrocities and (b) that the court will isolate Democratic Kampuchea's crimes from their historical context, damaging the greater project of international accountability by ignoring the role of powerful nations in atrocities committed in Cambodia.

Reifying the notion of “place”

In the previous sections on power and the rule of law, this article discussed the fundamentally hierarchical nature of Cambodian society; the same concept came up again in the section on feelings of justice, noting people’s reluctance to engage with the Court because it was above them. Those are only two examples of how the pyramidal notion of power in Cambodia operates at the level of government and throughout everyday Cambodian life. And, as we noted earlier, hierarchy is accompanied by a sharply enforced notion of staying in one’s place. This section will discuss how this stay-in-your-place mentality has implications for Cambodian’s views of authority and responsibility for mass atrocity.

According to the World Bank in Cambodia, “The hierarchical social structures that characterize village life support a culture of acquiescence. Studies of village level decision-making note a tendency for people to avoid open conflict with those who are seen to be more powerful than they are, lest they be marked as troublemakers”.⁸⁵

Consider those comments in light of what Miklos Biros has written about Yugoslavia: “In such a society, an authoritarian perspective is accompanied by profound passivity as the rank and file awaits instructions on acceptable thinking and behavior prescribed by the powerful elite”.⁸⁶ Biros finds that the authoritarian character of pre-conflict Yugoslav society created a “population that was ready to obey authority without reserve or criticism”; the result, now well documented, was horrific.

To what extent did Cambodia’s hierarchical social structure play a role in facilitating the crimes of Democratic Kampuchea? Cambodian anthropologist Alexander Hinton found that “when asked after the fact why they committed such abuses during DK [Democratic Kampuchea], many former Khmer Rouge cadres, like genocidal perpetrators all over the world, have claimed they were just following orders”.⁸⁷ Although Hinton finds that the motivating factors are more complicated than just one explanation, obedience to authority “highlights a key dynamic involved in genocide”.⁸⁸

One woman explained to us the reason why lower Khmer Rouge leaders needed to follow their superiors:

Those lower down needed to follow what the top said. For example, if I tell my son to go to the farm work he needs to go and cannot disobey my order. (Banteay Meanchay, farmer, age: not given, female)

In my opinion, the leaders are like big elephants and if the elephants attack one another other only the grass dies, not the elephants – this example is like real life, if the leaders fight each other only the simple people or the normal people will die. (Stung Treng, farmer, 53 years old, male)

There is a common perception that Cambodians will be dissatisfied with the Extraordinary Chambers because local, low-level perpetrators will not be brought to justice. That is certainly true for many, but many others feel satisfied with the Court because the idea of following orders from a superior makes intrinsic sense in a society organized around top-down patron-client relations.

If the KRT sentences only the top leaders and the most responsible for that regime, I support this idea because, the lower Khmer Rouge cadres are the parents, the children, and relatives of the villagers and especially they are all Khmer. They are innocent. Now they want to live in peace like others in the community. The ideology of that regime taught them to go the wrong way—they are also the victims of Khmer Rouge ideology. (Kampot, farmer, 60 years old, male)

The KRT should not prosecute the lower authorities at district, commune or village level. It is the same as in the present regime, the lower authorities are only the followers. (Svay Rieng, Nun, 60 years old, female)

One respondent in a study conducted by Suzannah Linton wrote that, “[i]n the past Cambodia was insecure and at war because the leadership groups were separated, smeared one another saying this one was good, that one bad, propagandizing the people to support one group. In the end there was war, and the victims were the innocent people who understood nothing and followed their leaders and swayed one way or another in the wind”.⁸⁹

These quotes indicate a potential danger for a tribunal that focuses only on the leadership: it can reinforce the authoritarian personality of the society, leading to a sense that following orders is an excuse for committing atrocities. Without careful attention to this issue, the take-home message of the Extraordinary Chambers may reaffirm the correctness of order-following suggesting that leaders are the only ones really responsible for crimes.

In fact, at a meeting with local NGOs, the most senior UN public affairs official at the Extraordinary Chambers, Peter Foster, explained that their outreach poster campaign was designed in part to “reassure” lower ranking Khmer Rouge cadres that they would not be targeted.⁹⁰ The Khmer Institute of Democracy, a local Cambodian NGO, also initially undertook a Western-donor funded outreach campaign designed to reassure low-level perpetrators.

This message is not only dangerous for Cambodian society, but it also flies in the face of the goals of international justice. International law clearly states that superior orders are not a defense to genocide or crimes against humanity.⁹¹ While, in practice, it may not be possible to prosecute all offenders, international criminal courts should at least seek to promote the spirit of the law, which condemns even those who followed orders to commit mass atrocity.⁹²

One danger presented by the Extraordinary Chambers is that by sanctioning only those who gave orders, the Court will reinforce the perceived correctness, the absence of blame for those who follow their superiors to whatever end. There are reasons to believe that it was exactly that sort of ideology that allowed the crimes to occur in the first place.

Creating a culture of impunity for foreign actors who committed serious crimes in Cambodia

The temporal jurisdiction of the Extraordinary Chambers begins the day that Democratic Kampuchea seized Phnom Penh, and ends on the day before the Vietnamese forces took the city in 1979. By limiting the powers of the Court in such a way, the jurisdiction effectively eliminates the possibility of accountability for crimes committed during the larger war that both preceded and followed the Democratic Kampuchea period.

Assuming that there will be no further attempts (beyond the Extraordinary Chambers) to find accountability for those left out by the Court's jurisdiction, the limitations on this Court could potentially undermine the greater project of international justice. Leaving out certain perpetrators, particularly those from powerful nations who themselves committed serious crimes can create the impression that international norms apply only to those without the power to avoid them.

One could say that the larger war began October 4, 1965 when the American forces began a secret bombing campaign in Cambodia, as part of their conflict in Vietnam. Over about eight years, the United States dropped 2,756,941 tons' worth of bombs over Cambodia on 113,716 sites.⁹³ For perspective, the Allies dropped just over 2 million tons of bombs during *all* of World War II. The result was near total destruction of Cambodia.⁹⁴

Ben Kiernan previously estimated that between 50,000 and 150,000 Cambodian civilians were killed as a result of the illegal American bombing; in light of a recent release of data from the U.S. government, he now suggests the number is surely higher.⁹⁵ The Finnish Kampuchea Inquiry Commission estimates that six hundred thousand Cambodians (or 10% of the population) died as result of the spillover of the Vietnam War in Cambodia.⁹⁶ They find that an additional two million civilians became refugees and 75% of the domestic animals (crucial in a largely agrarian society) were destroyed.

Kiernan also claims that the bombing played a direct role in facilitating the rise of the Khmer Rouge. He recounts a story told by journalist Bruce Palling, who asked a former Khmer Rouge officer if his forces had used the bombing as anti-American propaganda. The Khmer Rouge officer replied:

Every time after there had been bombing, they would take the people to see the craters, to see how big and deep the craters were, to see how the earth had been gouged out and scorched

[...] The ordinary people sometimes literally shit in their pants when the big bombs and shells came. Their minds just froze up and they would wander around mute for three or four days. Terrified and half crazy, the people were ready to believe what they were told.⁹⁷

When the American war in Vietnam ended, the “civil” war continued in Cambodia between the American-backed Lon Nol forces and the anti-American Khmer Rouge forces, backed by Vietnam and China. The Americans eventually pulled out of Cambodia allowing the Khmer Rouge to take the capital a few days later.⁹⁸

During the Democratic Kampuchea reign, China was by far the nation’s biggest supporter. The Chinese government gave enormous amounts of military and economic aid to the fledgling government. Historian Phillip Short details a long list of military equipment, economic aid and personnel resources committed by the Chinese – totaling perhaps more than 3.4 billion dollars in today’s money.⁹⁹

Once the Vietnamese invaded Cambodia to expel Democratic Kampuchea at the end of 1978, the international politics had shifted. The Americans, who had once fought Democratic Kampuchea, now came to their defense. They supported Democratic Kampuchea against “Vietnamese aggression”, turning a blind eye to enormous amounts of evidence of mass killing and starvation.¹⁰⁰ The UN, the West and China maintained their support of DK leaders throughout the cold war, until UNTAC in the 1990s.¹⁰¹

Yet, even after UNTAC, skirmishes continued within Cambodia until the current Cambodian government sufficiently weakened the guerilla forces around 1998. In total, that makes for a 33-year war, of which the three and a half year Democratic Kampuchea reign was by far the worst period.

Discussing the politics underlying the Extraordinary Chambers, the New York Times editorial board once noted that: “All Security Council members, for example, might spare themselves embarrassment by restricting the scope of prosecution to those committed inside Cambodia during the four horrific years of the Khmer Rouge rule”.¹⁰²

In fact, that is what happened. The jurisdiction of the Court has ensured that powerful nations will indeed be spared embarrassment, and reckoning for their respective roles in the overall war. The result is a significant danger that this limited court will take the place of full-fledged accountability.

To be sure, the proximate cause of the deaths of most of the people during the overall war was the Democratic Kampuchea regime, as they killed nearly two million people.¹⁰³ But shouldn’t the goal of international justice practitioners be a comprehensive investigation of the causes of atrocity and robust accountability for all the crimes and all the different players? Anything less threatens to undermine this relatively new project of international criminal justice, making it appear to be selective. There is a case that the United States alone committed grave breaches of the Geneva Conventions by systematically bombing known civilian targets.

For educated Cambodians, disappointment has already set in. Heng

Monychenda, the Executive Director of local Cambodian NGO Buddhism for Development, has said “I saw the Chinese at that time (during Democratic Kampuchea) – I watched films of Chinese people farming”. He feels “disappointed”, and wants to know “why is there no Chinese involvement [in the court process]; why is there no American involvement?”¹⁰⁴ For thoughtful leaders like Monychenda this is not about denying blame, rather it is about spreading it fairly.

But a broader project of accountability may also make it easier for ordinary Cambodians to accept Cambodia’s role in what happened. Without a comprehensive inquiry, the door is open to Cambodians to assign blame to outsiders, rejecting the outcomes of the Extraordinary Chambers.

In defense of the Court, one might say that accountability for some part of the crimes is better than for none. But by allowing the “international community” to participate in judging Democratic Kampuchea, without engaging in any process of reflection of their own, the Extraordinary Chambers runs the risk of de-legitimizing international criminal processes, and perhaps even promoting impunity.¹⁰⁵

Normalizing expectations for international criminal processes

Up to this point, this article has argued that the Extraordinary Chambers is ill-suited to live up to the three principle goals ascribed to it: to promote the rule of law, provide justice and encourage reconciliation. The article has also argued that there are some potential harms associated with the design of the process.

In fact, when viewed in light of the situation on the ground in Cambodia, the rationales for the Court begin to seem like post-hoc justifications for a Western-legal process.¹⁰⁶ The Extraordinary Chambers is so poorly suited to provide a sense of justice, promote the rule of law or foster reconciliation it is hard to imagine that the Extraordinary Chambers was in fact designed to meet those goals.

What are the actual reasons underlying support for this process? One can only speculate. For the Cambodian government it may be the desire to enhance the legitimacy they get from reminding the people of their role in ending the Democratic Kampuchea regime.¹⁰⁷ It is likely that each donor nation has its own national politics to consider. The United Nations may have institutional guilt left over from the recognition they afforded Democratic Kampuchea in the 1980s. It is impossible to know for sure.

But as the rhetoric of these international courts, such as the Extraordinary Chambers, soars higher and higher the Courts themselves can become distracted from what they can realistically accomplish.¹⁰⁸

Ultimately, international criminal courts are just criminal courts on a bigger stage. These courts must operate within the strictly impersonal confines of criminal law.¹⁰⁹ Philosophers have long identified criminal law as that, which focuses on a

wrong that has been done and on the question of who – if anyone – should be condemned and punished for that wrong.¹¹⁰ Whatever other goals we ascribe to these international processes are outside the scope of what they, like all criminal processes, are designed to do.¹¹¹

In fact many of the agendas heaped onto international criminal courts are exactly the kind of thing the criminal law is criticized for not doing: healing victims, encouraging reconciliation, and developing a common understanding of the past.¹¹² Restorative justice advocates have long criticized the criminal law because it transfers problems to a professionalized context of criminal justice in which neither victim nor offender are really able to participate.¹¹³ Malcolm Gladwell writes, “[t]he impersonality of codes is what makes the law fair. But it is also what can make the legal system so painful for victims, who find no room for their voices and their anger and their experiences. Codes punish, but they cannot heal”.¹¹⁴

The Extraordinary Chambers suffers from just this kind of misplaced expectations. Rather than trying to fit a square peg (victim’s sense of justice, reconciliation) into a round hole (Western-style criminal process) perhaps the expectations for the Court ought to line up with the kinds of things criminal courts normally do (find and punish offenders). In that case, the Court should be judged on whether it fairly identifies and prosecutes those individuals who fall within its mandate. And, if jailing a few old men for their few remaining years feels unsatisfactory, then that is a sign that other processes, ones tailored towards victims, should be studied. Creating a correct perception of what a court can realistically accomplish is a first step towards finding justice for the Cambodian victims.

Moving forward in Cambodia

There is a growing body of literature suggesting that legal solutions to mass atrocity are less preferable in many cases than other processes that better resonate with the local population.¹¹⁵ Fletcher and Weinstein suggest that the “emphasis on criminal trials overshadows attention to other options to achieve these same goals. In addition, the legal emphasis ignores the vast literature on collective violence”.¹¹⁶

Professor Mark Drumbl has said that, “given the important characteristics peculiar to each genocide and the differences among genocides, the modalities of securing accountability and encouraging healing should vary in each individual case. Consequently, there may be many policy responses to genocide, the efficacy of each depending on the situation at hand”.¹¹⁷

What would be non-legal responses to the Democratic Kampuchea period that could contribute to the rule of law, feelings of justice or reconciliation?

Promoting the rule of law in Cambodia begins with an analysis of the impediments to rule of law and reflection about whether efforts, such as training the judiciary, are indeed effective or instead entrench and reward party insiders. As

briefly discussed already, achieving a Western-style rule of law culture in Cambodia may be achieved best by promoting social change that disrupts entrenched power dynamics. But, power upheavals in Cambodia, especially those influenced by foreigners, have always been accompanied by terrible violence. Whether that dramatic social change is indeed best for Cambodia or whether foreign actors ought to take part in such activities deserves further debate.

Similarly, to begin a true justice process one might begin by identifying the most important elements of accountability in the minds of Cambodians. Further research may support an interest in punishing the dead, such as victims have suggested: putting chains on the grave of Pol Pot, constructing a prison for the names and photos of Democratic Kampuchea leaders, or a public Buddhist ceremonies to restrain the spirits of those dead leaders and to commemorate the victims.

Perhaps, a *somroh-somrueal* based process could give people a chance to tell their stories and maybe address the culpability of lower level perpetrators and bystanders who still live in Cambodian villages alongside victims. But it remains to be seen if such a process is of interest to ordinary people.

In addition, it is important to begin studying the kinds of historical education that will have the greatest impact on the new generation of youth, who now have difficulty believing their parents' stories about the past.¹¹⁸ One recent study on Cambodian youth's view of the genocide specifically noted that it is necessary to teach the history "in a way that promotes taking responsibility and coming to terms with the genocide, instead of denial that Khmer killed Khmer and that it was foreign influence that caused it".¹¹⁹

Also, it would be useful to engage in further study of Cambodian's relationship with authority and how to prevent future generations from following their leaders down the path of mass atrocity. Such a nuanced, culturally-sensitive topic would need to be explored carefully, and follow-up programs designed by Cambodians.

Other less legal processes could also address the legacy of foreign involvement in Cambodia, including the American bombing campaign. The very fact that an international court for American or Chinese crimes is probably not politically viable suggests that non-legal efforts should be pursued. De-mining efforts and public education campaigns could draw awareness to the present-day harms of that crime and recognize its victims. Taking stories of the bombing to American soil could serve an important purpose as well.

In essence, those responding to future mass atrocities may consider addressing the needs of the society from the perspective of the people living in it. This is hardly an original notion. Ariel Dorfman writes that we ought to think "from the ground up" and have "confidence that those who have been the most hurt have the best idea of how to mend the destruction".¹²⁰ That may also mean a willingness to acknowledge that people do not want to deal with the past.¹²¹

This is the challenge now facing the personnel at the Extraordinary Chambers. Once the limitations of a legal process are recognized, will the international community, donor states, and international NGOs dedicate themselves to listening to Cambodians, and carrying forward the people's agenda with the same energy and passion they have dedicated themselves to a trial meeting international due process standards? And will the Cambodian government pursue the people's input with the same fervor it has used the nation's troubled past to gain political advantage?

As it stands, the rhetoric and priorities of Extraordinary Chambers seem far removed from the priorities of the people. Yet even though it has taken over a decade to get to this point, and the defendants are quite old, the majority of Cambodians are young – there is still time to refocus.

Conclusion

The events of the past decade show that international criminal trials are fast becoming the preferred response to mass atrocity.¹²² But as quoted throughout this paper, Stover, Fletcher, Weinstein and others are sending up some cautionary research on the ICTY and ICTR – they've found “no direct link between criminal trials and reconciliation” and that “for survivors of ethnic war and genocide the idea of ‘justice’ encompasses more than criminal trials”.¹²³ The research on Cambodia presented here suggests that the Extraordinary Chambers could meet a similar reaction. Yet, the trials seem to be moving ahead with little reflection on these findings.

The international community has made a significant investment in the Extraordinary Chambers. The investment of foreign funds, at least \$50 million dollars over three years, is a mere drop in the bucket in terms Cambodia development dollars.¹²⁴ But the political investment has been enormous: the negotiations to create the Court lasted over ten years. The thinking on the ground is that we have come so far we cannot let this process fall apart now.

The Extraordinary Chambers may very well have reached a point of no return. But there are lessons in this story. One, the job of dealing with the Democratic Kampuchea legacy will not end with the last trials at Extraordinary Chambers. The next steps, if motivated by the Cambodian people, may take place outside the legal sphere, but they require no less seriousness, commitment or funds than a legal process.

Second, when future international experts debate the appropriate consequence for new atrocities, they would do well to learn from past experiences and engage with a detailed cultural analysis of the role criminal trials can realistically play and approach, with open minds, the suggestions of the people. A starting point for future responses could be: what do the members of the society want? As far as I know, that question was never asked in Cambodia.¹²⁵

NOTES

1. The author would like to express special thanks to Vichhra Muoyly, Vireak Kong, and Va Nou for their contributions to the underlying research and help in formulating this analysis. Also, to Henry Hwang and Heather Ryan for their support.

2. A. Hinton, *Why Did They Kill? Cambodia in the Shadow of Genocide*, Berkeley, University of California Press, 2005, p. 1 (hereafter: Hinton).

3. E. Stover and H. Weinstein, "Introduction" in E. Stover & H. Weinstein (eds.), *My neighbor, my enemy: justice and community in the aftermath of mass atrocity*, United Kingdom, Cambridge University Press, 2004 (hereafter: *My neighbor, my enemy*). See also L. Fletcher and H. Weinstein, "Violence and social repair: rethinking the contribution of justice to reconciliation", *Human Rights Quarterly*, v. 24.3, 2002, pp. 573-639 and p. 578 (noting that "the predominant mechanism to respond to mass violence focuses on individual perpetrators of war crimes and other serious violations of international law. Frequently, advocates for this model suggest that international trials may be the single most appropriate response to communal violence".) (hereafter: Fletcher and Weinstein). N. Kritz, "Progress and humility: the ongoing search for post-conflict justice" in M. Cherif Bassiouni (ed.), *Post conflict justice*, Ardsley, New York, Transnational Publishers, 2002, p.75; R. Zacklin, "The failings of ad hoc international tribunals", *Journal of International Criminal Justice*, v. 2, 2004, pp. 541-545.

4. This research was undertaken for the Open Society Justice Initiative; their support is gratefully acknowledged. The conclusions drawn here do not in any way reflect the views of the Justice Initiative or the Open Society Institute.

5. The interviews varied in length from half an hour to well over two hours. Although the team initially sought to conduct individual interviews, the nature of life in Cambodia meant that group interviews were often unavoidable. The sample was not statistically random. In each location the team sought to speak with different community stakeholders; consequently, the interview pool over-represents the views of local government authorities. Interviewees were selected arbitrarily among people who were home during the day at the time that the interviews were conducted. No interviews were conducted in cities (because the purpose of the research was to identify issues related to outreach in the rural areas) – 80% of the Cambodian population lives in rural areas.

6. See Laura A. Dickinson, "The promise of hybrid courts", *American Journal of International Law*, v. 97, 2003, pp. 295-310 (hereafter Dickinson).

7. See e.g. J. Goldston, "Foreword: an extraordinary experiment in transitional justice" in *Justice Initiatives*, Spring 2006, pp.1-6, available at: <www.justiceinitiative.org>, accessed on 25 August 2007 (hereafter: Goldston). Noting that if things at the Extraordinary Chambers goes well it will, "contribute to a sense of justice for the Khmer Rouge crimes, support broader legal reform efforts in Cambodia, and help confirm mixed national/international courts as a model for the future". International Bar Association, "Cambodia: IBA in consultation with Bar Association of the Kingdom of Cambodia", 13 December 2005, available at <<http://www.ibanet.org>>, accessed on 25 August 2007: noting that the Extraordinary Chambers will play a "fundamental role in establishing a legal tradition for Cambodia based on justice, accountability, and the rule of law". See also L. McGrew,

"The Legacy of the Khmer Rouge Trials Needs to be Planned", Letter to editor, *Phnom Penh Post*, v.15, issue 17, September, 2006, p.7; S. Huntington, "The Khmer Rouge Tribunal as an Opportunity for More Than Answers", *Searching for the Truth Magazine*, n.. 80, Debate, August 2006, E. Kinetz, "Tribunal's justice and judicial legacy at odds", *The Cambodia Daily*, 16 November 2006.

8. See generally, Cat Barton, "KR trial holds promise for court reform", 10-23 March 2006.

9. Goldston, pp. 1-2.

10. Ibid.

11.Center for Advanced Study and World Bank Phnom Penh, *Justice for the Poor? An Exploratory Study of Collective Grievances over Land and Local Governance in Cambodia*, Cambodia, 2006, p.2. See also *U.S. State Department Country Report on Human Rights Practices*, Cambodia, 2006, available at <<http://www.state.gov>>, accessed on 25 August 2007; Human Rights Watch, "Cambodia: Events in 2006" in *World Report 2007*, available at <<http://hrw.org>>, accessed on 25 August 2007 and Hinton, p. 101.

12. See generally United Nations Special Representative for the Secretary-General for Human Rights in Cambodia, "Continuing patterns of impunity in Cambodia", 2005, available at <<http://cambodia.ohchr.org/index.aspx>>, accessed on 25 August 2007 (hereafter: Continuing Patterns of Impunity).

13. A number of nations, individual donors, and UN Agencies contribute funds to rule of law promoting activities in Cambodia. An exhaustive list is not possible as not every donor makes their contributions public. See e.g. Ausaid, "Aid activities in Cambodia", 2006, available at <<http://www.usaid.gov.au>>, accessed on 25 August 2007 (detailing about 30 million dollars in grants over a period of six years); East West Management Institute, "Grantmaking", 2007, available at <<http://www.ewmi-praj.org/>>, accessed on 25 August 2007 (noting that from the program's inception in October 2003 until December 2006 PRAJ has given 92 grants with a total value of almost US\$8.4 Million in USAID funding; The World Bank's Legal and Judicial Reform Project, which has been dropped, managed about 10 million dollars over a period beginning in 2002, The World Bank, Legal and Judicial Reform Project, 2007, available at <www.worldbank.org>, accessed on 25 August 2007). Japan's significant donation are not calculated: JICA, "Activities", available at <<http://www.jica.go.jp/cambodia>> accessed on 25 August 2007. Other nations give smaller amounts as well, see: AiDA, Accessible Information on Development Activities, "Details", available at <www.developmentgateway.org>, accessed on 25 August 2007.

14. See e.g. Continuing Patterns of Impunity, p. 22.

15. Kingdom of Cambodia, Ministry of Commerce, *Legal and Judicial Reform Strategy for Cambodia*, available at <<http://www.moc.gov.kh>>, accessed on 25 August 2007.

16. T. Fawthrop & H. Jarvis, *Getting away with genocide?*, Ann Arbor and London, Pluto Press, 2004, p. 117.

17. E. Kinetz, "Sok An calls for UN 'dialogue' on KR defense", *The Cambodia Daily*, 18 December 2006.

18. One of the mandates of UNTAC was to wrest administrative control of the country from the ruling party of Hun Sen – despite formally controlling the reigns of power there is no evidence that

UNTAC disrupted administrative control. Michael Doyle, *UN peacekeeping in Cambodia: UNTAC's civil mandate*, London, Lynne Rienner Publishers, 1995.

19. *Continuing patterns of impunity*, p. 9.

20. Ibid.

21. Ibid., p. 33.

22. Ibid.

23. See Hinton, *op. cit.*, pp. 100-116 (detailing a case study on justice practices in Cambodia).

24. Hinton, p. 110.

25. J. Ledgerwood, *Understanding Cambodia: social hierarchy, patron-client relationships and power*, Department of Anthropology and Center for Southeast Asian Studies, Northern Illinois University, available at <<http://www.seasite.niu.edu>>, accessed on 25 August 2007 (describing patron-client relations).

26. Hinton, p.113

27. Fabienne Luco, *Between a tiger and a crocodile: management of local conflicts in Cambodia an anthropological approach to traditional and new practices*, Phnom Penh, UNESCO, 2002 (translated from the original French) (hereafter: Luco). Also Ledgerwood, *op. cit.*

28. See e.g. Hinton, pp. 105-116.

29. E. Gottesman, *Cambodia after the Khmer Rouge*, New Haven, Yale University Press, 2002, pp. 242-247. The government in Cambodia, including the judiciary, was constructed, literally from scratch, under the influence of the Vietnamese authorities starting in 1979. The Vietnamese courts have themselves been described as providing "telephone justice": whereby party elites contact the judges to direct the outcome of a case. K. Decker, C. Sage & M. Stefanova, "Law or justice: building equitable legal institutions", *World Bank Publications*, available at <<http://web.worldbank.org>>, accessed on 25 August 2007.

30. For example, Cold-War era judicial training is common among Cambodian judicial officials at the Extraordinary Chambers judges: of the 17 Cambodian judges and prosecutors appointed to the tribunal, four received their legal education in Cambodia; four were schooled in Kazakhstan and three in the USSR, of whom one pursued further study in Japan. Three more studied in Vietnam, and two in East Germany. Prak Chan Thul and W. Kvasger, "Some question KR judges' Soviet-era schooling", *The Cambodia Daily*, 16 May 2006, p. 1.

31. Center for Advanced Study and The Asia Foundation, *Democracy in Cambodia: a survey of the Cambodian electorate*, Cambodia, 2001, p. 26 (hereafter: CAS).

32. R. Ehrenreich Brooks, "The new imperialism: violence norms and the 'Rule of Law'", *Michigan Law Review*, v. 101, 2003, pp. 2275 and 2285.

33. Ledgerwood, *supra* note.

34. J. Ledgerwood & J. Vijghen, "Decision-making in rural khmer villages" in J. Ledgerwood (ed), *Cambodia emerges from the Past: eight essays*, DeKalb Illinois, Southeast Asia Publications, 2002, pp. 109 and 116 (hereafter: Ledgerwood and Vijghen).

35. Article 13 of the Democratic Kampuchea constitution stated, "There must be complete equality among all Kampuchean people [...]" "The Constitution of Democratic Kampuchea" in *The Cambodian Constitutions (1953-1993)*, Raoul M. Jennar (ed), available at: <<http://www.dccam.org>>, accessed on 25 August 2007. One foreign employee of a local NGO was surprised when the Executive Director asked him to remove the word "equality" from the front cover he had designed for the group's annual report. The Director explained that the word reminded him of the Khmer Rouge period. (Notes on Conversation with Henry Hwang, on file with author).
36. R. Y. Fajardo, Kong Rady & Phan Sin, *Pathways to justice: access to justice with a focus on the poor, women and indigenous peoples*, Cambodia, United Nations Development Program and the Cambodian Ministry of Justice, 2005, p. 11 (finding that "[m]ost rural people [...] do not participate in the cultural background of the formal legal system".) (Hereafter: *Pathways to Justice*). Furthermore, among those in the countryside, there is the additional barrier of extreme poverty with 75 percent working in the agricultural sector, even though the agriculture sector represents only 35 percent of the gross domestic product. This translates into a GNI per capita of only \$0.82 per day. Even public servants, such as teachers, nurses, and policemen receive less than a dollar per day. *Ibid.*, pp. 65-66.
37. I. Harris, "'Onslaught on beings': a theravada Buddhist Perspective on accountability for crimes committed in the Democratic Kampuchea period" in J. Ramji and B. Van Schaack, *Bringing the Khmer Rouge to justice: prosecuting mass violence before the Cambodian Courts*, Lewiston, The Edwin Mellen Press, 2005, pp. 76-80 (hereafter: Harris).
38. W. A. Collins, "Dynamics of dispute resolution and administration of justice for Cambodian villagers", a Preliminary Assessment Funded by USAID pursuant to Project Number 422-0111, Phnom Penh, 1997 (on file with author) (hereafter: Collins).
39. *Ibid.*, p. 40. The *somroh-somrueal* process has ancient roots; Harris has found that the Ankorian Cambodia possessed a sophisticated legal system. Harris, *op. cit.*, p. 74. He also notes that that the French colonial policies and laws eroded the monks role as a traditional solver of disputes. *Ibid.*, p. 79.
40. *Pathways to justice*, pp. 67-68.
41. Harris, p. 79.
42. Harris, p. 80.
43. Marija de Wijn, *Global justice and legitimacy in Cambodia: the Khmer Rouge trials and local concepts of justice* (Thesis in International Development Studies), University of Amsterdam, 2005, p. 76.
44. The purpose of this section is to set up the different cultural underpinnings to dispute resolution. But, *somroh-somrueal* is by no means a perfect system. Often, giving in to the more powerful party is seen to be an appropriate outcome of mediation. In addition, vigilante justice is also a problem. The U.S. State Department reports that, "Vigilante justice persisted, as well as killings of alleged witches and sorcerers. During the year vigilante mob violence resulted in at least 22 deaths of suspected thieves and the severe injury of many others [...]" *U.S. State Department Country Report on Human Rights Practices, Cambodia*, 2006, available at <<http://www.state.gov>>, accessed on 25 August 2007.
45. *Pathways to justice*, p. 11 (UNDP notes that, "[m]ost rural people are unfamiliar with the

formal proceedings and the law".); de Wijn, *op cit*, p. 76 (writing that, "[t]he official legal process is quite foreign to village reality, as its procedures are unclear to many villagers [...]). Our own research showed that there was little understanding of the role of judges or prosecutors, the basic steps of a court process, or higher order concepts underlying court procedure (such as why courts require evidence). As a statistical matter it is clear that courts resolve far fewer disputes every year than other local authorities. *Pathways to justice*, p. 179.

46. See e.g. Dickenson *supra* note.

47. Gottesman, p. 11.

48. *Ibid.*, p. 13.

49. Voice of the Asian-Pacific Human Rights Network, "Rule of law an elusive concept in Cambodia", 17 March 2006, available at <<http://www.hrdc.net/sahrdc/>>, accessed on 25 August 2007.

50. *Supra* note 13.

51. In 2005, the UN Special Representative of the High Commissioner for Human Rights Cambodia wrote that, "Although the failure to bring to justice those responsible is often attributed to scarce resources and poor capacity within law enforcement institutions and to the absence of a well functioning judiciary, the failure of these institutions to uphold the law can also be attributed to an accepted practice of impunity and collusion by police, military and security agencies". *Continuing patterns of impunity*, p.33.

52. *Justice for the poor?*, p. 5 (noting that "newly created or reformed institutions of justice in the liberal mold are prone to failure unless supported by the transformation of power relations that preceded (and to a great extent precipitated) their development in the West").

53. Similar problems have been noted in Rwanda where researchers have found that a highly politicized local judiciary stands in the way of international tribunals' ability to promote the rule of law, regardless of the additional funds invested. Alison Des Forges, Tim Longman, "Legal responses to genocide in Rwanda" in E. Stover, H. Weinstein (eds.), *op. cit.*, United Kingdom, Cambridge University Press, 2004, p.62 (hereafter: Des Forges and Longman).

54. Cambodian Human Rights Action Committee *et al.*, *Joint statement: urgent action needed on rules for Khmer Rouge Tribunal*, 2007, available at <<http://www.justiceinitiative.org>>, accessed on 25 August 2007 (noting that: "It is also hoped that the Extraordinary Chambers will contribute to the development of international standards and act as a catalyst for the strengthening of the rule of law and as a model for judicial reform, which are both greatly needed in Cambodia").

55. Voting on guilt or innocence will be achieved by supermajority – a majority of judges plus one (four of five judges in the trial chamber, or five of seven judges in the Supreme Chamber. *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*, June 6, 2003, available at <<http://www.eccc.gov.kh>>, accessed on 25 August 2007 (hereafter: Agreement).

56. Agreement, *supra* note.

57. The World Bank *et al.*, *A fair share for women: Cambodia gender assessment*, 2004, available at <<http://go.worldbank.org>>, accessed on 25 August 2007, p. 8.

58. *Justice for the poor?*, *op. cit.*, p. 5. See also, *CAS*, p. 48 (noting that: “[i]f one leaves the village arena, mediation becomes more difficult and more costly without a greater chance for success”).

59. Collins, *op. cit.*, p. 15.

60. *Justice for the poor?*, p. 5.

61. *Ibid.*

62. Pathways to Justice, *supra* note 45. See also, Des Forges and Longman, *op. cit.*, p. 56 (finding that many respondents in their survey saw the adversarial legal approach applied in the ICTR “as foreign to traditional Rwandan methods of conflict resolution, in which communities would come together and determine the nature of events and the punishments and reparations needed to reestablish social equilibrium”).

63. Xinhua, “Cambodia’s ruling party airs support for trial of former DK leaders”, *People’s Daily Online*, January 7, 2007, available at <<http://english.people.com.cn>>, accessed on 25 August 2007; Ek Madra, “Spat over bill threatens Khmer Rouge trial”, Reuters, 4 April 2007, available at <<http://www.swissinfo.org>>, accessed on 25 August 2007; Sophie Huntington, “The Khmer Rouge Tribunal as an opportunity for more than answers”, *Searching for the truth magazine, Debate*, n. 80, August 2006.

64. Hinton, *op. cit.*, p. 1 and P. Short, *Pol Pot: The History of a Nightmare*, London, John Murray Press, 2004, pp. 321-322.

65. However, more statistically relevant research on these issues is needed to make broad conclusions. There have been numerous attempts to gauge Cambodian’s views about a court for the Khmer Rouge. Yet, even so, there are no studies available that have been conducted in a scientifically meaningful way. Consequently, there is not enough information to draw exact conclusions about the views of the Cambodian population on this topic. The other studies of which I am aware are: B. Münyas, *Youth for peace, a study on genocide in the mind of Cambodian youth*, Cambodia, Peace Research and Publications, 2005 (hereafter: Münyas); Khmer Institute of Democracy, *Survey on the Khmer Rouge Regime and the Khmer Rouge Tribunal*, Cambodia, 2004, available at: <<http://www.bigpond.com.kh/users/kid>>, accessed on 25 August 2007; S. Linton, *Reconciliation in Cambodia*, Phnom Penh, Documentation Center of Cambodia, 2004; L. McGrew, *Truth, justice, reconciliation, and peace in Cambodia—20 years after the Khmer Rouge*, December 1999-February 2000, unpublished report, on file with author; de Wijn, *op. cit.*; W. Burke-White, “Preferences matter: conversations with the cambodian people on the prosecution of the Khmer Rouge leadership” in J. Ramji and B. Van Schaack, *Bringing the Khmer Rouge to justice: prosecuting mass violence before the Cambodian courts*, Lewiston, The Edwin Mellen Press, 2005; J. Ramji, “Reclaiming Cambodian history: the case for a truth commission”, *Fletcher Forum of World Affairs*, v. 24, 2000, pp. 137-158..

66. After our research interviews were completed, the two Cambodian researchers on the team, Vireak and Vichhra, rated their subjective impression of interviewees’ level of interest in the Extraordinary Chambers – their rankings came out roughly the same. In our qualitative research we found that about 20% of our interviewees were not interested or were opposed to the Court, about 45% were interested in the Court but not strongly, and about 35% were strongly supportive of and interested in the Court. Detailed analysis on file with author.

67. E. Stover, "Witnesses and the promise of justice at The Hague" in E. Stover and H. Weinstein (eds.), *My neighbor, my enemy: justice and community in the aftermath of mass atrocity*, United Kingdom, Cambridge University Press, 2004, p. 114.
68. Hinton, *op. cit.*, p. 98.
69. Münyas, *op. cit.*, p. 15 (also noting that a longer history, introduced in 2002 was pulled by the government upon criticism of the opposition – in addition, few teachers dare talk about the KR today because of difficulties distinguishing between history and politics).
70. D. Orentlicher, "Settling accounts: the duty to prosecute human rights violations of a prior regime", *Yale Law Journal*, v. 100, 1991, p. 2537.
71. Fletcher and Weinstein, *op. cit.*, p. 591.
72. E. Kinetz and Prak Chan Thul, "For Cham Muslims, justice may not be a tribunal", *The Cambodia Daily*, October 31, 2006.
73. Ida Bostian, "Cultural relativism in international war crimes prosecutions: the International Criminal Tribunal for Rwanda", *ILSA Journal of International and Comparative Law*, v. 12, n. 1, Fall 2005.
74. Luco, *op. cit.*
75. See e.g., John D. Ciorciari, "The Khmer Rouge Tribunal", Phnom Penh, Documentation Center of Cambodia, 2006, available at <<http://www.dccam.org>>, accessed on 25 August 2007.
76. Indeed there are many different groups in Cambodia that may hold differing views of the past: urban and rural Cambodians, young and old, Cambodians living abroad and those living in Cambodia, Khmer Rouge living in the North/Northwest and the rest of the country, and low-level perpetrators and villagers living in the same community. In some sense all of these views need to be "reconciled". That is not the sense in which reconciliation is being discussed here.
77. Linton, *op. cit.*, p.106. Weinstein and Stover talk about reconciliation as "people re-forming prior connections, both instrumental and affective, across ethnic, racial or religious lines". Stover and Weinstein, *op. cit.*, pp. 3 and 13.
78. "Coming to terms" with the past is a phrase sounds in an almost psychoanalytical framework; such Western terminology is particularly difficult to apply in Cambodia.
79. See Buddhism for Development, available at <<http://www.bfdkhmer.org/>>, accessed on August 31, 2007.
80. Author's interview with Look Heng Monychenda; notes on file with author.
81. *Ibid.*
82. Luco, *op. cit.*, pp. 16 and 21-22.
83. Hinton, *op. cit.*, p. 95.
84. Stover and Weinstein, *op. cit.*, p. 323.
85. *Justice for the poor?*, *op. cit.*, p. 16.
86. Miklos Biroš *et. al.*, "Attitudes toward justice and social reconstruction in Bosnia Herzegovina

and Croatia" in E. Stover and H. Weinstein (eds.), *My neighbor, my enemy: justice and community in the aftermath of mass atrocity*, United Kingdom, Cambridge University Press, 2004, p. 185.

87. Hinton, *op. cit.*, p. 277.

88. *Ibid.*, p. 279.

89. Linton, *op. cit.*, p. 169.

90. Meeting notes for CJI Outreach Meeting at Sunway Hotel, 15 December 2006; on file with the author.

91. Jason S. Abrams and Steven R. Ratner, *Accountability for human rights atrocities in International Law: beyond the Nuremberg Legacy*, New York, Oxford, Oxford University Press, 2001, p. 136.

92. Fletcher and Weinstein, *op. cit.*, pp. 597, 600 (noting that, "when guilt is attributed to specific persons, then individuals and groups are offered the opportunity to rationalize or deny their own responsibility for crimes committed in their name").

93. Ben Kiernan and Taylor Owen, "Bombs over Cambodia: new information reveals that Cambodia was bombed far more heavily than previously believed", *The Walrus*, October 2006, available at <<http://www.walrusmagazine.com>>, accessed on 25 August 2007 (hereafter: Owen and Kiernan); Kimmo Kiljunen (ed), *Kampuchea: decade of genocide*, Report of a Finnish Inquiry Commission, London, Zed Books, 1984 (hereafter Kiljunen) and Becker, *op. cit.*, p. 156.

94. Owen and Kiernan, *op. cit.*, p. 2.

95. *Ibid.*

96. Kiljunen, *supra* note 93.

97. Kiernan and Owen, p. 2.

98. Former Senator and Presidential nominee George McGovern once said that he thought the rise of the Khmer Rouge was one of the greatest single costs of U.S. involvement in Indochina. S. Power, *A problem from hell: America in the age of genocide*, New York, Basic Books, 2002, p. 133 (hereafter: Power).

99. Short, pp. 301-2.

100. Power has noted that the then U.S. National Security Advisor Zbigniew Brzezinski "saw the [Cambodian] problem through the Sino-Soviet prism. Since U.S. interests lay with China, they lay, indirectly, with the Khmer Rouge". See Power, p. 147.

101. Although occupied by Democratic Kampuchea directly, in 1979, the UN seat was later occupied by a coalition force but the Khmer Rouge maintained military superiority within the alliance and continued to keep their diplomats in all the foreign posts for the new group. See Becker, p. 457. China alone gave over billion dollars of aid to the Pol Pot regime in the 1980s, while they continued to wage a war against the Vietnamese backed Khmer government. See also Fawthrop and Jarvis, p. 178.

102. New York Times Editorial, "A trial for Pol Pot", *New York Times*, 24 June 1997, Sec. A. See also Fawthrop and Jarvis, p. 5.

103. Owen and Kiernan, p. 2.

104. Interview with Look Heng Monychenda; notes on file with the author.
105. See generally, Owen and Kiernan, *op. cit.*: making a similar point.
106. In fact, the history of the creation of the Court bears this out; the Extraordinary Chambers was conceived of as a legal process from the beginning and pushed along by UN officials and international NGOs. See generally T. Hammarberg, *Efforts to establish a tribunal against the Khmer Rouge leaders: discussions between the Cambodian Government and the UN*, available at <<http://www.ui.se/uikr.pdf>>, accessed on 25 August 2007; United Nations Report, *Report of the Group of Experts for Cambodia*, Established Pursuant to General Assembly Resolution 52/135, at U.N. GAOR, 53d Session, Agenda Item 110(b), at ¶ 5, U.N. Doc. A/53/850, 1999.
107. E. Davis, *Keeping the bones*, 2007, available at <<http://leahbowe.com/deathpower/>>, accessed on 25 August 2007.
108. V. Peskin, "Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Program", *Journal of International Criminal Justice*, v. 3, 2005, pp. 950-961 and 955-57.
109. Stanford Encyclopedia of Philosophy, "Punishment", available at <http://plato.stanford.edu>, accessed on 25 August 2007.
110. American Model Penal Code, s. 1.01 (1).
111. The International Co-Prosecutor at the Extraordinary Chambers has started making this claim. Robert Petit has been quoted as saying: "Our role is very black and white – to find someone innocent or guilty beyond a reasonable doubt". O. Ward, "Long road back to the killing fields", *Thestar.com*, 11 February 2007, available at <http://www.thestar.com>, accessed on 25 August 2007.
112. See generally, H. Strang and L. W. Sherman, "Reintegrative shaming experiments (rise): the victim's perspective", *Canberra RISE Working Papers*, n. 2, Australian National University, 1997, available at <<http://www.aic.gov.au/rjustice>>, accessed on 25 August 2007 (hereafter: Strang and Sherman).
113. M. Gladwell, "Here's why: a sociologist offers an anatomy of explanations", *The New Yorker*, April 10, 2006, available at <<http://www.gladwell.com/>>, accessed on 25 August 2007 (writing that, "All over the modern world, victims are the forgotten players in the drama of criminal justice, exploited for their evidence but otherwise abandoned").
114. *Ibid.*
115. Fletcher and Weinstein, p. 594 (finding that all Bosnian Serb and Bosnian Croat participants in their study "expressed concern that the ICTY was a 'political' organization; in this context, 'political' meant biased and thus incapable of providing fair trials").
116. *Idem*, p. 583 (questioning the assumption that contribution international courts can contribute to social healing, reconciliation, the feelings of victims, and the rule of law). See generally, Christina M. Carroll, "An assessment of the role and effectiveness of the International Criminal Tribunal for Rwanda and the Rwandan National Justice System in Dealing with the Mass Atrocities of 1994", *Boston University International Law Journal*, v. 18, n. 2, 2000, pp. 163-200.
117. M. Drumbl, "Punishment postgenocide: from guilt to shame to 'Civis' in Rwanda", *New York University Law Review*, v. 75, n. 5, 2000, pp. 1258 and 1225.

118. BBC News Online, "Khmer Rouge film reveals horrors", 16 December 2006, p. 1, available at <<http://news.bbc.co.uk>>, accessed on 25 August 2007.
119. Munyas, *op. cit.*
120. Stover and Weinstein, pp. 11, 15 and 18.
121. See E. Davis, Article on Bokor, 2007, available at <<http://leahbowe.com/deathpower/>>, accessed on 25 August 2007.
122. L. Fletcher and H. Weinstein, "A world unto itself? The application of international justice in the former Yugoslavia" in E. Stover & H. Weinstein (eds.), *My neighbor, my enemy: justice and community in the aftermath of mass atrocity*, United Kingdom, Cambridge University Press, 2004, p. 29.
123. Stover and Weinstein, p. 323.
124. In March 2007 major donors reportedly pledged \$ 601 million for one year of aid to Cambodia. In April, China announced a separate \$ 600 million pledge in grants and loans. Human Rights Watch, *op. cit.* See also Voice of the Asian-Pacific Human Rights Network, *op. cit.* (noting that "the international community has spent somewhere between US\$5-7 billion in Cambodia in the past decade").
125. The idea to establish a court process began with a suggestion by Thomas Hammarburg, then working for the UNHCHR in Cambodia. T. Hammarberg, "Efforts to establish a tribunal against the Khmer Rouge leaders: discussions between the Cambodian Government and the UN", Paper presented at seminar organised by the Swedish Institute of International Affairs and the Swedish Committee for Vietnam, Laos and Cambodia on the Proposed Trial against Khmer Rouge Leaders Responsible for Crimes against Humanity, Stockholm, 29 May 2001, available at <<http://www.ui.se/uikr.pdf>>, accessed on 25 August 2007, p. 8. After a request letter was drafted by the then co-Prime Ministers (with Hammarburg), the possibilities were studied by the United Nations Group of Experts who spent less than 10 days in Cambodia. Group of Experts Report, *op. cit.*, paragraph 7. After their suggestions were rejected, the negotiations between the Cambodian government and the UN began in earnest. From then on, as far as I know there was never a study done to determine what characteristics of a justice process would be most meaningful to Cambodians.

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