VICTIM PARTICIPATION IN INTERNATIONAL CRIMINAL JUSTICE

THE CASE OF THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA: REAL POWER OR EMPTY RHETORIC?

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ABSTRACT

This thesis critically examines the role, scope and implications of victims' participation in international criminal proceedings, drawing from the development of human rights doctrine, victimology and practices in domestic and international criminal justice systems. The comprehensive and in-depth analysis of the complex and multifaceted legal mechanism of victim participation is conducted primarily through the lens of the Extraordinary Chambers in the Courts of Cambodia (ECCC), examination of which constitutes the core of this thesis. In light of the specific characteristics of international criminal law, this thesis analyses the statutory and jurisprudential developments that have defined the ambit and boundaries of the participation of victims in international criminal proceedings. The research is conducted against a theoretical and case law backdrop, drawing on interviews conducted with judges, lawyers and victims at the ECCC.

The interpretation of victims' participatory rights in international criminal proceedings has been significantly diffuse and at times divergent, betraying a far from cohesive and consistent approach, and making the study of civil party participation at the ECCC an excellent medium through which to explore the breadth of victim participation as a legal mechanism. Victim participation is still in its infancy in international criminal proceedings, and as such, the trials at the ECCC have appeared more as 'experimenting laboratories' than as processes guided by sound and well-crafted rules and procedures. This thesis argues that whilst the apparent benefits of participation seem self-evident, and may lead, at least in theory, to the realisation of the aspiration of restorative justice for victims, the manner in which civil party participation has been crafted and interpreted in the trials before the ECCC has raised some important issues and questions regarding its role and impact with respect to the functionality of court proceedings, the rights of the accused, and the rights of victims themselves.

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While my name may be alone on the front cover of this thesis, I am by no means its sole contributor. This oeuvre is at least as much a product of years of interaction with, and inspiration by, a great number of friends and colleagues. At the outset, I wish to express my warmest gratitude to all those individuals whose comments, insights, criticism, support and encouragement, personal and academic, have left a mark on my work during this complicated journey. I also wish to thank all those institutions that have supported me in this endeavour.

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ABBREVIATIONS

ACHR	American Convention on Human Rights
ACtHPR	African Court on Human and People's Rights
ADHOC	Cambodian Human Rights and Development Association
AfCHPR	African Charter on Human and People's Rights
AU	African Union
CDP	Cambodian Defenders Project
CPR	Civil Procedure Rules [England and Wales]
CrPR	Criminal Procedure Rules [England and Wales]
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	European Union
EULEX	European Union Rule of Law Mission in Kosovo
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IMT	Nuremberg International Military Tribunal
IMTFE	Tokyo International Military Tribunal for the Far East
LAC	Legal Aid of Cambodia
OAS	Organization of American States
SCSL	Special Court for Sierra Leone
SPSC	Special Panels for Serious Crimes in East Timor
STL	Special Tribunal for Lebanon
TPO	Transcultural Psychosocial Organization [Cambodia]
UN	United Nations
UNCHR	United Nations Commission on Human Rights
UNMIK	United Nations Interim Administration Mission in Kosovo
UNTAET	United Nations Transitional Administration in East Timor
VSS	Victims Support Section [ECCC]

CHAPTER 1

Introduction

> My life has no sense. I have lost sense of it more than 35 years ago when all members of my family perished. After the Khmer Rouge I joined the army, not because I wanted to serve my nation. I did not have enough strength to kill myself and wanted to be killed at the hand of the enemy. I carry with me the injury… It is highly personal and emotional for me to be part of this process.[1]

This research began with those words in the spring of 2009 at Serey Sakor Pagoda, in Kampong Trabek Village, Prey Veng, Cambodia. At the time I was reading for a master's programme in criminology and criminal justice at Oxford and had accepted almost on a whim the invitation to join as a pro bono lawyer the legal team that represented victims as civil parties in the first trial[2] before the Extraordinary Chambers in the Courts of Cambodia (ECCC).[3] The man sitting in front of me was a victim of the Khmer Rouge regime,[4] who had suffered unbearable loss and grief, and who had been recognised as a civil party only a few months prior to our meeting. Such recognition had brought him into contact with the transitional justice process in Cambodia and had affirmed his position as a protagonist of facts and as a principal stakeholder in the proceedings before the ECCC.

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[1] Meeting with Civil Party Case 001, Serey Sakor Pagoda, Prey Veng province, 28 March 2009. Transcript of meeting on file with the author.

[2] The defendant in Case 001, Kaing Guek Eav, better known as Duch, was the chief of the infamous S-21 prison camp in Phnom Penh. *Case of Kaing Guek Eav* (Case 001), Trial Chamber Judgement, 26 July 2010. Note that in line with common usage, all judgments issued by international criminal tribunals are written as 'Judgements'.

[3] See the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (ECCC Law), with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006) arts 3-8, available at <http://www.eccc.gov.kh/english/cabinet/law/4/KR_Law_as_amended_27_Oct_2004_Eng.pdf.> (accessed 14 March 2015).

[4] The Khmer Rouge – a term coined by Cambodia's former king, Norodom Sihanouk – was the communist ruling political party of Cambodia from 1975 to 1979. Estimates of the numbers of those executed vary, ranging from 1.5 to 3 million. See Cambodian Genocide Program at Yale University, available at <http://www.yale.edu/cgp/> (accessed 14 March 2015).

His words of pain and sorrow reverberated across the hallowed space of this place of worship, which like many others around the country had come to symbolise a meeting point and a space where survivors and relatives of victims come to hold ceremonies and honour the memory of those lost. His words reverberated also through my head and brought victims' grief and needs ever so close. They spoke not only of the magnitude of the human suffering and unparalleled tragedy that had befallen the Cambodian people, but also of the incredible need that victims of gross violations of human rights very often feel, to be an essential part of a justice process established to address some of the most serious and egregious crimes in war-torn societies. Such a moral imperative is not unique to Cambodia; it is a common theme, shared with victims of mass atrocities across many post-conflict societies, that recognition of the rights and needs of those victims represents, in the words of Bassiouni, 'the most crucial imperative of our age.'[5] Empowering victims of mass atrocities as well as honouring their rights to participate and benefit from remedies and reparations not only signify the international community's solidarity with victims, but they also reaffirm 'the principles of accountability, justice and the rule of law.'[6] The call to contribute to the normative and empirical scholarship on this recent development and the highly complex undertaking of victim participation in international criminal justice captured not only my enthusiasm but also my intellectual curiosity and passion that firmly established my research trajectory.

The recognition of victims' participatory rights in criminal proceedings is a novelty in international criminal law.[7] The incorporation of victims as civil parties (*partie civile*) in

[5] M. Cherif Bassiouni, 'International Recognition of Victim's Rights' (2006) 6 Human Rights Law Review 203, 279.

[6] ibid.

[7] William A. Schabas, *An Introduction to the International Criminal Court* (2nd edn Cambridge University Press 2004) 328; Antonio Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections' (1999) 10 European Journal of International Law 144, 167; See also Emily Haslam, 'Victim Participation at the International Criminal Court: A Triumph of Hope Over Experience?' in Dominic McGoldrick, Peter Rowe and

international criminal proceedings marks a significant advance for victims' rights. This development evidenced throughout the 1980s and 1990s was the product of a broad movement and parallel advancements in both domestic and international legal systems towards greater acknowledgment of victims' rights. It was a response to the growing criticism by victims' rights advocates and organisations that concerned the apparent marginalisation of victims within the criminal justice process.[8] The pronounced trend towards enhancing victim participation at the international level was reflected in the efforts made by the International Criminal Court (ICC) established under the Rome Statute,[9] which became the first international criminal tribunal to endorse active victim participation by recognising victims as 'participants'.[10] This new dimension of victims' rights has been further heightened at the ECCC, mainly by offering an unprecedented characterisation of victims as full 'parties' to rather than just 'participants' in proceedings.[11] This trend has been reflected also in the recently established Special Tribunal for Lebanon (STL).[12] This development and the shift in international criminal law towards greater victim recognition and centrality, mirror to a great extent the growing prominence of restorative justice and the rise of victims' rights in Western

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Eric Donnelly (eds), *The Permanent International Criminal Court: Legal Policy and Issues* (Hart Publishing 2004) 315.

[8] Lucia Zedner, *Criminal Justice,* Clarendon Law Series (Oxford University Press 2004) 143.

[9] Rome Statute of the International Criminal Court, 1 July 2002, art 1. See <http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf> (accessed 15 May 2015).

[10] ibid, art 68.3. According to the Rome Statute, victims are given the right to 'present their views and concerns' to the Court and, and to do so 'where their personal interests are affected.'

[11] ECCC Internal Rules, r 23. See <http://www.eccc.gov.kh/sites/default/files/legal-documents/Internal_Rules_Rev_9_Eng.pdf> (accessed 13 June 2015).

[12] Statute of the Special Tribunal for Lebanon, art 28 (1), S/RES/1757 (2007). See <http://www.specialtribunalforlebanon.org/en/documents/stl-documents/statute/223-statute-of-the-special-tribunal-for-lebanon> (accessed 14 June 2015).

domestic justice systems.[13] The evolution and strengthening of victims' rights have found expression in two important international legal instruments: first, in the 1985 United Nations (UN) Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (the Victims' Declaration), with a focus primarily on victims of domestic crimes; and secondly, in the 2006 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (the Basic Principles), which has been described as 'for all practical purposes, an international bill of rights of victims',[14] with a principal focus on victims of international crimes. A multitude of measures and advances have contributed to the increasingly prominent role afforded to victims in contemporary international criminal law.[15] These developments were triggered and influenced by numerous factors, in particular the Basic Principles, the expansion of victims' rights under international human rights and humanitarian law, coupled with increasing recognition of victims' rights in the jurisprudence of the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR). The establishment of various diverse ad hoc and hybrid tribunals, and subsequently of the ICC, have made further important contributions to progress in this area, leading to enhanced procedural, substantive and remedial rights for victims. This is apparent in the greater rights afforded to victims in the context of court proceedings, including *inter alia* disclosure of documents, victim protection, and the availability of remedies, in particular reparations. Indeed, it is at the ECCC that victims of alleged crimes have been attributed the most expansive and advanced form of participatory rights, reflected in their being afforded the right to participate as civil parties in proceedings, rather than as mere witnesses.

[13] Carolyn Hoyle, 'Victims, the Criminal Process, and Restorative Justice' in Mike Maguire, Rod Morgan and Robert Reiner (eds), *The Oxford Handbook of Criminology* (5th edn Oxford University Press 2012) 398.

[14] Bassiouni (n 5) 203.

[15] Schabas (n 7) 323.

While it is argued generally by victim's rights advocates and support organisations that where participation affords victims the opportunity to present their views and observations, thereby enhancing prospects for both retributive and restorative justice, such participation affords the international community a momentous opportunity to meet the objective 'not only to bring criminals to justice but also to help the victims themselves obtain justice.'[16] Nonetheless, it appears that the comfortable liberal discourse on the participation of victims has often obscured the need to enquire critically into how it is being practised, and what its implications therefore are. Given the special characteristics of international criminal proceedings including subject-matter constraints, the structure and composition of international criminal tribunals, as well as the magnitude of cases and the nature of mass victimisation – distinguishing them in many significant ways from domestic criminal proceedings – victim participation in international criminal proceedings raises some unique and specific questions and themes, which in turn, as this thesis will show, give rise to some very complex answers and challenges.

The comprehensive and in-depth analysis of the complex and multifaceted legal mechanism of victim participation will be conducted through the lens of the ECCC, examination of which constitutes the core of this thesis. The empowerment of Khmer Rouge victims featured in the direct and active form of participation, and the approach endorsed by the ECCC by attributing seemingly full party status to victims, makes the ECCC stand out in the realm of international criminal justice. Furthermore, the ECCC is singular in the sense that it operates in one particular socio-cultural and politico-legal context, allowing it to

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[16] See <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/victims/Pages/victims%20and%20witnesses.aspx> (accessed 12 June 2015).

develop a single, holistic approach adopted by the Court as a whole, and unperturbed by some of the problems faced by the ICC, where each Chamber has to adapt its model of victim participation to the requirements of the individual case within a specific situation. Thus, it might be said that victim participation at the ECCC has undergone a more linear, albeit complex and incongruent development whereby the role and scope of victim participation have been set by one single court operating in and confined to specific subject-matter jurisdiction. In contrast, the development at the ICC has been more horizontal and decentralised in character, depending on the number of situations and cases within a situation whereby each individual pre-trial and trial chamber has to demarcate the boundaries of victim participation according to the requirements of each case and situation.[17]

In addition, at this point in time, there have been two concluded cases at the ECCC where the Court has crafted and interpreted victims' procedural rights and awarded remedies, thus providing a thorough basis on which a concrete and comprehensive analysis of victim participation can be drawn. Moreover, the ECCC has not received the requisite degree of attention and the breadth of scholarship that its unique experience with the civil party model warrants. A study of the ECCC is thus more promising than that of any other tribunal, including the ICC, to reveal the potential advances and shortcomings of victim participation in the shape and form in which it is practised. It is in this context that this research aims to make a significant contribution to the growing discussion and scholarship on civil party participation. Finally, and equally importantly, my initial exposure to the legal work with civil parties offered me a unique insight into and understanding of victim participation as it was unfolding in the first trial before the ECCC. This was further enhanced by the opportunity to

[17] Christine Van den Wyngaert, 'Victims Before International Criminal Courts: Some Views and Concerns of An ICC Trial Judge' (2012) 44 Case Western Reserve International Law Journal 483.

conduct interviews with all stakeholders in the proceedings at the ECCC, including with victims themselves, as will be discussed further in this and the following chapters.

Victim participation is still in its infancy in international criminal justice, and as such will remain a live topic of interest and discussion among academics and practitioners alike. Thus, a methodical and rigorous examination of the role, scope and impact of civil party participation on the justice process at the ECCC and on victims themselves, will contribute to and enrich our understanding of victim participation.

1. Victims and Criminal Justice

Traditionally, victims of alleged crimes were in general perceived as mere providers of information in the criminal justice process: they were the initial contact with the police, and were called upon to participate in subsequent proceedings as witnesses. However, around two decades ago, a movement that would eventually become known as the 'victims' rights movement' gained increasing traction and considerable influence on criminal justice policy[18] and human rights discourse.[19] It was influenced by a number of ideas and ideologies,[20] but at its core was the recognition that victims were very often victims not only of the primary crime committed, but also 'secondary victims' of the criminal justice process itself.[21] The result of the advancement of the victims' rights movement has been an increased focus on

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[18] Paul H. Robinson, 'Should the Victims' Rights Movement Have Influence Over Criminal Law Formulation and Adjudication?' (2002) 33 McGeorge Law Review 749; Michael M. O'Hear, 'Victims and Criminal Justice: What's Next?' (2006) 19 United States of America Federal Sentencing Reporter 83.

[19] Jonathan Doak, 'Victims' Rights in Criminal Trials: Prospects for Participation' (2005) 32 Journal of Law and Society 294; See also Francesca Klug, 'Human Rights and Victims' in Ed Cape (ed), *Reconcilable Rights? Analysing the Tension Between Victims and Defendants* (Legal Action Group 2004).

[20] Bassiouni (n 5) 206-211.

[21] See Zedner (n 8) 143; See also Mike Maguire and John Pointing (eds), *Victims of Crime: A New Deal?* (Open University Press 1988) 11; Uli Orth, 'Secondary Victimization of Crime Victims by Criminal Proceedings' (2002) 15 Social Justice Research 313.

victims' rights in the criminal justice process, including – but not limited to – criminal proceedings before the court. This development has been most marked in common law systems, where the role of victims, from being initially marginalised as essentially no more than 'speaking' evidence, has evolved considerably. This development has not gone unchallenged: often, calls for increased rights for victims were met by concerns expressed about the rights of the accused, and the burden imposed on the court and the criminal justice process as a whole by the inclusion of greater procedural rights and involvement for victims in the criminal justice process.[22] Nonetheless, the victims' rights movement has been described as a highly successful socio-political movement.[23] Zedner states that the role of victims is now conceived of in more dynamic and multifaceted terms than in the past: thus, victims may be regarded, on the one hand, as consumers of the criminal process,[24] and on the other, as bearers of rights.[25]

It has moreover been argued that victims have effectively been instrumentalised for political purposes, a contentious point that is intimately connected with different conceptions of the criminal justice system,[26] which will be analysed in detail in chapter 2. Those focused on restorative justice seek the inclusion of victims in the process in order to enhance the

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[22] Andrew Ashworth, 'Victims' Rights, Defendants' Rights and Criminal Justice' in Adam Crawford and Jo Goodey (eds), *Integrating a Victim Perspective within Criminal Justice* (Ashgate 2000).

[23] Angela J. Davis, *Arbitrary Justice: The Power of the American Prosecutor* (Oxford University Press 2007) 64; See also Michael M. O'Hear, 'Punishment, Democracy and Victims' (2006) 19 United States of America Federal Sentencing Reporter 1, listing seven Acts of Congress pertaining to victims' rights in domestic criminal law, adopted between 1982 and 2004. Similarly, there were several resolutions and instruments adopted at European level, such as Recommendation (85)11 of the Council of Europe's Committee of Ministers, on the Position of the Victim in the Framework of Criminal Law and Procedure.

[24] Zedner (n 8) 145.

[25] ibid 141. See also Helen Fenwick, 'Procedural "Rights" of Victims of Crime: Public or Private Ordering of the Criminal Justice Process?' (1997) 60 Modern Law Review 317.

[26] David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press 2001) 180. Garland argues that 'the interests of the victim and offender are assumed to be diametrically opposed: the right of one competing with those of the other in a zero sum game'.

values and aims of restorative justice, such as victim restoration and reparation. By contrast, while there are a number of different conceptions of retributive justice, some of those adhering to that school of thought would incorporate victims into criminal proceedings precisely in order to pit the victim against the offender, thereby highlighting the punitive element of the criminal process. As Zedner has argued, victims 'have been invoked as potent rhetorical devices or symbolic tools to lever up punitiveness.'[27] In similarly trenchant terms, Ashworth has referred to this politicisation of victims in favour of models of retributive or punitive justice as 'victims in the service of severity.'[28] This is not to say that modern understandings of a retributivist justice model are grounded in notions of vengeance. They do however emphasise the inherent value of punishment. Arguably, both retributive and restorative justice elements are reflected in the current trends regarding victims in both domestic and international legal systems, as discussed further in chapter 2.

The reasons for the evolution of victims' rights are eclectic. However, the question arises what triggered the increasing concern with victims' rights on the part of policymakers, legislators, practitioners and many in the academy. There were, on the one hand, domestic pressures such as the victims' rights movement, which in itself was largely a response to an increasing acknowledgment that current criminal justice processes were not apt to deal with the mounting problem of crime witnessed in Western countries throughout the 1970s and 1980s.[29] On the other hand, there were international pressures as well. The European Court of Human Rights (ECtHR) expanded its jurisprudence under Articles 2 and 3 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR), which

[27] Zedner (n 8) 144.

[28] Ashworth (n 22) 186.

[29] Bassiouni (n 5) 210-211; Zedner (n 8) 144; John J. Donohue III, 'Understanding the Time Path of Crime' (1998) 88 Journal of Criminal Law and Criminology 1423.

deal with the right to life and the right to freedom from inhuman and degrading treatment, respectively, to encompass some rights of victims.[30] Such rights are however implicit and not expressly spelt out, unlike in the case of Article 6 which deals with the rights of the accused in the criminal process. Moreover, as has already been highlighted, the Victims' Declaration and the Basic Principles, although non-binding, had an important impact,[31] domestically and internationally, on victims' rights. This is not to say that the adoption or implementation of these two important legal instruments was a straightforward exercise. To the contrary, as Bassiouni has highlighted,[32] protracted negotiations preceded the adoption of these instruments, and implementation in practice has been far from consistent. Nevertheless, it remains true that their adoption has been a defining moment for victims' rights.

Inherent in the terms of the Victims' Declaration and the Basic Principles, is a two-fold emphasis on rights, namely 'service rights' on the one hand, and 'process rights' on the other. Whilst being mindful of the considerable overlap between the two, and of the fact that some service rights are process rights at the same time, this categorisation serves to explain the parallel development of two important strands in victims' rights. In the first place, it was acknowledged that victims should have greater rights to information. This was reflected, on the domestic level, in the development of the so-called One Stop Shop in the United Kingdom,[33] and more recently the Code of Practice for Victims.[34] There has also been a

[30] See, in particular *Jordan v United Kingdom* (2003) 37 EHRR 2; *McKerr v United Kingdom* (2002) 24 EHRR 20; and *Finucane v United Kingdom* (2003) 37 EHRR 29; See also Fiona Leverick, 'What Has the ECHR Done for Victims? A United Kingdom Perspective' (2004) 11 International Review of Victimology 177.

[31] There are other instruments making provision for victims' rights, such as the African Commission on Human and People's Rights, Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa; the American Convention of Human Rights; and Recommendation (85)11.

[32] Bassiouni (n 5) 203.

[33] Carolyn Hoyle, Ed Cape, Rod Morgan and Andrew Sanders, *Evaluation of the 'One Stop Shop' and Victim Statement Pilot Projects* (Home Office 1998). The 'One Stop Shop' initiative is designed to provide a single point of information for victims of serious crimes, including ready access to information on case progress.

Commissioner for Victims in the United Kingdom since March 2010.[35] It has also been reflected on the international level, in institutions such as the ICC and the ECCC, as will be examined further below.

Furthermore, it was also acknowledged that enhanced provision of information in and of itself was insufficient to satisfy the demands of victims and of the victims' rights movement. The evolution of service rights was accompanied by the evolution of process rights; that is rights for victims in the criminal process, including the trial and in particular sentencing. Impact statements such as the Victim Personal Statement developed in the United Kingdom[36] are one domestic example of this development; civil party participation as practised at the ECCC is arguably the most evolved such example on the international plane. It can thus be seen that victims may play widely divergent roles in the criminal justice process.

McGonigle Leyh has identified five main typologies of victim participation.[37] The most basic form of participation granted by all legal systems is that of complainant: the victim makes an official complaint to the police or other judicial or prosecutorial state institution, thereby triggering a criminal investigation and, potentially, charges against the accused.

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[34] Ministry of Justice, Code of Practice for Victims, October 2013, available at <https://www.cps.gov.uk/publications/docs/victims_code_2013.pdf> (accessed 10 July 2015).

[35] See <http://victimscommissioner.org.uk> (accessed 9 July 2015).

[36] See Carolyn Hoyle, 'Victims, the Criminal Process, and Restorative Justice' in Mike Maguire, Rod Morgan and Robert Reiner (eds), *The Oxford Handbook of Criminology* (5th edn Oxford University Press 2012) 412; Carolyn Hoyle, Rod Morgan and Andrew Sanders, 'The Victim's Charter – An Evaluation of Pilot Projects' (1999) 107 Home Office Research Findings. Victim personal statements were initially introduced under the Victims' Charter 1996, granting victims an opportunity to state the physical, financial, psychological, social and emotional impact that the offence has had on them and their family members. See also Marie Manikis and Julian V. Roberts, 'Victim Personal Statements: Latest (and Last) Trends from the Witnesses and Victims Experience Survey in England and Wales' (2013) 13:3 Criminology and Criminal Justice 245.

[37] Brianne McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings* (Intersentia 2011) 78-86.

Secondly, victim-complainants often also fulfil the role of victim-witnesses, in particular during the pre-trial and trial stages of proceedings. The victim is called on to testify to the facts. If this happens during the trial stage, such testimony may be given under oath or not, depending on the legal system in question.

A third type of victim participation is that of private or auxiliary prosecutor. Indeed, most civil law jurisdictions permit private prosecutions for minor crimes, and recognise 'auxiliary prosecutors', whose role is attached to that of a public prosecutor.[38] In most common law systems such as the United Kingdom, the United States and Australia, crimes were traditionally regarded as being offences against the state or the Crown as much as against the victim himself,[39] and the right to act as a private prosecutor survives in those jurisdictions. The right to bring private prosecutions is most prevalent in England and Wales.[40]

A more recent development has, fourthly, been impact statements provided by victims, known, as highlighted above, as the Victim Personal Statement. Such statements have become common in particular in common law countries, the first such statement being introduced in California in 1976.[41] Such statements were introduced in New Zealand in 1987, in Canada in 1988, and rolled out nationally across England and Wales in 2001.[42] This allows

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[38] Marion E. Brienen and Ernestine H. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems: The Implementation of Recommendation (85) 11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure* (Wolf Legal Publishers 2000).

[39] McGonigle (n 37) 83.

[40] See Prosecution of Offences Act 1985, s 6(2); and *The Queen (on the application of Gujra) v The Crown Prosecution Service* [2012] UKSC 52, [2012] 3 WLR 1227.

[41] See Manikis and Roberts (n 36) 246.

[42] ibid.

victims to submit a formal statement to be read out in open court, testifying to the victims' personal, physical, emotional, and financial trauma and suffering.[43] Some jurisdictions go further and allow victims to make observations related to sentencing in their impact statements.[44] Scholars such as Roberts have argued that such statements, 'constitute the primary vehicle by which victims may have input into the sentencing process.'[45]

Finally, a more enhanced and somewhat different form of participation is civil party participation, with which the bulk of this thesis is concerned. The participation of victims as civil party or *partie civile* in criminal proceedings finds its genesis in French law and other civil law jurisdictions,[46] although the precise parameters of civil party participation vary from one system to another; it is, however, unknown to most common law systems. Unlike witnesses, civil parties do not give evidence or testimony under oath.[47] Subject to exceptions, they generally have similar rights as other parties to proceedings, including the right to question the accused and to make closing submissions.[48] The participation of a victim as a civil party must however pertain to a specific claim for damages.[49]

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[43] Home Office, *The Victim Personal Statement Scheme* (Home Office 2001); Edna Erez and Linda Rogers, 'Victim Impact Statements and Sentencing Outcomes and Processes: the Perspectives of Legal Professionals' (1999) 39 British Journal of Criminology 216.

[44] See generally Andrew Ashworth, 'Victim Impact Statements and Sentencing' (1993) Criminal Law Review 498. It should be noted that scholars such as Ashworth and von Hirsch have expressed concern and criticism on the role of victims in the sentencing process.

[45] See Julian Roberts, 'Victim Input into the Criminal Process', Report for the Research and Statistics Division, Department of Justice Canada, September 2008 (Working Paper) 3.

[46] McGonigle (n 37) 79.

[47] Albert V. Sheehan, *Criminal Procedure in Scotland and France* (Her Majesty's Stationary Office 1975) 22.

[48] McGonigle (n 37) 80.

[49] Jan van Dijk, 'Victim Rights: A Right to Better Services or a Right to Active Participation?' in Jan van Dijk, Charles Haffmans et al. (eds), *Criminal Law in Action* (Kluwer Law International 1988) 351.

The common theme underlying developments in this field has thus been an increased emphasis on and recognition of victims' service and process rights. However, the precise role of victims will vary from one system to another, and this is true of both the domestic and the international level. The symbiosis of law and practice, both domestically and internationally, has become apparent in this section: domestic law and practice was instrumental in providing the road map for civil party participation on the international plane. However, the role of victims of international crimes such as crimes against humanity, genocide and war crimes in international criminal tribunals is correspondingly distinct from the role of victims in domestic proceedings. The following section analyses in greater detail the nature and characteristics of international criminal law as well as the ramifications of the role played by victims in international criminal justice specifically.

2. Victims and International Criminal Justice

Justice for victims has often been claimed as the raison d'être and the rallying call of international criminal justice mechanisms.[50] This noble goal has been at the heart of the work of hybrid and ad hoc international criminal tribunals as well as the ICC, and yet criticism has been levelled at these tribunals for not doing enough for victims of mass atrocities.[51] The main challenge for these mechanisms lies in the ambiguity as to what justice for victims means and what form it takes within international criminal justice.[52] Understanding the role

[50] ICTY First Annual Report to the UN General Assembly, A/50/365-S/1995/728, 1995, para 1; Third Annual ICTR Report to the UN General Assembly A/53/429-S/1998/857, 1998, para 160; and more recently by the ICC Prosecutor, Statement following an application seeking an adjournment of the provisional trial date in the *Kenyatta* case, 19/12/2013. See Eric Møse, 'Main Achievements of the ICTR Prosecutor' (2005) 3(4) Journal of International Criminal Justice 920, 934.

[51] Luke Moffett, *Justice for Victims Before the International Criminal Court* (Routledge 2014) 8.

[52] ibid.

and the scope of substantive and procedural rights afforded to victims has been a significant issue with which all international criminal tribunals have struggled.

2.1 International Criminal Justice

The 20th century is remembered as one marked by mass atrocities and gross violations of human rights, from the Holocaust of the Second World War, the Killing Fields of Cambodia, the Rwandan Genocide, the Srebrenica massacre to many other atrocious crimes, all of which demonstrated an intent to destroy the remembrance of individuals, their lives and dignity.[53] Such events sadly are not unprecedented, as mass atrocities have recurred throughout human history. One fundamental difference, however, is the invention of new and distinctive legal forms of response. Various mechanisms and devices have been developed to address the problem of 'how to stem rampant violence in the world community.'[54] The type of approach that post-conflict societies adopt to deal with mass atrocities and human suffering depends on many factors, including *inter alia* history, culture, legal systems, and the specific needs of the society in question.[55] Nations and the international community have searched for a formal response to atrocities. As such, the reaction to gross violations of human rights ranges from informal responses, such as revenge (a primitive form of justice), forgetting through amnesties, or simple oblivion, as well as 'conversely bringing alleged *culprits* to trial or at any rate before a public quasi-judicial authority,'[56] to more formal responses. These include the exercise of state courts' jurisdiction to bring accused perpetrators to justice; the

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[53] Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (Beacon Press 1998) 1. See also M. Cherif Bassiouni, 'The Need for International Accountability' in Bassiouni (ed), International Criminal Law (2nd edn Transnational Publishers 1999). It is estimated that 70- 170 million people have died since the Second World War in over 250 conflicts around the world.

[54] Antonio Cassese, *International Criminal Law* (1st edn Oxford University Press 2003) 5.

[55] Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Blackwell Publishers 2002) 7.

[56] ibid.

fact-finding process through forgiveness by the establishment of a truth and reconciliation commission; and the establishment of international criminal tribunals tasked with trying those most responsible for serious crimes, by placing the emphasis on individual criminal responsibility.[57] As Minow asserts, 'groping for legal responses marks an effort to embrace or renew the commitment to replace violence with words and terror with fairness.'[58]

Since 1993, permanent and ad hoc international criminal tribunals have been established to address genocide, crimes against humanity and war crimes, resulting in 'one of the more extensive waves of institution-building in modern international relations.'[59] This development includes *inter alia,* the establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL), the Special Panels for Serious Crimes in East Timor (SPSC), the UNMIK/EULEX war crimes panels in Kosovo, the ICC, the ECCC, and the STL. To respond to mass atrocities with prosecutions and to hold accountable those most responsible is to embrace the rule of law and to respond appropriately to international crimes.[60] The rule of law, as an important principle and institution enshrined in national and international law, requires the compliance of several elements, including commitment to due process and fair trial.[61] As Judge Goldstone has commented, 'the success of the international criminal tribunals will be tested by whether the trials were fair and not by the number of

[57] ibid.

[58] Minow (n 53) 2.

[59] Mark A. Drumbl, *Atrocity, Punishment and International Law* (Cambridge University Press 2007) 10.

[60] Minow (n 53) 24.

[61] Jeffrey Jowell QC, 'The Rule of Law and Its Underlying Values' in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (7th edn Oxford University Press 2011); Joseph Raz, 'The Rule of Law and Its Virtue' (1977) 93 Law Quarterly Review 195.

prosecutions or convictions.'[62] In addition to preserving fairness and demanding accountability, criminal trials are also aimed at acknowledging the harm caused to victims by giving a voice to their suffering and addressing victims' needs.

However, despite the advancement of victims' rights and the greater role often played by victims in various domestic jurisdictions, victims have not featured prominently in criminal trials held at the international level.[63] In the criminal trials at the Nuremberg and Tokyo international military tribunals, the ICTY, ICTR and SCSL, the role of victims had been relegated to that of witnesses.[64] The conventional perceptions of criminal justice as applied in these tribunals failed to engage and empower those most directly affected by the crimes committed, the victims, underscoring the fact that the focus of international criminal prosecutions is naturally on the accused, and the role of the victim is usually limited to that of witness, subject to examination and cross-examination. The trials were often marked by a process where crimes were defined as a violation of international law and order, harms were defined abstractly, the international community and offenders made up the primary parties, and where victims' needs and rights were ignored and interpersonal dimensions were considered irrelevant.[65] In this context, for the most part, victims were only called to testify in court if their testimony could corroborate findings and arguments made by prosecution or defence, and the protection measures were extended only to victim-witnesses. Victims were not granted the right to appear before the courts to express their views and concerns.

[62] Richard J. Goldstone, 'Comments, Panel on "Due Process in the Pursuit of Truth," Truth and Reconciliation Committee Meeting' (30 May 1998) Cape Town, quoted in Minow (n 53) 26. Judge Goldstone served as the Chief Prosecutor of the ICTY and the ICTR from 15 August 1994 to September 1996.

[63] McGonigle (n 37) 8.

[64] See Theo van Boven, 'The Position of the Victim in Statute of the International Criminal Court' in Herman A.M. von Hebel, Johan G. Lammers and Jolien Schukking (eds), *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (T.M.C. Asser Press 1999) 77-89.

[65] Howard Zehr, *Changing Lenses* (Herald Press 1995).

Furthermore, victims could not make any direct claims for reparations through these courts and instead had to pursue redress through national courts, which was often an impossible avenue to pursue, given the nature and conditions of the particular post-conflict society. The issue of greater victims' rights was broadly discussed when preparing the Statute of the ICTY. However, the drafters rejected proposals aimed at expanding the rights of victims, such as the right to seek reparations through the court or to allow victims to be represented by their own legal counsel.[66] Such rejections stemmed from the concerns that inclusion of any third party in the proceedings would have significant implications for the functionality of court proceedings, the rights of the accused and/or any potential conflict with the prosecution's case.[67] Whilst it is clear that the ICTY did attempt to grant victims some participatory rights, questions about the rights of the accused, the efficient allocation and use of resources and of court time, as well as the administrative burden involved in allowing victims to be represented by individual counsel, ultimately militated against the adoption of a far-reaching scheme of victim participation in ICTY proceedings. Interestingly, whether or not justified at the time, these questions and concerns have proven worrisome and to some extent valid, as will be shown in the comprehensive and detailed examination of victim participation and its implications at the ECCC in chapters 4, 5 and 6.

Nonetheless, following rejection by the ICTY and the apparent marginalisation of victims at the international level, victims' rights groups together with a handful of states called for a reform that focused on greater rights of protection, participation, and reparation in international criminal justice. It is against this backdrop and in view of the mounting criticism

[66] See Virginia Morris and Michael P. Scharf, *An Insiders' Guide to the International Criminal tribunal for the Former Yugoslavia* (Martinus Nijhoff Publishers 1995).

[67] ibid 167; See also Vladimir N. Tochilovsky, 'Victims' Procedural Rights at Trial: Approach of Continental Europe and the International Tribunal for the Former Yugoslavia' in Jan J. M. Van Dijk, Ron G. H. Van Kaam and Jo Anne Wemmers (eds), *Caring for Crime Victims: Selected Proceedings of the Ninth International Symposium on Victimology, Amsterdam, August 25-29, 1997* (Criminal Justice Press 1999).

facing the ICTY, ICTR and SCSL with regard to victims' rights that a new paradigm shift had to take place in international criminal justice, placing a greater role upon victims in trials at international criminal tribunals. As such, all the international criminal tribunals that have been established after the ad hoc tribunals (ICTY and ICTR) and the SCSL, namely the ICC, the ECCC and the STL, provide for greater recognition of victims' rights,[68] which has been reflected in an expansion of both victims' service rights and procedural rights. However, as already highlighted above, the most advanced form of victim participation on the international plane is civil party participation at the ECCC.

2.2 International Crimes and International Criminal Trials

The establishment of international criminal tribunals to address mass atrocities is widely regarded as initiating a new era of justice. Due to the nature of the international crimes committed and the sheer magnitude of cases, the approach to trial has generally taken a far more hybrid form than in domestic courts. Although international criminal tribunals vary in their structure and form, there are a number of characteristics unique to international criminal proceedings distinguishing them in many ways from domestic criminal proceedings. As highlighted above, issues relating to subject-matter constraints, the structure and composition of international criminal tribunals, as well as the magnitude of cases and the nature of mass victimisation produce a system that is significantly different from that of the domestic criminal justice system.

More concretely, international criminal tribunals only deal with specific types of cases, namely the most aggravated and serious crimes in international law, including war crimes,

[68] See ECCC Internal Rules, r 23, as revised 16 January 2015.

crimes against humanity, and genocide.[69] Five general characteristics of international crimes can be identified: (1) mass victimisation; (2) large-scale organised participation; (3) ideologically driven perpetration; (4) state involvement; and (5) the impact of crimes and impunity on victims.[70] First, these international crimes comprise of numerous crimes perpetrated against multiple individuals and groups over a period of time.[71] More specifically, genocide is committed against a 'group' of victims; crimes against humanity involve a 'widespread or systematic attack' directed against a civilian 'population'; and war crimes must occur within the context of an armed conflict.[72] Second, all these crimes are closely associated with mass collective victimisation, which is to a large extent what 'propels them to the level of international crimes.'[73] Furthermore, such atrocities can be committed by both state and non-state actors, who work in organised groups to enable the mass scale of such crimes and victimisation.[74] Third, as the reign of the Khmer Rouge – one of the most diabolical regimes – and other types of mass atrocities have revealed, the perpetration of such egregious crimes is ideologically driven. Often individuals are targeted because of their race, ethnicity, religion, political beliefs or mere belonging to a specific group. This in itself has led

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[69] Some hybrid international criminal courts have jurisdiction over serious national crimes. For instance, the STL has jurisdiction over the domestic crime of terrorism. Furthermore, the ICC has jurisdiction over the crime of aggression. In the summer of 2010, the ICC's Assembly of States Parties (ASP) adopted the definition of the crime of aggression falling under the ICC's jurisdiction (art 8*bis* of the Rome Statute, which is expected to come to effect in 2017 at the earliest).

[70] Drumbl (n 59) 10. See also Marc S. Groenhuijsen and Antony Pemberton, 'Genocide, Crimes Against Humanity and War Crimes: A Victimological Perspective on International Criminal Justice' in Rianne Letschert, Roelof Haveman, Anne-Marie de Brouwer and Antony Pemberton (eds), *Victimological Approaches to International Crimes: Africa* (Intersentia 2011).

[71] ibid 12.

[72] Rome Statute of the International Criminal Court, 1 July 2002, art 5. See also Antonio Cassese, *International Criminal Law* (2nd edn Oxford University Press 2008) 148.

[73] M. Cherif Bassiouni, 'The Protection of Collective Victims in International Law' (1998) 14 Nouvelles Études Pénales 45. See also McGonigle (n 37) 10.

[74] Jahn K. Kleffner, The Collective Accountability of Organised Armed Groups for System Crimes, in Harmen van der. Wilt and André. Nollkaemper (eds), *System Criminality in International* Law (Cambridge University Press 2009) 238.

to a narrative that distances perpetrators from victims by labelling them as 'others'.[75] Fourth, the execution of international crimes on such a widespread and/or organised scale occurs usually as the result of the state's action or inaction.[76] More concretely, state involvement can take the form of direct perpetration by mobilising forces, or collaboration with non-state actors.[77] On the other hand, the inaction of the state, such as failure to protect civilians, can enable different rebel groups or armed forces to pursue a genocidal agenda by committing crimes with impunity. International criminal justice focuses on individual criminal responsibility rather than state responsibility. As such the state's responsibility for action or inaction is relegated to the accountability of individuals with decision-making powers. Fifth and equally importantly, addressing the impact that these most serious and aggravated crimes have on victims and their families is at the very heart of the international criminal justice system. Victims are often subjected to some of the most horrendous physical and mental abuse, ranging from brutal killings and mutilations to mental trauma and suffering, as well as other forms of inhumane treatments.

In addition to subject-matter constraints and the distinctive characteristics of international crimes, other factors, such as the make-up and structure of international criminal tribunals, make these systems of justice distinct from domestic jurisdictions. The international criminal tribunals are very diverse institutions, with judges and legal practitioners coming from various parts of the world with different legal traditions, and

[75] See Moffett (n 51) 11. As Moffett argues, 'as part of this ideology victims are often dehumanised to legitimise violence against them or to glorify Jews as "rats".' Another powerful example is that of the Rwandan genocide where Tutsis were often called 'cockroaches'. See also Groenhuijsen and Pemberton (n 67) 28-32; Mark Osiel, 'Why Prosecute? Critics of Punishment for Mass Atrocity' (2000) 22 Human Rights Quarterly 118, 129; Primo Levi, *The Drowned and the Saved* (Abacus 1989) 44.

[76] See Moffett (n 51); See also Groenhuijsen and Pemberton (n 70) 44.

[77] William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010) 40.

bringing with them particular experiences and deep-rooted beliefs about law and procedure. As Mégret argues, 'judges associated with particular traditions have been known to, consciously or unconsciously, promote certain features of criminal justice with which they are familiar.'[78] In this context, it is understandable that all legal practitioners in international criminal justice will have distinctive understandings of criminal law and procedure and of the respective roles of expert actors in proceedings such as judges, prosecutors, and defence lawyers, as well as the role afforded to victims.[79] In practice, the application of international criminal law as demonstrated in the current international criminal tribunals has demanded procedural rules that appeal to the two predominant legal traditions, namely the common law tradition and civil law tradition.[80] This synthesis and merging is reflected in the statutes and rules of procedure, and is evidenced as well in the judgments and decisions rendered by the courts. While tribunals vary in terms of legal approaches adopted, whereby some have embraced a more adversarial approach, such as the ICTY, ICTR, SCSL and ICC, and others more inquisitorial, as in the case of the ECCC, the reality on the ground has demonstrated that all have grappled with the difficulties of 'melding civil law and common law rules and international human rights standards into a truly 'international' body of procedural and substantive criminal law.'[81] This duality would undoubtedly have an impact on the way the service and process rights, the substantive and procedural rights afforded to victims, are understood and interpreted by the courts.

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[78] Frédéric Mégret, 'Beyond 'Fairness': Understanding the Determinants of International Criminal Procedure' (2009) 14 University of California Los Angeles Journal of International Law and Foreign Affairs 37, 44.

[79] McGonigle (n 37) 11.

[80] Mark Findlay, 'Synthesis in Trial Procedures? The Experience of International Criminal Tribunals' (2001) 50 International Comparative Law Quarterly 26.

[81] Faiza Patel King and Anne-Marie La Rosa, 'International Criminal Tribunal for the Former Yugoslavia: Current Survey' (1997) 8 European Journal of International Law 125.

In addition, another important factor to be taken into consideration when assessing the role and scope of victim participation in international criminal proceedings is the overall cost of international criminal trials, which is significantly higher than for domestic trials. The very nature of international crimes and the magnitude of cases, make the operation of these courts a very costly affair, when taking into account the very high expenses associated with investigations, staffing, translation and interpretation services, the provision of protection, defence services and others. Thus, resource constraints put significant limitations on the court's operations when dealing with crimes on a massive scale and the very high degree of victimisation in post-conflict societies. The result is that only a small number of cases can be taken up by the court. International criminal tribunals are not designed to try a large number of individuals. On the contrary, they are tasked to exercise a selective approach to prosecution by bringing charges only against those most responsible for the crimes committed. This in turn means that not all victims of gross violations of human rights will have their voices heard, since only some of them will be recognised by the court as civil parties in proceedings.[82]

2.3 Victims' Rights in International Law

The legal developments that occurred in the wake of the atrocities of the Second World War as well as the international community's pursuit of individual criminal responsibility have had an impact on the expansion of the rights of individuals to protection, resulting in individuals being recognised as subjects of international legal rights.[83] This

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[82] McGonigle (n 37) 12.

[83] Bassiouni (n 5) 208.

marked the beginning of international human rights law.[84] In the aftermath of the Second World War, human rights and victims' mechanisms continued to develop. A notable example was the development of the European human rights system, where individuals can bring claims before the ECtHR for violations of the ECHR.[85] This development was also reflected, as discussed above, in significant measures adopted at national level.

States have obligations towards victims, and to this end certain international and regional texts, both explicitly and implicitly, demand greater recognition of victims' rights in criminal proceedings.

The non-binding texts include:

- The Victims' Declaration;[86]
- The Basic Principles;[87]
- Council of Europe Committee of Ministers, Recommendation (85) 11 on the Position of the Victim in the Framework of Criminal Law and Procedure;
- African Commission on Human and People's Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

[84] M. Cherif Bassiouni, *The Protection of Human Rights in the Administration of Criminal Justice: A Compilation of United Nations Norms and Standards* (Transnational Publishers 1994); See also Anne F. Bayefsky, *How to Complain to the UN Human Rights Treaty System* (Transnational Publishers 2002); James Lyons and Gene M. Mayall (eds), *International Human Rights in the 21st Century: Protecting the Rights of Groups* (Rowman & Littlefield 2003); Jack Donnolly, *Universal Human Rights in Theory and Practice* (2nd edn Cornell University Press 2003).

[85] See Clare Ovey and Robin C. A. White, *Jacobs and White, The European Convection of Human Rights* (3rd edn Oxford University Press 2002); Donna Gomien, *Judgments of the European Court of Human Rights,* 1959-1995 (Council of Europe Publishing 1996); David Harris, Michael O'Boyle and Colin Warbrick, *Law of the European Convention of Human* Rights (Butterworths 1995).

[86] Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, A/RES/40/34 (29 November 1985).

[87] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, A/RES/60/147 (21 March 2006).

The binding texts include:

- UN Convention against Transnational Organized Crime and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children;
- European Convention on Human Rights;
- American Convention on Human Rights;
- European Union Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime.

These non-binding and binding legal instruments provide an important framework to guide the development and implementation of victims' rights at an international level. The non-binding UN instruments are to a great extent a reflection of accepted norms and standards already developed in domestic practice.[88] Although not directly enforceable, they are important legal instruments because they define, albeit in broader terms, the various rights afforded to victims, serving as an essential guiding tool in both domestic and international criminal justice systems. Although their adoption, as discussed in section 1 of the present chapter, has been far from a straightforward process, often characterised by lengthy and protracted negotiations as well as slow implementation, their impact on the advancement of victim's rights has been a remarkable achievement of the international community.

Significantly, while these instruments may not specifically call for victim participation, their language and interpretation, most notably those of the Basic Principles, often imply the importance of participation through their emphasis on equal and effective access to justice,

[88] Matti Joutsen, 'Listening to the Victim: The Victim's Role in European Criminal Justice Systems' (1987) 34(1) Wayne Law Review 95.

the right to truth, as well as adequate and effective remedies for victims.[89] Furthermore, Article 6(b) of the Victims' Declaration requires the ratifying states to provide for victim participation in the criminal process, subject to their domestic laws. Such emphasis on victim participation is reflected also in the UN Convention Against Transnational Organized Crime and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, which provide that victims shall be permitted to present their views and concerns at appropriate stages of proceedings. Measures to expand victims' rights have continuously been adopted both at regional and international levels. For instance, the Council of Europe and the Council of the European Union have sought to provide greater clarity with regard to the means through which victims can participate in the criminal process. Thus, Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, which is binding on Members States as to the result to be achieved, requires them to amend their criminal procedural laws to be in compliance with reforms to victim's rights envisaged therein. Similar measures have been adopted by the African Commission, which has sought to promote the rights of victims in criminal proceedings.[90]

Furthermore, it is important to note that the jurisprudence of regional and international courts on victims' rights, as a primary source of law, has made a significant contribution by shaping and delineating the contours of victims' rights. Most international human rights instruments contain a general provision that place States Parties under the obligation to respect or secure the rights provided in that instrument.[91] These provisions have been subject

[89] McGonigle (n 37) 19.

[90] ibid.

[91] Bassiouni (n 5) 266. Such provisions are found in numerous instruments, to name a few: art 1 Convention on the Prevention and Punishment of the Crime of Genocide 1948, 78 UNTS 277; art 1 European Convention on Human Rights; See also art 1(1) Inter-American Convention on Forced Disappearances 1994, and art 1 Inter-American Convention to Prevent and Punish Torture.

to interpretation by various regional and international courts. More notably, the ECtHR and IACtHR have interpreted their respective conventions in light of the expansive role afforded to victims by the provision of greater procedural rights. Overall, international human rights law and various regional and international bodies have sought to expand 'victims' rights to access, disclosure, compensation, reparations, and above all, symbolic recognition in the context of criminal proceedings.'[92] Nonetheless, as will be examined in further detail in chapter 3, the interpretation of victims' participatory rights in international criminal justice has been significantly diffuse and at times divergent, betraying a far from cohesive and consistent approach, and making the study of civil party participation at the ECCC an excellent medium through which to explore the breadth of victim participation as a legal mechanism.

3. Central Research Questions

In a landscape of evolving jurisprudential and academic discourse on victim participation as well as practice in international criminal trials, the incorporation of victim participation as a restorative justice element into an inherently retributive justice process, has brought into sharper focus the need for a more critical and comprehensive normative and empirical examination of victim participation as both an approach and a principle. The seemingly innovative approach endorsed by the ECCC, by including victims of alleged crimes as civil parties, rather than as mere witnesses, offering an unprecedented expansion of victims' rights, has revealed potential strengths and weaknesses as well as the possibilities for the future direction of development in international criminal justice. Whilst the benefits of participation – affording victims greater procedural rights and substantive remedies – appear self-evident, there is limited jurisprudential and empirical evidence to support many of the

[92] Bassiouni (n 5) 205.

supposed benefits. Also, a more thorough evaluation and understanding is required of the defendant's right to a fair and expeditious trial, the functionality of court proceedings, as well as the potential damaging consequences of participation for victims, affected communities, and transitional justice in Cambodia. Although a number of important empirical studies conducted in recent years have contributed to a better understanding of participation in practice (e.g Stover, Balthazard and Koeng, 2011; Pham et al., 2011; Hoven 2013),[93] victim participation as a recent development remains underexplored. It is in this context that this thesis aims to shed further light on the complexities of victim participation. This thesis examines the scope, content and impact of civil party participation in international criminal proceedings within the ECCC, which constitutes the case study for this research. A thorough analysis of this topic requires addressing three principal areas upon which this research is built.

First, the thesis examines victim participation in international criminal proceedings by focusing generally on theories of criminal justice, rather than on theories of victims' rights specifically. Although approaches from theories of victims' rights are valuable and have made significant contributions to this subject, a criminal justice approach within the narrower international criminal justice framework provides a useful method with which to examine participatory rights of victims in international criminal proceedings. Such a perspective takes into account the role and rights of all individuals involved in the criminal process and sheds light more specifically on the roles afforded to the accused and the victim, and the potential

[93] Eric Stover, Mychelle Balthazard and K. Alexa Koenig, 'Confronting Duch: Civil Party Participation in Case 001 at the Extraordinary Chambers in the Courts of Cambodia' (2011) 93 International Review of the Red Cross 503; Elisa Hoven, 'Civil Party Participation in Trials of Mass Crimes: A Qualitative Study at the Extraordinary Chambers in the Courts of Cambodia' (2013) Journal of International Criminal Justice 1-27; Phoung Pham, Patrick Vinck, Michelle Balthazard and Sokhom Hean 'Victim Participation and the Trial of Duch at the Extraordinary Chambers in the Courts of Cambodia' (2011) 3 Journal of Human Rights Practice 264.

for tension between these roles. Thus, this study offers an overview of the main theoretical frameworks of criminal justice, in so far as they provide an important context for understanding the current (and future) role of victims in international criminal proceedings.

Second, this thesis investigates the role afforded to victims in domestic jurisdictions and the development of their procedural rights both domestically and internationally. It addresses the dominant legal traditions and approaches to criminal procedure which have most influenced international criminal procedures with regards to victim participation. Rather than examine particular domestic legal systems and the role which they afford to victims, this thesis focuses on the various models of participation as recognised and shared by many legal systems. Furthermore, this thesis looks at the evolution of victims' rights at the international level by analysing the various legal instruments adopted to provide greater service and process rights for victims. A relatively novel phenomenon, victim participation at the international level has posed many of the same questions that domestic jurisdictions face, but it has also presented questions unique to the international criminal justice context.

Third, this thesis undertakes a comprehensive and in-depth examination of the scope, content and practical implications of civil party participation as a legal mechanism in proceedings before the ECCC. This part of the analysis constitutes the bulk of the research on victim participation. It offers a systematic analysis of procedural and substantive rights granted to victims of the Khmer Rouge. More specifically, it examines the procedural rights afforded during pre-trial and trial proceedings as well as substantive remedies which civil parties may obtain. In addition, this thesis offers a critical analysis of the possibilities and limitations arising from the application of the civil party participation scheme in international criminal proceedings before the ECCC. The ECCC's governing legal documents and the body

of case law generated by the ECCC – albeit limited in quantity – have produced significant jurisprudence on a breadth of issues related to victim participation and have, to some extent, provided an initial delimitation of the ambit of victim participation. Thus, relevant literature and grounded empirical research are used to examine how scholars, a selection of ECCC judges and lawyers, as well as a number of civil parties and victims have interpreted civil party participation.

The central question which this thesis addresses, is therefore:

In light of the specific characteristics of international criminal law, how have statutory and jurisprudential developments at the ECCC defined the scope, content and impact of the participation of victims as civil parties in international criminal proceedings?

4. Methodology of Research

In seeking to address the central question of this thesis, an eclectic approach to methods was deemed to be necessary in order to achieve a methodical and thorough analysis of the subject of this research. For this purpose, a cross-method triangulation, which refers to 'the procedure of using different types of methods to study the same phenomenon,'[94] was adopted. This methodological approach has allowed for the examination of all facets of the legal mechanism of civil party participation. The methodology encompasses three key components: (1) literature review, (2) case law review, and (3) qualitative research. Relevant literature and grounded empirical research were used to examine how scholars, a selection of ECCC judges and lawyers, as well as a number of civil parties and victims have interpreted civil party participation at the ECCC. In this study, the overarching conceptual framework is

[94] Carolyn Hoyle, *Negotiating Domestic Violence: Police, Criminal Justice and Victims*, Clarendon Studies in Criminology (Oxford University Press 2000) 27.

based on a range of existing theoretical approaches. The first component, the literature-based research, consisted of an examination of the extant literature dealing with the characterisation of victims' rights in domestic and international criminal justice systems, and more specifically at the ECCC. The literature review includes *inter alia* various publications (books and articles) on the subject, statutes, treaties, conventions, legislation and the internal rules governing the work of the ECCC. These publications are all in the public domain, with most available at various Oxford University libraries and/or online.

The second component of research comprised case law review, which consisted of a detailed analysis of the body of case law of the ECCC. Although the jurisprudence generated by this court is limited in terms of quantity, the manner in which victims' participatory rights have been crafted in this tribunal through the lengthy judgements, decisions and interpretation attached to them, provides for a qualitative analysis of this important legal mechanism. The judgements and decisions have been thoroughly reviewed and carefully selected on the basis of their relevance to the process of the development of victims' participatory rights in proceedings at the ECCC. They have been consulted both in printed form through the courts' publications and in electronic format through the courts' websites. Summaries of judgements, decisions and opinions handed down by the ECCC are particularly valuable for this research, as the manner in which the right of victims to participate has been interpreted has defined the scope and content of such participation.

The third and most enriching component of the methodological approach adopted for this study was the empirical research conducted through three separate stages of fieldwork carried out in Cambodia. The first fieldwork project was conducted during two months of participant observation at the court as a pro bono Civil Party legal consultant from March to

May 2009. This was followed by a second project, consisting of a two-month period of data collection through structured interviews and more informal discussion, as well as analysis of material and case law from March to May 2012. On this occasion, I carried out fifteen interviews with members of the Court, personnel across the Chambers, Office of the Co-Prosecutors, Defence, Civil Party Lawyers and Registry. The third and most recent project was conducted as part of a three-month period of fieldwork in Cambodia for a consultancy project with Impunity Watch.[95] As part of this project, I conducted fifty interviews and five focus group meetings with civil parties and victim complainants between September and November 2014. The qualitative research was aimed at investigating leads and insights gleaned from literature and case law reviews to further pursue the central question of the thesis. The interviews conducted with legal practitioners and victims have allowed for the incorporation of the views of all stakeholders in the Cambodian transitional justice mechanism, and for a comprehensive evaluation of the role and value of civil party participation. It is through the views, experiences, and analyses of the key expert actors in the proceedings, reflected in the decision-making and interpretive processes at the ECCC, as well as of the civil parties and victims interviewed, that this research is able to shed light on the form, scope and implications of civil party participation, in particular as regards the presumed benefits and the anticipated harms resulting therefrom.

[95] Impunity Watch is an international non-profit organisation, seeking to promote accountability for past atrocities in countries emerging from a violent past. See <http://www.impunitywatch.org/html/index.php?paginaID=23> (accessed 15 March 2015).

4.1 Design of Empirical Research

During the second stage of the qualitative research in Cambodia, I conducted fifteen elite interviews[96] from March to May 2012, carrying out data collection, semi-structured interviews and more informal discussion with members of the Court, personnel across the Chambers, Office of the Co-Prosecutors, Defence, Civil Party Lawyers and Registry. More specifically, the interviews were conducted with three members of the judicial chambers, namely one judge and two senior legal officers; five members of the Defence; three Civil Party lawyers; two members of the Office of the Co-Prosecutors; and two members of the Registry. The goal was to explore the analyses and experiences of the key expert actors in the proceedings and to examine their decision-making and interpretive processes as they collectively shape the scope and legal parameters of victim participation. For this purpose, I enrolled in the elite interviewing course offered by the Politics and International Relations Department at Oxford, in order to obtain the necessary research and interviewing skills for this type of empirical work.

In the third stage of the qualitative research, I interviewed fifty civil parties and victim complainants, and arranged for five focus group meetings held between 5 September and 10 November 2014. The interviews and focus group meetings were conducted in the following places: Phnom Penh city and surrounding districts; Borseth district in Kampong Speu province; Siem Reap city and surrounding districts; Pouk district, Prey Veng province; Kampong Cham province and Odongk district. The fieldwork aimed to capture the views and experiences of three primary groups: (1) victims officially recognised by the ECCC as civil

[96] Elite interview is a specific type of interview, utilised to study those at the 'top' of any stratification system. In practice, the study of elites touches on some of the major and perennial issues of social analysis. In the context of the ECCC, the elite interviews were conducted to obtain views of, and insights from, key expert actors in proceedings at the ECCC, in charge of defining and interpreting the civil party participation mechanism.

parties; (2) victim complainants, and (3) victims more generally and affected communities who have not sought to participate officially or 'directly'.

The first group of interviews was conducted with 35 victims who had their applications for formal recognition accepted by the ECCC, have given testimony and have received reparations. This group is sampled by utilising the information obtained from the Victim Support Section (VSS), Civil Party Lead Co-Lawyers' Section and civil party lawyers, who provided the list and the location of victims who were recognised as civil parties in Case 001 and Case 002 by the ECCC. The second group of interviews was focused on a stratified sample of 15 victims who had filed complaints by filling out the Victim Information Form and submitted the same to the VSS, but who were denied civil party status. This group is sampled using contact lists provided by the VSS and local NGOs.

4.2 Challenges and Limitations

Conducting fieldwork research in the context of post-conflict societies ravaged by war and poverty always presents a set of challenges for any researcher. Such a task becomes even more daunting when the focus of the empirical research is on the victims of gross violations of human rights. A number of preliminary questions were considered before embarking on this empirical research, in particular: what is different about interviewing victims and survivors of violence and tragedy from other types of interviews conducted with legal practitioners and policymakers? What are the special techniques and ethical obligations in these types of interviews? How can we avoid re-victimising already-traumatised individuals? How is that fine balance to be struck between obtaining high-quality information from the interviews and limiting the inherent risks involved in trying to obtain that data?

Considering the overall challenges confronted in the research, it is important to acknowledge that two particular issues – the poor infrastructure and the extreme poverty in Cambodia – were always going to have a considerable impact on the accessibility of victims as well as the quality of the interviews. In this context, it was helpful liaising with local agencies and individuals to obtain the most relevant information particularly with regard to infrastructure.

Cultural peculiarities, the dominance of the Buddhist faith and in particular the issue of language may represent further barriers to effective interviewing, as being able to speak the native language may be important in gaining access to respondents and to establishing trust.[97] From a practical perspective, the approach taken in this project has been to reduce the potential for error, and all quotations taken from interviews conducted with victims have been left in their original wording. On a normative level, there is always a risk that the interpreter as an outsider to the research process may undermine the trust and rapport that the researcher must work hard to secure. Despite various challenges and obstacles encountered in the course of this research, the quality of interviews was not affected and the core objectives were met satisfactorily *inter alia* through the facilitation and assistance given by third parties, such as interpreters, the VSS, and victims' legal representatives.

5. Structure of Thesis

This remainder of this thesis is structured as follows: chapter 2 adopts a contextual approach, offering a theoretical and analytical account of the different theories of criminal

[97] Molly Andrews, 'Against Good Advice: Reflections on Conducting Research in a Country Where You Don't Speak the Language' (1995) 22(2) Oral History Review 75; Erik W. Tsang, 'Inside Story: Mind Your Identity When Conducting Cross National Research' (1998) 19(3) Organization Studies 511.

justice and the role and rights attributed to victims. It provides a critical examination of the traditional theories of criminal justice, primarily retributivism and utilitarianism, and looks into the evolution of restorative justice, focusing on the distinctive role and rights afforded to victims within restorative approaches to justice. It discusses the extent to which various elements of different theories of criminal justice can be adopted and adapted, leading to a more hybrid and synthetic approach, as increasingly embraced on both the domestic and international spheres. The analysis aims to show through consideration of philosophical and theoretical underpinnings the breadth of the contribution made by the various theories of criminal justice in respect of the foundations, scope and nature of international criminal law and procedure, with particular emphasis on the role of victims in these processes. An analysis of the theories of criminal justice provides an important theoretical backdrop for understanding the current (and future) role of victims in criminal proceedings, and more specifically in the context of victim participation at the ECCC.

The issue of victims' rights, and more specifically the right of victims to participate in international criminal proceedings, cannot be fully studied or understood without taking into account the advancement of the rights of crime victims generally and the role afforded to victims in domestic jurisdictions. In this context, chapter 3 begins with a review of important and influential regional and international human rights instruments as well as jurisprudence and policies created thereunder. It proceeds with an overview of the roles of different parties in criminal proceedings and the models of participation afforded to victims against the backdrop of inquisitorial and adversarial approaches to procedure as reflected in the civil law and common law traditions, respectively. This analysis is developed further by examining the role and substantive and procedural rights accorded to victims at various international criminal tribunals. This chapter provides the foundations for the thorough and detailed

examination of the enhanced victim participation regime at the ECCC undertaken in the subsequent chapters.

Chapters 4, 5 and 6, which comprise the core of this research, provide a rich contextual analysis of the practice of civil party participation, as a novel legal mechanism at the ECCC. As a post-conflict society, Cambodia is still struggling to come to terms with its past, and faces challenges in the quest for justice over how much to acknowledge, how to treat perpetrators, how to address the rights and needs of victims, and how to foster reconciliation. In this regard, chapter 4 takes account of the historical and social context of Cambodian post-conflict society. It highlights the dominant historical events that led to the Khmer Rouge regime and the particular nature of the mass victimisation that took place in Cambodia. It analyses the different dynamics conditioning transitional justice in Cambodia. Further, this chapter analyses the ECCC's unique structure, its legal and procedural framework as an important development that governs the victim participatory scheme.

Chapter 5 critically examines the procedural rights afforded to victims at various stages of the criminal process as well as the substantive remedies that victims may obtain as interpreted in the ECCC jurisprudence. Further, this chapter examines the practical implications that civil party participation has had with regards to the right of the accused to a fair and expeditious trial and the functionality of court proceedings. It evaluates the challenges with which the ECCC has struggled in finding the most feasible way to strike a balance between these competing rights and to ensure the effective and efficient operation of the Court.

Given that the incorporation of victims as civil parties is a novelty in the realm of international criminal justice, the application of this mechanism as seen at the ECCC has undoubtedly revealed potential advances and limitations. Chapter 6 provides a thorough theoretical and empirical analysis, which builds on literature and case law review, and most importantly on the in-depth interviews with victims and legal practitioners. It aims to elucidate what the real impact of participation is and whether and how such participation leads to the benefits that are commonly assumed. It specifically examines how participation has helped victims obtain justice from within; seek truth through participation by learning more about the regime and the motivations behind the crimes committed; foster reconciliation, and equally importantly, obtain meaningful reparations through participation.

The trials at the ECCC have been considered as 'experimenting laboratories', whereby the ECCC is essentially crafting the most appropriate way in which to incorporate victim participation without jeopardising court proceedings and infringing the rights of the accused. Reflecting on the expansive role afforded to victims to participate in criminal proceedings, the final section of the thesis draws on the findings of the previous chapters. It considers the extent to which victim participation in criminal proceedings, as observed in practice, might lead to the fulfilment of the aspiration of a more inclusive justice system for victims of mass atrocities, in terms of helping to unearth the truth, fostering national reconciliation, as well as potentially providing substantive remedies. Further, it considers whether victim participation is overall in the best interests of justice and in the best interests of victims.

CHAPTER 2

Victims and Theories of Criminal Justice

Different theories of criminal law and criminal justice have developed and evolved across time,[1] and the role and rights afforded to victims have varied depending on the particular theory adopted. The question arises why an understanding of criminal justice theories is required in the context of victim participation in international criminal proceedings. There are a number of possible responses. First, the intrinsic value of theorising resides in the fact that theory can be deployed analytically and descriptively on the one hand, and normatively on the other. An analytical approach seeks to explain and analyse a concept or system. A normative approach, by contrast, seeks an account of what the concept or system ought to be and aspire to achieve.[2] Secondly, theory helps to explain the legitimacy of, and justification for, the adoption of specific processes and institutions. Thus, there is abundant literature on the legitimacy of international criminal tribunals,[3] however the question of legitimacy cannot be addressed without considering what version of criminal justice is being espoused. Thirdly and most importantly, an understanding of the different theories of criminal justice is indispensable to a thorough appreciation of the role afforded to victims in international criminal law. The role envisaged for victims in proceedings before international tribunals such as the ECCC is premised on a particular vision of criminal justice. Some theories eclipse

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[1] See generally Harry Acton (ed), *The Philosophy of Punishment* (Macmillan 1969); Andrew von Hirsch and Andrew Ashworth, *Proportionate Sentencing* (Oxford University Press 2005); Antony Duff and Stuart Green (eds), *Philosophical Foundations of Criminal Law* (Oxford University Press 2011); John Gardner, 'The Functions and Justifications of Criminal Law and Punishment' in *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford University Press 2007); H. L. A. Hart, *Punishment and Responsibility* (Oxford University Press 1968); Lucia Zedner and Julian Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (Oxford University Press 2012).

[2] Michael D. A. Freeman, *Lloyd's Introduction to Jurisprudence* (7th edn Sweet & Maxwell 2001) 10-11; Michael S. Moore, *Act and Crime* (Oxford University Press 1993).

[3] See Antonio Cassese, 'The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice' (2012) 25 Leiden Journal of International Law 491; William A. Schabas, 'The Legitimacy and Legality of the Tribunals' in *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press 2006).

victims entirely, focusing on the defendant and the harm done to the community. Such theories come in different shapes and forms, as will be discussed in further detail later on in this chapter. More recently, an approach that focuses on restorative principles has gained considerable traction, although this has required more far-reaching adjustments in common law systems than in civil law systems. Suffice it to say for the present that the role of victims in international criminal proceedings cannot be analysed in isolation from the particular theory or theories of criminal justice which the court or system at issue endorses.

One important point should be made regarding the meaning of criminal justice: the ascription of a legal label may often obfuscate more than it reveals. Criminal justice is a protean expression that can be given a variety of meanings. Thus, Zedner has argued that the criminal justice system is 'a particular set of legally defined responses to disputes, deviance and harmful behaviour,'[4] and consists of essentially four characteristics: in the first place, it is a mode of governance, sitting 'at the most coercive end of a continuum of institutions.'[5] The criminal justice system is viewed as a means to achieving social order, the resolution of disputes, and the management of risks. Secondly, the criminal justice system can be regarded as a set of defined, formal responses to infractions that the law regards as criminal. There is also, thirdly, a more institutional understanding of the criminal justice system, which focuses on the ensemble of agencies and mechanisms established to attain the aforementioned objectives. Finally, Zedner also stresses the importance of the criminal justice system as a normative framework which can be justified by recourse to theories of justice or a given set of values. Indeed, it has been argued that it is not possible to devise a theory of criminal justice in isolation from a general theory of law, or that any notion of criminal justice is

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[4] Lucia Zedner, *Criminal Justice* (Oxford University Press 2004) 13.

[5] ibid 3.

informed by broader conceptions of social justice.[6] In other words, the question is what 'set of values' underlies the legal order. To the extent that the argument is that the nature of criminal justice and criminal law is intimately connected with the understanding of law and social justice itself, there is much truth in this. However, the point should not be overstressed. It is only natural that a theory of criminal law and criminal justice should be informed by a general theory of law and justice. Hence, theories of criminal justice are influenced by a multitude of factors, in particular by moral philosophy, political theory, and sociology.[7] As Lacey has stated, theories of criminal law and criminal justice stretch,

> […] from relatively technical discussion of the fundamental tenets of and issues within criminal law doctrine, through more abstract attempts to conceptualise the general framework within which the doctrine operates, to historical analysis of the development of criminal justice ideologies and practices and normative arguments about the proper or ideal shape of that conceptual framework in a liberal, socialist, or other form of political society.[8]

The following will trace and analyse these different conceptions of criminal justice with a focus on the role played by victims. It should however be noted here that the very existence of criminal justice processes has not gone unchallenged. Christie has argued forcefully that the polity 'steals' what is essentially a private dispute from its rightful owners, the wrongdoer and the victim, appropriating it and trying it as a wrong against the *public*.[9] This analysis is questionable on the municipal level, and all the more so on the international plane. It is difficult to see how any crime tried by an international criminal court could conceivably be

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[6] Georg Rusche and Otto Kirchheimer, *Punishment and Social Structure* (Columbia University Press 1939). The analysis was strongly influenced by Marxism, but can in principle apply to any ideology.

[7] Michael S. Moore, *Placing Blame: A General Theory of the Criminal Law* (Clarendon Press 2007); Antony Duff, *Punishment, Communication and Community* (Oxford University Press 2001); Victor Tadros, *Criminal Responsibility* (Oxford University Press 2005).

[8] Nicola Lacey, 'Contingency, Coherence, Conceptualism' in Antony Duff (ed), *Philosophy and the Criminal Law: Principle and Critique* (Cambridge University Press 1998) Ch 4.

[9] Nils Christie, 'Conflicts as Property' (1977) 17 British Journal of Criminology 1.

regarded as a *private* dispute.[10] This chapter will proceed on the basis that having a criminal justice system in the international context is justified. However, as is a common theme of this thesis, the very nature of the international criminal justice system poses unique questions and challenges that are not usually encountered by national legal systems. Whilst there is a rich and sophisticated scholarship on theories of criminal justice, criminal law and punishment, this mostly has a domestic focus, raising the question to what extent notions of domestic criminal justice are readily transferable to international criminal justice.

It is the purpose of this chapter to address these questions. The first section examines the principal differences between civil and criminal law with regard to the implications resulting from the finding of a wrongful act. This analysis aims to underline the distinctive and significant role played by the state, and equally importantly, the role afforded to the victims of a wrongful act, in civil and criminal law respectively. The second section describes and analyses the different theories of criminal justice and the role and rights attributed to victims. It focuses primarily on the general distinction between the consequentialist and non-consequentialist schools of thought. It then proceeds to a thorough and critical examination of the traditional theories of criminal justice: retributivism and utilitarianism, and traces the rise of restorativisim. This leads to the third section, which analyses the evolution of restorative justice and the distinctive role and rights afforded to victims within restorativist approaches to justice. It considers the question of how to characterise victims and what victims aspire to achieve in the criminal justice system. It highlights the rise of victim-oriented approaches towards criminal justice and of victimology as a distinct scientific discipline. However, as will be seen in this chapter, legal practice in both the national and international spheres has shown that criminal justice systems have evolved to embrace a more hybrid or synthetic

[10] Contrast for example the crime of theft, the civil law equivalent of which is the tort of conversion, and gross violations of human rights, such as genocide, crimes against humanity, and war crimes.

approach where various elements of different theories of criminal justice are adopted. In this context, the fourth section examines the extent to which a synthesis between different theories of criminal justice may be reached. It offers a theoretical and analytical account of the potential legal and procedural implications arising out of the complex and multifaceted hybrid approach. This chapter then concludes by considering how the domestic theories of criminal justice apply at the international level. The fifth and last section aims to highlight how theories of criminal justice systems as applied on the domestic plane assist in explaining and shaping international criminal justice systems. This chapter aims to show through consideration of the philosophical and theoretical underpinnings the breadth of contribution that various theories of criminal justice have had on the foundations, scope and nature of international criminal law and procedure, with particular emphasis on the role of victims in these processes.

1. Criminal Justice, Civil Justice and Victims

Virtually every modern legal system draws a dichotomy between civil and criminal law, and the distinction can already be observed in Roman jurisprudence.[11] In most systems, certain conduct may constitute both a civil wrong and a criminal offence.[12] The criminal law is a synthesis of *lex talionis* – the principle whereby an individual harmed by a wrong was entitled to retaliate – and the enforcement of the law in the public interest. In historical terms, most systems of law develop a civil notion of *lex talionis* before institutionalising a distinct body of criminal law.[13] Crimes came to be regarded as wrongs against the sovereign and

[11] Barry Nicholas, *An Introduction to Roman Law* (Oxford University Press 1962) 208.

[12] Carolyn Hoyle, 'Victims, the Criminal Process, and Restorative Justice', in Mike Maguire, Rod Morgan, and Robert Reiner (eds), *The Oxford Handbook of Criminology* (5th edn, Oxford University Press 2012) 410; Edwin Peel and James Goudkamp (eds), *Winfield and Jolowicz on Tort* (19th edn Sweet & Maxwell 2014) para 1.015.

[13] Nicholas (n 11) 208; See also Francesco Parisi, 'The Genesis of Liability in Ancient Law' (2001) 3(1) American Law and Economics Review 82, 84.

society generally. Thus, the early criminal law of England was characterised as being concerned with keeping the King's peace, although more recently greater emphasis has been placed on the harm done to 'society' than the government.

It is important to differentiate between criminal and civil law for a number of reasons, in particular due to differences in procedural and substantive standards, such as the burden of proof.[14] This raises however the prior question, what is criminal law? The criminal law is concerned with crimes, which may be defined as serious breaches of legally defined and mandated standards, the violation of which may result in a punitive sanction such as a fine or imprisonment. As Ashworth has noted, 'The idea of a crime is that it is something that rightly concerns the State, and not just the person(s) affected by the wrongdoing.'[15] It should further be noted that not every sanction needs to be criminal in nature as exemplified by the existence of civil penalties.[16] Indeed, German law has a distinct body of law on regulatory offences (*Ordnungswidrigkeiten*), which straddles the border between the criminal and the civil.[17]

In this regard, it could be argued that the principal difference between civil and criminal law is that the former is concerned with private disputes, whereas the latter is

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[14] Cf. Jonathan Doak, 'Victims' Rights in Criminal Trials: Prospects for Participation', (2005) 32 Journal of Law and Society 294, 300. Doak has criticised the criminal/civil dichotomy as being untenable. As will be seen below, whilst there is considerable overlap between the criminal and civil justice systems, it nevertheless makes sense to maintain the distinction.

[15] Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn Oxford University Press 2013) 2.

[16] See Law Commission Consultation Paper, 'Criminal Liability in Regulatory Contexts' Consultation Paper No 195. Available at, <http://www.lawcom.gov.uk/wp-content/uploads/2015/06/cp195_Criminal_Liability_consultation.pdf > (accessed 8 July 2015).

[17] Thomas Weigend, 'The Legal and Practical Problems Posed by the Difference Between Criminal Law and Administrative Penal Law' (1998) 59 Revue Internationale de Droit Pénal 67; See also the German Act on Regulatory Offences (*Gesetz über Ordnungswidrigkeiten*) available in English and German at <http://www.gesetze-im-internet.de/englisch_owig/index.html> (accessed 8 July 2015).

generally regarded as forming part of the public law of a given legal system.[18] The implications of this are apparent on three distinct levels, and will be examined briefly in turn: the role of the state, the consequences of a finding of wrongful conduct, and the role of the victim. First, the role of the state in the civil justice system is extensive, but limited to the provision of mechanisms and institutions to bring and (if successful) enforce a claim. Thus, the substantive and procedural rules in place, as well as courts and judges, owe their existence to state intervention, designed to facilitate the resolution of disputes.[19] These mechanisms and institutions will assist the claimant in vindicating his or her rights, but the proceedings are brought by the claimant alone, and he or she would not normally be able to obtain co-operation from state bodies such as the police in investigating a claim. In some jurisdictions, a claimant may apply to the court for disclosure or discovery of pertinent documents, but these will need to be inspected by the claimant. It is different in criminal law, with investigations, proceedings and punishments usually carried out by state agencies. As Lamond has argued, the gist of crimes 'lies in their being public wrongs, not (as is often thought) because they wrong the public, but because the public is responsible for punishing them, i.e. because they merit state punishment.'[20]

Secondly, the consequences of a finding of wrongful conduct are substantially different in the civil and criminal spheres. The usual remedy available to a person harmed by a civil wrong is damages as compensation; other remedies such as specific performance or an

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[18] Jaap Hage 'Basic Concepts of Law' in Jaap Hage and Bram Akkermans (eds), *Understanding the Law* (Heidelberg 2014) 38.

[19] However, the increasing role of alternative methods of dispute resolution should be borne in mind. These are private means of settling civil disputes, primarily arbitration and mediation. See generally, Susan Blake, Julie Browne and Stuart Sime, *A Practical Approach to Alternative Dispute Resolution* (3rd edn Oxford University Press 2014).

[20] Grant Lamond, 'What is a Crime?' (2007) 27 Oxford Journal of Legal Studies 609.

injunction may be granted under specific circumstances.[21] Damages are designed either to 'put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation,'[22] or to place him 'so far as money can do it… in the same situation, with respect to damages, as if the contract had been performed.'[23] By contrast, a finding of guilt in criminal proceedings results in a conviction, with all the inherent consequences entailed by a guilty verdict (such as a criminal record, a loss of voting rights, etc., depending on the criminal justice system in question), and renders the convicted individual liable to punishment. It is important to make two points in this regard. On the one hand, whereas the consequences of a conviction are invariably punitive in nature, the civil laws of some countries also allow for the imposition of punitive or 'exemplary' damages. This is the case in the United States, though English law does not allow punitive damages in relation to breach of contract, and only allows them in very limited circumstances in tort.[24] On the other hand, recent decades have witnessed an increasing recognition of claims for compensation as part of criminal proceedings. Therefore, in a number of civil law countries such as France and Germany, victims may in certain circumstances join civil claims to a prosecution.[25] In England, while victims have no right to obtain compensation in criminal proceedings,[26] the

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[21] See general Andrew Burrows, *Remedies of Torts and Breach of Contract* (3rd edn Oxford University Press 2004).

[22] *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39 (*per* Lord Blackburn). This is the general measure of damages for torts.

[23] *Robinson v Harman* (1848) 1 Ex 850, 855 (*per* Parke B). This is the general measure of damages for breach of contract.

[24] Peel and Goudekamp (n 12), 23.12 - 23.14.

[25] See German Criminal Procedure Order (*Strafprozessordnung*) sections 403 to 406c; and French Criminal Procedure Code (*Code de Procédure pénale*) section 706-15.

[26] Hoyle (n 12) 410.

Criminal Justice Acts of 1972[27] and 2003 have made considerable strides towards providing compensation, the former empowering the courts to make compensation orders in criminal proceedings, and the latter placing specific emphasis on reparation.[28] The extent to which such developments have a real impact on the ground is debatable.[29]

There is thus considerable overlap between the criminal and civil justice systems in many countries, but the core characteristics remain the same. This is particularly apparent in the context of the role afforded to, and rights of, the person or persons wronged by the harmful conduct in question. In civil law, that person is the claimant (or plaintiff) in a civil action brought against the defendant. In criminal law, that person is the victim and is usually not the prosecutor actually pursuing the case. The role of victims in criminal proceedings has been subject to great debate and will be analysed in chapter 3. Suffice it to say that prosecutions are nominally brought by the state or, in England and other Commonwealth countries, the monarch, and that victims can have an array of rights and roles in this context, ranging from that of civil party to auxiliary or private prosecutor. Indeed, as seen in chapter 1, the general position in English law is that private prosecutions are in principle permissible. A key difference is that in order to bring a prosecution, the victim's co-operation is not necessarily required. Therefore, as a matter of practice, prosecutors may decide not to pursue a case where the victim does not want to 'press charges', but that is subject to the prosecuting authority's discretion. By contrast, a civil lawsuit cannot exist in the absence of a claimant, and the rules of standing are limited, in that only the person harmed or their estate may sue.

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[27] The relevant provisions were repealed and replaced by the Powers of Criminal Courts (Sentencing) Act 2000, sections 130 to 134, which deal with compensation orders.

[28] Criminal Justice Act 2003, section 142(1)(e).

[29] Hoyle (n 12) 410.

Thus, it can be said in general terms that the civil justice system aims at providing the mechanisms and institutions required to vindicate individuals' private rights. It is designed to compensate for breach of contract, negligence, libel, nuisance, unjust enrichment, etc. The criminal justice system by contrast consists of a publicly owned process, in which victims are afforded vastly different roles, depending on the legal order in question. The precise nature of the criminal justice system, and the functions of victims therein, require an understanding of the theories that have shaped the evolution of criminal justice systems, a topic which will be discussed in the following section.

2. Theories of Criminal Justice

There is a vibrant literature on different theories of criminal justice. The focus of that corpus of literature has expanded in recent years from concentrating on the issue of the justification of punishment to broader conceptions of criminal justice, encompassing the rights of victims, and criminal justice theory in an international context.[30] It should be noted at the outset that not everyone is in agreement that criminal justice can be distilled into a 'theory'. For instance, Flew rejects the ascription of theoretical value on the grounds that it is too scientific.[31] Whilst it is no doubt true that pure theory will inevitably fall short of capturing the multifaceted complexities of human interaction, the same argument applies to all theorising in law. It requires us to be mindful of practical implications, but it does not undermine the value of theory as such.

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[30] Jonathan Doak, 'Victims' Rights in Criminal Trials: Prospects for Participation' (2005) 32 Journal of Law and Society 294, 300. See also Peter Meredith, 'Restoring a Focus on Victims in Criminal Justice' Washington University School of Law, Restorative Justice Seminar, 1 May 2009. See https://law.wustl.edu/Faculty_Profiles/Documents/haley/SeminarPapers/PeterMeredith.pdf> (accessed 2 August 2015).

[31] Antony M. A. Flew, 'The Justification of Punishment' in Harry Acton (ed), *The Philosophy of Punishment* (Macmillan 1969) ch 5.

As seen in the preceding section, the criminal law is an amalgam of Roman notions of *lex talionis* and the exercise of royal authority by the courts in keeping the King's Peace. Implied in the historical development is a desire for retaliation or retribution, what we may call a primitive form of justice, and the crystallisation of criminal law in the thirteenth century as an institutionalised response to a wrong against sovereign authority.[32] However, the modern view is considerably more complex, being replete with different approaches to criminal justice, social justice, and the very nature of law.

The primary distinction in theories of criminal justice is between consequentialism and non-consequentialism.[33] It is said that consequentialism is prospective, looking to the consequences in the future of the infliction of punishment. By contrast, non-consequentialism is retrospective, emphasising the acts committed and the state of mind of the perpetrator.[34] Neither consequentialist nor non-consequentialist approaches to criminal justice adhere to solely one particular theory of criminal justice, as will be explained in detail below. For example, Zedner with some justification regards the more modern theory of restorative justice as being a consequentialist theory.[35] However, the point made at the beginning of this section should be borne in mind, namely that theory will rarely find pure application in practice.

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[32] Frederic Maitland and Frederic Pollock, *The History of English Law before the Time of Edward I* (Cambridge University Press 1895).

[33] Duff (n 7)

[34] Wilbur R. Miller (ed), *The Social History of Crime and Punishment in America: An Encyclopaedia*, Vol 3 (Sage 2012) 1625.

[35] Zedner (n 4) 101-106.

2.1 Traditional Theories of Criminal Justice

The prevalent 'traditional' theories of criminal justice are retributivism and utilitarianism. The attribute 'traditional' is used here not because retributivism and utilitarianism no longer have any traction. On the contrary, as will be seen below, retributivism has had something of a revival in recent years. Nor is it to say that more modern conceptions of criminal justice such as restorativism are entirely novel phenomena. Indeed, restorative approaches to justice have been found in the cultures of the indigenous peoples of Canada, America and New Zealand.[36] Rather, both retributivism and utilitarianism were the prevailing approaches to criminal law and punishment for much of the time that these topics were seriously debated and discussed, eclipsing alternative theories.

2.1.1 Retributivism and 'just deserts'

Retributivism falls within the non-consequentialist camp, and has been described as 'arguably the oldest and most widely invoked justification of punishment'.[37] Early forms of retributivism can be found in religious texts such as the Old Testament.[38] At the core of retributivism is the idea that punishment serves to right a wrong. There are, however, multiple ways of achieving that objective. The most basic form is a primitive notion of vengeance, which informed the *lex talionis* and was a victim-centred approach to justice. Vengeance and giving *carte blanche* to victims may however result in disproportionate consequences, and is in any event incompatible with modern conceptions of criminal justice as a state-imposed and maintained system of institutions and processes.[39] In this light, Moore and Schoeman's

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[36] ibid 103.

[37] ibid 86.

[38] Old Testament, Exodus 21:23.

[39] See generally Nicola Lacey, *State Punishment: Political Principles and Community Values* (Routledge 1988) 17-18.

definition of retributive justice as 'sanctioned revenge'[40] should be read with caution, not least because the focus of retributive justice has been on society and the offender, rather than on the victim. Similarly, the mantra of 'an eye for an eye, a tooth for a tooth' is almost universally rejected as total equivalence between wrong and punishment is in practice unattainable or undesirable. More sophisticated versions of retributivism, such as the desert model which emerged in the 1970s and has since 'gained much influence,'[41] take their cue from Kant, whose theory of 'just deserts' holds that punishment is necessary in order to restore equality between the parties by removing the offender's dominance over the victim in having committed the wrong.[42] The offender as a rational being had made a deliberate choice to offend, and thus 'deserved' to be punished for that wrongdoing. This version of retributivism establishes a clear link between wrongdoing and punishment, the latter being the logical consequence of the former: punishment is an end in itself and ought to be blind to extraneous considerations such as the danger of the offender, the likelihood of recidivism, or the rehabilitative quality of punishment. Whether or not this version of retributivism is grounded in a particular moral philosophy is controversial.[43] This underlines the important connection between the specific view of retributivism adopted, the underlying theory of criminal justice, and the wider theory of law within which the particular criminal justice system subsists. Thus, it is possible to argue, as Mill did, that criminalisation ought to be kept to a minimum and should reflect moral harm done to a victim:[44] this 'harm principle' requires the criminal justice system to become active only where another's right or interest has been

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[40] Michael Moore, 'The Moral Worth of Retribution' in Frederick Schoeman (ed), *Responsibility, Character, and the Emotions* (Cambridge University Press 1987) 216.

[41] Von Hirsch and Ashworth (n 1) 4.

[42] Immanuel Kant, *The Metaphysics of Morals*, transl. by Mary Gregor (Cambridge University Press 1996).

[43] George P. Fletcher, 'What is Punishment Imposed For?' (1994) 5 Journal of Contemporary Legal Issues 101, 109-110. Fletcher regards retributive justice as 'restoration of moral worth'.

[44] John Stuart Mill, *On Liberty* (John W. Parker & Son 1859) 21-22.

adversely affected. However, it is not *necessary* for a retributivist to draw the link between morality and criminal justice.

All retributivist theories frown upon disproportionate punishment as this goes beyond 'just deserts', and for precisely that reason emphasise the importance of due process rights: the right to a fair trial by an independent and impartial tribunal established by law, supported by rules of criminal evidence and procedure designed to safeguard the accused and to establish beyond reasonable doubt that the conduct complained of did in fact occur. Without such emphasis on due process rights, the 'just deserts' theory breaks down, at least in terms of justification and legitimacy. Similarly, plea bargains, far more prevalent in the United States than in England, directly contradict in many ways the premise of 'just deserts' and are influenced by a number of extraneous factors. The admission of Victim Personal Statements at the sentencing stage is a more complex issue and depends on the particular version of retributivism adopted: a victim-centred approach would favour the admissibility of such statements, whereas the 'just deserts' theory would not, as the reason for inflicting punishment is the commission of the wrong itself, not the harm specifically caused to the victim.[45] On this view, Victim Personal Statements would increase the risks of arbitrariness and partiality on the part of the tribunal, and hence undermine the accused's due process rights.

The foregoing observations raise the question of exactly what role is played by victims in retributive justice theories. Cragg has criticised the notion of retributivism as sanctioned revenge, as this fails to account for the complex relationships between human

[45] Von Hirsch and Ashworth (n 1).

beings, including reconciliation, compassion and forgiveness.[46] For Cragg, the 'victim loses his central role' in retributivist theory. In similarly trenchant terms, Moffett has stated that retributivism 'marginalise[s]' victims, arguing that a greater role afforded to victims would undermine the equality of arms between the prosecution and the defence.[47] There is much truth in this: victims have traditionally been regarded as providers of information such as in the role of complainant or witness. This attitude is just as apparent on the international level as it is on the domestic level, as will be seen in subsequent chapters.[48] The focus of modern retributivism or 'just deserts' is not victim-centred but focuses primarily on the offence committed, on the presence of *actus reus* and *mens rea*.

This marginalisation is not shared by all adherents of retributivist theory. As already seen above, Fletcher regards the restoration of the victim's moral worth as being at the heart of retributivism. Starkweather, who also supports the 'just deserts' theory, criticises the prevailing view which separates retribution from victim restitution: the two are intertwined concepts that cannot and should not be neatly separated. Victim restitution seeks to 'restor[e] the relationship between the offender and the victim by making the offender pay for his crime.'[49] The focus is less on monetary restitution, which is the primary concern of private law, but on psychological restitution which is designed to 'provide the victim with an emotional resolution of the crime experience,'[50] and is thus distinct from revenge.

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[46] Wesley Cragg, *The Practice of Punishment: Towards a Theory of Restorative Justice* (Routledge 1992) 18-19.

[47] Luke Moffett, *Justice for Victims Before the International Criminal Court* (Routledge 2014) 16.

[48] Chapters 4, 5 and 6.

[49] Note, 'Victim Restitution in the Criminal Process: A Procedural Analysis' (1984) 97 Harvard Law Review 931, 939.

[50] David A. Starkweather, 'The Retributive Theory of "Just Deserts" and Victim Participation in Plea Bargaining' 67 Indiana Law Journal 852, 865.

Whilst Starkweather professes to be a supporter of 'just deserts', his theory is substantially modified to accommodate victims' rights and interests. Not all retributivists would agree with Starkweather's position. In this context, if the view is adopted that the mere commission of a wrong ought to be punished regardless of its effect on victims, victim restitution becomes irrelevant: it may very well be desirable to have victim restitution in normative terms, but it is not required by traditional theories of 'just deserts'. What this does show however is the flexibility and malleability of different theoretical approaches to criminal justice, which are far richer than the initial dichotomy between consequentialism and non-consequentialism appeared to suggest. We shall now turn to the principal consequentialist school of thought, utilitarianism.

2.1.2 Utilitarianism

Bentham is generally regarded as the father of the utilitarian school of thought. For Bentham, 'the greatest happiness of the greatest number' was the objective of politics.[51] Utilitarianism, which looks to the utility of measures taken for the general public good, was the vehicle through which to attain this objective. Bentham regarded punishment as a social evil, a view shared by Duff and Garland, who regard punishment as 'morally problematic because it involves doing things to people that (when not described as punishment) seem morally wrong.'[52] Thus, locking up a person is both a tort and a crime. However, when done in pursuance of a court order, it is 'imprisonment', usually (but not invariably)[53] imposed to punish an offender. *A fortiori,* a similar argument can be made in relation to wilful killing and capital punishment. The justification of punishment is seen to be that it outweighs the

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[51] Jeremy Bentham, *Introduction to the Principles of Morals and Legislation* (Oxford University Press 1907).

[52] Antony Duff and David Garland (eds), *A Reader on Punishment* (Oxford University Press 1994) 2.

[53] Imprisonment may be justified by reference to other (utilitarian) goals, such as crime prevention or risk management: remand imprisonment or public security sentences being examples of such an approach.

disadvantages of not having punishment, such as the proliferation of crime, the failure to sanction wrongful behaviour, etc.

Utilitarianism is a consequentialist theory in that it focuses squarely on the consequences of punishment within the criminal justice system. It may also be called an 'instrumentalist' theory because it regards punishment as a mere instrument, a means, to the specific ends espoused by utilitarian thought, but not as a goal in its own right. This is the principal difference between consequentialism and non-consequentialism, or specifically between retributivism and utilitarianism. It is however incorrect to state that retributivism is about proportionality, whereas utilitarianism is not. Rather, both theories approach the proportionality calculus from different perspectives: in retributivist thought, the punishment must be proportional to the wrong; in utilitarian thought, the punishment must be proportional to the extraneous objectives sought to be attained. This assumes a rather 'pure' theory of utilitarianism that entirely eschews non-consequentialist considerations. It will be seen shortly that there are pure and non-pure versions of this school of thought.

What then are the extraneous objectives pursued by a utilitarian theory of criminal justice? The most important ones are deterrence/prevention, incapacitation, and reform/rehabilitation. It should be noted that these are in no way mutually exclusive, and that a utilitarian theory may pursue one or more of these objectives. Whilst there are thus various versions of the utilitarian view of criminal justice, such theories usually have in common their emphasis on crime reduction and deterrence. Other aspects may be more controversial. Deterrence has three different aspects:[54] first, the notion of positive general prevention. This is the idea that the existence of a criminal justice system and of punishment that may or will

[54] Urs Kindhäuser, *Strafrecht Allgemeiner Teil* (Nomos 2009); See also Gardner (n 1).

be imposed for breach of the rules of that system reinforces the polity's trust in the legal system.[55] The second aspect is that of negative general prevention, or what may be regarded as deterrence *stricto sensu*.[56] Finally, the concept of specific prevention aims at the individual potential offender, in that the existence of a criminally sanctioned norm should deter the individual from committing the crime he may otherwise commit.

Some utilitarian theories also focus on the concept of incapacitation: whilst imprisoned, an offender is barred from committing further crimes in the community. Yet more controversial are the rehabilitative and reformative aims of the criminal justice system.[57] Punishment is imposed to deter and arguably to incapacitate, but on this view it is also imposed to give the offender an opportunity to atone for the wrong done, and to be re-admitted to society by rehabilitation and reform. This is not to say that punishment is the only means at the disposal of the criminal justice system to enhance rehabilitation, and it should be noted that it has been questioned whether the rehabilitative ideal really is attained by the imposition of punishment.[58] Other means of rehabilitation would include drug counselling, psychotherapy and education initiatives. However, traditionally, even utilitarianists emphasising the rehabilitative nature and objectives of the criminal justice system, nevertheless regard punishment as central.

[55] Cf. Andrew Ashworth, 'Was ist positive Generalprävention? Eine kurze Antwort' in B. Schünemann, A. von Hirsch and N. Jareborg (eds), *Positive Generalprävention: Kritische Analysen im deutsch-englischen Dialog* (C. F. Müller 1998), who states that positive general prevention 'rides on the coat-tails of negative general prevention or of desert', at 67; quoted in Gardner (n 1) 201.

[56] Paul Johann Anselm von Feuerbach, *Revision der Grundsätze und Grundbegriffe des positiven peinlichen Rechts* (Hennings 1799).

[57] John Braithwaite and Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford University Press 1990) 4; J. D. Mabbot, 'On Punishment' in Harry Acton (ed), *The Philosophy of Punishment* (Macmillan 1969) 17.

[58] Fergus McNeill, 'Punishment as Rehabilitation' in Gerben Bruinsma and David Weisburd (eds), *Encyclopedia of Criminology and Criminal Justice* (Springer 2014) 4195-4206.

McGonigle draws a distinction between pure and non-pure forms of consequentialist or utilitarian thought.[59] The pure form assumes that the criminal justice system is justified solely by reference to the beneficial effects on society as a whole. The non-pure form, whilst certainly putting considerations relating to the greater good centre-stage, nevertheless acknowledges that the greater good does not legitimise any practice regardless of the impact of its pursuit on the rights and interests of others, such as the accused in criminal proceedings. An example will serve to illustrate the point. A pure utilitarianist may argue that the most efficient way of preventing crime and thus providing for 'the greatest good to the greatest number of people' is to impose harsher sentences for all crimes, although it is doubtful whether this is actually borne out by the empirical evidence. A non-pure utilitarianist, whilst supporting the view that the general public welfare justifies the imposition of punishment in certain cases, may nevertheless feel that the imposition of harsher sentences would be disproportionate to minor crimes and infractions. Similarly, whilst a pure consequentialist may favour the relaxation of criminal evidence and procedure, a non-pure consequentialist may resist this view regardless of whether this resistance may be justified by reference to instrumentalist reasoning or not.

Hart's answer to this problem was to draw a distinction between the justifications for punishment in general terms, and the justification for imposing a specific penalty in a particular case. He described these as the 'General Justifying Aim' and 'Distribution of Punishment' respectively.[60] Hart believed that utilitarian considerations were most pertinent in justifying the existence of punishment itself: rehabilitation, deterrence, and incapacitation were relevant factors. However, Hart further posited that utilitarian concerns were irrelevant

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[59] Brianne McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings* (Intersentia 2011) 42-43.

[60] H. L. A. Hart, *Punishment and Responsibility* (Oxford University Press 1968).

at the stage of deciding on the justification of punishment in a particular case: this would have to be answered by retributivist arguments, such as the moral harm done by commission of the wrongful act.

The utilitarian school has been criticised for the fact that it may lead to disproportionate penalties, and that its purported benefits are not backed up by empirical evidence. It has also been criticised from victims' perspectives: utilitarianism is offender-oriented, not according any central role to victims.[61] As already seen in the previous subsection, a similar argument has been levelled against the 'just deserts' theory in that the focus is on the wrong committed. It is not entirely inconceivable for victims' rights to be accommodated within a utilitarian theory, just as some retributivists such as Starkweather see no contradiction between retributivism and victim restitution. However, such a theory needs to be advanced and sustained by reference to utilitarian considerations. It would have to be argued, for example, that the public good is best served by giving victims a greater voice in the criminal justice system, though such arguments are clearly contestable. Alternatively, a non-pure version of utilitarianism may be adopted designed to accommodate victims' concerns. A related but more subtle theory is put forward by Duff, who regards punishment as justified by the communicative impact of the imposition of punishment.[62] Whilst this may in some ways have utilitarian-instrumentalist overtones, the key difference is the stress Duff lays on the nature of communication between the offender, the victim, and society as a whole. One may press yet further and develop a theory that places victims centre-stage. The evolution of restorative justice has made great strides in this direction.

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[61] Michaela Heikkilä, *International Criminal Tribunals and Victims of Crime* (Abo Akademi University Press 2004) 31.

[62] Duff (n 7).

3. The Move Towards Restorativism

As seen above, one of the principal points of criticism with regard to the traditional theories of criminal justice, primarily the retributivist and utilitarian schools of thought, was that they largely neglect the role and rights of victims in the criminal process. It was this dissatisfaction with the traditional orthodoxy that led to an increased focus on victims' rights, the rise of the victims' rights movement, which gained prominence in several countries during the 1960s and 1970s,[63] and the development of victimology as a distinct discipline in social science. This was followed by the adoption of restorative justice approaches, albeit it to varying degrees depending on the country in question, encompassing measures as diverse as victim-offender mediation, conferences, the admissibility of impact statements, etc. The question has been raised whether restorative justice is best seen as being a particular theory of criminal justice, or whether it is outwith the confines of the criminal justice system altogether. The discussion further below will consider this question, and argue in favour of an understanding that locates restorativism within the criminal justice system.

3.1 Victims, Victimisation and Victimology

It is certainly true that victim-oriented approaches towards criminal justice can be traced back to earlier writings, such as those of Beccaria,[64] Lombroso,[65] Sutherland[66] and

[63] In the late 1960s and 1970s, various social movements centred on greater rights for victims of crime began to mobilise at local and national levels, giving rise to what became known collectively as the victims' rights movement. Thus, whilst groupings adhering to different ideologies united to pursue harsher punitive policies in the criminal justice system, by contrast in the United Kingdom, the victims' movement developed later and was motivated by the establishment of Victim Support, a charity. See Frank Carrington and George Nicholson, 'The Victims Movement: An Idea Whose Time Has Come' (1984) 11 Pepperdine Law Review 1.

[64] Cesare Beccaria, *On Crimes and Punishment* (1764), available at <http://www.constitution.org/cb/crim_pun.htm> (accessed 9 July 2015).

[65] Cesare Lombroso, *Criminal Man* (Duke University Press 2006) (transl. Mary Gibson and Nicole Hahn Rafter).

[66] Edwin H. Sutherland, *Criminology* (J.B. Lippincott 1924).

Hentig.[67] However, it was not until the pioneering work of Benjamin Mendelsohn that the term 'victimology' was coined.[68] The development of victimology as a distinct discipline in social sciences, which began in earnest in the 1970s, has played a profound role in the advancement of victims' rights and criminal justice reform at the domestic level.[69] Victimology is concerned with the concepts of victim and victimisation,[70] i.e. how victims suffer, as a result of crime, 'a violation of rights, or significant disruption of their wellbeing.'[71] More specifically, victimology is the study of victimisation, examining how the harm caused by crimes impacts individuals and wider society, as well as assessing its causes, extent, and consequences.[72] However, originally victimology appeared to be concerned with analysing victims who were defined in criminal law, so-called positive victimology.[73] This approach nonetheless seems to be too narrow and exclusive, particularly since it neglects the impact of social structures upon victimisation, such as race, class, gender, age and others. In reaction to such a narrow application, critical, feminist and radical victimology theorists broadened the category of victims. These expansive perspectives on victims focused generally on greater recognition, support and treatment of victims. This development of victimology has led to a shift from a positive theory based on the objective standard of the

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[67] Hans von Hentig, *The Criminal and His Victim* (Yale University Press 1948).

[68] See Raquel Aldana-Pindell, 'An Emerging Universality of Justiciable Victims' Rights in the Criminal Process to Curtail Impunity for State-Sponsored Crimes' (2004) 26 Human Rights Quarterly 605, 614-615.

[69] McGonigle (n 59) 44.

[70] Moffett (n 47) 19.

[71] Jo-Anne Wemmers and Anne-Marie de Brouwer, 'Globalization and Victims' Rights at the International Criminal Court' in Rianne Letschert and Jan van Dijk (eds), *The New Faces of Victimhood: Studies in Global Justice* (Springer 2011) 282.

[72] Ernesto Kiza, Corene Rathgeber, and Holger Rohne, *Victims of War: War-Victimisation and Victims' Attitudes Towards Addressing Atrocities* (Hamburger Institut für Sozialforschung 2006) 81.

[73] See Hans von Hentig, *The Criminal and His Victim: Studies in the Socio-Biology of Crime* (Archon 1967); Benjamin Mendelsohn, 'Une nouvelle branche de la science bio-psycho-sociale, la victimologie' (1956) 11(2) Etudes Internationales de Psycho-Sociologie Criminelle 95.

law, to a more subjective examination of those who suffer harm, and of the causes of victimisation.[74]

In this regard, it is important to define what we mean by 'victim' in the context of victimology. The notions of 'victim' and 'victimisation' are undoubtedly shaped by historical and cultural contexts, or 'manipulated for political goals, such as seeking harsher punishments for perpetrators.'[75] Stover has defined victims as 'certain persons and groups who are seen to suffer, and considered not responsible for their harm.'[76] This definition, although broad, highlights two key elements: first the suffering as a result of the intent or recklessness of a perpetrator in committing a harmful act against an injured party; and second not being responsible for their own harm.[77] In most domestic legal systems and in international criminal tribunals such as the ECCC, the definition is provided by the governing statutory law.

Victimisation concerns the way in which individuals and groups suffer harm. It consists of 'a violation of rights, or significant disruption of [victims'] wellbeing' as the result of a crime.[78] The 1985 Declaration of Basic Principles defines harm in a broad sense as including *inter alia* physical, mental, or emotional harm, economic loss, or substantial impairment of their fundamental rights.[79] However, a crime can cause harm to victims in

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[74] Moffett (n 47).

[75] James Dignan, *Understanding Victims and Restorative Justice* (Oxford University Press 2005) 35.

[76] Eric Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague* (University of Pennsylvania Press 2005) 5.

[77] Wemmers and de Brower (n 71) 282.

[78] ibid.

[79] Principle 1 of the 1985 Declaration of Basic Principles.

different ways and to varying degrees. Thus victimisation itself can be distinguished by the degree in which it affects certain individuals and groups. The 'multi-victim perspective'[80] of victimisation is highlighted in the different categorisation of victims; primary, secondary and tertiary victims. In this context, the 'direct or primary victim' is the person who is injured or murdered as a direct result of the offence committed. However, a crime can affect more than the direct victim. 'Secondary victims' are persons victimised by their connection to the 'primary victim' and they can be family members, relatives, individuals who witnessed the crime and have therefore been subjected to emotional trauma as well as individuals who tried to prevent victimisation and are harmed as result. 'Tertiary victims' are members of communities affected by the crimes committed, 'due to the primary or direct victim being a member of such a group, such as in cases of hate crimes or genocide.'[81] This distinction in categorisation of victims is particularly important when considering the appropriate remedies for victims, such as compensation, restitution and rehabilitation for primary and secondary victims, collective reparation and non-recurrence for tertiary victims. This 'multi-victim perspective' has particular resonance and significance in international criminal justice, where victims of genocide, crimes against humanity and war crimes are not only individuals, but also communities and groups.[82]

[80] Richard Young, 'Integrating a Multi-Victim Perspective into Criminal Justice through Restorative Justice Conferences' in Adam Crawford and Jo Goodey (eds), *Integrating a Victim Perspective within Criminal Justice* (Ashgate Dartmouth 2000) 227, 238.

[81] Moffett (n 47) 18, See also Basia Spalek, *Crime Victims: Theory, Policy and Practice* (Palgrave Macmillan 2005) 13; Carolyn Hoyle and Lucia Zedner, 'Victims, Victimisation and Criminal Justice' in Mike Maguire, Rod Morgan and Robert Reiner (eds), *The Oxford Handbook of Criminology* (4th edn Oxford University Press 2007) 461, 470.

[82] Tristan Anne Borer, 'A Taxonomy of Victims and Perpetrators: Human Rights and Reconciliation in South Africa' (2003) 25(4) Human Rights Quarterly 1088, 1109.

3.1.2 Victims' Expectations From the Criminal Justice Process

As will be seen throughout this thesis, there are a number of reasons why victims may wish to participate in the criminal justice process, and a corresponding number of expectations that victims have of the system. However, a unifying theme underlying the disparate approaches to the question of what victims seek to obtain from the criminal justice system is the insistence on the importance of rights afforded to victims, encompassing both service and procedural rights. Traditionally, notions of procedural justice have been tied up with, and reduced to, the due process rights available to the accused, overlooking the need for procedural rights to be made available to other actors in the proceedings. This imperative applies with particular force to victims, for whom having a 'voice' in the process is highly significant. The literature on process rights offers interesting insights in this regard. Galligan has identified two principal rationales underlying process rights.[83] These apply with equal strength to due process and to procedural rights for victims. On the one hand, there is the instrumental dimension which in the context of victims would stress the fact that their inclusion in the criminal justice process enhances decision-making and reinforces victims' and the public's trust in the integrity of the system. On the other hand, the non-instrumental dimension focuses on the inherent, 'dignitarian' values of procedural rights,[84] acknowledging victims' dignity and suffering. Thus, enhancing procedural rights for victims has led to greater satisfaction with the process, as well as increased acceptance of the final outcome of the case.[85] The close link between service rights and process rights allows us to extrapolate a number of more distinct points regarding the demands and expectations that victims may have with regards to the criminal justice system.

[83] Denis J. Galligan, *Due Process and Fair Procedures* (Oxford University Press 1996) 75.

[84] ibid; See also John Rawls, *A Theory of Justice* (Oxford University Press 1973) 235.

[85] Gerald Greenberg, 'A Taxonomy of Organizational Justice Theories', (1987) 12 Academy of Management Review 9; See also Tom R. Tyler, 'The Psychology of Procedural Justice: A Test of the Group-Value Model' (1989) 57 Journal of Personality and Social Psychology 830.

First, the discussion in the preceding paragraph has already highlighted the 'dignitarian' aspect of granting procedural rights to victims. Acknowledging the dignity of victims and treating them with respect are clearly important, in particular in view of the problem of secondary victimisation, meaning that many victims feel victimised not only as a result of the initial crime, but also by the response or even the non-response of the criminal justice system.[86] This is closely connected to the second point, namely that victims want to be informed of important steps taken in proceedings, as well as the general progress and outcome of the case.[87] The interrelationship between a right to information and human dignity is readily apparent and recognised in several legal systems.[88] The provision of information is not limited to regular updates on the proceedings. As Briener and Hoegen have stated, victims wish to be supplied with information regarding their rights and responsibilities in proceedings, in order to enable them to take part to the greatest extent possible in the process.[89] This may necessitate the provision of full-fledged victim support services, as well as legal assistance in some cases. Thirdly, victims make more substantive demands on the criminal justice process itself. Thus, victims often ask for a certain degree of informality in the proceedings taking due account of their particular situation and circumstances; in other words, they 'want a less formal process where their views count.'[90] The precise nature of this involvement may vary, from the provision of impact statements to a more substantive

[86] See chapter 1, section 1.

[87] Hoyle (n 12) 418.

[88] See for example *The Queen (on the application of Anufrijeva) v Secretary of State for the Home Department* [2004] 1 AC 604.

[89] Marion E. Brienen and Ernestine H. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems: The Implementation of Recommendation (85) 11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure* (Wolf Legal Publishers 2000) 995.

[90] Hoyle (n 12) 418.

participation in criminal proceedings. Whilst victims may participate at various stages in the proceedings, their service and process rights may very well be extended to decisions about sentencing and parole,[91] depending on the precise nature of the respective system. The role of victims at the sentencing stage is subject to much debate and interpretation on both the domestic and the international planes. As will be seen in chapter 6, the empirical research conducted with victims and civil parties in respect of their participation at the ECCC has revealed that there are different rationales for victims wanting to participate in proceedings, including *inter alia* an opportunity to tell one's story, unearthing the truth, facing the accused, seeking reparations, and fostering reconciliation.[92]

Each victim has his or her own story to tell, and hopes to achieve different ends through the criminal justice system. Nevertheless, the general recognition of service and process rights for victims, coupled with the more distinct demands outlined above and the rise of the victims' rights movement and victimology as a serious discipline, have led to a broad reconceptualisation of criminal justice in many respects. This has been more pronounced in common law jurisdictions than in civil law jurisdictions, where victims' service and process rights have long been recognised as falling within the demands of justice, and hence embedded in the structure of the criminal justice process itself. Somewhat paradoxically, the recognition of victims' rights led both to a resurgence of retributive justice theories and of the 'just deserts' model on the one hand, and the evolution of restorative justice on the other.[93] For retributivists, the utilitarian and offender-oriented penal philosophies prevalent in the 1960s and 1970s favoured criminals at the expense of victims. A

[91] Julian Roberts, 'Victims of Crime: Successes and Challenges in the Years to Come' (2008) Victims Crime Research 2.

[92] See chapter 6, section 2.

[93] Hoyle (n 12) 405.

combination of camps adhering to different philosophies advocated in favour of harsher punishments. For restorativists, on the other hand, the emphasis on punishment was too narrow; by the 1980s they embraced broader conceptions of criminal justice, such as the incorporation of victims' participation as a restorative justice element into retributive justice mechanisms. The following section will examine restorativism in detail.

3.2 Restorativism

The victims' rights movement and the development of restorativism were related and originated in the aftermath of the Second World War. However, restorativist approaches to criminal justice have only come to prominence relatively recently, not least because of the enduring importance of retributivist understandings of justice. As Dignan has pointed out, restorativism 'has taken just a quarter of a century to leap from a position of virtual obscurity to one of increasing international influence.'[94] Despite this increasing interest in restorativism, a number of problems have been identified. First, it is difficult to define precisely what is meant by restorativism, being a 'variety of disparate practices.'[95] Thus, some may put emphasis on rights afforded to victims outside the confines of the court system, such as independent victim-offender mediations or state-funded financial compensation for victims. The latter aspect is exemplified by the Criminal Injuries Compensation Authority (CICA), an executive agency of the United Kingdom's Ministry of Justice, which was established in 1964 and distributes funds to victims of crime.[96] Some may regard state-funded compensation schemes as not belonging within restorative justice at all, but constituting a

[94] Dignan (n 75) 1.

[95] Hoyle (n 12) 415.

[96] Criminal Injuries Compensation Act 1995; prior to the Act, CICA had been established as a board under the royal prerogative.

victim-centred model in its own right.[97] On the other side of the spectrum are more wide-ranging models of victim restoration, such as the participation of victims in the criminal proceedings themselves, whether as civil party, auxiliary prosecutor, or otherwise. It should however be remembered that there are also various different approaches within both the utilitarian and retributivist schools of thought. The key to the definitional problem is to develop a typology of restorativism that bypasses what Dignan has termed the 'conceptual confusion'[98] surrounding restorativism.

In this context, Dignan has developed a three-dimensional analytical framework for restorativism, departing from 'monolithic' understandings of the concept.[99] The first dimension or goal of restorative justice is to put right the harm that has been done by the offence. Whilst this may be regarded as a noble aspiration but difficult if not impossible to put into effect in practice, what is remarkable about this is that neither the retributivist nor the utilitarian theories of criminal justice generally focused on this restorative aspect. It is important not to confuse the ideal of 'righting the wrong' with the notion of vengeance, the latter being the precise opposite of what restorative justice aims to achieve. The second dimension is to focus on the offender's personal accountability to his or her victims, and importantly, to do so in a balanced way, with due regard to all the circumstances of the offence and of the offender. The third and final dimension relates to procedure. Restorative approaches adopt an inclusive and non-coercive form of decision-making process aimed at

[97] Dignan (n 75) 7.

[98] ibid 2.

[99] ibid.

encouraging participation by key actors in order to determine how best to deal with the offence committed.[100]

This analytical framework serves not only to differentiate restorative justice from the utilitarian and retributivist approaches considered earlier in this chapter, but also to draw distinctions between different victim-focused approaches to justice. Thus, adopting Dignan's analytical approach, institutions such as CICA in the United Kingdom would not be regarded as forming part of the restorative justice model, as CICA has no influence on the actual decision-making process dealing with the offence. For Dignan, an institution such as CICA would fall within a welfare-focused model of justice.[101]

Part of the definitional problem is the lack of agreement on whether restorativist approaches to justice are best conceptualised as being a distinct theory of criminal justice, or whether they do not fall within the ambit of criminal justice in the first place. It is axiomatic that the answer to this question conditions to a considerable extent the precise mechanisms and institutions which are advocated for under the umbrella of restorative justice. In other words, an approach that seeks to locate restorative justice outside the established system of criminal justice might focus principally on mechanisms and institutions that are independent of the courts, such as victim-offender mediation, conferences with family members or representatives from the police. On the other hand, an approach that regards restorativism as a theory of justice might prefer to replace many established legal mechanisms with more victim-centred ones. There are a variety of options in between, specifically the integration of particular restorative justice elements within an existing criminal justice system. Thus,

[100] Daniel W. Van Ness, 'Restorative Justice and International Human Rights' in Bert Galaway and Joe Hudson (eds), *Restorative Justice: International Perspectives* (Criminal Justice Press 1996) 23.

[101] Dignan (n 75) 7.

Dignan draws a distinction between restorative justice on the one hand, and criminal justice on the other. However, this distinction is not necessarily mandated by the adoption of the type of analytical framework proposed by Dignan. As Luna has persuasively argued, '[a]lthough sometimes viewed as a social movement in Western nations rather than a positive or normative theory, restorative justice is nonetheless championed as an alternative to traditional punishment theories, particularly retributivism.'[102] Similarly, Cunneen and Hoyle have argued that restorative justice should be regarded as forming part of the criminal justice system.[103] As will be seen in the thorough examination of victim participation at the ECCC in chapters 4 to 6, this does not mean that restorativism will, or should, entirely overshadow notions of punishment, just deserts, or taking into account the link between criminal justice and the incidence of offending. This notwithstanding, as the analysis will reveal there are real limitations in fully implementing the incorporation of victim participation within what is otherwise a principally retributive justice system, such as the criminal process. The challenges are particularly apparent in the context of the accused's due process rights to a fair and expeditious trial, the functionality of court proceedings, and more specifically proportionality in sentencing.[104]

4 Mixed Theories and the Search for Synthesis

The discussion in the foregoing sections focused on the 'traditional' theories of criminal justice of retributivism and utilitarianism, before turning to the victims' rights movement and the rise of restorativism. Engaging critically with the theories of criminal

[102] Eric Luna, 'Punishment Theory, Holism and the Procedural Conception of Restorative Justice' (2003) 1 Utah Law Review 205.

[103] Chris Cunneen and Carolyn Hoyle, *Debating Restorative Justice* (Hart Publishing 2010).

[104] However at the ECCC, victims' rights have not been extended to the sentencing stage of the proceedings. If it were otherwise questions would need to be asked about the impact of such participation on the concept of proportionality in sentencing.

justice is not only intellectually enriching, it also allows us to describe, explain and compare different conceptions of criminal justice, and divergent underlying value systems. It would be mistaken to believe that a criminal justice system can, or should, exist entirely devoid of a unifying theoretical-conceptual framework. Ashworth has captured the idea of such a system with the term 'cafeteria approach,'[105] describing a line of thinking whereby the nature of punishment is determined by reference to different rationales, depending on the offender and the offence committed. This 'eclecticism'[106] is mirrored in national legislation especially in common law countries, often exhibiting a bewildering number of theoretical approaches to the determination of punishment with at times irreconcilable claims: thus, section 142 of the United Kingdom's Criminal Justice Act 2003 stipulates retributive, utilitarian and restorativist elements to be taken into account when determining the sentence, including the punishment of the offender, crime reduction and public protection, rehabilitation, and reparation.[107] There is no *a priori* reason against recourse to such elements, as the utilitarian and retributivist schools of thought exist in their 'pure' form only in academic writing. Legal practice in the criminal justice system has always been considerably more complex and multi-faceted than reflected in theoretical discourse. Nonetheless, in terms of consistency in sentencing, and in maintaining a genuine 'system' of criminal justice, it is important to be clear about the values and theoretical approaches which a given legal system espouses and, in a given case, prioritises. Acknowledging the inherent value of theory, there is however a danger of any one theory claiming sole validity, and denying the premises and ideas of others. As Zedner has

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[105] Andrew Ashworth, *Sentencing and Criminal Justice* (3rd edn Butterworth 2000) 62.

[106] Nicola Padfield, 'Sentencing Reform – Perspectives from England' (2005), paper delivered at the 13th Malaysian Law Conference, available at <http://www.malaysianbar.org.my/criminal_law/sentencing_reform_perspectives_from_england_by_nicola_padfield.html> (accessed 10 July 2015).

[107] See also, *inter alia,* Penalties and Sentences Act 1992 section 9 (Queensland); Sentencing Act 1992, section 5 (Victoria); Criminal Code, section 718 (Canada).

rightly pointed out, there is a tendency of 'polarizing theories and setting them up as presumptively incompatible.'[108]

A synthetic or 'hybrid'[109] approach to criminal justice theory is not entirely a phenomenon of current debate in the academy and amongst practitioners. As already seen above, Hart's notions of the General Justifying Aim and the Principles of Distribution posited a theory the aim of which was to reconcile the oftentimes divergent demands of utilitarian and retributivist thought: utilitarian considerations furnished the general justification for the very existence of punishment, whereas in the individual case, punishment was of an offender for a specific offence, and should be approached on a retributivist basis.[110] Robinson took the opposing view, positing a just deserts theory limited by considerations of utility in the determination of the requisite punishment.[111] Hart and Robinson's respective theses are thus but two of the most enduring hybrid theories that adopt a primarily utilitarian or retributivist approach, qualifying this by adoption of elements of the rival theory.[112]

More recently, approaches incorporating elements of the traditional theories and of restorativism have emerged as well. Duff's theory of the communicative value of punishment, already encountered above, may be regarded as a tentative attempt at reconciling retributivism and utilitarianism with restorativism.[113] Duff focuses on the message delivered

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[108] Zedner (n 4) 107.

[109] Richard S. Frase, 'Theories of Proportionality and Desert', in John Petersilia and Kevin R. Reitz (eds), *The Oxford Handbook of Sentencing and Corrections* (Oxford University Press 2012).

[110] Hart (n 1).

[111] Paul H. Robinson, 'Hybrid Principles for the Distribution of Criminal Sanctions' (1987) 82 Northwestern Law Review 19.

[112] Luna (n 102) 225.

[113] Duff (n 7).

by the imposition of punishment, the moral censure imposed on a rational human being who has done wrong. This moral censure focuses, on the one hand, on the declaratory role of the criminal justice system, in that wrongful conduct is condemned and declared unacceptable by means of a proportionate response. On the other hand, the focus on the offender as a rational moral agent also underlines the importance of the offender's understanding of the message addressed to him, enabling him to reform and reintegrate into society. Duff's theory also accommodates the role of victims to the extent that the communicative role of the law is targeted not exclusively at the person punished, but also at the victim of crime. Arguably, theories such as Duff's transcend many of the antimonies between the traditional approaches to criminal justice.

Yet, an important question that needs to be addressed is whether the incorporation of elements of one system undermines or at least, has the potential to undermine, the integrity of the other.[114] One answer to such concerns is provided by incorporating certain *procedural* elements of restorativism with a *substantive* theory of criminal justice. Indeed, as will be seen in chapters 4, 5 and 6, the model of victim participation before the ECCC is premised on a retributive justice model with certain restorative justice elements, primarily the participation of victims as civil parties in the proceedings. There is moreover the broader point that there is nothing necessarily or inherently inconsistent between the different conceptions of criminal justice, provided that it is conceded that the criminal justice system will always pursue more than one end.

[114] Such an argument may be advanced by analogy with Lon L. Fuller, 'The Forms and Limits of Adjudication' (1978) 96 Harvard Law Review 353.

5. Criminal Justice Theories, Victims and International Criminal Justice

The examination of the theoretical and philosophical underpinnings of the competing theories of criminal justice and their approaches towards victims of crime at the domestic level has revealed various understandings and perceptions of the role attributed to all stakeholders in criminal proceedings. Furthermore, it has shown that national legal systems tend to embrace a variety of approaches to criminal justice. Generally, the prevalent traditional theories of criminal justice such as retributivism and utilitarianism have focused primarily on crime, society, and the accused with only minor acknowledgment of the individual victim within the criminal justice system. As such, victims have been neglected and essentially reduced to a secondary role where notions of 'crime', 'prosecution' and 'punishment' are perceived to be matters of public concern. As highlighted above, the move towards restorativism has sought to address this by adjusting the focus of criminal justice theories away from conceptions of punishment to a more holistic conception of criminal justice.

Although theories of criminal justice almost exclusively focus on the domestic criminal law of nation states, their fundamental principles, as shown in the work of different ad hoc and hybrid international criminal tribunals, have found application at the international level. Therefore the question is not whether these theories can be transferred from the national to the international planes, but whether the distinctive nature of international crimes, the structure of these tribunals and mass victimisation have called for a different application and approach to justice. It is important to understand in this context that just as with domestic criminal justice systems, at the international level, those in charge of designing and shaping post-conflict and transitional justice mechanisms have varying understandings and competing conceptions of what the primary objectives of the specific mechanism should be. This has led

in practice to a myriad of hybrid approaches that range from the establishment of truth and reconciliation commissions and historical commissions, to the establishment of a number of ad hoc and hybrid criminal tribunals. The particular system endorsed depends greatly on the values the international community aims to emphasise.

To a great extent, international criminal tribunals have incorporated many procedures often found in domestic criminal justice systems, sometimes with a utilitarian, more usually with a retributivist focus. Nonetheless, as with the domestic sphere, there has been a shift in the international system as well, whereby the calls of civil society and of victims' rights groups have been met by offering greater inclusion of restorative principles and practices in post-conflict societies. This approach has led to an increase in the use of the truth and reconciliation commissions, which have been regarded broadly as restorative responses to mass crimes due to their focus on the harm done and the aim of bringing together members of the community torn by conflict.[115] More recently, the rise of restorativisim on the international plane has seen a movement towards the incorporation of restorative principles within what may be described as the traditional criminal justice paradigm. This has been reflected in the incorporation of victims of gross violations of human rights, as a restorative element into what is otherwise an inherently retributive criminal justice system. The approaches endorsed by the ICC and the ECCC represent the most 'advanced' form of such expansion. However, as will be seen in the thorough examination of civil party participation at the ECCC, tensions intrinsic to the nature of such 'cohabitation' of retributivism and restorativism underlie the work and functioning of these tribunals.

[115] McGonigle (n 59) 59.

5.1 Traditional Theories of Criminal Justice at the International Level

The traditional theories of criminal justice have featured prominently in international criminal justice. Most ad hoc and hybrid criminal tribunals established to date have predominantly had a retributive focus. Holding individual perpetrators accountable for the wrongfulness of international crimes serves two primary purposes: ensuring that they receive their 'just deserts', and that international criminal law is upheld.[116] Retributivists endorse the establishment of international criminal tribunals by advancing the view that the individuals who committed the morally reprehensible crimes receive their 'just deserts' through proportional punishment.[117] Furthermore, international criminal justice mechanisms affirm that the purpose of punishment is to 'reinstate the rule of law by ending impunity for international crimes.'[118] Procedurally, principles of retribution find expression in all the stages of the criminal process, including sentencing. Whilst it can be argued that punishment at the international level may serve other purposes, such as deterrence or social utility, these are considered more as useful by-products and side effects of punishment. Punishment is a central focus of the retributivist nature of international criminal justice and the whole philosophy underlying the establishment and work of these tribunals is to define and declare certain kinds of behaviour and actions as criminal, 'because intrinsically they violate society's moral values and are deserving of punishment.'[119] However, there are distinct limitations to the retributivist school of thought on the international level. Whilst it is no doubt true that perfect equivalence between the harm done and the punishment imposed as a

[116] ibid 60.

[117] Punishment at international criminal courts is rooted in the retributive rationale in that it is meant to be proportional to the crime committed and the culpability of the wrongdoer.

[118] Moffett (n 47); See also Preamble of the Rome Statute, recital 5; Marc S. Groenhuijsen and Antony Pemberton, Genocide, 'Crimes Against Humanity and War Crimes: A Victimological Perspective on International Criminal Justice' in Rianne Letschert, Roelof Haveman, Anne-Marie de Brower, and Antony Pemberton (eds), *Victimological Approaches to International Crimes: Africa* (Intersentia 2011) 15.

[119] McGonigle (n 59) 60.

result can rarely if ever be achieved, this is particularly apparent in the context of international criminal justice. Due to the magnitude and seriousness of international crimes, it is all but impossible to secure a proportional sentence that could equate with the mass suffering and victimisation caused.[120] As Koskenniemi asserts, 'sometimes a tragedy may be so great that punishing an individual does not come close to measuring up to it.'[121] Indeed, international criminal justice mechanisms are selective in their approach to addressing wrongdoing and fighting impunity. The limitations in terms of the structure, resources and evidence available to the tribunal mean that only a small number of individuals may be tried before these tribunals.[122] Whilst the aim is to try those most responsible for the crimes committed, practice at various international criminal tribunals has shown that lower-ranking perpetrators can also be punished before these tribunals mainly because of their important role in the egregious crimes.[123] Nonetheless, given the nature of mass atrocities and mass victimisation, it would be impossible for any international criminal tribunal to try all those involved in wrongdoing.

In addition to retributive attributes, international criminal justice pursues a number of utilitarian goals. Deterrence and prevention of future atrocities underlie some of those goals. However, reality has shown that international criminal justice is inept in that regard, as despite the expansion of international criminal justice institutions in recent decades, international crimes have been committed and are being committed without being prosecuted

[120] Lotte Kohler and Hans Saner (eds), *Hannah Arendt and Karl Jaspers: Correspondence: 1926-1969* (Harcourt Brace International 1992) 54.

[121] Martti Koskenniemi, 'Between Impunity and Show Trials' (2002) 6 Max Planck Yearbook of United Nations Law 2.

[122] Mark Osiel, Ascribing Individual Liability within a Bureaucracy of Murder, in Alette Smeulers (ed), *Collective Violence and International Criminal Justice: An Interdisciplinary Approach* (Intersentia 2010) 105.

[123] Steven Ratner, Jason Abrams and James Bischoff, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (3rd edn Oxford University Press 2009) 372.

on the international stage.[124] Other competing objectives of international criminal justice are restoration and maintenance of peace and reconciliation.[125] However, while international criminal trials may have some reconciliatory effects in the post-conflict society at issue, imperative objectives of peace and reconciliation cannot be achieved in isolation. There is a need for more orchestrated efforts that bring together various measures, such as peace agreements and local reconciliation actions. It appears that reconciliation in the international criminal justice arena has so far been confined to the 'rhetorical' level and has not been elevated to higher grounds in practice.[126] Thus, it could be argued that international criminal justice has been influenced by both retributive and utilitarian paradigms to varying degrees, 'without necessarily completely satisfying either theory in practice.'[127] To that extent, the focus has generally been on the crimes committed and the rights of the accused, with little emphasis on the harm suffered by the victims of these egregious crimes.[128]

5.2 The Move Towards Restorativism at the International Level

Recently, a paradigm shift has taken place in international criminal law where post-conflict responses, and more specifically international criminal justice mechanisms, have embraced a more mixed approach to addressing mass atrocities as well as the needs of all those with a stake in the process. This focus on restorative justice principles has aimed at addressing the criticism levelled against the inherently retributive nature of international criminal trials, which place emphasis on the punishment of the wrongdoer, without

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[124] Mark A. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press 2007) 170.

[125] UN Security Council Resolutions creating the ICTY S/RES/827 (1993), 25 May 1993; ICTR S/RES/955 (1994), 8 November 1994.

[126] Drumbl (n 124) 150.

[127] Moffett (n 47) 16; See also McGonigle (n 59) 61.

[128] McGonigle (n 59) 61.

necessarily remedying the harm suffered by the victim.[129] Restorative justice at the international level is a philosophy that calls for inclusiveness, as well as an approach that focuses on the victim and the harm suffered, rather than confining itself to the wrongdoer and the crime itself. These restorative underpinnings aim at an inclusive resolution of the conflict involving offenders, victims, and the wider community in order to help address the harm suffered by victims.

As we shall explore in further detail in chapter 3, it was this marginalisation of victims in international criminal proceedings at the ICTY, ICTR, SCSL and elsewhere that has given rise to a new approach resulting in an expansion of victims' rights, as seen recently at the ICC and the ECCC. Undoubtedly, the resistance towards broadening victims’ rights was justified to some extent by the rationale that victim participation would undermine the equality of arms between the prosecution and the defence and disturb that equilibrium, and may have an impact on the functionality of court proceedings. Suffice it to say that whilst international criminal justice appears to have endorsed an expansive and synthetic approach with the inclusion of both retributive and restorative principles, those concerns have nonetheless remained valid. The examination of the role and implications of victim participation at the ECCC, as we will see in chapters 4 to 6, has raised serious questions about the overall value of victim participation and the potential shortcomings that the incorporation of this restorative justice element has produced.

At the international level, the restorative justice approach can be observed broadly in the creation of truth and reconciliation commissions (TRCs),[130] which first emerged in the

[129] William Tallack, *Reparation to the Injured and the Right of the Victims of Crime to Compensation* (Wertheimer 1990).

[130] For example, the South African Truth and Reconciliation Commission (1995-1998).

mid-1970s as viable and strategic restorative justice processes. A distinguishing feature of the TRCs is their focus on the inclusion of all stakeholders in the process, as institutions set up to obtain a 'broader range of truth due to the fact that they are able to look at wider patterns of crimes rather than simply the individual criminal responsibility of a handful of accused.'[131] Nonetheless, it is noteworthy to stress that TRCs are seen as justice-supportive processes, 'designed to complement rather than replace national and international prosecution.'[132] Unlike the TRCs, victim participation as a new development on the international level focuses on an expansion of service and process rights afforded to victims within the framework of the traditional criminal justice system. A distinction should be drawn in this regard between restorative justice processes as such on the one hand, and the restorative element consisting of victims' expansive procedural rights within criminal trials on the other. Put differently, granting victims greater procedural rights in the criminal process cannot necessarily transform that system into a restorative one.[133] The comprehensive and methodical research conducted with regard to civil party participation at the ECCC has sought to answer many of the questions that have arisen from the application of this new restorative justice mechanism in the criminal process, allowing us to assess the complex and multifaceted aspects of the civil party participation regime.

Both domestic and international criminal justice systems are founded on certain philosophical and theoretical understandings and premises which shape the structure, substantive law and procedures adopted within a given system. As argued in this chapter, there has been a significant shift on the domestic and international planes towards greater

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[131] McGonigle (n 59) 62.

[132] Carsten Stahn, 'Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor' (2001) 95 American Journal of International Law 952, 954.

[133] Andrew Ashworth, 'Victims Rights, Defendants' Rights and Criminal Procedure', in Adam Crawford and Jo Goodey (eds), *Integrating a Victim Perspective Within Criminal Justice* (Ashgate Publishing 2000) 192.

emphasis on the inclusion of victims in various justice processes by expanding their service and procedural rights and by offering greater recognition to the harm suffered. Nonetheless, this development has been met with reluctance and, to some extent, criticism by scholars, policymakers, and practitioners alike. This is so especially concerning the potential implications that greater victims' rights could have on equality of arms and the criminal justice process as such. Whilst no theory of criminal justice can be found in its pure form, all criminal justice systems have embraced, albeit to varying degrees, a more synthetic and hybrid approach whereby various elements of different theories are combined, demonstrating that a variety of policy rationales and values can be espoused in a given society (or post-conflict society): the focus is no longer solely on retribution or the utility of punishment, and accommodates increasingly a more nuanced and prominent role for victims. Like domestic criminal justice, international criminal justice pursues a multitude of goals. In this context, its very foundations lie on competing conceptions of criminal justice relating to important objectives such as retribution, deterrence, and restoration. Thus, a central question to be addressed is how best to serve the goals of the criminal justice system most effectively.

To understand the role and scope of victim participation in international criminal justice, it is essential that we look at the evolution of victims' rights and victims-oriented processes on the domestic and international levels. The following chapter will examine the advancement of the rights and role afforded to victims in the criminal justice system, and will explore the contribution that diverse approaches adopted at the domestic level have made towards the current role afforded to victims in the international criminal justice system.

CHAPTER 3

The Advancement of Victims' Rights: Models of Participation in Domestic and International Criminal Justice

The development of the modern, centralised nation state and the growing influence of retributivist thought on developing domestic criminal justice systems increasingly bypassed victims: the focus was on the offender and on the state as investigator, prosecutor, judge and executioner. Concerns about victims' rights were voiced in different legal systems, belonging to both the civil and the common law traditions. Furthermore, regional and international human rights treaties were traditionally approached in a legalistic manner,[1] the absence of any express reference to the rights and interests of victims of crime being regarded as precluding any protection on grounds of international humanitarian and human rights law. It was the rise of the victims' rights movement, of victimology as a discipline of the social sciences, and of human rights doctrine as reflected in the activism of regional judicial and non-judicial human rights bodies and their purposive interpretation of international human rights instruments, which resulted in a greater focus on, and advancement of, victims' procedural rights in the domestic sphere throughout the 1970 and 1980s. Thus, existing provisions in many civil law systems were revived, such as the civil party model in German and French law, and new mechanisms were added, such as victim impact statements in a number of common law jurisdictions. It is axiomatic that as international criminal tribunals were being established and developed, national legal systems served as models, and a mutual influence of domestic and international legal systems and tribunals can be observed. The distinctive nature of international crimes and their association with mass victimisation have been key drivers of the expansion of victims' rights in the evolving international arena, and

[1] M. Cherif Bassiouni, 'International Recognition of Victims' Rights' (2006) 6(2) Human Rights Law Review 203, 204.

have rendered their advancement correspondingly more compelling. This development has been part of a wider process, which has seen the gradual evolution of the role played by victims from mere complainants and victim-witnesses, through their role as providers of personal impact statements, to their recognition as participants or full parties in proceedings. This has culminated in the civil party participation scheme adopted by the ECCC, which has afforded victims the broadest array of procedural rights and will be examined in detail in subsequent chapters. The present chapter lays important foundations, analysing the international human rights instruments that have been used as vehicles for the insistence on increased rights for victims; examining the different roles and models that victims may conceivably assume in criminal proceedings, on both domestic and international levels; and analysing how these models play out in domestic legal systems, and the way these in turn have influenced the practice of international criminal tribunals.

In addressing these questions, this chapter is divided into three principal parts. The first part, which encompasses the first, second, and third sections, reviews important and influential regional and international human rights instruments as well as jurisprudence and policies created thereunder. The first section considers two landmark resolutions of the UN General Assembly that are concerned directly and exclusively with the rights afforded to victims of domestic and international crimes respectively. Although not formally binding on states, their influence has been tangible. The second section deals with regional human rights conventions and institutions in Europe, America and Africa. These instruments are formally binding, and guarded by judicial institutions that have developed a rich jurisprudence fashioning specific rights for victims, despite the absence of any specific reference to victims in the human rights instruments themselves. The discussion then proceeds in the third section to an overview of recent developments in the context of victims' rights on the European and

international planes. The second part of this chapter, consisting of the fourth section, analyses different models of participation for victims against the backdrop of inquisitorial and adversarial approaches to procedure, as reflected in the civil law and common law traditions respectively. This section also provides an overview of these different traditions and approaches, thereby enhancing our understanding of the roles afforded to different parties and victims in specific legal systems. The final part and fifth section develops this theme further in the context of international criminal justice. It examines the development of the role and substantive and procedural rights afforded to victims at various international criminal tribunals, tracing the evolution of victims' rights and of the models of participation through the various court systems. As will be argued further on in this thesis, the expansion of victims' rights culminating in the civil party participation regime at the ECCC poses significant questions and gives rise to a number of challenges inherent in the tension between an increase in the rights afforded to victims, and the established due process rights available to the defence.

1. Human Rights Instruments of the United Nations

The UN has been instrumental in the advancement of victims' rights. Its influence has been felt on both the domestic level and the international level, in the form of two instruments adopted by the UN General Assembly that will be examined in this section. More recent proposals for further reform, such as the draft Victims' Convention, will be discussed in the third section of this chapter.

1.1 The 1985 Victims' Declaration

Article 8 of the Universal Declaration of Human Rights provides that everyone 'has the right to an effective remedy by the competent national tribunals for acts violating the

fundamental rights granted him by the constitution or by law.'[2] As will be seen below, general provisions in various human rights instruments relating to the entitlement to an effective remedy have been the vehicles through which victim-specific rights have been created and elaborated. Article 8 was the foundation for the Victims' Declaration,[3] adopted by the UN General Assembly on 29 November 1985, which although not legally binding, has been cited in numerous national, regional and international courts and tribunals.[4] It has also had an important influence on the drafting of national measures aimed at enhancing victims' rights.[5]

Article 1 of the Declaration defines victims as,

> [P]ersons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.

The Declaration is thus aimed at victims both of crime and of abuses of power, which is reflected in its structure, Part A being concerned with victims of crime, and Part B with victims of abuse of power. Reference in the definition of victims to the laws operative within Member States should be noted, highlighting that the Declaration applies to victims of domestic, not international, criminal offences.

[2] Available at <http://www.un.org/en/documents/udhr/> (accessed 30 July 2014).

[3] The 1985 United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, A/RES/40/34.

[4] Brianne McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings* (Intersentia 2011) 96.

[5] See for example the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance, DOC/05/(XXX)247 (2001).

Part A contains an array of important rights for victims, including a right of access to justice and to fair treatment,[6] as well as rights to restitution,[7] compensation,[8] and assistance.[9] The dignity of victims is stressed,[10] and provision made as to information and assistance rights. Article 6(b) stipulates that victims' views and concerns should, where their personal interests are affected, be voiced and 'considered at appropriate stages of the proceedings', subject to the accused's due process rights. As will be seen below, this language has been replicated in other victims' rights instruments. Notably, whilst Article 7 falls short of providing for restorative justice mechanisms, it nevertheless refers to 'informal mechanisms for the resolution of disputes', listing mediation, arbitration and customary justice for the facilitation of 'conciliation and redress for victims.'

Whilst it is therefore clear that the Victims' Declaration contains broad rights for victims and no doubt constitutes a noble aspiration in this regard, it should be noted that victims are not granted any specific participatory rights in trial proceedings, nor do they have a right to request a review of prosecutorial decisions under the Declaration. A close reading of the Declaration makes clear that states are given a broad margin of discretion in implementation and, as seen above, the Declaration is in any event not legally binding. The Victims' Declaration is nonetheless an important statement of principle regarding victims' rights. It represents the first successful global effort to create a definitive instrument setting out the standards that states should seek to attain within their domestic legal systems, and the

[6] Victims' Declaration, arts 4-7.

[7] ibid arts 8-11.

[8] ibid arts 12-13.

[9] ibid arts 14-17.

[10] ibid art 4.

Declaration's influence can be observed in a variety of contexts. It has also fuelled later developments in this area, such as the 2006 Basic Principles.

1.2 The 2006 Basic Principles

Unlike the Victims' Declaration, the principal concern of the 2006 Basic Principles and Guidelines[11] is with international criminal justice. Like the Victims' Declaration, the Basic Principles are not legally binding,[12] although they are meant to largely reflect 'existing legal obligations under international human rights law and international humanitarian law.'[13] The Basic Principles were the product of two legal experts appointed by the UN Committee on Human Rights (UNHCR), Professors van Boven and Bassiouni.[14] The General Assembly adopted the Basic Principles by consensus on 21 March 2006.

Article 8 of the Basic Principles defines victims in terms very similar to those of the Victims' Declaration. However, there are two important differences: first, the definition refers to victims of 'gross violations of international human rights law, or serious violations of international humanitarian law,' rather than violations of national law, reflecting the international focus of the Basic Principles. Secondly, unlike the Declaration, the Basic Principles expand the meaning of victims by including, where appropriate, family members, dependants, and those who have attempted to help the primary victim, and who have

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[11] The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, A/RES/60/147 (21 March 2006).

[12] Anne-Marie de Brouwer and Mikaela Heikkilä 'Victim Issues: Participation, Protection, Reparation, and Assistance' in Göran Sluiter, Håkan Friman, Suzannah Linton, Sergey Vasiliev and Salvatore Zappalà (eds), *International Criminal Procedure: Principles and Rules* (Oxford University Press 2013) 1337.

[13] UNHRC, 'Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law' UN Doc E/CN.4/2004/57, 26.

[14] Bassiouni (n 1) 249-250.

themselves suffered harm. This accords with the meaning attributed to the term 'victim' under most international and regional human rights instruments.

Article 11 sets the structure for the remainder of the Basic Principles, stipulating the rights that victims have: the right of access to justice; the right to adequate, effective and prompt reparations; and the right of access to relevant information. The right of access to justice applies on both an individual and on a collective basis.[15] The right and correlative duty of states to offer an effective remedy is complemented by a range of positive injunctions addressed to states, such as the obligation to disseminate of information.[16] Furthermore, the right of access to justice implies a duty to prosecute, which is acknowledged in explicit terms in Article 4. Victims of international crimes are entitled to reparations, which include restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition,[17] and must be proportionate to the harm suffered.[18] Finally, the Basic Principles recognise and acknowledge victims' entitlement to obtain the truth, although Article 24 does not expressly link this to any definitive procedural or participatory right as such. However, in the words of Bassiouni, some opine that 'the victims' right to the truth is best revealed through a criminal process, even in a situation where a State offers alternative remedial means such as truth commissions.'[19] The Basic Principles' broad catalogue of rights for victims of international crimes is commendable. Although they do not expressly call for victim participation in international criminal proceedings, it is arguable that such participatory rights are necessarily

[15] Basic Principles, art 13.

[16] ibid art 12.

[17] ibid art 18.

[18] ibid art 15.

[19] Bassiouni (n 1) 265.

implied in the distinct rights set out in the Principles, in particular the rights of access to justice and to reparations.

2. Human Rights Instruments, Institutions and the Development of Victims' Rights

Three regional human rights instruments have been particularly influential: the European Convention on Human Rights and Fundamental Freedoms (ECHR), the American Convention on Human Rights (ACHR), and the African Charter on Human and People's Rights (AfCHPR). Whilst none of these international instruments refers in explicit terms to the rights of victims of crimes, jurisprudence in particular under the ECHR and, to an even greater extent, the ACHR, has accorded victims specific procedural rights. As will be seen throughout the following analysis, the courts have had to grapple with the difficulty of reconciling the rights of the accused to a fair and expeditious trial with the rights of victims to have their voices heard, and to participate in the proceedings. A common theme of this thesis, the extent and breadth of the rights afforded to victims have been subject to considerable debate in this regard.

2.1 The European Convention on Human Rights

The ECHR was ratified by the Council of Europe[20] in 1950 and entered into force in 1953.[21] It was a product of its era, the aftermath of the atrocities of the Second World War and the Holocaust having been the impetus for the creation of a pan-European instrument for the protection of fundamental and human rights. There were initially two bodies charged with monitoring compliance with the ECHR, the European Commission on Human Rights and the

[20] The Council of Europe is an inter-governmental organisation established in 1949 that is entirely independent of the European Union. It currently has 47 member states, including all continental European countries bar Belarus. See <http://www.coe.int/en/web/portal/home> (accessed 15 August 2015).

[21] See generally, David Harris, Michael O'Boyle, Edward Bates and Carla Buckley, *Law of the European Convention on Human Rights* (3rd edn Oxford University Press 2014); Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs, White and Ovey on the European Convention on Human Rights* (6th edn Oxford University Press 2014).

European Court of Human Rights (ECtHR), although the Commission was discontinued in 1998 after the coming into force of Protocol 11 to the ECHR.[22] Individual citizens have direct access to the ECtHR if they are 'victims' of a violation of the ECHR, once they have exhausted all domestic remedies, such as rights of appeal.[23] This sets the European system of human rights protection apart from the ACHR and AfCHPR, which will be analysed in the following two subsections. The ECHR is binding in international law, and has, where required, been incorporated into the national legal systems of all 47 member states of the Council of Europe.[24] Indeed, adherence to the ECHR is a pre-condition of membership of the European Union,[25] and the Charter of Fundamental Rights of the EU is modelled on the ECHR.

The ECHR itself does not expressly refer to victims of crime, other than in the general context of victims of a violation of human rights norms. However, as will be seen below, the jurisprudence of the ECtHR has evolved considerably over the past decades. It is however important to state one point at the outset, namely that the ECtHR does not recognise any general or absolute right for victims to participate in criminal proceedings. At the same time, the Court has, through a combination of Articles 2, 3, 6, and 13 achieved a level of participation for victims that has required certain member states to adjust their procedural and substantive rules at least in certain contexts. The ECtHR has used a teleological, purposive

[22] Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, CETS No 155.

[23] ECHR arts 34-35 (as substituted by Protocol 11).

[24] See for example, BGBl. 2002 II S 1054 (Germany); Human Rights Act 1998 (United Kingdom); European Convention on Human Rights Act 2003 (Ireland). Such incorporation is required where the legal system in question follows a dualist as opposed to a monist approach to public international law. A state that fails to incorporate the ECHR may be in breach of the art 13 requirement of an effective remedy.

[25] See 'Commission Opinion on Bulgaria's Application for Membership of the European Union', DOC/97/11 (15 July 1997). Article 6(2) of the Treaty on the Functioning of the European Union requires the EU to accede to the ECHR in its own right. However, this has not to date been possible, the Court of Justice of the European Union having ruled in a recent advisory opinion that the draft accession agreement was contrary to EU law, see Opinion (CJEU) No 2/13.

interpretative technique to accommodate such developments and evolution in the protection of human and victims' rights.[26] In this context, the Court has relied considerably on Article 13, which provides for an effective remedy before a national authority for any violation of the ECHR.

Article 2 of the ECHR protects the right to life in general terms. The ECtHR has held in a number of decisions that the obligation incumbent upon a state to protect the lives of those within its jurisdiction encompasses also an 'investigative duty.'[27] The ECtHR has ruled that the investigative duty may apply even in circumstances where no state actors were directly implicated. Thus, in *Menson and Others v United Kingdom*,[28] the ECtHR held that notwithstanding the fact that the victim had been killed in a racist attack not involving the member state concerned as such, Article 2 nevertheless 'imposes a duty on that State to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person, backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions.'[29] Whilst this line of jurisprudence falls short of affording victims direct procedural rights,[30] it nevertheless

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[26] Rainey, Wicks and Ovey (n 21) 65.

[27] *McCann v United Kingdom* 82 (2005) EHRR 842*, Oneryildiz v Turkey* (2005) 41 EHRR 20*, Osman v United Kingdom* [1998] EHRR 101. See also *The Queen (on the application of Middleton) v West Somerset Coronor* [2004] UKHL 10 para 3, where Lord Bingham described the duty as being one to 'initiate an effective public investigation by an independent official body into any death occurring in circumstances in which it appears that one or other of the … substantive obligations has been, or may be, violated, and it appears that agents of the state are, or may be, in some way implicated.'

[28] (2003) 37 EHRR CD 220. The ECtHR relied on its previous decision in *Osman v United Kingdom* [1998] EHRR 101 esp. para 115.

[29] (2003) 37 EHRR CD 220 para 1.

[30] It should be noted that the question of whether one regards such rights as 'participatory' rights depends on the meaning given to participation. For instance, the stipulation in *Gulec v Turkey* (1999) 28 EHRR 121 to the effect that victims have a right to be given notice of a decision not to prosecute may be regarded as participation or as non-participation. See generally, Sherry R. Arnstein 'A Ladder of Citizen Participation' (1969) 35 Journal of the American Planning Association 216; Ian Edwards, 'An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making' (2004) 44 British Journal of Criminology 967.

acknowledged the right of victims – including both direct victims and indirect victims, such as close relatives[31] – to insist on an official and fair investigation. A similar line of jurisprudence has emerged from the ECtHR in relation to coroner's inquests conducted in the United Kingdom.[32] The ECtHR has also found that Article 3, which prohibits torture and inhuman or degrading treatment or punishment, may impose obligations on the state in relation to victims.

More importantly, however, the Court has also explicitly recognised that victims must be afforded participatory rights under certain circumstances, as exemplified by *McKerr v United Kingdom*.[33] The case involved a victim who was shot dead by police officers in Northern Ireland, regarding an inquest procedure into his death. The ECtHR held that 'in all cases … the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.'[34] This line of jurisprudence has been enhanced in the context of Article 6, which deals with fair trial rights.[35] Traditionally, Article 6 was concerned with the rights of the accused to a fair and expeditious trial, reflecting the liberal model of human rights discourse which regards the state as an omnipotent entity to which human rights protection provides a response.[36] However, the ECtHR has made great strides towards recognising broader rights for victims directly under Article 6 of the Convention. Thus, in *Perez v France*,[37] the Court held, in the context of the participation of

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[31] *Timurtas v Turkey* [2000] ECHR 221.

[32] *Hugh Jordan v United Kingdom* (2003) 37 EHRR 2; *McKerr v United Kingdom* (2002) 34 EHRR 20; *Kelly & Ors v United Kingdom* [2001] ECHR 328.

[33] *McKerr v United Kingdom* (2002) 34 EHRR 20.

[34] *McKerr v United Kingdom* (2002) 34 EHRR 20 para 115.

[35] *Acquaviva v France* (1995) A 333-A.

[36] Larry Siegel, *Criminology* (11th edn Wadsworth Publishing 2011).

[37] *Perez v France* (2005) 40 EHRR 39

victims as *partie civile* in criminal proceedings, that rights under Article 6 to a 'fair and public hearing within a reasonable time by an independent and impartial tribunal established by law' apply not only to the accused, but also to civil parties who have attached a civil claim for reparations to proceedings.[38] However, the ECtHR has also implied that such rights apply in the context of the determination of the civil parties' 'civil rights' under Article 6, and may thus apply in the context of civil party participation in criminal proceedings, or independently as part of civil proceedings for damages, but does not apply in and of itself to a direct participatory role in criminal proceedings.

2.2 The American Convention on Human Rights

The Organization of American States (OAS) was founded in 1948 in the aftermath of the Second World War, and its membership of 45 states now encompasses the entire territory of both Americas.[39] In 1948, the OAS passed the American Declaration of the Rights and Duties of Man, which is generally regarded as the oldest international human rights instrument.[40] It was replaced in 1969 by the American Convention on Human Rights (ACHR), which remains in force to this day. As will be further elaborated below, whilst there are a number of similarities between the ACHR and the ECHR, there are some important differences between the two instruments: these are the accessibility and jurisdiction of the Inter-American Court of Human Rights (IACtHR).

First, with regards to the IACtHR's jurisdiction, this is contingent on a state's express consent and acceptance thereof. By contrast, under the ECHR as amended as a result of

[38] ibid paras 64-65.

[39] See <http://www.oas.org/en/default.asp> (accessed 15 August 2014).

[40] The Declaration was passed in April 1948, some eight months before the United Nations General Assembly adopted the Universal Declaration of Human Rights in December of that year.

Protocol 11, the ECtHR's jurisdiction is now as a matter of fact a necessary by-product of adherence to the ECHR.[41] Secondly, with regards to the accessibility of the Court, individual victims of violations of human rights norms have no right to petition the IACtHR directly for a redress of grievances. This right is reserved to member states. Rather, reflecting in this regard the original position under the ECHR, individuals must petition the Inter-American Commission of Human Rights to examine the case, attempt to reach a settlement with the defendant state, and if deemed necessary and appropriate, to institute proceedings against said state before the IACtHR. It may be thought that the lack of direct accessibility inherent in this two-tier approach is indicative of a less victim-friendly regime, but the IACtHR has in fact expansively interpreted the provisions in the Convention to afford rights to victims of human rights violations and victims of crime that are greater than those provided under the ECHR. Quite justifiably, the IACtHR has been described as 'innovative and creative.'[42]

Articles 8(1) and 25 of the ACHR largely mirror Articles 6(1) and 13 of the ECHR, dealing with the rights to a fair trial and to an adequate and effective remedy, respectively. The IACtHR has extrapolated from a combined reading of these articles, in conjunction with the general duty to ensure respect for the 'free and full exercise of those rights and freedoms,'[43] a general principle of law granting victims a broad right of access to justice and, going further than the ECtHR, to the criminal process itself. In the leading case of *Blake v Guatemala*,[44] which involved the disappearance without trace of a US American journalist on Guatemalan soil, the IACtHR held that victims have participatory, procedural rights in four

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[41] ECHR art 32.

[42] Christina Binder, 'The Prohibition of Amnesties by the Inter-American Court of Human Rights' (2011) 12 German Law Journal 1203, 1203.

[43] ACHR art 1(1).

[44] *Blake v Guatemala*, Judgment of 24 January 1998.

important respects: first, in relation to the investigation of the offence committed; secondly, in relation to the prosecution of the offence; thirdly, in respect of the attribution of punishment should the prosecution have proved to be successful; and finally, with regards to compensation for harm suffered.[45] As will be seen shortly, the IACtHR has also recognised a fifth dimension to the body of victims' rights under the Convention.

The 'investigative duty' imposed on states is already familiar from the jurisprudence of the ECtHR, and was firmly established in the context of the ACHR in the ruling in *Velasquez-Rodriguez v Honduras*, which made the duty applicable at least in circumstances where there has been a serious violation of human rights.[46] However, the vague wording of the judgment in places[47] left the door ajar for a more far-reaching approach beyond the confines of human rights violations. In the *Blake* case, the IACtHR confirmed that the duty to investigate includes a duty to prosecute where its exercise would be appropriate. The duty arises not only where there are serious violations of human rights norms, but where life or, more generally, personal integrity is concerned.[48] The IACtHR further held in *Velasquez* and in *Castillo-Paez v Peru*[49] that where a prosecution had been successfully brought, this would trigger a duty to punish. As has already been seen above, the Court has further held in a number of decisions that victims are entitled to appropriate compensation from the state, once again going further than the jurisprudence under Article 13 ECHR.

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[45] ibid, paras 96-97; see also *Velasquez-Rodriguez v Honduras*, Judgment of 29 July 1988, paras 174 et seq.

[46] *Velasquez-Rodriguez v Honduras* (n 45).

[47] ibid para 176.

[48] *Blake v Guatemala*, para 121.

[49] *Castillo-Paez v Peru,* Judgment of 3 November 1997.

The IACtHR has gone even further in a number of respects, developing what was referred to above as the fifth dimension of victims' rights. Most notably, the Court held in *Villagran Morales v Guatemala*[50] that 'it is evident from Article 8 of the Convention that the victims of human rights violations or their next of kin should have substantial possibilities of being heard and acting in the respective proceedings, both in order to clarify the facts and punish those responsible, and to seek due reparation.'[51] This affords victims a degree of specific involvement and participation in the actual criminal proceedings themselves, acting as witnesses of fact, making submissions as to the sentence to be imposed, and allowing victims to obtain compensation for the harm suffered. The IACtHR has thus extended due process rights to a fair trial to victims. In this regard, it has taken a similar approach to the EtCHR, although pressing further on the concrete rights afforded to victims. The IACtHR's expansive approach to victims' rights is also reflected in a line of cases that has caused some controversy, reflecting as it does the competing demands of due process rights for the accused on the one hand, and rights for victims of crime on the other. The IACtHR has stated that amnesty laws are incompatible with the Convention, holding in *Barrios Altos v Peru*[52] that 'all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible,'[53] as they prevent the investigation, prosecution and punishment of those who committed human rights violations. In *La Cantuta v Peru*,[54] the IACtHR found in unequivocal terms that states 'may never apply amnesty

[50] *Villagran Morales v Guatemala,* Judgment of 19 November 1999.

[51] ibid para 227 (this case is also known as the 'Street Children case', as it concerned five street children having been abducted and killed by armed gangs).

[52] *Barrios Altos v Peru*, Judgment of 14 March 2001.

[53] ibid para 41.

[54] *La Cantuta v Peru*, Judgment 29 November 2006.

laws.'[55] In the same vein, the Court also held that a state may never 'raise the statute of limitations, non-ex post facto nature of criminal laws or res judicata defenses, or rely upon the principle of double jeopardy … or resort to any other similar measure designed to eliminate responsibility in order to escape its duty to investigate and punish those responsible.'[56]

Such arguably draconian limitations of the rights of the defence may be regarded as a concession to victims, and reflect the Court's wider jurisprudence on victims' rights. Whilst this approach may be explicable in view of the peculiar history of human rights protection in Latin America in particular, the IACtHR's expansive approach to victims' rights is nevertheless instructive in the context of rights afforded to victims of serious violations of human rights.

2.3 The African Charter of Human and People's Rights

The AfCHPR is considerably younger than the ECHR and ACHR, having been in force since 1986.[57] The AfCHPR is the human rights instrument of the Union of African States and its successor, the African Union (AU). Similar to the initial position under the ECHR, and under the two-tier system within the framework of the ACHR, monitoring compliance with the Charter was originally the task of a Commission, the African Commission on Human and People's Rights, but this has been 'complemented' since 1998 by

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[55] ibid para 226.

[56] ibid.

[57] See <http://www.achpr.org/instruments/achpr/> (accessed 15 August 2014).

the work of the African Court on Human and People's Rights (AfCtHPR).[58] Both the Commission and the Court are tasked with the interpretation of the Charter.[59]

To date, the AfCtHPR has delivered only a very limited number of judgments,[60] and its jurisprudence vis-à-vis victims' rights remains to be developed and subsequently evaluated. The Commission has however provided some guidance on the rights to be afforded to victims under the Charter. What is remarkable about the AfCHPR is that, unlike the ECHR and ACHR, it does not contain any provision regarding an effective remedy. As we saw above, Article 13 ECHR and Article 25 ACHR have been the respective vehicles through which the regional human rights tribunals in Europe and the Americas have justified and legitimated the expansion of process rights initially reserved to the accused to victims of serious crimes and human rights violations. There being no equivalent in the AfCHPR, the task of the Commission is correspondingly rendered more difficult in an already complex and volatile politico-legal context.[61] However, the Commission has published, in pursuance of its rule-making powers contained in Article 45, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.[62] The Principles do make provision as to an effective remedy for wrongs suffered.[63] The interests of victims are referred to at various points in the Principles, in particular in section P(f)(ii), which states that officials must accommodate

[58] Protocol to the AfCHPR of 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III), art 2.

[59] ibid art 3; AfCHPR art 45. The AU is planning to establish an African Court of Justice, to be merged with the AfCtHPR: see, Protocol on the Statute of the African Court of Justice and Human Rights, available at <http://www.au.int/en/sites/default/files/PROTOCOL_STATUTE_AFRICAN_COURT_JUSTICE_AND_HUMAN_RIGHTS.pdf> (accessed 1 August 2015). However, this has not yet come into effect.

[60] <http://www.african-court.org/en/index.php/2012-03-04-06-06-00/cases-status1> (accessed 1 August 2015).

[61] Godfrey Musila, 'The Right to an Effective Remedy Under the African Charter on Human and Peoples' Rights' (2006) 6 African Human Rights Law Journal 442.

[62] Principles and Guidelines on the Right to a Fair Trial and Legal Assistance, DOC/05/(XXX)247 (2001). Victims are defined in section S(n).

[63] ibid section C.

victims' needs by 'allowing their views and concerns to be presented and considered at appropriate stages of the proceedings where their personal interests are affected', although this is made subject to the rights of the accused.[64]

One justification for the seemingly generous approach taken by the Commission in the formulation of the Principles is the broad wording of Article 7(1) of the Charter, which provides that 'Every individual shall have the right to have his cause heard.' The language used is more general than that in Article 6(1) ECHR or Article 8(1) ACHR, which are the corresponding provisions in those human rights instruments. A literal interpretation of Article 7(1) AfCHPR would dispel any potential of the Principles being in effect *ultra vires* the enabling power in the Charter. However, it remains to be seen how victims' rights play out in practice in the context of the African Commission and Court, and whether the noble aspiration in terms of victims' rights contained in the Principles will apply and be enforced on the ground.

3. New Developments on the International Level

The foregoing analysis considered central international and regional human rights instruments, some of them binding, others not. There have however been further advancements in terms of victims' rights both globally and in the context of the European Union (EU), which will be considered briefly before turning to the role of victims in domestic and international criminal justice systems.

[64] ibid section P(f)(ii). It will be noted that the language mirrors verbatim that used in Article 6(b) of the UN Declaration of Basic Principles.

3.1 International Treaties and Conventions

In addition to the Victims' Declaration and the Basic Principles examined in the first section of this chapter, victims' rights are referred to explicitly in two significant rights instruments at the level of the United Nations,[65] albeit not elsewhere. As seen above in the discussion of the regional human rights treaties, however, tribunals have often read the right to an effective remedy, coupled with due process norms, as providing for victims' rights, albeit implicitly.

The United Nations High Commissioner for Human Rights, in co-operation with the World Society of Victimology, has published a draft Convention on Justice and Support for Victims of Crime and Abuse of Power, going beyond the provisions in the Declaration of Basic Principles.[66] The draft Convention would require states 'to establish or enhance systems of restorative justice, that seek to represent victims' interests as a priority.'[67] It is presently unclear whether the Convention will be formalised and opened for ratification.

3.2 Initiatives on the European Level

Both the Council of Europe[68] and the EU[69] have had a role to play in the regional advancement of victims' rights. For a long time, the Framework Decision on the standing of

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[65] See, Convention against Transnational Organized Crime, art 25(3), and Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Woman and Children, art 6; International Convention for the Protection of All Persons from Enforced Disappearance, art 24(2). Neither the UK nor the US has ratified the latter Convention: <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-16&chapter=4&lang=en> (accessed 30 July 2015).

[66] Available at <http://www.ohchr.org/Documents/HRBodies/CCPR/GConArticle9/Submissions/WorldSocietyOfVictimologyDraftConvention.pdf> (accessed 30 July 2015).

[67] Draft Convention, art 9.

[68] In addition to the ECHR, see also the influential Recommendation (85)11 on the position of the victim in the framework of criminal law and procedure, containing 16 guidelines regarding the treatment of victims within domestic criminal justice systems, as well as Recommendation (87)21 on assistance to victims and the

victims in civil proceedings[70] was the only EU-wide instrument addressing victims' rights, and has been criticised as not being sufficiently comprehensive and effective.[71] In 2012, however, following increasing concern for victims' rights on the European level, and following the changes to the EU's competence in the field of justice and home affairs brought about by the revised Lisbon treaties, an EU Directive establishing minimum standards on the rights, support and protection of victims of crime was adopted by the Parliament and the Council.[72] A number of points can be made that are relevant to the broader themes examined in this chapter. First, the Directive has been described as an ambitious instrument that 'represents a significant advance on even the highest level of victims' rights available,'[73] even though it is expressed in terms of minimum harmonisation at Union level.[74] Article 2 defines victims purely in terms of natural persons, namely persons who have 'suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence,'[75] or family members who have suffered harm as a result of the primary victim's death.[76] Victims have a number of important rights under the Directive.[77] As already

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prevention of victimisation. Recommendation (85)11 has been influential in the creation of the EU's Framework Decision.

[69] See generally <http://ec.europa.eu/justice/criminal/victims/index_en.htm> (accessed 30 July 2015).

[70] Framework Decision (EU) No. 2001/220/JHA.

[71] Thus, the European Commission stated in a 2009 report that the Framework Decision's objectives had been insufficiently and unsatisfactorily implemented by member states: COM(2009) 166 final.

[72] Directive 2012/29/EU, repealing the Framework Decision. The Directive must have been implemented into the national legal systems of member states by 16 November 2015: art 27(1).

[73] Anthony Pemberton and Marc Groenhuijsen, 'Developing Victims' Rights Within the European Union: Past, Present and Future', in Hidemichi Morosawa, John Dussich and Gerd Kirchhoff (eds), *Victimology and Human Security: New Horizons* (Wolf Legal Publishers 2012).

[74] Directive 2012/29/EC, recital 11.

[75] ibid art 2(1)(a)(i).

[76] ibid art 2(1)(a)(ii).

[77] Notably, these are: a right to 'understand and be understood' (art 3); to receive information from the first contact with a competent authority (art 4); certain procedure and service rights when making a complaint, such as interpretation services (arts 5, 7); a right to receive information about the case (art 6); to access victim support

mentioned, the Directive also expressly recognises the value of restorative justice mechanisms provided 'the offender has acknowledged the basic facts of the case,'[78] restorative justice being defined as 'any process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the criminal offence through the help of an impartial third party.'[79] The Directive envisages a number of restorative justice mechanisms, such as victim-offender mediation, family group conferencing and sentencing circles,[80] and makes elaborate provision as to the consent required for recourse to such mechanisms, which may be withdrawn at any time.[81]

This is a rather broad catalogue of rights for victims. However, the new Directive has been criticised as failing to broaden significantly the accessibility of restorative justice mechanisms,[82] and as granting member states a considerable margin of appreciation in implementation,[83] the danger being that the spirit of the Directive may not be transposed into the national legal systems of the EU.

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services (arts 8-9); to be heard 'during criminal proceedings' and to provide evidence (art 10); to have a decision not to prosecute judicially reviewed (art 11); a right to safeguards to prevent secondary victimisation and to ensure safety in the context of restorative justice (arts 12, 18-24); and a right to legal aid and financial assistance (arts 13-14).

[78] Directive 2012/29/EU art 12(1)(c).

[79] ibid art 2(1)(d).

[80] ibid recital 46.

[81] ibid art 12(1)(a).

[82] Katrien Lauwaert, 'Restorative Justice in the 2012 EU Victims Directive: A Right to Quality Service, But No Right to Equal Access for Victims of Crime' (2013) 1(3) Restorative Justice: An International Journal 414.

[83] Jodie Blackstock, 'Protecting Victims: EU Competences and Mechanisms for Safeguards' (2012), available at <http://justice.org.uk/wp-content/uploads/2015/02/Protecting-Victims-EU-Competences-and-mechanisms-for-safeguards.pdf> (accessed 29 July 2015).

4. Victims and Domestic Criminal Justice

The role and rights afforded to victims in the criminal justice process have been touched upon at various points in the preceding chapters. The purpose of this section is, on the one hand, to draw together those disparate analyses, and to examine in detail the way in which victims' service and process rights are applied by legal systems in practice. In this regard, a careful choice as to the material to be included had perforce to be made, the focus of this section being on two civil-law jurisdictions, namely France and Germany, and on two common-law jurisdictions, these being England and US states. Reference to other legal systems will be made where appropriate. It is however important to clarify at the outset that what follows is not meant to constitute a comparative treatise of victims' rights in national legal systems. Rather, the focus will be on the different roles that victims may play in the criminal justice process, how such different roles play out on the ground, and how developments on the national level have influenced and impacted upon models of participation in international criminal justice. The analysis will begin with an overview of the civil law/common law dichotomy, followed by an examination of inquisitorial and adversarial approaches. The focus will then turn to the different models of victim participation that are employed in the various legal systems considered, before shifting to the role of victims in international criminal proceedings.

4.1 Civil Law and Common Law Legal Systems

There are more legal systems in the world than there are sovereign states. For example, there are 51 distinct legal systems under the jurisdiction of the United States, and three legal systems within the United Kingdom (excluding in either case their outlying possessions and dependencies, which usually have legal systems of their own).[84] In view of

[84] Although both the US and the UK are generally regarded as common law countries, certain of their jurisdictions are based largely or primarily on the civil law tradition, namely Louisiana in the US and Scotland

this diversity, it makes some intuitive sense to attempt a categorisation of those legal systems by history and degrees of commonality, thereby shedding some light on different understandings of criminal justice generally and the role of victims therein specifically. Thus, most modern legal systems may be classified as belonging to either the civil law tradition or the common law tradition, albeit that it should be borne in mind that there are other important legal traditions, such as Sharia and Hindu law.[85] Parts of the literature regarded the Socialist legal systems as a distinct legal tradition, although they are perhaps better regarded as civil law systems operating within and fundamentally shaped by a specific socio-economic model of governance.[86]

The key division is therefore between the civil law and common law traditions.[87] The civil law tradition is the oldest legal tradition, and may be dated back to the enactment of the Twelve Tables in the Ancient Rome of 451-450 BC, and traced through classical Roman law to the law under Byzantine Emperor Justinian in the sixth century AD, which would constitute the basis for the rediscovered Roman law of the eleventh and twelfth centuries.[88] This led to a revival of Roman legal scholarship initially at the University of Bologna and spread quickly to academic institutions around Europe, being ultimately taken up by

in the UK. See Robin White and Ian Willock, *The Scottish Legal System* (4th edn Tottel Publishing 2007). Similarly, the province of Quebec is a civil law jurisdiction, whilst the remainder of Canada is based on English common law.

[85] See Rene David and John Brierley, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law* (2nd edn Free Press 1978); JuriGlobe 2009, *Legal Systems Classification*, Faculty of Law of the University of Ottawa, available at <http://www.juriglobe.ca/eng/sys-juri/index.php> (accessed 1 July 2015).

[86] John Quigley, 'Socialist Law and the Civil Law Tradition' (1989) 37(4) American Journal of Comparative Law 781.

[87] William Buckland and Arnold McNair, *Roman Law and Civil Law* (2nd edn Cambridge University Press 1952).

[88] See generally, Barry Nicholas, *An Introduction to Roman Law* (Oxford University Press 1962) Chs 3-4.

practising lawyers.[89] This in turn led to the development of a *jus commune* throughout much of Europe, based on a developed, adapted version of Byzantine legal principles. With the codification movement starting initially in France and spreading to Italy, Germany and all other European states bar the Scandinavian countries, national divergences became more nuanced and more pronounced.[90] However, despite the fact that there are considerable differences between, say, the German *Bürgerliches Gesetzbuch* or the French *Code civil*, Nicholas has argued that the legal systems that are attributed to the civil law tradition nevertheless use a 'common language' in terms of legal terminology, basic principles and underlying methodology.[91]

There are principally two reasons for the expansion of civil law across the continents. In the first place, imperialism has resulted in the adoption and incorporation of the legal systems of the traditional European powers into former colonies. In the second place, law reform bodies in different countries have turned to other legal systems as models for their very own reform initiatives.[92]

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[89] ibid.

[90] Reinhard Zimmermann, 'Codification: the Civilian Experience Reconsidered on the Eve of a European Sales Law' in Wen-Yeu Wang (ed), *Codification in International Perspective* (Springer 2014) Ch 2.

[91] Nicholas (n 88) 2. Within this common core of the civil law tradition, three distinct strands may be discerned, although classification may vary: civil law systems belonging to the Romano-Germanic group, which includes Germany, Austria, Switzerland, Turkey, Brazil, China and Japan; those belonging to the Romano-French group, including France, Belgium and many former French colonies such as Cambodia; and those belonging to the Romano-Dutch group, including the legal systems of the Netherlands and South Africa. See David and Brierley (n 85) 32.

[92] The German *Bürgerliches Gesetzbuch* has been especially influential in this regard, being considered the most elaborate, thorough and structured code of civil law, explaining the commonalities between, for instance, German, Portuguese and Japanese civil law. See Wilhelm Rohl, *History of Law in Japan Since 1868* (Brill 2005) 184-185.

The common law's global influence is largely the result of imperialism. As Nicholas has aptly pointed out, codes are easy enough to export.[93] The common law, however, is essentially contained in judicial pronouncements rather than in exhaustive, finite legal codes. This can be explained by reference to the history of the common law, which originated in the early England of the eleventh century. The common law was the name of that body of law which was enforced by the King's judges sitting in the King's courts, going on circuit throughout the realm and using a 'common' set of legal rules and principles, in place of the regional customary laws applied by the local squires and magistrates.[94] Over time, the common law supplanted regional variations and became supplemented by rules of equity and, increasingly commonly, by statute. Even so, however, codification is a primary attribute of the civil law tradition, although there are common law jurisdictions that are substantially codified.[95] Another core characteristic of the common law is a pragmatic approach to developing the law as opposed to the civil law tradition's 'more abstract approach to the law, preferring to see it in terms of fundamental principles.'[96] Furthermore, as adumbrated above, whilst the common law consists primarily of judicial elaboration of the law contained in jurisprudence that is binding on lower courts under the *stare decisis* doctrine of precedent,[97] the civil law is more characterised by academic exposition and is in general much less reliant on *stare decisis*. The emphasis is on doctrine and dogmatic analysis rather than the ratio of specific cases. Part of the reason for this is the fact that most civil law systems are based on

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[93] Nicholas (n 88) 52.

[94] Sir John Baker, *Introduction to English Legal History* (4th edn Butterworths 2002); John Cartwright, *Introduction to the English Law of Contract for the Civil Lawyer* (2nd edn Hart Publishing 2013) Ch 1.

[95] Californian law, which had been influenced considerably by Romano-Spanish law prior to the state's adhesion to the US, being a prominent example of a near-codified common law system.

[96] Donald Harris and Denis Tallon, *Contract Law Today: Anglo-French Comparisons* (Clarendon Press 1989) (Preface by Barry Nicholas).

[97] See Sir Rupert Cross and J.W. Harris, *Precedent in English Law* (4th edn Oxford University Press 1991).

elaborate legal codes containing almost the entire corpus of law within that system.[98] However, as seen above, codification is not an invariable characteristic of civil law systems; indeed, most Scandinavian countries, whilst regarded as belonging to the civil law tradition, do not have legal codes.[99] A further important distinction between the civil law tradition and the common law tradition is the role and conception of the state therein. In the civil law, the state is a central institution and will normally have some degree of corporate or legal personality: the state plays an important role in the enforcement of the law, as reflected in expressions such as *Etat de droit*, *Stato di diritto* and *Rechtsstaat* in contrast to 'rule of law.'[100] On a practical level, this is reflected in the fact that civil law prosecutions are, as a general rule, brought by a state-appointed authority, and that purely private prosecutions are rarely permissible in the context of serious offences. By contrast, the common law has traditionally not attributed any degree of legal personality to the state, and modern English law still does not regard the state as an entity.[101] To an extent, this different attitude towards the state is reflected in what is often, although not necessarily accurately, regarded as the key distinction between the civil law and the common law: the difference between inquisitorial and adversarial approaches to law and procedure. These different approaches will now be analysed in turn, with a particular focus on the role played by victims within these differing conceptions of the judicial process.

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[98] Thus, Germany has a Civil Code (the *Bürgerliches Gesetzbuch*), a Code of Civil Procedure, a Penal Code, a Code of Criminal Procedure, a Commercial Code, a Social Security Code, an Employment Law Code, etc.

[99] Cartwright (n 94) Ch 1.

[100] Martin Loughlin, 'Rechtsstaat, Rule of Law, Etat de Droit', in *Foundations of Public Law* (Oxford University Press 2010) Ch 11.

[101] Loughlin (n 100) Ch 7, 'The Concept of the State'. There is a rich literature on this issue. The closest English law comes to recognising the state as a distinct entity is by equating the monarch with the state: Stanley de Smith and Rodney Brazier, *Constitutional and Administrative Law* (8th edn Penguin Publishing 1998) 134; Geoffrey Marshall, *Constitutional Theory* (Oxford University Press 1980) Ch 2.

4.2 The Inquisitorial Approach: The Role and Rights of Parties in Proceedings

While it is true that the common law tradition is generally associated with an adversarial approach to court proceedings, and the civil law tradition is generally associated with an inquisitorial approach, these terms are principally descriptive in nature, and it should not be thought that an inquisitorial system may have no adversarial elements, and vice versa. It should also be borne in mind that recent reforms in various national domestic jurisdictions have incorporated certain inquisitorial elements into common law systems, such as the considerably enhanced role granted to English courts in the case management process;[102] and similarly, it has been argued that civil law systems have become increasingly adversarial in character, with greater emphasis being placed on the rights and responsibilities of the defence with a reduced role for state agencies.[103] Nonetheless, there are certain commonalities between the majority of legal systems belonging to the civil law tradition, which will be extrapolated and analysed in what follows.

The modern inquisitorial approach has few features in common with the proceedings of the Inquisition, from which it historically derives. Essentially, under an inquisitorial system, both the investigative and the trial stages are in the hands of a state-appointed agency.[104] The particular features of the inquisitorial system become apparent in respect of both the pre-trial and the trial stages. Thus in France, the criminal investigation is usually conduced by the judicial police under the supervision and instruction of an investigating

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[102] See in the context of England and Wales, Civil Procedure Rules (CPR) S.I. 1998/3132, Part; 3 Criminal Procedure Rules (CrPR) S.I. 2014/1610, Part 3.

[103] Richard Vogler and Barbara Huber (eds), *Criminal Procedure in Europe* (Duncker and Humblot 2008) 11-24; Mireille Delmas-Marty, 'Reflections on the "Hybridisation" of Criminal Procedure' in John Jackson, Maximo Langers and Peter Tillers, *Crime, Procedure and Evidence in a Comparative and International Context* (Hart Publishing 2008).

[104] Kate Malleson, *The Legal System* (3rd edn Oxford University Press 2007) 11-13. The point made in the text applies as much to civil litigation as to criminal prosecutions, although the focus will be on the latter.

magistrate (*juge d'instruction*).[105] Hearings before the magistrate are held *in camera* and are thus not public.[106] However, all parties have full access to the case file (*dossier*),[107] which is a fundamental principle common to many civil law systems, and has been adopted by the European Union as a general principle.[108] The magistrate will often depose witnesses, after the latter have been interviewed by the judicial police and the public prosecutor, rather than by the defence. Indeed, in many respects, it may be said that the role of defence counsel is limited to ensuring that the accused's due process rights are complied with during the pre-trial investigative phase.

Germany's inquisitorial model is similar to the French in a number of respects, but there are also important differences. The role of the investigating judge in Germany (*Ermittlungsrichter*) is not directly equivalent to that of the *juge d'instruction*. In 1975, Germany reformed its criminal procedure law by abolishing the judicial pre-trial phase, with a corresponding increase in the role of the public prosecutor (*Staatsanwalt*), who supervises and directs the criminal police in its investigations.[109] The role of the investigating judge is to issue arrest warrants and to monitor compliance with conditions, to review the legality of pre-trial detention, to order searches, etc.[110]

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[105] French Code of Criminal Procedure (*Code de procédure pénale*) (French Code), arts 79-83. The magistrate is seized by the bringing of charges by a public prosecutor (*procureur*), and will thereafter actively supervise the continuing investigation, with the prosecutor relegated to a subsidiary role: see French Code, arts 1, 31.

[106] Harry Dammer and Jay Albanese, *Comparative Criminal Justice Systems* (5th edn Wadsworth Publishing 2014) 135.

[107] ibid.

[108] Charter of Fundamental Rights of the European Union, art 41.

[109] See First Law on Reforming the Criminal Procedure Code ('StVRG') of 9 December 1974, available at <http://www.bgbl.de/xaver/bgbl/start.xav?start=%2F%2F*%5B%40attr_id%3D'bgbl174132.pdf'%5D#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl174s3393.pdf%27%5D__1440951484728> (accessed 30 July 2015).

[110] German Code of Criminal Procedure (*Strafprozessordnung*) (German Code), s 162. Available in English at <http://www.gesetze-im-internet.de/englisch_stpo/index.html> (accessed 30 July 2015).

The trial phase itself is somewhat more adversarial in nature, with the defence having a greater role in the proceedings. However, there remain fundamental differences with regards to the trial as opposed to an adversarial system. Most notably, there is no direct equivalent to cross-examination in the inquisitorial system, which is a hallmark of common law trials.[111] By contrast, the paradigm of the inquisitorial system is questioning by the judge him or herself. The trial judge (*juge de jugement*) is different from the investigating magistrate, whose role was examined in the previous paragraph. Other than the fact that the judge himself leads the questioning of witnesses, with a right given to the parties to question witnesses afterwards, the methodology of questioning also tends to be different in the inquisitorial system. Whereas adversarial cross-examination involves counsel making lengthy submissions and often insisting on simple affirmative or negative answers, witnesses in an inquisitorial trial usually give evidence in narrative format.[112] German trial proceedings are similar to their French counterparts, with witnesses giving evidence in narrative form, usually not under oath, and the presiding trial judge leading the questioning.[113]

In inquisitorial systems, it is generally true to say that the trial and sentencing stages, which are typically separate stages in common law criminal proceedings, are merged.[114] This

[111] William van Caenegem, 'Advantages and Disadvantages of the Adversarial System in Criminal Proceedings' (1999) 74, 81, available at <http://epublications.bond.edu.au/law_pubs/224> (accessed 30 July 2015). Cross-examination may take place in some civil law jurisdictions that use jury trials for serious criminal offences, such as the French *cour d'assise.* Cross-examination is the questioning by the prosecution and defence of a witness in the presence of a judge (and, depending on the legal system in question, a jury).

[112] William T. Pizzi and Walter Perron, 'Crime Victims in German Courtrooms: A Comparative Perspective on American Problems' (1996) 32 Stanford Journal of International Law 37. The witness is invited to present his or her version of events in a more or less uninterrupted way. In this context, it is understandable that 'witness proofing' is not permissible in an inquisitorial context (although common law systems equally take an increasingly dim view of witness proofing).

[113] German Code, s 238.

[114] van Caenegem (n 111) 74.

has ramifications with regards to the position of victims. As examined in chapter 2, English law allows victims to have input into the sentencing stage via the submission of victim personal statements. However, direct victim input is otherwise regarded as inappropriate other than in the role of witness, as the question of guilt is a question of fact to be determined by the jury.[115] As no such distinction is drawn in inquisitorial systems, broader victims' rights could be accommodated with less friction, explaining why the roles of auxiliary prosecutor and the like are unknown to the common law. In summary, therefore, it may be said that the inquisitorial system is based on the belief that the best way of finding the truth is to have a judicial tribunal with wide-ranging powers of case management and questioning. The prosecution in such a system has a broad duty to present exculpatory and inculpatory evidence, and all parties as well as the court are obliged to ensure that fundamental procedural and substantive rights are not infringed upon.[116]

4.3 The Adversarial System

The adversarial system, occasionally also referred to as the 'accusatorial' approach,[117] differs to a considerable extent from the inquisitorial system just analysed. There is in general no access to the case file, but there are broad duties of disclosure incumbent on the parties in both civil and criminal proceedings.[118] In some states of the US, as well as in the context of federal proceedings, the pre-trial phase consists of an appearance before a grand jury charged with issuing an indictment, following an investigation carried out by the police under

[115] Unless there was a bench trial, in which case the judge himself decides on the question of guilt, before turning to the sentencing stage. Even in the case of bench trials, there is a discernible distinction between the trial and sentencing stages.

[116] German Code, s 160(2).

[117] Malleson (n 104) 11.

[118] See in relation to England and Wales, CPR Pt 31 and CrPR Pt 22.

supervision of a state attorney.[119] In England, the pre-trial phase in relation to indictable offences consists of a summary committal by a magistrates' court to Her Majesty's Crown Court.[120] In most common-law systems, but by no means all, trial on indictment is by jury, whose task it is to deliver a verdict. The judge subsequently decides on the appropriate punishment if the accused has been found guilty. The role of the judge (and jury) is considerably more passive in the adversarial approach:[121] judges do not normally act *proprio motu*, or take into account arguments or legal authorities that have not been cited by counsel during the trial or in the written pleadings.[122] The pre-trial phase is less important in the adversarial than in the inquisitorial system, and the oral trial phase itself is correspondingly more significant, not least because the jury's access to written evidence will be limited, their verdict being based primarily on the submissions made by counsel, and the testimony offered by the witnesses, during the trial. The adversarial model is thus rooted in the idea that the best way of obtaining the truth is to allow the accused and the prosecution to 'battle out' the facts and legal arguments in a public, oral trial, with the judge in the role of a more or less passive umpire, ensuring that the accused's due process rights are complied with.[123] Conceptually, the adversarial approach is closely related to the liberal model of justice that regards state power as being in need of curtailment by insistence on the right to a fair and expeditious trial for the accused. The role of victims within such a system was largely neglected for a long time, and as seen in chapter 2, recent developments reflecting the broadening of participatory rights granted to victims, in particular the influence of the victims' rights movement, the rise of

[119] Fifth Amendment to the US Constitution; Federal Rules of Criminal Procedure r 6; Howard Goldstein, *Grand Jury Practice*, Lslf edn (Law Journal Press 2015).

[120] Magistrates' Courts Act 1980, s 6(1).

[121] Malleson (n 104) 12.

[122] Under modern procedural rules, English judges do however have such powers, although they are exercised more rarely than by an inquisitorial tribunal.

[123] Malleson (n 104) 12.

victimology, as well as the impact of the various regional human rights instruments, have required greater adjustments in common law systems that are based on the adversarial model, than in civil law systems.[124]

4.4 Models of Participation

In the first section of chapter 1, we encountered five models of victim participation prevalent in criminal proceedings in different jurisdictions. The discussion then was concerned with tracing, in broad terms, the development and evolution of the role afforded to victims from complainant to full party to proceedings. The focus now shifts to a more detailed analysis of these models in use in various domestic criminal justice systems, which will constitute the basis on which to analyse the models of participation that have been adopted in international criminal tribunals.

4.4.1 Complainant

The proposition that a victim of crime may make a complaint to the police or other appropriate agency is true of any legal system. However, the rights contingent on such a complaint having been made may differ considerably as between different jurisdictions.[125] In Germany, certain crimes can only be prosecuted where an official complaint has been lodged, whereas others may be prosecuted *ex officio*, regardless of any official complaint or absence thereof.[126] In the United Kingdom and other common law countries, it is normal practice for

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[124] See also, Marion E. Brienen and Ernestine H. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems: The Implementation of Recommendation (85) 11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure* (Wolf Legal Publishers 2000) 1158.

[125] Thus, in some jurisdictions a formal complaint is required to set the investigation in motion, whereas in others the complaint has a purely informative value. Similarly, differences may exist as to the precise level of duties imposed on the investigating agency once a complaint has been received.

[126] German Code, s 158.

the police only to become active once a complaint has been received, and not to go ahead with a prosecution unless the victim is co-operative and wishes to press charges.[127] As a matter of law, the Crown Prosecution Service has discretion to prosecute where to do so is in the 'public interest,'[128] and judicial review is available in relation to decisions not to prosecute.[129] The jurisprudence under the ECHR has been highly influential in this regard.

4.4.2 Victim-Witness

The role of victims as witnesses to the crime in question is perhaps the most fundamental form of participation of victims in criminal proceedings. The roles of complainant and witness are closely related but focus on temporally distinct aspects of the proceedings: once a complaint has been formally registered and is being pursued, the investigating authorities will usually have an interest in obtaining testimony from the victim as witness, where any information he or she has may lead to a resolution of the crime. Thus, the role of witness commences considerably earlier than at the trial stage. Being a witness is the most basic form of participation in proceedings in both common law and civil law jurisdictions, and has considerably less procedural advantages compared to acting as a civil party, private prosecutor and the like.

[127] See https://www.cps.gov.uk/victims_witnesses/reporting_a_crime/decision_to_charge.html (accessed 30 July 2015).

[128] See <https://www.cps.gov.uk/about/principles.html> (accessed 30 July 2015); Prosecution of Offences Act 1985.

[129] *The Queen v Director of Public Prosecutions, ex parte Kebilene* [2000] 2 AC 326; *The Queen v Director of Public Prosecutions, ex parte Manning* [2001] QB 330; Directive 2012/29/EU Art 11. See also Crown Prosecution Service guidelines on judicial review of prosecutorial decisions, available at <http://www.cps.gov.uk/legal/a_to_c/appeals_judicial_review_of_prosecution_decisions/> (accessed 30 July 2015).

4.4.3 Private, Subsidiary or Auxiliary Prosecutor

On one level, it may be said that the role of prosecutor provides victims with the greatest scope for participation in proceedings, although this is arguably contestable in view of the considerable burdens in terms of procedure, evidence and costs that are inherent in being a prosecutor. Domestic legal systems have adopted different approaches to the role of private individuals in prosecutions, but the divide between the common law and the civil law traditions is a rough guide, reflecting the limited role afforded to the concept of the state in the common law. For instance, English law is very permissive with regards to private prosecutions, save for the limited number of statutory offences the prosecution of which requires the consent of Her Majesty's Attorney General or the Director of Public Prosecutions.[130] Private prosecutions are rare in the United States, but there are state-level court decisions to the effect that private prosecutions are permissible in certain circumstances.[131] French and German law do not generally grant private individuals full prosecutorial rights except in relation to certain enumerated offences, but individuals may in certain circumstances act as auxiliary prosecutor in support of the prosecution.[132] In German law, an auxiliary or subsidiary prosecutor (*Nebenkläger*) may, but need not, join a civil claim for compensation by way of 'adhesion' to the criminal proceedings.[133]

4.4.4 Impact Statement Provider

Impact statements, or victim personal statements as they are known in the United Kingdom, have been considered in the preceding chapters. Such statements are usually

[130] See generally, <http://www.cps.gov.uk/legal/a_to_c/consent_to_prosecute/> (accessed 30 July 2015).

[131] Roger A. Fairfax Jr., 'Delegation of the Criminal Prosecution Function to Private Actors' (2009) 43 U.C. David Law Rev 411.

[132] In French law, minor offences that target or affect personal interests may be the subject of a private prosecution (*citation directe*), see French Code, arts 389 to 392-1.

[133] German Code, s 403, which is governed separately from the role of auxiliary prosecutor.

provided in writing. As seen above, the inquisitorial approach does not traditionally separate the determination of guilt stage from the sentencing stage,[134] and victims' impact statements being ordinarily submitted as one factor to be taken into account in finding the appropriate level of punishment for the convicted offender, it follows that impact statements are more common in common law jurisdictions, such as Australia, Canada, some US states and more recently, the United Kingdom. Victim impact statements do however also exist in some civil law countries.[135] Victim statements may in some systems make submissions as to the appropriate level of punishment,[136] in others they may not.[137] Such statements provide victims with an important opportunity to make their voice heard in court and, to varying degrees, to have some meaningful participation in the proceedings. However, it should be noted that victim statements have been criticised from two primary perspectives: first, in that they may unjustifiably raise victims' expectations regarding what the statement may achieve,[138] and secondly, on a normative level, in that unless a system has a strong restorativist base, 'there must be grave doubts about allowing a victim to voice an opinion as to sentence.'[139]

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[134] Note however that such statements may also be provided in the context of bail or parole hearings. See in relation to England and Wales, Parole Board Rules S.I. 2011/2947, Sched.1, Part B, para 4(k).

[135] See for example, Dutch Code of Criminal Procedure (*Wetboek van strafvordering*), art 302, which makes provision as to the submission of oral statements.

[136] As seems to be permissible in Canada: see Julian Roberts and Marie Manikis, 'Victim Personal Statements: A Review of Empirical Research' (2011) Report for the Commissioner for Victims and Witnesses in England and Wales 28. Cf. also the tentatively permissive approach adopted in England in the Code of Practice for Victims of Crime (2013) para 1.21, available at <https://www.cps.gov.uk/publications/docs/victims_code_2013.pdf> (accessed 30 July 2015).

[137] Mark Stevens, 'Victim Impact Statements Considered in Sentencing' (2000) 2(1) Berkeley Journal of Criminal Law 3.

[138] See Carolyn Hoyle, Ed Cape, Rod Morgan and Andrew Sanders, 'Evaluation of the "One Shop Stop" and Victim Statement Pilot Projects' (1998), Report to the Home Office Research Development and Statistics Directorate, available at <http://tna.europarchive.org/20080727010344/homeoffice.gov.uk/rds/pdfs/occ-one.pdf> (accessed 29 July 2015).

[139] Andrew Ashworth, *Sentencing and Criminal Justice* (4th edn Cambridge University Press 2005) 356.

4.4.5 Victims as Civil Parties

As already highlighted above in the discussion of auxiliary prosecutors, German law permits the attachment of a civil claim to a criminal prosecution. Indeed, this model of participation of victims in criminal proceedings as civil parties is common throughout the civil law tradition, although it has no direct equivalent in most common law jurisdictions. The French model of participation as civil party (*partie civile*) recognises more explicitly than the German model that the civil party is a separate, independent party to the proceedings whose interests may not be entirely congruent with that of any other party, including the prosecution. A civil party may, but is not required to, pursue a claim for compensation as a matter of French law.[140] As a full party to proceedings, the civil party has extensive procedural rights during both the pre-trial stage and the trial stage: thus, the civil party may exercise his or her right to access the case file, be represented by legal counsel,[141] make requests for inquiries and investigations to be carried out, and appeal certain decisions of the *juge d'instruction* to a reviewing tribunal. During the trial, the civil party is entitled to pose questions to the accused and other witnesses,[142] make submissions as to evidence and the specific claim for compensation, and make closing remarks, usually before those of the other parties.

There are a number of rationales for allowing victims to act as civil parties. The normative argument focuses on the inherent value of giving expression to victims' dignity, concerns and interests, *viz.* to tell their story, to face the accused, etc. The instrumental or pragmatic argument is concerned with the apparent economic savings that can be achieved by

[140] French Code, art 418(3).

[141] ibid art 424.

[142] ibid art 422. They may not themselves act as witnesses.

joining a civil claim to a criminal prosecution, thereby making more efficient and streamlined use of court time. It should be noted that these arguments, in particular the instrumental argument, are contestable. As will be elaborated upon in the detailed examination of civil party participation at the ECCC, critics of victim participation convincingly argue that such participation leads to protracted delays and complications during the proceedings, and that it is difficult to reconcile with the due process rights of the accused. This tension between the variable interests of different stakeholders in proceedings, which are just as apparent on the international as on the domestic level, are a recurring theme of this thesis. Suffice it to say for the present that municipal courts are aware of the tension, and take into account the interests of both civil parties and the accused.

5. Victims and International Criminal Justice: Models of Participation

The notion of international criminal prosecution of individuals, including leading state officials for the human rights violations of the past, goes back to the aftermath of the First World War.[143] However, attempts to establish various international criminal institutions at the time did not yield any tangible results and may in that regard be considered as a failure.[144] It was not until the end of the Second World War that these efforts materialised, leading to the establishment of the Nuremberg and Tokyo military tribunals, which represented, as Minow asserts, 'the possibility of legal responses, rather than responses grounded in sheer power

[143] Antonio Cassese, *International Criminal Law* (1st edn Oxford University Press 2003) 327.

[144] A prime example of such attempts was the proposal made in 1919 by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties to establish a 'high tribunal composed of judges drawn from many nations.' See the Report of the Commission to the Preliminary Peace Conference reprinted in (1920) 14 American Journal of International Law 116. As Cassese argues, 'such early attempts were laudable for their far-sighted recognition of the need for an international organ of criminal justice. Nevertheless, these initiatives could not bear fruit in a period which placed an exceptionally high premium upon considerations of national sovereignty.' See Cassese (n 143) 327.

politics or military aggression.'[145] The development of modern international criminal law and international criminal justice has been a slow and painstaking process, conceptualised in terms of various distinct phases, which Cassese identifies as: (i) abortive early attempts (1919-1945); (ii) criminal prosecutions in the aftermath of the Second World War in the context of the Nuremberg and Tokyo Tribunals (1945-1947); (iii) elaboration by the International Law Commission of the statute of a permanent court; (iv) the post-Cold War 'new world order' and the development of the two ad hoc Tribunals (1993-1994); and (v) the drafting of the ICC Statute (1994-1998). Suffice it to say that until the adoption of the Rome Statute of the ICC, victims, as those most affected by international crimes, had often been marginalised and neglected in international criminal tribunals.[146] This has been mainly due to the retributive focus of international criminal justice in prosecuting and punishing perpetrators of international crimes. This section explores the development of the role and substantive and procedural rights afforded to victims in international criminal law, starting with the Nuremberg and Tokyo Tribunals; it then proceeds to an examination of ad hoc and hybrid tribunals, including the ICTY, ICTR, SCSL, the courts in East Timor and Kosovo; and it concludes with a brief overview of the new era of active victim participation. The ECCC, as highlighted in chapter 1, constitutes the case study for this research. The role, scope and implications of victim participation at the ECCC are analysed in greater detail in chapters 4 to 6. The review of the various courts and tribunals seeks to assess whether the development with regard to victims' recognition and greater procedural and substantive rights reflects a clear advancement of victims' rights at the international level.

[145] Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (Beacon Press 1998) 127.

[146] Luke Moffett, *Justice for Victims Before the International Criminal Court* (Routledge 2014) 58.

5.1 Nuremberg and Tokyo Military Tribunals

The Second World War was the most widespread and deadliest war in history, involving more than 30 countries and resulting in more than 50 to 85 million military and civilian deaths. In its aftermath, the Allied Powers (the United States, the United Kingdom, France, and the Soviet Union) called for criminal prosecutions and accountability for those responsible for such atrocities.[147] On 18 October 1945, the Nuremberg Tribunal, known formally as the International Military Tribunal (IMT), was founded by the Allies to prosecute members of the political, military, and economic leadership of Nazi Germany who allegedly planned, carried out, or otherwise participated in the Holocaust and other war crimes.[148] This was followed by the establishment of the Tokyo Tribunal, the International Military Tribunal for the Far East (IMTFE), on 5 May 1946 to prosecute Japanese leaders for the crimes committed in the Pacific and Asia.[149] The trials held at these tribunals marked a landmark achievement in the development of modern international criminal law and continue to some extent to influence our understanding thereof, as well as of post-conflict justice.[150] For victims of gross violations of human rights and most atrocious crimes, trials were intended to

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[147] Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (Knopf Doubleday 1992) 32; M. Cherif Bassiouni, *Introduction to International Criminal Law* (Transnational Publishers 2003) 403. See also Gary Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton University Press 2001) 150-181.

[148] Established by the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, London, 8 August 1945 (London Charter).

[149] Established by the Charter for the International Military Tribunal for the Far East, Tokyo, 19 January 1946 (Tokyo Charter).

[150] Guénaël Mettraux, *Perspectives on the Nuremberg Trial* (1st edn Oxford University Press 2008).

provide a 'symbolic'[151] sense of justice and vindication by punishing high-ranking officials in the Nazi and Japanese leadership.[152]

Both Tribunals were characterised by a common-law adversarial approach to trial proceedings, mainly due to the American influence on their design. Most importantly for this research, no provisions on the participation, protection, and support of victims were made other than with regard to the role of victims as witnesses. Moreover, there is no record of the idea of victims' inclusion as civil parties ever being suggested or discussed during the negotiations, not even by representatives of countries with known civil party participation regimes in their domestic legal systems.[153] The Nuremberg and Tokyo Tribunals have been subject to both praise and criticism. While their influence on the advancement of international criminal law is acknowledged, the trials held at these Tribunals were nonetheless fraught with legal shortcomings.[154] One of the major shortcomings was that these trials did not provide a forum for victims, even though victims' suffering was routinely invoked in the negotiations leading to, and subsequently during the trial proceedings, in order to justify punishment of individuals on behalf of victims. At Nuremberg, the Chief Prosecutor, Robert Jackson, called

[151] Susanne Karstedt, 'The Nuremberg Tribunal and German Society: International Justice and Local Judgment in Post-Conflict Reconstructions' in David A. Blumenthal and Timothy L. H. McCormack (eds), *The Legacy of Nuremberg: Civilising Influence on Instutionalised Revenge?* Humanitarian Law Series 13-35, (Martinus Nijhoff Publishers 2008) 18.

[152] See Moffett (n 146) 60. See also Sam Garkawe, 'The Role and Rights of Victims at the Nuremberg International Military Tribunal', in Herbert Reginbogin, Christoph J. M. Safferling, and Walter R. Hippel (eds), *The Nuremberg Trials: International Criminal Law since 1945* (Kluwer 2006) 86.

[153] McGonigle (n 4) 134.

[154] Kirsten Stellars, 'Imperfect Justice at Nuremberg and Tokyo' (2011) 21(4) European Journal of International Law 1085. The trials at the Nuremberg and Tokyo Tribunals have been subject to a great number of legal commentaries. There are those who believe, as Stellars argues, that 'the Second World War was an exceptional event requiring special legal remedies, and commended the tribunals for advancing international law. Others condemned them for their legal shortcomings and maintained that some of the charges were retroactive and selectively applied' (at 1085).

upon the Tribunal to find the accused guilty so that 'justice may be done to these individuals as to their countless victims.'[155]

In terms of the recognition of victims of the Second World War, both the Nuremberg and Tokyo Tribunals recognised victimisation associated with the three crimes under their respective jurisdictions: crimes against peace, war crimes, and crimes against humanity.[156] A total of 94 witnesses, including 14 victim-witnesses, testified before the tribunal.[157] At the IMT, victims played a limited role. This was mainly a result of the Tribunal's heavily reliance on documentary evidence rather than the live testimony. The picture was slightly different at the IMTFE, where judges had to rely on a greater amount of victim-witness testimony, due to the fact that they had less documentary evidence at their disposal since the Japanese had previously destroyed most of their military records.[158] As such, IMTFE heard 416 witnesses, including 27 victim-witnesses, and accepted affidavits and depositions from a further 779 individuals, many of whom were victims. The selection of victims who were called to testify pointed to another notable shortcoming of the trials at these Tribunals, particularly since only the direct victims were called, given that their testimony would offer a larger contribution to establishing the guilt of the accused. In addition, no victims of rape were called before either Tribunal despite rape being a widespread crime in areas controlled by Nazi and Japanese forces.[159] This selective and exclusive approach endorsed by these Tribunals manifested itself not only with regard to the type of victims (direct or indirect) and the exclusion of victims of

[155] See IMT Transcripts Vol. XIX, 434; See also Chief Prosecutor Keenan at the IMTFE Vol. II, 387, quoted in Moffett (n 146) 60.

[156] IMT Charter art 6; IMTEF Charter art 5.

[157] Bassiouni (n 147) 411.

[158] McGonigle (n 4) 136.

[159] ibid. See also, Henry Nicola, 'Witness to Rape: The Limits and Potential of International War Crimes Trials for Victims of Wartime Sexual Violence' (2009) 3 International Journal of Transitional Justice 114, 115.

specific crimes, but also in the failure of these institutions to recognise representatively all victims of atrocities committed during the war. This is particularly important when considering the crimes committed by the Allies, such as the United States' use of the atomic bombs on Hiroshima and Nagasaki, as well as the rape of German women and many other crimes that were never investigated and prosecuted, underscoring the role of the Tribunals as manifestations of victor's justice.[160] As such, the very selective recognition of the victims' suffering, which obfuscated important truths and historical facts, has undeniably led to secondary victimisation.[161]

Whilst the procedural role afforded to victims in trials at the Nuremberg and Tokyo Tribunals was that of witnesses, historical records show that efforts were made at the time for a greater recognition of victims' roles. The Institute for Jewish Affairs had requested to act as amicus curiae in proceedings at the Nuremberg trials, but this request had apparently been rejected,[162] thus invoking a fundamental concern that has characterised the debate surrounding victim participation ever since: the participation of victims, who in the Second World War amounted to millions, would have jeopardised the court proceedings and rendered the trial unworkable.[163] In addition, victims' role in proceedings was further hindered by the nature of the criminal trial and the adversarial procedural approach adopted, whereby victims were never offered a platform to tell their story of suffering and loss in a narrative form, but only answered the questions put to them. In their final judgments, the Nuremberg and Tokyo Tribunals found 19 senior Nazi and 25 senior Japanese leaders guilty of international crimes.

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[160] Moffett (n 146) 62; See also Christian Tomuschat, (2006) 4(4) The Legacy of Nuremberg, Journal of International Criminal Justice 830, 834.

[161] ibid.

[162] See Michael R. Marrus, 'A Jewish Lobby at Nuremberg: Jacob Robinson and the Institute for Jewish Affairs 1945-1946' (2006) 27(4) Cardozo Law Review 1651, 1655.

[163] ibid.

For the first time at the international level, victims' suffering was recognised and publicly condemned. Nonetheless, these trials fell short of empowering victims of the Holocaust and other heinous crimes of the Second World War by not responding adequately to their needs and by failing to grant them greater procedural and substantive rights.[164] The evolution of victims' rights at the international level has mirrored to some extent the evolution of international criminal justice itself. Subsequent tribunals, as we will see further below, have contributed more substantially to the advancement of victims' rights and interests.

5.2 The Two Ad Hoc Tribunals for Yugoslavia and Rwanda

The end of the Cold War as well as the increasing importance and development of human rights doctrine contributed to an enhanced need for international criminal justice in the early 1990s. The widespread violence against civilians that erupted in the former Yugoslavia and in Rwanda served, as Cassese asserts, 'to rekindle the sense of outrage felt at the closing stage of the Second World War.'[165] In response to atrocities committed in the former Yugoslavia and Rwanda, the UN Security Council established ad hoc tribunals pursuant to its powers under chapter VII of the UN Charter to decide on measures necessary to maintain or restore international peace and security: in 1993 the International Criminal Tribunal for the former Yugoslavia (ICTY)[166] and in 1994 the International Criminal Tribunal for Rwanda (ICTR).[167] The creation of these two ad hoc tribunals occasioned a new and modern era in international criminal law and international criminal justice. Pursuant to their Statutes, these Tribunals were vested with jurisdiction over individuals accused of grave

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[164] Particularly in relation to reparation, although there was some reference in Article 28 of the Nuremberg Charter, and in the Potsdam Declaration, a preparatory document of the Tokyo Tribunal, nonetheless both tribunals failed to address the matter and no such reference was made in the trials.

[165] Cassese (n 143) 335.

[166] UNSC RES 808, UN Doc S/RES/808 (1993).

[167] Statute for the International Criminal Tribunal for Rwanda, UNSC RES 955, S/RES/955 Annex (1994).

breaches of the Geneva Conventions, violations of the laws and customs of war, and crimes against humanity.[168] The procedures adopted by both the ICTY and the ICTR are predominantly adversarial. The adversarial approach was adopted following lengthy discussions among the drafters of the Rules of Procedure and Evidence. Since no code of international criminal procedure existed prior to the ICTY, judges were entrusted with drafting the rules, by considering various proposals submitted by states and organisations as well as drafts submitted by judges themselves.[169]

With regard to victims' rights, neither the Statute nor the Rules of Procedure and Evidence for the ICTY and the ICTR provide for any form of active and direct victim involvement other than as witnesses. Interestingly enough, when drafting the ICTY Statute, a proposal for allowing the appointment of separate counsel for victims was submitted and later rejected.[170] However, the ICTY Statute envisages a number of procedural rights, such as the right to protection and support under Article 22, and the right to restitution under Article 24(3). Nearly identical articles on victims' procedural rights are provided in the ICTR Statute, which is similar in structure and substance to the ICTY Statute.[171] Given the number of constraints and limitations underlying the structure and functioning of both the ICTY and the ICTR, these courts were not equipped and to some extent have been reluctant to expand victims' participatory rights beyond the existing legal provisions. There are three ways in

[168] ICTY Statute, arts 2-5; ICTR Statute, arts 2-4.

[169] McGonigle (n 4) 138; See also Virginia Morris and Michael P. Scharf, *An Insiders' Guide to the International Criminal Tribunal for the Former Yugoslavia* (Martinus Nijhoff Publishers 1995) 176. According to Morris and Scharf, the US submitted 'by far the most comprehensive set of proposed rules with commentary'. This may to some extent explain the influence towards a more adversarial approach to trial.

[170] Morris and Scharf (n 169) 167.

[171] Mark Drumbl, 'Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda' (2000) 75(5) New York University Law Review 1221, 1231.

which victims can participate before the ICTY and the ICTR: as witnesses; amici curiae; and providers of Victim Impact Statements.[172]

5.2.1 Victim-Witnesses

A victim is defined in relation to both Tribunals as a 'person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed.'[173] Over 4,500 witnesses have testified before the ICTY since the Tribunal's first trial in 1996,[174] and over 3,000 at the ICTR.[175] Unlike the Nuremberg and Tokyo Tribunals' vast documentary evidence, judges at the ICTY and the ICTR have relied heavily on witness testimony, and this is reflected in the considerable number of victims called to testify. According to studies conducted by Stover (2005) and Hodžić (2010), victims' participation as witnesses has been characterised by a wide array of experiences, both positive and negative.[176] Various factors have contributed to their overall perceptions and attitudes to participation, including,

> [T]heir personal experience of testifying, the perceived preferential treatment of the accused compared to victims, their (lack of) knowledge and understanding of the procedural mechanisms relevant to these proceedings, and, most importantly, the length of sentences handed down to the accused and the early release of convicted persons.[177]

Notwithstanding the importance of victims' role as 'protagonists of facts', testifying for victims can often be discouraging, given the narrow focus and procedural construct of the trial process. At the ICTY and the ICTR, victims' testimony very often has been confined and

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[172] McGonigle (n 4) 140.

[173] Rules of Procedure and Evidence of the ICTY and ICTR, common r 2(a).

[174] Witness Statistics, ICTY at < http://www.icty.org/sid/10175> (accessed 2 August 2015).

[175] See ICTR Annual Reports 1996-2014 to the UN General Assembly and Security Council.

[176] Eric Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague* (University of Pennsylvania Press 2005); Refik Hodžić, 'Living the Legacy of Mass Atrocities: Victims' Perspectives on War Crimes Trials' (2010) 8 Journal of International Criminal Justice 113.

[177] Hodžić (n 176) 123.

controlled by the questions asked, which has hindered victims' ability to tell their story in a narrative form and in a comforting setting.[178] This shortcoming is particularly significant when considering victims' overriding need to tell their story of suffering and grief, a need shared with almost all victims of mass atrocities. The empirical research with victims of the Khmer Rouge at the ECCC, as examined in chapter 6, squarely affirms the imperative goal of victim participation, namely to give victims an opportunity to tell their stories. It is against this backdrop and the criticism levelled at the ICTY and the ICTR that various victims' rights groups began to campaign for greater victim acknowledgment and representation.

5.2.2 Amicus Curiae

Amicus curiae, which translates as 'friend of the court', is a legal mechanism according to which an individual or organisation, not being a party to a case, can provide information to the court in deciding matters of law before it. Rule 74 of both the ICTY and the ICTR Rules of Procedure and Evidence provides that a Chamber 'may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to appear before it and make submissions on any issue specified by the Chamber.' The Tribunal has discretionary authority to decide whether to accept or reject a request to act as amicus and such decision depends 'on the significance of information for the proper determination of the case.'[179] Amicus curiae has been applied in proceedings at the ICTY and the ICTR, where both Tribunals have invited amici with respect to specific legal issues.[180] In principle, victims and victims' rights organisations could seize

[178] McGonigle (n 4) 141.

[179] ibid 142.

[180] Examples of decisions involving amici curiae include: ICTY, *Prosecutor v Tadić*, Case No. IT-94-1, Order Denying Leave to Appear as Amicus Curiae, Trial Chamber II, 25 November 1996; *Prosecutor v Blaškić*, Case No. IT-95-14, Orders Granting Leave to Appear as Amicus Curiae, Trial Chamber I, 11 April 1997; *Prosecutor v Furundžija*, Case No. IT-95-17/1, Order Granting Leave to File Amicus Curiae Brief, Trial Chamber II, 10 November 1998; *Prosecutor v Furundžija,* Case No. IT-95-17/1, Order Granting Leave to File *Amicus Curiae*

the opportunity to participate as amici curiae in the criminal process.[181] In practice, on a few occasions those acting on behalf of victims' interests have sought to participate as amici. Two significant applications were made in the *Bagosora* case at the ICTR, first by the Belgian Government seeking to participate as amicus based on 'The right of Belgians or rightful claimants, […], to appear before the Tribunal as plaintiffs and not as mere witnesses […],'[182] and secondly by the Government of Rwanda aiming to assist in proving the guilt of the accused and in seeking damages for unlawful appropriation of property.[183] The Court rejected both requests emphasising the premature nature of the applications, given that the discussion on penalties and restitution could not take place before the determination of guilt.[184] These and other similar decisions by the ICTR and the ICTY underscore not only the clear divide between the determination of guilt and sentencing already familiar from adversarial systems generally, but also the Tribunals' overall reluctance to expand victims' procedural rights beyond those of witnesses, being mindful of the impact that that could have on the rights of the accused as well as the role accorded to the prosecution.

5.2.3 Providers of Victim Impact Statements

The role of victim impact statements in common law jurisdictions as examined above in the context of domestic criminal justice has found expression also in the jurisprudence and practice of the ICTY and the ICTR. More specifically, even though the ICTY and ICTR

Brief, Trial Chamber II, 11 November 1998; See also ICTR, *Prosecutor v Akayesu*, Case No. ICTR-96-4-T, Order Granting Leave for Amicus Curiae to Appear, Trial Chamber I, 12 February 1998; *Prosecutor v Musema*, Case No. ICTR-96-13-T, Decision on an application by African Concern for leave to appear as Amicus Curiae, Trial Chamber 1, 17 March 1999.

[181] See Morris and Scharf (n 169).

[182] McGonigle (n 4) 142; ICTR, *Prosecutor v Bagosora et al.,* Case No. ICTR-96-7-T, Decision on the Amicus Curiae Application by the Government of the Kingdom of Belgium, Trial Chamber II, 6 June 1998, p 2.

[183] ICTR, *Prosecutor v Bagosora et al.,* Case No. ICTR-96-41-T, Decision on Amicus Curiae Request by the Rwandan Government, Trial Chamber II, 13 October 2004.

[184] McGonigle (n 4) 142.

Statutes do not provide for active victim participation, both Tribunals have allowed the submission of victim impact statements for the purposes of sentencing.[185] In addition, Rule 92bis of the Rules of Procedure and Evidence of the ICTY and the ICTR provides:

> (a) that a Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused in the indictment; and
>
> (b) that the fact that the evidence in question concerns the impact of crimes upon victims is a factor of admitting evidence in the form of a written statement.

The significance of victims' impact statements at the sentencing stage is particularly poignant when considering the gravity of international crimes committed. In *Kristić*, the Trial Chamber argued that, 'appropriate consideration of [individual circumstances and consequences] gives 'a voice' to the suffering of the victims.'[186] The statements offered an opportunity for victims to convey to judges the harm suffered as a result of the crimes committed by the accused.

5.2.4 Protection of Victims

One of the greatest concerns associated with the participation of victims in trial proceedings is their protection and safety. Under Article 20 of the ICTY Statute and Article 19 of the ICTR Statute, trial proceedings are to be conducted with 'due regard for the protection of victims and witnesses.' Furthermore, the Tribunals should take all the necessary measures to secure the protection of victims and witnesses, in and out of the courtroom as well as the protection of their identity.[187] In addition, provisions in this regard are incorporated into the ICTY and the ICTR Rules of Procedure and Evidence. Undoubtedly,

[185] See footnote 56 in McGonigle (n 4) 143.

[186] ICTY, *Prosecutor v Krsitić.* Case No. IT-98-33, Judgement, Trial Chamber I, 2 August 2001, para 703.

[187] ICTY Statute art 22; ICTR Statute art 21.

these provisions represented the greatest advancement of victims' procedural rights since the Nuremberg and Tokyo Tribunals. Another relevant improvement relates to the creation of the ICTY's Victims and Witnesses Section (VWS) and the ICTR's Witness and Victims Support Section (WVSS) aimed at encouraging victims and witnesses to come forward to testify, providing them with the necessary safety conditions and a dignified environment. Throughout their decision-making process with regards to protective measures for victims, matters of confidentiality and anonymity, judges have had to strike a very fine balance between the rights of the accused to a public trial and the rights of victims and witnesses to protection and safety. The jurisprudence of the ICTY and the ICTR is replete with decisions and interpretations of protective measures for victims, and could easily make for an elaborate field of research. Limits of space preclude however any detailed analysis of this area. For present purposes it is nevertheless important to highlight that despite considerable efforts made by both Tribunals to grant the most feasible protective measures to victims and witnesses, both have fallen short in that regard. Criticism has been levelled at both the ICTY and the ICTR on numerous occasions in particular in view of the issue of secondary victimisation.[188]

5.2.5 Victims' Substantive Rights: Reparations

Despite considerable strides made by the ICTY and the ICTR in recent years to address and accommodate victims' needs and interests, especially in light of the criticism faced, both Tribunals have adopted a conservative approach, which is best reflected in their narrow retributive understanding of justice for victims.[189] The lack of reparations for victims

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[188] For specific references to the issue of protection, see *inter alia*, *Prosecutor v Tadić*, Case No. IT-94-1, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, paras 46-50; *Prosecutor v Ramush Haradinaj et al.,* Case No. IT-04-84-A, Appeals Chamber Judgement, 21 July 2010 para 37.

[189] Moffett (n 146) 82.

is perhaps the most poignant example of this approach. However, the right to reparation was never part of the ICTY and the ICTR's mandates and neither Tribunal has jurisdiction to make reparations available to victims. Resolution 827(1993) establishing the ICTY states that 'the work of the International Tribunal shall be carried out without prejudice to the right of the victims to seek through appropriate means, compensation for damages incurred as a result of violations in international humanitarian law.'[190] As highlighted above, reference to restitution is made in Articles 24(3) and 23(3) of the Statutes of the ICTY and the ICTR respectively. Furthermore, common Rule 106 of the Rules of Procedure and Evidence allows victims to claim compensation before domestic courts of the former Yugoslavia and Rwanda against those defendants who are convicted by the ICTY and the ICTR. However, this has little to no prospect of materialisation in practice since most defendants are unlikely to have the funds to compensate victims.[191] In fact, most defendants before the ICTY and the ICTR are indigent and have applied for legal aid. In response to victims' outcry regarding the lack of reparations, both the ICTY and the ICTR have appealed to the UN Security Council, though to no avail.[192] Undoubtedly the lack of action on behalf of the Security Council has undermined the goals of the Tribunals to deliver justice to victims. This was acknowledged also by the President of the ICTY:

> The failure to properly address this issue constitutes a serious failing in the administration of justice to the victims of the former Yugoslavia. The Tribunal cannot, through the rendering of its judgements alone, bring peace and reconciliation to the region: other remedies should complement the criminal trials if lasting peace is to be achieved, and one such remedy should be adequate reparations to the victims for their suffering.[193]

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[190] S/RES/827, 25 May 1993, para 7; the ICTR resolution makes no reference to compensation.

[191] Susanne Malmstorm, 'Restitution of Property and Compensation to Victims', in Richard May et al. (eds), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* (Brill 2000) 383.

[192] See Moffett (n 146) 83. See also Letter dated 12 October 2000 from the President of the International Tribunal for the Former Yugoslavia addressed to the Secretary-General, S/2000/1063, 3 November 2000; Letter dated 9 November 2000 from the President of the International Criminal Tribunal for Rwanda addressed to the Secretary-General, S/2000/1198, 15 December 2000.

[193] Bi-Annual Completion Report to the UN Security Council, S/2010/588, 19 November 2010, para 78.

Such shortcomings in meeting victims' needs and expectations, especially with regards to reparations, highlight the inherent limitations of international criminal tribunals, whose primary objective is to prosecute those most responsible for the crimes committed rather than provide a wider conception of justice for victims.[194]

5.3 Hybrid Courts

The establishment of the ad hoc Tribunals marked a new era of international criminal justice, which saw a proliferation of various internationalised criminal institutions 'that became precursors to the International Criminal Court.'[195] Interestingly, this type of internationalised tribunal has continued to expand even after the ICC, with the establishment of institutions such as the ECCC and the STL. They are commonly referred to as hybrid courts because of their unique structure combining international and national elements.[196] Some of the hybrid tribunals that preceded the ECCC, which are briefly discussed here, are the SCSL, the Special Panels for Serious Crimes in East Timor and the UNMIK/EULEX War Crimes Panels in Kosovo. Each of these courts has approached victim participation in distinctive ways. However, what can be noted is that there has been a gradual expansion of victims' procedural and substantive rights culminating in civil party participation at the ECCC.

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[194] Malmstrom (n 191) 384.

[195] McGonigle (n 4) 148.

[196] The classification of a court as 'hybrid' depends on a variety of criteria, which range from the court's legal basis, its subject matter jurisdiction, the composition of the court's personnel, and its location within or outside of a domestic court system. See John Cerone and Clive Baldwin, 'Explaining the UNMIK Court System' in Cesare P. R. Romano, André Nollkaemper, and Jann K. Kleffner (eds) *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (1st edn Oxford University Press 2004) 41, footnote 2.

5.3.1 Special Court for Sierra Leone

The SCSL is a treaty-based sui generis court of mixed jurisdiction and composition established in 2002, following a 10-year conflict in Sierra Leone.[197] With regard to victims' rights, the Court did not offer a significant development, as victims could participate only in their capacity as witnesses and any request for reparations or compensation was left to domestic courts, similar to the situation in respect of the ICTR and ICTY.[198] However, a noteworthy development outside the judicial system was the role afforded to victims in a non-judicial, post-conflict mechanism, the Truth and Reconciliation Commission,[199] which was created at the same time as the SCSL. The combination of these judicial and non-judicial mechanisms with complementary roles in post-conflict Sierra Leone was advancement in achieving broader objectives of justice for victims. Their work was characterised by overlapping jurisdiction, as well as contradictions deriving from lack of clear delimitation and demarcation of functions from the very beginning. For present purposes, it can be stated with regard to victims' needs and interests, that the Truth and Reconciliation Commission offered a forum for victims to tell their stories in a narrative form, which the SCSL was unequipped for and incapable to offer.

5.3.2 East Timor: Special Panels for Serious Crimes

Following the gross violations of human rights that occurred in East Timor in 1999, the UN Security Council created the United Nations Transnational Administration in East

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[197] Report of the Secretary General on the Establishment of a Special Court for Sierra Leone, UN SCOR, 55th Sess., 915th Mtg., UN Doc. S/2000/915(2000), para 9.

[198] Hakan Friman, 'Procedural Law on Internationalised Criminal Courts', in Cesare P.R. Romano, André Nollkaemper, and Jann K. Kleffner (eds), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (1st edn Oxford University Press 2004) 351.

[199] See <http://www.sierraleonetrc.org> (accessed 30 July 2014).

Timor (UNTAET).[200] Under UNTAET, new hybrid courts referred to as the Special Panels for Serious Crimes (SPSC) were established in Dili. Whilst the SPSC have been criticised for many institutional flaws, with respect to victims these courts adopted 'a sophisticated approach echoing many international developments and domestic practice.'[201] More importantly for this research, victims were granted participatory rights that extended beyond the victim-witness model. In practice this included a number of rights, *inter alia*: the right to request specific investigations subject to the prosecution's discretion; the right to be heard at a review hearing before the Investigating Judge and at any hearing on an application for conditional release; the right to be represented in court by legal counsel; the right to be notified on the progress of the case; the right to request a review of the prosecutor's decision not to go forward with a prosecution.[202] Yet, it is important to note that the SPSC's code of criminal procedure did not afford victims a right to participate as civil parties at trial. Their participation beyond the victim-witness model was permitted when appropriate and conditioned by judges' discretion. Despite these legal provisions that aimed to empower victims, it does not appear that any lawyers representing victims took part in proceedings.[203] Another significant development in respect of victims' substantive rights is their right to reparations. Section 49.1 of the UNTAET resolution provides for compensation claims by victims. However, notwithstanding the value of these substantive rights, they seem to have remained on the level of theory; as Bassiouni argues, 'the rights of victims were not truly

[200] UNSC Res 1272, UN Doc S/RES/1272, 25 October 1999. Following the independence of East Timor from Indonesia, the Indonesian National Army and a number of Timorese militias launched violent attacks against the people of East Timor, which resulted in killing of thousands and displacing more than 500,000 civilians. See Bassiouni (n 147) 559.

[201] See McGonigle (n 4) 152. UNTAET Reg 2000/15, 6 June 2000, sections 24-25; Friman (n 198) 351.

[202] See UNTAET Reg 2000/30, 25 September 2000 (as amended by UNTAET Regulation 2001/25 of 14 September 2001), sections 12 and 25.

[203] McGonigle (n 4) 153.

taken into account or properly addressed in the decisions of the [SPSC] panels.'[204] Lack of institutional capacity and inadequate funding have undermined substantially the prospect for meaningful reparation in the context of this Tribunal.

5.3.3 UNMIK/EULEX War Crimes Panels in Kosovo

The establishment of the United Nations Interim Administration Mission in Kosovo (UNMIK) in the aftermath of the Kosovo war in the former Yugoslavia (1998-1999) led to the creation of a Kosovar court system charged with maintenance of civil law and order and the protection and promotion of human rights.[205] An important task of this new court system has been to prosecute and try those responsible for the atrocities that occurred in Kosovo. In terms of structure and legal framework, this court system was characterised by a cohabitation of domestic and international court personnel and a legal framework based partly on Regulation 1999/24 and partly on the Constitutional Framework.[206] According to this new system, international judges would sit in panels throughout Kosovo on a case-by-case basis.[207] The war crimes panels constitute a complex system of tribunals whose approach to the role of victims is instructive on a number of levels. Most pertinently for this study, victims under the new Kosovar court system have extensive participatory rights, at least in theory: in addition to the victim-complainant and victim-witness models, victims have the right to participate as civil parties, subsidiary prosecutors, or private prosecutors. However, it appears from the records available that the number of victims that have exercised these rights is very low.[208] The number has remained low even after the European Union took over from

[204] Bassiouni (n 1) 242, footnote 202.

[205] UNSC Res 1244, UN Doc S/RES/1244 (1999) para 10.

[206] See UNMIK reg 1999/24, 12 December 1999, and Constitutional Framework.

[207] Cerone and Baldwin (n 196) 48-47.

[208] McGonigle (n 4) 15.

the UN and established the European Union Rule of Law Mission in Kosovo (EULEX),[209] which has full authority to prosecute war crimes and related cases.[210]

5.4 Active Victim Participation

Calls for greater procedural and substantive rights for victims on the international level have been met with increased recognition of the role of victims of mass atrocities in international criminal justice, reflected in the expansive approach embraced by recently established international criminal tribunals. The most notable development has been the establishment of the permanent International Criminal Court (ICC)[211] which is the first international criminal justice institution to endorse active victim participation in its proceedings and to explicitly provide for reparation measures.[212] This evolution marked a new era of victim-oriented approaches in international criminal justice and paved the way for victim participation at the ECCC and the STL.[213] The regime of victim participation at the ICC has been hailed as a major achievement of modern international criminal justice.[214] However, as its application in practice has shown through its growing jurisprudence, victim participation remains one of the most controversial aspects of the ICC and one which the

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[209] Council of the European Union, Joint Action 2008/124/CFSP on the European Union Rule of Law Mission in Kosovo, EULEX Kosovo, 4 February 2008; Kosovo, Law No. 03/L-053 On The Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo.

[210] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc S/2009/149, 17 March 2009.

[211] Rome Statute of the International Criminal Court, 1 July 2002, art 1.

[212] ibid art 75.

[213] The Special Tribunal for Lebanon (STL) was established on 30 May 2007 under the UNSC Res 1757, which included the agreement between the UN and Lebanon for the establishment of the STL. The procedural framework of the STL allows for the participation of victims throughout all stages of proceedings, including sentencing, but only after the issuance of an indictment.

[214] Christine H. Chung, 'Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?' (2008) 6 Northwestern Journal of International Human Rights 459. See also, Christine Van den Wyngaert, 'Victims Before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge' (2012) 44 Case Western Reserve International Law Journal 476.

Court has been grappling with ever since its inception. The victim participation regime at the ICC has been the subject of an increased focus in scholarly work and debate, and warrants considerable and in-depth research and analysis, which would merit a separate monograph.

As discussed in chapter 1, there are a number of reasons for focusing on the ECCC, including the fact that the ECCC offers the broadest and most encompassing model of victim participation in the form of civil party participation. In addition, the ECCC's jurisdiction is temporally and spatially limited, operating within a single socio-cultural and politico-legal context unperturbed by some of the multiple and immense challenges faced by the ICC.[215] Moreover, there is still considerable scope for scholarly analysis of the ECCC, in particular in respect of the evolving civil party participation regime that has been adopted by the Court. The comprehensive and in-depth analysis of the complex and multifaceted legal mechanism of victim participation at the ECCC will be conducted in chapters 4 to 6.

The analysis in this chapter has shown the extent to which the nature and the characteristics of a legal system, such as its broad adherence to the common law or civil law tradition, shapes and influences the scope and parameters of the procedural and substantive rights accorded to victims. It has also shown in this context that domestic and international systems are closely interconnected, in that models of participation in one system are often incorporated and adapted in another. The international criminal tribunals have faced a considerable challenge in reconciling the expansion of victims' rights with what Weber has termed 'formal rationality', meaning that courts operate in pursuance of strict procedural standards of due process, which are principally geared towards the accused.[216] Thus, whereas

[215] Van den Wyngaert (n 214) 476.

[216] Martin E. Spencer, 'Weber on Legitimate Norms and Authority' (1970) 21 British Journal of Sociology 123, 128.

victims' role in the Nuremberg and Tokyo Tribunals was heavily circumscribed and limited to that of witnesses, later tribunals such as the ICTY and the ICTR, whose Statutes make some limited reference to victims' rights, provided for the right to participate in the roles of witness, amicus curiae, and provider of impact statements. One weakness of these models of participation, in particular the role of a victim-witness in an essentially adversarial system, is that they provide only limited opportunity for victims to tell their stories from their perspective, as testimony is not normally given in narrative format. Criticism was levelled at these tribunals for the seemingly limited rights that they granted to victims of mass atrocities, in turn resulting in the enhanced rights of victims in proceedings at the ICC, ECCC and the STL. The more inquisitorial approach adopted by these tribunals has been helpful in this regard. There remain, however, a number of shortcomings in terms of victims' substantive rights. The letter of the governing instruments and practice on the ground may not always accord, as experience with victim participation at many tribunals has been limited. Thus, the governing laws and rules often reveal little of the potential that may be unlocked by a great number of victims availing themselves of the rights available to them in theory. Furthermore, it should also be noted that efforts to bolster victims' rights by creating the means to provide reparations are incremental and will likely remain limited in the future, as will further be seen in the context of the ECCC.

CHAPTER 4

Transitional Justice in Cambodia: Victim Participation at the Extraordinary Chambers in the Courts of Cambodia

To keep you is no benefit, to destroy you no loss.

(Khmer Rouge slogan)

Unparalleled in its form, dimension and cruelty, the Khmer Rouge regime carried out a systematic campaign of murder and starvation that eradicated over 1.7 million ethnic and non-ethnic Cambodians.[1] From April 1975 through January 1979 the government of Democratic Kampuchea[2] committed one of the most horrendous mass executions of humanity in modern history. Over thirty-five years later, the longstanding hope to bring to justice some of the architects of the mass atrocities in Cambodia seems close to realisation. Today, a hybrid tribunal combining Cambodian and international judges stands as the sole judicial body to conduct the trials of those most responsible for the crimes of the Khmer Rouge regime. Most distinctively, the Extraordinary Chambers in the Courts of Cambodia (ECCC)[3] offers a unique opportunity for the victims of the Khmer Rouge to participate as civil parties in legal proceedings.

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[1] See Cambodian Genocide Program at Yale University, available at <http://www.yale.edu/cgp/> (accessed 14 March 2015). However, estimates of the number of those executed vary, ranging between 1.5 and 3 million. The Khmer Rouge directed atrocious campaigns against several distinct groups in Cambodia, including: Buddhist monks; the Cham, Buddhist and Vietnamese minorities; and the Eastern Khmer population. The Cambodian Genocide Program at Yale University, which assisted the Documentation Center of Cambodia (DC-Cam) from 1995 to 2005, provides the most comprehensive study of archives and the most extensive database.

[2] During the Khmer Rouge regime, Cambodia was renamed Democratic Kampuchea.

[3] See the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (ECCC Law), with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006) arts 3-8, available at <http://www.eccc.gov.kh/english/cabinet/law/4/KR_Law_as_amended_27_Oct_2004_Eng.pdf.> (accessed 14 March 2015).

In a landscape of evolving philosophy and practice in international criminal trials, the novel approach endorsed by the ECCC, by including victims of alleged atrocities as civil parties, and not simply as witnesses, has revealed potential strengths and weaknesses as well as the possibilities for the development of transitional justice generally and international criminal justice specifically. This and the following two chapters, which constitute the core of this thesis, examine the form, scope and implications of the civil party participation regime at the ECCC. As a post-conflict society, Cambodia is still struggling to come to terms with its past, and faces challenges in the quest for justice over how much to acknowledge, how to treat perpetrators, how to address the rights and needs of victims of crimes under the Khmer Rouge regime, and how to recover.[4] In this regard, this chapter takes account of the historical and social context of Cambodian post-conflict society. It highlights the dominant historical events that led to the Khmer Rouge regime and the particular nature of the mass victimisation that unfolded in Cambodia. It analyses the different dynamics and challenges conditioning transitional justice in Cambodia leading up to the establishment of the ECCC. Further, this chapter analyses the ECCC's unique structure, its legal and procedural framework as an important development that governs the civil party participation scheme. The argument is structured around two broad sections. The first section takes account of the historical and social context of Cambodian post-conflict society. The dominant historical events that led to the Khmer Rouge regime and the particular nature of the mass victimisation that took place have posed significant challenges in the quest for justice in Cambodia. Any analysis of the Cambodian transitional justice mechanism should be carried out with a view to the socio-cultural and politico-legal dynamics and challenges that characterise it. This is followed by a conceptual examination of the very notion of transitional justice, and the four pillars on

[4] Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (Beacon Press 1998) 2.

which it rests; seeking truth, ensuring accountability, enabling reparations, and fostering reconciliation.

The second section examines the ECCC's unique structure, its legal and procedural framework as an important development that governs the civil party participation scheme. Such an analysis is essential to establishing a contextual understanding and a critical evaluation of the scope and parameters of civil party participation as well as its practical implications. As highlighted above, this chapter lays the foundations that are critical for a sound appreciation of the subsequent detailed analysis of civil party participation at the ECCC and its overall implications.

1. Historical and Social Context

Cambodia, once acclaimed for its ancient civilisation and mighty Khmer empire,[5] became known in the twentieth century for one of mankind's greatest human tragedies and most hideous mass atrocities. It was a singular example of a regime that combined 'extremist ideology with ethnic animosity and diabolical disregard for human life.'[6]

Shortly after the rise in 1975 of the Khmer Rouge regime, life in Cambodia's cities was paralysed, characterised by massive evacuations, the eradication of all human freedoms, and mass executions.[7] The Khmer Rouge embarked upon a ruthless mission of deconstructing

[5] E.g., Angkor Wat, a great architectural masterpiece that represented the power of the once-mighty Khmer Empire. See Michael Haas, *Genocide by Proxy: Cambodian Pawn on a Superpower Chessboard* (Praeger 1991) and Ian Brown, *Cambodia: The Background, The Issues, The People* (Oxfam Country Profiles Series 2000).

[6] See Cambodian Genocide Program at Yale University < http://www.yale.edu/cgp/> (accessed 14 March 2015).

[7] Ben Kiernan, *The Pol Pot Regime: Race, Power, and Genocide in Cambodia under the Khmer Rouge* (3rd edn Yale University Press 2008) 339.

Cambodian society, in a deranged campaign to return society to 'Year Zero.'[8] The latter signified a campaign of drastic measures that subjugated human beings to forced labour, ignorance, and the abandonment of their religion and culture.[9] The horror inflicted by the regime was driven by a confounding conviction that the time had come for history to be finished, and that 'Cambodians were asleep and enslaved for two thousand years.'[10] Cambodia became a nation 'kidnapped and besieged from within.'[11] The brief but tragic revolutionary period that followed the siege of Phnom Penh in April 1975 culminated in the creation of 'a prison camp state, where eight million prisoners served most of their time in solitary confinement' and 1.7 million inmates 'were worked, starved and beaten to death.'[12] The events unfolding in Cambodia could not be encapsulated better than in the words of one of the victims who witnessed the atrocities, and who told me that 'he had never seen a nation kill its own people like that,'[13] a view shared among virtually all other civil parties and victims interviewed for this research.

The concentration of power by the Khmer Rouge's Communist Party of Kampuchea (CPK), 'the purest and most thoroughgoing Marxist-Leninist movement,'[14] was driven by an

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[8] ibid. The term 'Year Zero' applied to the capture of the capital of Cambodia, Phnom Penh, on 17 April 1975, when the Khmer Rouge erased the calendar back to Year Zero.

[9] As Ronayne states, 'Religion in general, and Buddhism in particular, were declared incompatible with the revolution… The Khmer Rouge eradicated Buddhism from the country in no more than a year. Out of a total of 2,680 Buddhist monks from eight Cambodian monasteries, only seventy were known to have survived into 1979.' See Peter Ronayne, *Never Again?: The United States and the Prevention and Punishment of Genocide since the Holocaust* (Rowman & Littlefield Publishers 2001) 54.

[10] David Chandler, *Brother Number One: A Political Bibliography of Pol Pot* (Westview Press 1999) 4.

[11] Ben Kiernan, *The Pol Pot Regime: Race, Power, and Genocide in Cambodia under the Khmer Rouge* (2nd edn Yale University Press 2002) 9.

[12] ibid.

[13] Transcript of interview on file with the author (Civil Party Case 002, Phnom Penh, 3 October 2014).

[14] Chandler (n 11) 3.

unequalled quest for absolute control.[15] A chain of significant historical events led to the centralisation of this power in the hands of Pol Pot, the leader of the Khmer Rouge and the Prime Minister of Democratic Kampuchea from 1976 to 1979.

Following almost a century of French colonisation, which culminated in the 1953 proclamation of independence, Cambodia found itself under the rule of a monarch, Norodom Sihanouk. At the peak of the Vietnam War, Sihanouk adopted policies that he claimed were to preserve Cambodia's neutrality and most importantly security. His efforts to prevent Cambodia from being drawn into a wider regional war, however, came at a cost, since in so doing, he made difficult choices of alliances in pursuit of the least dangerous course of action, which resulted in immense pressure upon his government from all sides in the conflict.[16] In 1970, then-Premier Lon Nol, with the support of the National Assembly, organised a military coup to overthrow King Sihanouk, in an event that led to the increased political appeal of the Khmer Rouge.[17] While in exile in Beijing, Sihanouk made an alliance with the Khmer Rouge and became the nominal head of a Khmer Rouge-dominated government-in-exile (known by its French acronym *GRUNK*), which was backed by the People's Republic of China. This alliance is believed to have significantly advanced the Khmer Rouge's goal to come to power.

The intensification of Khmer Rouge control in Cambodia was marked by two important events. First, Sihanouk's popular support amongst the peasantry of Cambodia allowed the Khmer Rouge insurgents to gain power and influence, and ultimately to exercise

[15] Kiernan (n 7) 358.

[16] Kiernan (n 11).

[17] David Chandler, *The Tragedy of Cambodian History: Politics, War, and Revolution Since 1945* (Yale University Press 1993); Elizabeth Becker, *When The War Was Over: Cambodia And The Khmer Rouge Revolution* (PublicAffairs 1998).

de facto control over the vast majority of Cambodian territory, since many rural Cambodians thought that they were fighting for the restoration of Sihanouk.[18] Second, extensive foreign intervention related to the ongoing war in Vietnam, marked most notoriously by the massive 'carpet bombing' of Cambodia in 1969 by the United States, was a key factor in the growth of the Khmer Rouge and the rise of Pol Pot.[19] When Cambodia succumbed to the Khmer Rouge regime in 1975, Sihanouk returned from exile to become the symbolic head of state of the new regime while Pol Pot remained in power. However, he spent the next few years virtually as a hostage of the Khmer Rouge, culminating in Sihanouk being forced out of office again and into political retirement.[20] The end of this infamous regime was followed by yet another protracted civil war, which did not end until 1998, 'when the Khmer Rouge political and military structures were dismantled.'[21]

It should be noted that some 'show trials' were conducted in 1979 by the Vietnamese-dominated regime that deposed the Khmer Rouge.[22] Typically hollow spectacles, these lacked the fundamentals of due process such as 'an impartial magistrate, an opportunity to confront the evidence and defend against the charges, and a verdict based upon the evidence.'[23] The fact that the outcome of these trials was known beforehand highlights the corrupt nature of

[18] David Chandler, *A History of Cambodia* (Westview Press 2008).

[19] Craig Etcheson, *The Rise and Demise of Democratic Kampuchea* (Westview Press 1984) 97; See also Bruce Wilshire, *Get 'Em All! Kill 'Em: Genocide, Terrorism, Righteous Communities* (Lexington Books 2005) 69.

[20] Kiernan (n 7).

[21] See DC-Cam Publication, <http://www.dccam.org/Publication/Monographs/Night%20of%20the%20KR.pdf> accessed 12 March 2015.

[22] Howard J. De Nike, John Quigley, and Kenneth J. Robinson, *Genocide in Cambodia - Documents from the Trial of Pol Pot and Ieng Sary* (University of Pennsylvania Press 2000) 20. The People's Revolutionary Tribunal was constituted in Cambodia in 1979 for the trial on charges of genocide in August of that year of Pol Pot and Ieng Sary.

[23] ibid.

the events. Except as an obscure event of political history, these trials have no relevance to the pursuit of justice in Cambodia.

The primary evidence of what is known today about the horrendous acts committed between 1975 and 1979 comes from 'the autobiographical confessions' extracted from victims under torture, which preceded execution, in the notorious political prison of Tuol Sleng (alias S-21).[24] This massive collection of documents, gathered and preserved by the Documentation Center of Cambodia (DC-Cam),[25] constitutes vital legal evidence for the establishment of any accountability mechanism for the crimes of the Khmer Rouge.[26]

1.1 Quest for Justice in Post-Conflict Cambodia: Dynamics and Challenges

Characterised as 'a corporate body in abrupt transition, fractured and disturbed for decades… in every conceivable way,'[27] Cambodia is still struggling to come to terms with its turbulent past, and faces significant challenges in the quest for justice.[28] The unique matrix of factors dominating Cambodian transitional society renders the pursuit of justice challenging and complex. Holding individual members accountable for crimes committed more than thirty-five years ago presents significant legal, evidential and procedural challenges. Adding to the difficulty are the perceived limitations and corruption overshadowing the domestic

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[24] Kiernan (n 7) 464.

[25] The Documentation Center of Cambodia (DC-Cam) is a Cambodian non-governmental organisation, whose mission is to heal the wounds of the past by documenting, researching, and sharing the history of the Khmer Rouge for the purposes of memory and justice. See <http://www.dccam.org/#/our_mission/purpose>. See also Ben Kiernan, Human Rights Review (April-June 2000), available at <http://www.yale.edu/cgp/BringingtheKhmerRougetoJustice2000-1.pdf> (accessed 27 February 2015).

[26] See DC-Cam, available at <http://www.dccam.org/Abouts/index.htm> (accessed 27 February 2015).

[27] Wilshire (n 19) 70.

[28] See Minow (n 4).

criminal justice system, as well as the political power wielded by the government.[29] These challenges are further exacerbated by the legal and structural complexities of a criminal tribunal that 'must navigate between the interests of its national and international constituencies,'[30] and in which victims and their legal representatives participate in the courtroom alongside prosecution and defence. While acknowledging the wide spectrum of challenges to the quest for justice in Cambodia, an analysis of the key socio-cultural and politico-legal dynamics and challenges will deepen our understanding of the complexities of the Cambodian transitional justice model.

1.1.1 Socio-Cultural Dynamics and Challenges

Characterised by 'changelessness'[31] as a society resistant to transformation, Cambodia was long considered 'as a sort of ethnographic black hole.'[32] Cambodians are often described as a people with a particular attitude towards authority, and it is part of a more fundamental Cambodian concern 'that situations be clearly defined, and that people do the proper thing at the proper time.'[33] These socio-cultural themes become apparent through the unfolding of the Cambodian mass atrocities and the aftermath thereof, as Cambodia struggles to make sense of the events and strives to move towards justice and reconciliation.

[29] Alex Bates, 'Cambodia's Extraordinary Chamber: Is it the Most Effective and Appropriate Means of Addressing the Crimes of the Khmer Rouge', in Ralph Henham and Paul Behrens (eds), *The Criminal Law of Genocide: International Comparative and Contextual Aspects* (Ashgate 2007) 186.

[30] Neha Jain, 'Between the Scylla and Charybdis of Prosecution and Reconciliation: The Khmer Rouge Trials and the Promise of International Criminal Justice' (2009) 20(2) Duke Journal of Comparative and International Law 249.

[31] Chandler (n 17) 14.

[32] The most detailed survey is probably that of anthropologist May Ebihara, author of 'Sway: A Khmer Village in Cambodia'. See Ben Kiernan, 'The Cambodian Genocide: Issues and Responses' in George J. Andreopoulos (ed), *Genocide: Conceptual and Historical Dimensions* (University of Pennsylvania Press 1994) 192.

[33] David J Steinberg et al., *Country Survey Series: Cambodia, Its People, Its Society, Its Culture* (Hraf Press New Heaven 1957) 6.

The reintegration of many thousands of former Khmer Rouge cadres into the population poses considerable difficulty in fully addressing the Pol Pot atrocities. When asked why they participated in the mass killings, many former Khmer Rouge cadres, like most perpetrators of such crimes, have claimed that they were 'just following orders.'[34] This sense of obedience to the demands of authority is a striking element of Cambodian society, which strongly manifested itself during the rule of the Khmer Rouge. Another aspect of Cambodian society that complicates the quest for justice relates to dimensions of cultural and religious practice. In an almost exclusively Buddhist country, Cambodians' views on justice focus mainly on reconciliation rather than retribution.[35] Within the Buddhist tradition, concepts such as acceptance, tolerance, and compassion often overshadow notions such as accountability.[36] This stands in contrast to the view of criminal justice generally held by Western legal systems and within international law itself, both of which are commonly associated with a clear focus on accountability, and are strongly linked with the idea that justice must be served. A view that the perpetrator will be punished in the next life is hard to reconcile with the overall goal of retributive justice or with ending impunity for those who committed gross abuses of human rights. However, the empirical research in the form of victim interviews conducted recently in Cambodia has revealed a somewhat more nuanced picture; in particular, many interviewees emphasised the significance to them of the accountability mechanism offered by the ECCC. Such subtle views and perceptions on accountability held by victims are brought out in powerful words in the following quotation:

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[34] ibid 278.

[35] Ian Harris, 'Onslaught on Beings: A Theravada Buddhist Perspective on Accountability for Crimes Committed in the Democratic Kampuchea Period' in Jaya Ramji and Beth Van Schaack (eds), *Bringing the Khmer Rouge to Justice: Prosecuting Mass Violence Before the Cambodian Courts* (Edwin Mellen Pr 2005).

[36] See Rudina Jasini, 'Challenges in the Quest for Justice in Cambodia' (2010) Oxford Transitional Justice Research (OTJR) Working Paper Series, available at: <http://otjr.crim.ox.ac.uk/materials/papers/41/Jasini__ChallengesintheQuestforJusticeinCambodia.pdf> (accessed 28 February 2015).

> My first impression is I need to find justice for my parents. I thought that if I have a chance I would find justice for my parents as well as other Cambodian people. But the first thing I was most interested in was the information that the Royal Government of Cambodia and the United Nations had the plan to establish the court, and I was happy to hear so. I hope that if such a court was successfully established, I would try any ways I could to file the complaint to the court so that I can find justice for my parents and Cambodian nationals. I was happy and hopeful about the establishment of the court, because I thought that even if my parents were to die, they would do so in the knowledge that their son tried his best to find justice for them. I hope that people in the world, not just only Cambodian people, will participate in sentencing the Khmer Rouge leaders so that they may be held to account for the crimes they committed.[37]

Views such as those exemplified in the foregoing quotation seem to reflect to some extent the degree to which victims' perceptions of accountability have been shaped and influenced by the very establishment of the ECCC, and the educational impact that this has had on the importance and value of accountability for the atrocities committed.

1.1.2 Politico-Legal Dynamics and Challenges

The desire of the Cambodian government to retain ownership of the criminal proceedings in the ad hoc tribunal comes at a high price. To respond to the call for an independent and credible system of criminal law, as well as to comply with standards of international criminal justice, the Cambodian government must show a strong commitment to a fair trial process. Many concerns have cast a shadow over the ongoing criminal proceedings at the ECCC. First and foremost, a system where judges, investigating judges[38] and prosecutors are selected and appointed by the government, at least in part, raises serious doubts about the impartiality and independence of Cambodian judges and prosecutors, as

[37] Transcript of interview on file with the author (Civil Party Case 002, Siem Reap, 24 October 2014). All quotations taken from interviews conducted with victims have been left in their original wording. See further the methodology section in chapter 1.

[38] The nature, role and jurisdiction of the investigating judges, which are characteristic of many civil law legal systems such as those of France and Cambodia, will be explored in further detail in chapter 5.

well as questions about their susceptibility to political influence.[39] Secondly, as will be discussed further in this chapter, the reluctance of the Cambodian government to extend the scope of accountability beyond Case 001 and Case 002, and the constant pressure exerted on the Court through political interference, which has often manifested itself in prolonged delays in proceedings, have undoubtedly undermined the independence and efficiency of the Court. In this respect, Cambodian government officials as well as the Cambodian prosecutors and judges appointed to the ECCC have continuously shown reluctance and occasionally overt objection to cooperating with regards to the prosecution of further suspects, not least because a considerable number of those are themselves former Khmer Rouge members. Thus, Cambodian Prime Minister Hun Sen, himself a former Khmer Rouge official, reportedly asserted that further prosecutions would threaten political stability in the country.[40] More recently, following the announcement on 27 March 2015 of the international Co-Investigating Judge that a second accused had been formally charged in Case 004, Hun Sen further stated that Cambodia might sink back into a 'civil war,' if further charges against former Khmer Rouge cadres were to be brought.[41] This demonstrates in strong terms the tense and politically charged atmosphere within which the ECCC operates.

In addition to the political complexities outlined above, there are also legal dynamics and challenges affecting the Cambodian transitional justice mechanism. Thus, law is

[39] According to the ECCC's structure, which will be analysed in detail in section 3.1 of this chapter, the Chambers and the Office of the Co-Prosecutors include a minority nominated by the UN Secretary General, all of whom are non-Cambodian. A majority, effectively appointed on the nomination of Prime Minister Hun Sen, were selected from the government-controlled Cambodian judiciary. Human Rights Watch Report, 'Cambodia: Stop Blocking Justice for Khmer Rouge Crimes' 22 March 2015. See: <http://www.hrw.org/news/2015/03/22/cambodia-stop-blocking-justice-khmer-rouge-crimes> (accessed 25 March 2015).

[40] See Human Rights Watch Report (n 39).

[41] See <www.upi.com/top_news/world-news/2015/03/27/ex-khmer-rouge-official-charged-with-crimes-against-humanity/7231427498610/> (accessed 29 March 2015).

generally seen in Cambodia 'as an instrument to affirm the rightfulness of the power holders.'[42] This is hardly surprising, since rulers throughout Cambodian history were seen to be above the law. There persists a limited concept of accountability of public officials. Moreover, although offences such as perjury, bribery, and coercion of witnesses exist in the criminal law of Cambodia, no criminal offence exists for interfering with the course of justice.[43] Furthermore, the endemic problem of corruption in Cambodia is a real threat to the execution of justice.

The legal and procedural framework of the accountability mechanism in Cambodia represents one of the greatest challenges. The crimes over which the ECCC has jurisdiction include those from the 1956 Penal Code of Cambodia (homicide, torture, and religious persecution), as well as international crimes such as genocide, crimes against humanity and war crimes.[44] On the one hand, the Cambodian Penal Code of 1956 has not been applied since the days before the Khmer Rouge, which presents challenges as to its applicability. On the other hand, the unfamiliarity of the Cambodian judges of the ECCC with the principles of international law and their applicability can also present a major problem. Such legal, procedural, and evidentiary challenges, including complexities in the substantive law and gaps in procedural and evidentiary rules, render the quest for justice in Cambodia's post-conflict society all the more challenging and complex and could potentially undermine the ECCC's capacity to hold effective trials.

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[42] Bates (n 29) 191.

[43] Provisions Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia During the Transitional Period, 10 September 1992, passed during the United Nations Transitional Authority in Cambodia (UNTAC).

[44] ECCC Law, arts 3-8.

2. Transitional Justice in Cambodia

The previous section analysed the socio-cultural and politico-legal dynamics and challenges in Cambodia's post-conflict society, the impact of which on criminal justice has already been touched upon above. However, a more thorough examination of the conceptual and philosophical underpinnings of transitional justice in the context of gross violations of human rights specifically is indispensable to a critical analysis of victim participation at the ECCC, and its role in Cambodian post-conflict society.

Post-conflict societies are often faced with fundamental questions, such as 'how to address the heavy burden of their dark past,'[45] and what kind of transitional justice they wish to pursue. Having some mechanism of transitional justice in place is crucial in view of the task of building sustainable peace by advancing justice and securing reconciliation in a post-conflict society.[46]

Transitional justice is a complex notion, requiring careful planning and a realistic view of what is achievable in the circumstances and in the society in which the particular transitional justice mechanism is to operate. Whilst the scope and substance of such a mechanism are dependent on, and fact-sensitive to, the characteristics of the society at issue, the following generic definition of the term 'transitional justice' may tentatively be proffered: By and large, the notion of transitional justice is used to denote the array of judicial and non-

[45] Elmar G. M. Weitekamp, Stephan Parmentier, Kris Vanspauwen, Marta Valinas, and Roel Gerits, 'How to Deal with Mass Victimization and Gross Human Rights Violations: A Restorative Justice Approach' in Uwe Ewald and Ksenija Turković (eds), *Large-Scale Victimisation as a Potential Source of Terrorist Activities: Importance of Regaining Security in Post-Conflict Societies* (IOS Press 2006) 218.

[46] Rachel Kerr and Eirin Mobekk, *Peace and Justice: Seeking Accountability after War* (Polity Press 2007) 2.

judicial mechanisms, legal and social institutions established to address 'justice in the aftermath.'[47] In similar terms, Impunity Watch has defined 'transitional justice' as follows:

> The set of judicial and non-judicial measures implemented in countries attempting to deal with a violent past in order to redress the legacies of massive human rights abuses. Measures include criminal prosecutions, truth commissions, reparations programmes, and various kinds of institutional reforms.[48]

These comprehensive notions of transitional justice encompass more distinct concepts of justice, including retributive and restorative justice, which, as Weitekamp et al. illustrate, are often highlighted under the intertwined pillars of truth, accountability, reparation and reconciliation,[49] central ideas in transitional justice societies in response to massive human rights abuses. Something will be said here about each of these four pillars, which can be regarded as distinct manifestations of the overarching quest for 'justice'.

Thus the quest for truth, is strongly related to the needs of victims and of the community to know what has actually happened.[50] Revealing the truth, on a more instrumental level, is key to fostering personal, communal and national reconciliation. Nowhere is this more essential than in the context of a society haunted by the aftermath of a genocidal regime. No matter how painful and complex the truth might be, its revelation is often a prerequisite for any society to move forward. Yet truth is not easy to obtain, as it comes in various forms and derives from different sources. Nor is there any such thing as a

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[47] ibid 3; Rama Mani *Beyond Retribution: Seeking Justice in the Shadows of War (*Blackwell Publishers Ltd 2002) 3.

[48] Impunity Watch, *Promoting Victim Participation in Dealing with the Past and Transitional Justice, Comparative Research Framework* (March 2014). See <http://www.impunitywatch.org/html/index.php?trefwoord=Comparative+Research+Framework&x=25&y=8> (accessed 20 March 2015).

[49] Weitekamp et al. (n 45) 218.

[50] Jean-Marie Kamatali, 'Accountability for Genocide and other Gross Human Rights Violations: The Need for an Integrated and Victim-Based Transitional Justice' (2007) 9 Journal of Genocide Research 281.

single truth.[51] Nonetheless, the attempt to uncover the truth must be the first and foremost goal of any mechanism of justice, and the civil party participation scheme at the ECCC is an apt example of this. Victims in this regard can make a valuable contribution to the establishment of truth. As De Hemptinne argues, whilst acknowledging that seeking the truth may not be the only or even the primary motivation behind victims' participation in proceedings, civil parties and victims 'may bring relevant facts or evidences [sic] that are not provided by the prosecutor or defence, thereby helping the judges to develop a more nuanced view of the case.'[52] Similarly, in the context of the ICC *Lubanga* trial, Catani has observed that victims significantly assisted the Court in its determination of the truth.[53] Thus, truth-seeking in the context of transitional justice has two essential dimensions: on the one hand, it is important for victims and civil parties themselves in their broader quest for justice. On the other hand, truth-seeking is inherent to the functions of the ECCC – in fact, obtaining the truth is a condition precedent to the other pillars of the transitional justice mechanism.

The second pillar is accountability, a notion already touched upon in the context of the discussion of the socio-cultural and politico-legal context of Cambodian society. It has been asserted that, 'any examination of accountability for massive human rights violations in the region must confront these realities [challenges and complexities surrounding Cambodian post-conflict society] in the face of the obvious moral imperative for punishment,'[54] thus

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[51] Kerr and Mobekk (n 46) 5.

[52] Jérôme de Hemptinne, 'Challenges Raised by Victims' Participation in the Proceedings of the Special Tribunal for Lebanon' (2010) 8 Journal of International Criminal Justice 167.

[53] Lucia Catani, 'Victims at the International Criminal Court' (2012) 10 Journal of International Criminal Justice 919, as cited in Elisa Hoven, 'Civil Party Participation in Trials of Mass Crimes' (2014) 12 Journal of International Criminal Justice 5.

[54] Ralph Henham and Paul Behrens (eds), *The Criminal Law of Genocide: International Comparative and Contextual Aspects* (Ashgate 2007) 186, citing Steven R. Ratner and Jason S. Adams, *Accountability for Human Rights, Atrocities in International Law: Beyond the Nuremberg Legacy* (2nd edn Oxford University Press 2001) xliv.

stressing the link between accountability and transitional justice, and the view that justice must be served. Victims often call for criminal prosecution, linked with the desire among many to see an end to impunity for those who committed gross abuses of human rights.[55] Holding accountable those who caused harm and suffering allows for injustices against the victims to be 'vindicated through legal processes in the courts of the land.'[56] Accountability is a highly complex aspect of any justice system, and more so for a system of transitional justice. Fundamental questions must be answered, namely, what type of accountability is sought, and who should stand trial – whether defendants should be 'only the heads and the planners of gross violations of human rights, or also those who executed the orders and those who assisted them.'[57] This issue has particular significance in the context of the ECCC, which has been established to try those '*most* responsible'[58] for the Khmer Rouge atrocities.

The third pillar, reparation for victims, indicates a strong moral imperative, and 'in societies emerging from a period of exploitation and gross violation of human rights, appropriate action aimed at redressing the resentment and legitimate claims of victims and survivors is essential.'[59] The concept of reparation is closely related to, and indeed but one aspect of, the broader principle of restoration. The latter is not always a clearly-defined concept as it can range from reparative measures such as some form of financial compensation, restitution of goods, symbolic measures to rehabilitation through social

[55] Kerr and Mobekk (n 46) 4.

[56] Charles Villa-Vicencio, 'Transitional Justice, Restoration and Prosecution' in Dennis Sullivan and Larry Tifft (eds), *Handbook of Restorative Justice: A Global Perspective* (Routledge International 2006) 390.

[57] Weitekamp et al. (n 45) 219.

[58] See preamble and arts 1, 2, 5 and 6 of the Agreement between the UN and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea (UN-Cambodia Agreement), UN Resolution 57/228 of 18 December 2002, available at <http://www.eccc.gov.kh/sites/default/files/legal-documents/Agreement_between_UN_and_RGC.pdf> (accessed 6 March 2015); and see also ECCC Law, Arts 1 and 2.

[59] Villa-Vicencio (n 56) 394.

measures as well as to 'guarantees of non-repetition of alleged acts.'[60] It may take the form of individual or collective measures. It seems clear however that there is a limit as to what can be restored, for 'one cannot fully restore harmed persons, to their prior condition.'[61] This does not mean, however, that a system should not aspire to and strive towards the pursuit of victim restoration. The approach adopted by the ECCC in relation to the restorative principle is in itself an advance in international criminal justice, particularly in contrast to the previous ad hoc and hybrid international criminal tribunals. However, as will be discussed in detail in the following chapters, the ECCC's jurisdiction and legal-procedural framework impose limitations on the nature, form and scope of reparations awarded to civil parties.

The fourth and final pillar is reconciliation, a critical and in fact quintessential – and some would say, 'overriding'[62] – objective of any transitional justice mechanism. It is one of the core principles underlying the ECCC Agreement between the United Nations and the Royal Government of Cambodia.[63] A fundamental question in any society that has suffered long-term conflict is how that society can regain some form of social cohesion allowing it to move forward.[64] A particular difficulty concerns the issue of how reconciliation can be made to transcend the individual plane and apply across an entire society. It is evident that any form of reconciliation requires that both victims and perpetrators be involved. Accordingly, reconciliation represents a two-way process: on the one hand, a retrospective process

[60] Weitekamp et al. (n 45) 220.

[61] ibid.

[62] Ken Gee-kin Ip, 'Fulfilling the Mandate of National Reconciliation in the Extraordinary Chambers in the Courts of Cambodia (ECCC): An Evaluation Through the Prism of Victim's Rights' (2013) 13 International Criminal Law Review 865.

[63] See <http://www.eccc.gov.kh/sites/default/files/legal-documents/Agreement_between_UN_and_RGC.pdf> (accessed 15 March 2015).

[64] Weitekamp et al. (n 45) 220.

addressing the causes of the past conflict; and on the other hand, a prospective process aimed at building a sustainable peace.[65]

It is clear from the above that the pursuit of transitional justice in Cambodia, as in any other post-conflict society, requires careful planning, taking into account the exigencies of truth, accountability, reparation, and reconciliation under the overarching principle of achieving 'justice'. The time factor is clearly important in this context. Thus, the very delay in bringing proceedings relating to atrocities committed more than thirty-five years ago may affect victims' prospects for justice. For example, the process of fact-gathering and truth-seeking is undoubtedly hindered by the long period between the timing of the alleged crimes and the commencement of trial proceedings. Similarly, the idea of holding perpetrators accountable for their actions may be attenuated due to the old age of the accused. The notion of transitional justice thus requires at the outset a thorough and realistic evaluation of what might be achieved, and must address the role to be fulfilled by victims in transitional justice mechanisms.

Unsurprisingly, contemporary mechanisms of transitional justice have increasingly focused on victims, as part of more victim-centred processes brought about by the advancement of restorativism. This increasing focus can be observed not only in the realm of policy-making and judicial processes, but equally in scholarly discourse. Thus, the expansive role granted to victims of the Khmer Rouge has been the subject of elaborate debate among policymakers, academics and practitioners alike. Although still in the early stages of evolution, the application of civil party participation in the trials at the ECCC concluded thus

[65] Phil Clark, 'Hybridity, Holism and 'Traditional' Justice: The Case of the Gacaca Community Courts in Post-Genocide Rwanda' (2007) 39 George Washington International Law Review 765.

far, has offered the international community a deeper understanding of victim participation as a complex transitional justice mechanism, and more specifically of both legal practitioners' and victims' perceptions and attitudes towards this mechanism as applied by the ECCC.[66]

3. The ECCC as a Transitional Justice Mechanism

The longstanding aspiration of the victims of the Khmer Rouge to bring to justice those most responsible for the atrocities has been 'a slow and lengthy affair, hampered over the past thirty years by both Cambodian and international politics.'[67] Robust attempts to establish an accountability mechanism in Cambodia gained momentum in the late 1990s, when Cambodian Prime Minister Samdech Hun Sen announced, after six years of negotiations with officials of the UN, that the 'time [had] come for those responsible for planning and directing this horror to be held accountable for their crimes.'[68] The period immediately after that statement was followed by several initiatives focused on exploring the possible options for bringing former Khmer Rouge leaders to justice.[69] One of the options was the creation of a Truth and Reconciliation Commission (TRC).[70] However, according to the official report at the time, this model did not find sufficient support among Cambodians.[71] Ultimately, the Group of Experts appointed by the UN Secretary General, mindful of the political and social

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[66] ECCC Law arts 3-8.

[67] See Shane Darcy, 'Dilemmas of Delayed Justice for the Crimes of the Khmer Rouge' (2008) Oxford Transitional Justice Research (OTJR) Working Paper Series, available at < http://www.csls.ox.ac.uk/documents/Darcy_F.pdf> (accessed 28 February 2015).

[68] Declaration by Samdech Hun Sen, Prime Minister of the Royal Government of Cambodia, available at <http://www.cambodia.gov.kh/krt/english/introduction_eng/#PREFACE> (accessed 5 March 2015).

[69] See Report of the Group of Experts for Cambodia established pursuant to General Assembly Resolution 52/135, Document No. A/53/850 S/1999/231, 16 March 1999, 33-34, available at <http://cambodia.ohchr.org/WebDOCs/DocReports/4-Other-Reports/Other_CMB16031999E.pdf> (accessed 18 March 2015).

[70] Marten Zwanenburg, 'Much Truth about Truth Commissions', Review of Priscilla B. Hayner, 'Unspeakable Truths: Confronting State Terror and Atrocity' (2002) 3 Human Rights and Human Welfare 130.

[71] ibid.

context in which the trials would occur,[72] recommended that 'the Cambodians reflect on a process that would be most desirable to the Cambodian people,'[73] in which the intertwined goals of individual accountability and national reconciliation would serve as the pillars upon which this justice mechanism would operate. Following the UN-Cambodia Agreement,[74] a unique criminal tribunal, with a strong restorative justice element embedded in civil party participation, was established. This effort marked the first step towards what ultimately became the ECCC. Six years of contentious and scrupulous negotiations brought forth a hybrid criminal tribunal that has no true precedent in international criminal law.[75] To understand the uniqueness of this tribunal, it must be viewed in light of the underlying 'balance struck between the Cambodian government's desire to retain ownership (or arguably control) and the United Nations' concern to ensure that international standards of justice are protected.'[76]

As in many post-conflict societies, the architects of the ECCC 'had to consider a range of sometimes competing objectives.'[77] In this context, a natural question to ask is where this unique tribunal stands thus far against the gold standard for international criminal justice? In

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[72] Although no longer in power, it could be said that several former Khmer Rouge cadres who had defected do now occupy important positions in Cambodia's political scene.

[73] See (n 69) 33-34.

[74] See (n 58) UN-Cambodia Agreement.

[75] It appears that during the negotiations with the UN, Prime Minister Hun Sen had rejected the UN proposals for a fully independent tribunal, and had delayed progress towards the establishment of a court, thereby creating tensions with then-UN Secretary General Kofi Annan, who was in favour of the establishment of a court that met international standards of independence and fairness. Eventually, an agreement was reached to establish what would become the ECCC. See Human Rights Watch Report (n 39).

[76] Elena Rose, 'A Predictable Disagreement with an Uncertain Outcome' (2009) Oxford Transitional Justice Research (OTJR) Working Paper Series, 1 available at <http://www.csls.ox.ac.uk/documents/RoseFinal.pdf> (accessed 18 March 2015).

[77] John D Ciorcari, 'Who Should Stand Trial in Cambodia?' (2008), Oxford Transitional Justice Research (OTJR) Working Paper Series, 1 available at <http://www.csls.ox.ac.uk/documents/Ciorciari_Final.pdf> (accessed 06 March 2015).

this regard, it is important to consider that the framers had to bear in mind that the ECCC's work would be measured against norms and standards of international criminal justice that were already well-established. Thus, as Jain has argued,

> Ubiquitous and multifaceted there seems to be no limit to what [international criminal tribunals] are expected to achieve – in addition to the usual goals of criminal justice, they are tasked with achieving peace, telling a much contested truth, creating historical records for societies and educating the world against the horrors of mass violence.[78]

Yet among all these goals, an additional aim of the ECCC is to accommodate the needs of victims of the Khmer Rouge and to bring about justice for them.[79] As Youk Chhang, the Executive Director of the DC-Cam and a survivor of the Khmer Rouge said about the many overarching objectives of, and the great expectations regarding the ECCC, it is like 'giving an extra-large shirt to fit a court with tiny shoulders.'[80] From the outset it appeared to be an almost impossible mission to operate such a multifaceted tribunal, hobbled by domestic and international negotiations, unreliable political support and occasional political interference, inadequate and uncertain funding, and the absence of other resources needed. Although not uniformly endorsed, the ECCC is perceived as a transitional justice mechanism established to punish the guilty, obtain the much-contested truth, create an historical record, educate the public, and, equally importantly, address victims' rights and needs.

Today, the ECCC stands as the sole judicial body established to try the most senior leaders of the Khmer Rouge. Initially, five former Khmer Rouge officials, the most senior surviving leaders of the Khmer Rouge regime, were in the custody of the Court. The

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[78] Jain (n 30) 289.

[79] Dame Silvia Cartwright (ECCC Trial Chamber Judge), 'International Criminal Trial. A promise fulfilled?' (The 2011 Annual Hawke Lecture, Adelaide 9 June 2011) available at <http://w3.unisa.edu.au/hawkecentre/ahl/2011AHL_Cartwright.pdf> (accessed 08 March 2015).

[80] Transcript of interview on file with the author (Phnom Penh, 22 September 2014).

defendant in Case 001, Kaing Guek Eav, better known as *Duch*, was the chief of the infamous S-21 prison camp in Phnom Penh. His trial was completed on 26 July 2010.[81] The other four defendants, Nuon Chea, Ieng Sary, Khieu Samphan, and Ieng Thrith were set to be tried jointly in Case 002.[82] However, the death on 14 March 2013 of the second accused, the former Foreign Minister of the Khmer Rouge, and the release under judicial supervision in August 2012 of the fourth accused, the former Social Action Minister, who was ruled unfit to stand trial due to her worsening dementia, have brought into sharper focus the diminished scope of the accountability mechanism in Cambodia.[83] Cases 003 and 004, which involve five additional senior Khmer Rouge leaders, have been under investigation for several years now.[84] On 3 March 2015, the international Co-Investigating Judge, Mark Harmon, charged in absentia Meas Muth[85] in Case 003, and Im Chaem[86] in Case 004 for their alleged crimes

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[81] *Case of Kaing Guek Eav (Case 001),* Trial Chamber Judgement, 26 July 2010.

[82] The trial commenced with the start of the initial hearing on 27 June 2011. The opening statements in the trial commenced on 21 November 2011.

[83] See <www.eccc.gov.kh/en.case/topic/2>; See also Human Rights Watch Report, 'Cambodia: Ieng Sary Death Shows Khmer Rouge Court Failings', 14 March 2013 <http://www.hrw.org/news/2013/03/14/cambodia-ieng-sary-death-shows-khmer-rouge-court-failings> (accessed 06 March 2015).

[84] In November 2008, the then-international Co-Prosecutor Robert Petit proposed investigations into five additional suspects, including two former Khmer Rouge military commanders, Sou Met and Meas Muth (Case 003); and three former Khmer Rouge local officials, Aom An, Im Chem, and Yim Tit (Case 004). However, the Cambodian Co-Prosecutor Chea Leang and subsequently the Cambodian Co-Investigating Judge You Bunleng rejected the proposal and objected to the continuation of the investigation.

[85] The allegations against Meas Muth, a former high ranking Khmer Rouge navy commander, include: homicide, as a crime under the 1956 Cambodian Penal Code; the crimes against humanity of murder, extermination, enslavement, imprisonment, persecution on political and ethnic grounds, and other inhumane acts allegedly committed at Wat Enta Nhien security centre, Kampong Som, Kratie, S-21 security centre, and against Vietnamese, Thai and other foreign nationals at sea and on the islands over which Democratic Kampuchea claimed sovereignty; and grave breaches of the Geneva Conventions of 1949 through the commission of the crimes of unlawful confinement of civilians, willful deprivation of a prisoner of war or civilian's rights to fair and regular trials, willful killing, unlawful deportation or transfer, willful causing of great suffering or serious injury to body or health, and torture, allegedly committed in Kampong Som, Kratie, S-21 security centre, and against Vietnamese, Thai and other foreign nationals at sea and on the islands over which Democratic Kampuchea claimed sovereignty. See the statement of the International Co-Investigating Judge regarding Case 003,
<http://www.eccc.gov.kh/en/articles/international-co-investigating-judge-charges-meas-muth-absentia-case-003> (accessed 22 March 2015).

[86] The allegations against Im Chaem, a former Khmer Rouge district chief, include: homicide, as a violation of the 1956 Cambodian Penal Code, allegedly committed at Phnom Trayoung security centre and Spean Sreng worksite; the Crimes against Humanity of murder, extermination, enslavement, imprisonment, persecution on

during the Khmer Rouge regime. On 27 March 2015, a second accused, Ao An (aka Ta An) was charged in Case 004.[87] Despite this recent and tentatively positive development, it remains uncertain whether these two cases will progress much further, as efforts by the Court continue to be undermined by the unwillingness of Cambodian officials to cooperate in bringing these cases before the Court.[88] This goes to highlight further the ECCC's challenge in manoeuvring between demands for a more comprehensive prosecution effort that might undermine Cambodian political support for the ECCC trials and a focus on only a handful of senior Khmer Rouge officials that could undermine genuine accountability.[89] An analysis of the ECCC's structure and organisation, as well as its legal and procedural framework, will therefore offer a more insightful understanding of the ECCC's implications for the effective realisation of justice.

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political grounds, and other inhumane acts at the Phnom Trayoung security centre; and the Crimes against Humanity of murder, enslavement, imprisonment, and other inhumane acts at the Spean Sreng worksite. See the statement of the International Co-Investigating Judge regarding Case 004, <http://www.eccc.gov.kh/en/articles/international-co-investigating-judge-charges-im-chaem-absentia-case-004> (accessed 22 March 2015).

[87] The allegations against Ao An, a former deputy secretary in the Central Zone of Democratic Kampuchea, include: premeditated homicide as a violation of the 1956 Cambodian Penal Code, allegedly committed at Kok Pring execution site, Tuol Beng security centre and Wat Au Trakuon security centre; and the crimes against humanity of murder, extermination, persecution on political and religious gorunds, imprisonment and other inhumane acts. See the statement of the International Co-Investigating Judge regarding Case 004, <www.eccc.gov.kh/en/articles/international-co-investigating-judge-charges-ao-case-004> (accessed 29 March 2015.)

[88] The pressure imposed by the Cambodian Government and the tension underlying the work of the Co-Investigating Judges and Co-Prosecutors was fully exposed when the Co-Investigating Judge Laurent Kasper-Ansermet resigned on 4 May 2012, announcing that his work has been constantly contested by the National Co-Investigating Judge, highlighting the politically charged environment that obstructed his work as a judge. Furthermore it was stated that, 'In view of the victims' right to have investigations conducted in a proper manner and despite his determination to do so, Judge Laurent Kasper-Ansermet considers that the present circumstances no longer allow him to properly and freely perform his duties'. See <http://www.eccc.gov.kh/en/articles/press-release-international-reserve-co-investigating-judge> (accessed 22 March 2015); See also, Zsombor Peter and Phorn Bopha, 'No More Khmer Rouge Trials, Premier Tells Ban' *The Cambodia Daily* (Phnom Penh 28 October 2010) 1; Cheang Sokha and James O'Toole, 'Hun Sen Shoots from the Lip: Cases after 002 Face Embargo' *Phnom Penh Post* (Phnom Penh 28 October 2010).

[89] Jain (n 30) 253.

3.1 ECCC's Structure and Organisation

The ECCC is a hybrid criminal tribunal grounded in local law and procedure, applying international standards of justice where required, relying on both national and international cooperation to function, and operating under the technical and financial assistance provided by donor countries of the United Nations. The classification of a tribunal as 'hybrid' depends on a variety of criteria, including: the tribunal's legal basis, its location within or outside of a domestic court system, its subject matter jurisdiction, and the composition of the tribunal's personnel.[90] In respect of the ECCC, the Court is established and operated by UN and Cambodian officials; it has a unique relationship with the domestic court system; and it has five sources of applicable law, as discussed in section 3.2 below.[91]

The ECCC organisational framework is designed to ensure the execution of justice through a system of checks between various organs and levels of inquiry. The exceptional nature of the ECCC structure is clearly highlighted in the mixed composition of its organs. Unlike other international or national criminal courts, the ECCC has two Co-Prosecutors, one Cambodian and one foreign. The same structure applies to the Office of the Co-Investigating Judges, and extends to almost every organ of the tribunal. The notion of this unusual 'cohabitation' between national and international prosecutors and judges derives from the aims that underpinned the establishment of the tribunal; namely, the attempt to provide the Cambodian people with the opportunity to obtain justice from within. It was for this very reason that it was considered fitting for Cambodians to work together with the international community in trying those most responsible. However, this 'cohabitation', which has

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[90] John Cerone and Clive Baldwin, 'Explaining and Evaluating the UNMIK Court System' in Cesare Romano, André Nollkamper and Jann K. Kleffner (eds), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia* (Oxford University Press 2004) 41-58.

[91] See section 3.2 below.

characterised the ECCC from its inception, has foreshadowed a number of challenges and disputes faced by various organs of this Tribunal, more specifically with regards to the civil party participation scheme.

Compared to other permanent and ad hoc tribunals where the adversarial system dominates the proceedings, the ECCC proceedings are characterised by an inquisitorial model, which increases the level of scrutiny by the Court.[92] This approach resulted mainly from the strong reliance of the domestic Cambodian legal order on the French inquisitorial legal system, pertinent aspects of which were examined in chapter 2. According to this model, the discretion regarding how to proceed with the investigations lies with the judicial authority of the Co-Investigating Judges rather than with the Co-Prosecutors. Thus, the investigation of a case is subject to two layers of scrutiny, with the second one, that of the Co-Investigating Judges, being superior.

The Co-Prosecutors have joint exclusive competence to initiate criminal prosecutions of crimes within the ECCC jurisdiction on the basis of a complaint or *proprio motu.*[93] Additionally, they have the power to conduct preliminary investigations to determine whether crimes that were committed fall within the Court's jurisdiction, as well as to identify potential suspects and witnesses.[94] The issue of how best to exercise discretion regarding which suspects to prosecute has been the subject of considerable debate. According to the UN-Cambodia Agreement and the ECCC Law, the ECCC would be empowered to try only 'senior leaders' and others deemed most responsible for the widespread atrocities of the

[92] Guido Acquaviva, 'New Paths in International Criminal Justice? (2008) 6 Journal of International Criminal Justice 135.

[93] ECCC Internal Rules, r 49.

[94] ibid r 50.

Khmer Rouge regime.[95] The discretion afforded to the ECCC Co-Prosecutors, however, is subject to limits of temporal, material, and personal jurisdiction, 'which serve as an initial limitation as to whom the Co-Prosecutors may indict.'[96]

Many arguments have focused on how the Co-Prosecutors are to decide whom to prosecute, since a special formula is employed to solve the puzzle. For example, a significant dispute arose between the Cambodian and the international Co-Prosecutor on 24 December 2008 concerning the potential judicial investigations against six new suspects. This debate became highly publicised when the international Co-Prosecutor publicly announced his intention to submit the disagreement to the Pre-Trial Chamber. The Cambodian Co-Prosecutor argued that the expansion of investigations to suspects beyond the five already in pre-trial detention would 'contradict the original mandate of the ECCC, overstretch its duration and budget, and undermine national stability and reconciliation.'[97] Nonetheless, political reality suggests that this kind of reluctance on the part of the national Co-Prosecutor is likely to continue, and highlights some of the tension intrinsic to the model of national and international Co-Prosecutors. In terms of general procedure, once the Co-Prosecutors have completed their preliminary investigation, the case file and an introductory submission are sent to the Co-Investigating Judges.[98] The Co-Prosecutors also have a legal obligation to disclose all exculpatory evidence to the Co-Investigating Judges.[99]

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[95] UN-Cambodia Agreement at preamble, arts 1, 2 and 5; and ECCC Law, art 1.

[96] Jain (n 31) 257.

[97] Cat Barton, '6 New Tribunal Suspects Likely: Sources' *Phnom Penh Post* (Phnom Penh 24 December 2008); Brendan Brady, 'No More KR suspects: Cambodian Prosecutor' *Phnom Penh Post* (Phnom Penh 6 January 2009) 1.

[98] ECCC Internal Rules, r 53 (1) and (2).

[99] ibid r 53 (2) and (4).

The Co-Investigating Judges have the final authority to investigate the facts laid out by the Office of the Co-Prosecutors,[100] as well as to lodge criminal charges against individuals regardless of whether those individuals are identified in the Co-Prosecutors' submissions.[101] The Co-Investigating Judges rely on the information presented by the prosecution, but they are independent in exercising their authority. All parties in a criminal case, including the victims, have the right to request the Co-Investigating Judges to carry out investigations. The power to grant protective measures for victims and witnesses also lies within the Co-Investigating Judges' authority.[102] At the conclusion of the investigation process, the Co-Investigating Judges notify all parties about the criminal charges against the accused.[103]

The Chambers of the ECCC are composed of a five-judge Pre-Trial Chamber, a five-judge Trial Chamber and a seven-judge Supreme Court Chamber.[104] The Chambers of the ECCC are another unique aspect of its operational structure. The majority of judges in each chamber are Cambodian, as are the respective presiding judges.[105] The ECCC has adopted a super-majority formula for decision-making. In practice, however, the ECCC strives to achieve decisional unanimity.[106] The Pre-Trial Chamber plays an important role in the disputes that have arisen at this early stage, as it strives to achieve a balance between the Co-Prosecutors and the Co-Investigating Judges. The Pre-Trial Chamber is also responsible for

[100] ibid r 55 (2) and (3).

[101] ibid r 55 (4).

[102] ibid.

[103] ibid r 66 (I).

[104] ECCC Law, art 9.

[105] ibid.

[106] ibid art 14.

appeals against orders and decisions of the Co-Investigating Judges.[107] This is a key responsibility, since it was this specific procedure that was central to the issue of victim participation at the beginning of ECCC trial proceedings. The trial itself will be conducted by the Trial Chamber.[108] A further appeal on both law and fact lies to the Supreme Court Chamber, which acts as a court of final instance.[109] Decisions of the Chamber are final, and may not be remitted back to the Trial Chamber once made.[110]

3.2 The ECCC Legal and Procedural Framework

One of the most important developments for justice and reconciliation in Cambodia was the adoption of a new and distinctive legal framework to govern the ECCC. While a set of factors has influenced the development of the ECCC's substantive and procedural law, three primary factors have most substantially contributed to the ECCC legal and procedural framework. First, due to Cambodia's colonial past, the ECCC is heavily influenced by the French civil law tradition, which is a departure from other international criminal tribunals, which have adopted an approach grounded more in the common law tradition. Second, due to the mixed composition of its organs, the two Co-Prosecutors (one Cambodian and one international) have joint, exclusive competence to initiate the prosecution of crimes, and two Co-Investigating Judges (one Cambodian and one international) are jointly responsible for investigating the facts. Third, the super-majority formula adopted by the Pre-Trial Chamber,

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[107] ECCC Internal Rules, rr 73 and 74. See also Statement of the Co-Prosecutors, deciding to appeal against the Closing Order of 8 August 2008 indicting Kaing Guek Eav, alias *Duch*, available at <www.eccc.gov.kh/english/cabinet/courtDoc/121/2008-08-21_OCP_Statement.pdf> (accessed 16 March 2015).

[108] ECCC Internal Rules, r 79.

[109] ECCC Law art 26; ECCC Internal Rules, r 104.

[110] ibid.

the Trial Chamber and the Supreme Court Chamber, means that at least one of the international judges must agree to any decision taken.[111]

The ECCC has five sources of applicable law, comprising the Framework Agreement between the UN and Cambodia, the ECCC Law, the Internal Rules, the Cambodian Penal and Criminal Procedure Codes, and international standards.[112] However, the adoption of a functioning legal framework was the result of many discussions and compromises. The prevailing structure available to the ECCC was fraught with confusion and lacked key procedural elements. The long process of determining the scope of the ECCC's personal jurisdiction and identifying those most responsible for the Khmer Rouge atrocities has been complex and filled with controversy. The ECCC has jurisdiction over domestic crimes under the 1956 Penal Code of Cambodia (including homicide, torture, and religious persecution) and international crimes such as genocide, crimes against humanity, war crimes, grave breaches of the Geneva Conventions, the destruction of cultural property during armed conflict pursuant to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, and crimes against internationally protected persons pursuant to the 1961 Vienna Convention on Diplomatic Relations.[113] Yet, at the outset, as with many other aspects of this hybrid tribunal, the substantive and procedural law was not very clearly defined. Three important components initially formed the legal foundations of this Tribunal: the UN–Cambodia Agreement, Cambodian legislation on the ECCC, and existing domestic

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[111] Sylvia De Bertodano, 'Problems Arising from the Mixed Composition and Structure of the Cambodian Extraordinary Chambers' (2006) 4 Journal of International Criminal Law 285.

[112] Brianne McGonigle Leyh, 'Strengthening the Participation of the Victims at the ECCC? A Look at the Revised Legal Framework for Civil Party Participation' (2010) Oxford Transitional Justice Research (OTJR) Working Paper Series, available at <http://www.csls.ox.ac.uk/documents/McGonigle_TheLegalFrameworkofVPattheECCC.pdf> (accessed 7 March 2015).

[113] ECCC Law.

penal and procedural codes. However, it quickly became apparent that this legal framework did not offer the most viable and consistent package for conducting the trials at the ECCC. This initial framework did not answer many important procedural questions, such as the role of victims in proceedings dealing with mass atrocities. This was aggravated by the lack of clarity of the successive domestic codes of criminal procedure and the endemic corruption that has characterised Cambodian judicial institutions.[114]

In light of this situation, the ECCC was compelled to draft a new set of Internal Rules, published on 12 June 2007, to overcome the issues relating to 'clarity, fairness, corruption, and usurpation of the judicial process.'[115] Above all, the Internal Rules, which were drafted and revised by the ECCC judges and form the authoritative source of procedural law, set out provisions that regulate the participatory rights of victims in proceedings.[116] Since then, the Internal Rules have been subject to several revisions, with the last one completed on 16 January 2015. The Internal Rules together with the ECCC Law and the Cambodian Criminal Procedural Code (CPC) form the substantive and procedural law under which the ECCC operates. The new procedural framework is integral to furthering justice, since it has given shape, albeit insufficiently and, as will be seen below, belatedly, to the distinctive role of victims in trial proceedings.

Although it has become a particularly salient feature of the ECCC, the incorporation of victims as civil parties did not find any mention in the Framework Agreement or the ECCC Law. An interesting revelation from the interviews conducted with officers at the ECCC

[114] Acquaviva (n 92) 132.

[115] Brianne McGonigle, 'Current Legal Developments. Two for the Price of One: Attempts by the Extraordinary Chambers in the Courts of Cambodia to Combine Retributive and Restorative Justice Principles' (2009) 22 Leiden Journal of International Law 136.

[116] ECCC Internal Rules, r 23 (6), (7), (8) and (9).

offered some insight into why the ECCC appeared 'unprepared' to grapple with questions concerning victim participation. Arguably, the sole reason why civil party participation was even considered as a transitional justice mechanism at the ECCC was because of a stray word in the ECCC Law. Thus, the only reference to the concept of civil party participation can be found in Article 36 of the ECCC Law, which grants *victims* a right of appeal to the Supreme Court Chamber. As was explained by a senior legal officer in Chambers,

> I understand that the only basis for putting a form of victim participation is an interpretation of this one phrase. It was as if it were to be a typographical error, as there is no reference to victims in the legal framework of the ECCC. And the answer to that from the civil lawyers was that, we are not quite sure as to how to give effect to that, but one system that we are familiar with is the civil party system, and hence it was born. I refer to it as the most expensive typographical error in the history of the courts.[117]

This goes to highlight the way in which civil party participation was dealt with from its inception and throughout the trials. Even though no single legal issue at the ECCC gained as much attention as the issue of the participation of victims as civil parties in legal proceedings, interestingly enough, its framework was one of the last issues to be considered by the ECCC judicial officers.[118] This was presumably related to the complexity of designing an appropriate and workable scheme for victim participation.

The form, nature, scope and implication of civil party participation in proceedings before the ECCC will be examined in detail in chapters 5 and 6. What is important to note at this stage is the incremental evolution of the rights of victims in ECCC proceedings, as well as the more or less haphazard nature by which it came about. This, alongside the complex socio-cultural and politico-legal dynamics and challenges examined above, goes some way

[117] Interview with Susan Lamb (Participant 4) Senior Legal Officer, Chambers, ECCC (Phnom Penh 9 April 2012), notes on file with the author.

[118] David Boyle, 'The Rights of Victims: Participation, Representation, Protection, Reparation' (2006) 4 Journal of International Criminal Justice 310. See also McGonigle (n 112) 138.

towards explaining the difficulties of civil party participation as a transitional justice mechanism in Cambodia.

This chapter has demonstrated the current breadth of the study of, and research into, the Cambodian transitional justice process. It has offered a contextual perspective on the legal responses to serious human rights abuses in Cambodia, and on the unique role afforded to victims of the Khmer Rouge to participate as civil parties in the ECCC proceedings. The general analysis of the dominant historical events leading up to the Khmer Rouge regime and the particular nature of the mass victimisation that unfolded in Cambodia has provided the background for a better understanding and appreciation of the need for accountability and justice for the victims of the Khmer Rouge. Furthermore, the different socio-cultural and politico-legal dynamics and challenges conditioning the Cambodian transitional justice model, and ultimately culminating in the establishment of the ECCC, have highlighted the terrain in which the Cambodian transitional justice mechanism operates.

This was followed by a more conceptual examination of what is meant by 'transitional justice'. It has been seen that any transitional justice mechanism rests on four overarching pillars, namely searching for the truth, ensuring accountability, enabling reparations, and fostering reconciliation. The notion of 'justice' may take a number of different forms, and can be served through a number of diverse mechanisms. Clearly, a society cannot recover from outrages that remain concealed and unacknowledged. As Hannah Arendt has memorably written, we 'are unable to forgive what we cannot punish.'[119] It is thus imperative for any post-conflict society to establish an accountability mechanism that best attains the demands of justice. The establishment of the ECCC as a hybrid criminal tribunal was aimed at

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[119] Quoted in Minow (n 4) 4.

achieving a broad range of overarching goals including, as seen above, truth, accountability, reparation, and reconciliation. Different conceptions of justice, in particular restorative and retributive justice, may give different weight to those factors. However, both restorative and retributive elements are incorporated under one umbrella institution in the form of the ECCC, in recognition of the fact that this joint incorporation best serves the prospect of building a just society and a sustainable peace in Cambodia. The ECCC's unique structure, its complex legal-procedural framework, and the overall nature of the ECCC as a transitional justice process as explored this chapter have created the necessary foundations for a full examination and understanding of the nature, form and role of civil party participation at the ECCC. Such an analysis is indispensable to establishing a contextual understanding and a critical evaluation of the scope and parameters of civil party participation as well as its practical implications, which will be discussed in chapters 5 and 6.

CHAPTER 5

Characterising Victim Participation at the Extraordinary Chambers in the Courts of Cambodia: A Balancing Act

The empowerment of Khmer Rouge victims featured in the direct and active form of their participation as primary stakeholders with 'decision-making clout'[1] at the Extraordinary Chambers in the Courts of Cambodia (ECCC) has brought into sharper focus the need for a more critical and comprehensive understanding of victim participation as both an approach and a principle. Whilst the apparent benefits of participation seem self-evident, the manner in which civil party participation has been crafted and interpreted in the first and second trials before the ECCC has raised some important themes and questions regarding its role and impact with respect to the functionality of court proceedings, the rights of the accused, and the rights of the victims themselves.

Building on the contextual, substantive and procedural framework of the ECCC as a transitional justice mechanism in Cambodian post-conflict society, highlighted in the previous chapter, this chapter provides a thorough normative and empirical examination of the role, form, scope and implications of civil party participation as a restorative justice element in a retributive justice mechanism. It critically examines the ways in which civil party participation has been interpreted and shaped in the trials before the ECCC. It does so by analysing how the rights of victims to remedies for violations of international human rights have been dealt with by the ECCC, and by evaluating, on a more specific level, the ECCC's challenges in balancing the rights of victims and of the accused.

[1] Sherry R. Arnstein 'A Ladder of Citizen Participation' (1969) 35(4) Journal of the American Planning Association 216-224. A figurative expression intended to denote victims' indirect and intangible influence by virtue of their participation on the decision-making process.

In this chapter, the argument is structured around three broad sections. The first section starts with an overview of the various forms of participation that victims may engage in at the ECCC, as complainant, witness, or civil party. It proceeds with a detailed analysis of the form, content, legal and procedural framework of civil party participation. It critically examines the procedural rights that victims have with regards to the various stages of the criminal process as well as the substantive remedies that victims may obtain, as envisaged in the ECCC Internal Rules and developed in the ECCC jurisprudence.

The second section focuses on an analysis of the contextual application and interpretation by the ECCC of the fundamental rights of victims to remedies as recognised and enshrined in the 2006 Basic Principles.[2] The ECCC Internal Rules specify that the purpose of civil party participation is twofold: to support the prosecution and to secure collective and moral reparations.[3] Defining the scope and boundaries of the reparation scheme at the ECCC has appeared more as a work in progress than as a well-conceived model that is grounded in reality. The limitations observed in the reparations awarded in Case 001 and Case 002/01 have undoubtedly highlighted the difficult territory in which the Court finds itself, often described as being 'between a rock and a hard place'[4] with regards to reparations.

The third section examines from a procedural standpoint how civil party participation overall has shaped the trial proceedings at the ECCC. It evaluates the challenges the ECCC has struggled with in finding the most feasible way in which to strike a balance between the

[2] See chapter 3, footnote 11.

[3] ECCC Internal Rules, r 23 (1).

[4] Interview with Susan Lamb (Participant 4) Senior Legal Officer, Chambers, ECCC (Phnom Penh 9 April 2012), notes on file with the author.

rights of victims and the rights of the accused, as well as to ensure the effective and efficient operation of the court. More specifically, it explores what the impact of civil party participation is on the court proceedings, particularly as regards trial length and disclosure issues. It examines the effects of civil party participation on the defence and prosecution as well as unintended effects that such participation has on victims themselves. Chapter 6 will address the latter issue, and examine in detail victims' perspectives, perceptions and attitudes regarding the benefits and shortcomings of their participation.

1. Characterising Victim Participation at the ECCC

There is perhaps no stronger affirmation of the power of victims' voices in criminal trials than when that power is recognised by the judges themselves. As Judge Cartwright has highlighted,

> Any lawyer or judge will tell you that the dry words of an indictment charging an accused with serious crimes come alive when the victim speaks in court…More significantly for me, the victim testimony gave a real vibrancy to the history of the regime and took us all back to the country as it was in the 1970's under Pol Pot's leadership.[5]

Such recognition speaks not only to the symbolic nature but also to the meaningful role that victims could potentially play in a criminal trial of this scale. As the international Lead Co-Lawyer representing civil parties in Case 002/01 affirmed, 'in a way the civil party brings a human aspect to the proceedings.'[6] Such a sentiment fits well with the rhetoric of victims' rights advocates, who see the 'invitation' of victims by the Court to participate as a platform

[5] Dame Silvia Cartwright (ECCC Trial Chamber Judge), 'International Criminal Trial. A Promise Fulfilled?' (The 2011 Annual Hawke Lecture, Adelaide 9 June 2011) available at <http://w3.unisa.edu.au/hawkecentre/ahl/2011AHL_Cartwright.pdf> (accessed 08 March 2015).

[6] Interview with Elisabeth Simonneau-Fort (Participant 3) Civil Party Lead Co-Lawyer, ECCC Case 002 (Phnom Penh 7 April), notes on file with the author.

for them to demonstrate our humanity by giving a voice to their injury and victimisation.[7] The importance and centrality to transitional justice of victim participation has therefore been openly acknowledged and indeed trumpeted by different stakeholders including human rights advocates, policy makers and judges themselves.

The incorporation of victim participation at the ECCC is thought to mark a significant advance for the victims' rights movement. While a set of factors has influenced this major advancement, three primary developments have most substantially contributed to the creation of the civil party participation scheme at the ECCC: first, an unyielding effort by Cambodian human rights organisations, which prepared the terrain and led the effort to inform the Cambodian public and launched campaigns both domestically and internationally;[8] second, the case law of international human rights tribunals;[9] and finally, a determination shared by the international community to avoid the shortcomings of other ad hoc and hybrid tribunals in respect of victims' rights and needs, as highlighted in chapter 3.[10] At a glance, this

[7] Maria Elander, 'The Victim's Address: Expressivism and the Victim at the Extraordinary Chambers in the Courts of Cambodia' (2013) (7) International Journal of Transitional Justice 95.

[8] Sam Garkawe,'Victims and the International Criminal Court: Three Major Issues' (2003) 3 International Criminal Law Review 345; Erin O'Hara, 'Victim Participation in the Criminal Process' (2005) 13 Journal of Law and Policy 229; Leslie Sebba, *Third Parties: Victims and the Criminal Justice System* (Ohio State University Press 1996); Raquel Aldana-Pindell,'An Emerging Universality of Justiciable Victims' Rights in the Criminal Process to Curtail Impunity for State-Sponsored Crimes' (2004) 26 Human Rights Quarterly 607; Charles P. Trumbull, 'The Victims of Victim Participation in International Criminal Proceedings' (2008) 29 Michigan Journal of International Law 777.

[9] The case law generated by treaty-based international human rights tribunals also influenced the approach to enhance victims' participatory rights in the ICC and ECCC. As Aldana-Pindell has asserted, 'this case law has create[d] norms that respond to many of the concerns expressed by surviving human rights victims about their exclusion from the criminal proceedings, especially when [S]tates rampantly refuse to comply with their duty to prosecute.' See Raquel Aldana-Pindell, 'In Vindication of Justiciable Victims' Rights to Truth and Justice for State-Sponsored Crimes' (2002) 35 Vanderbilt Journal of Transnational Law 1399.

[10] Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court: Observers Notes, Article by Article* (2nd edn Hart Publishing 2008); Jean-Marie Kamatali, 'From the ICTR to ICC: Learning from the ICTR Experience in Bringing Justice to Rwandans' (2005) 12 New England Journal of International and Comparative Law 89; Claude Jorda and Jérôme de Hemptinne, 'The Status and Role of the Victim' in Antonio Cassese et al. (eds), *'The Rome Statute of the International Criminal Court: A Commentary'* (Oxford University Press 2002).

unprecedented expansion of victims' rights reflected in the scope, magnitude and form of civil party participation at the ECCC could in principle set a precedent for the advancement of victims' rights at an international level. However, a close observation of the application of civil party participation in practice has thus far painted a more nuanced and arguably even less promising picture.

Notwithstanding victims' grand aspirations to have their voices heard and the potential value that their participation could bring, such a development in international criminal justice demands, as the ECCC model has demonstrated, a careful evaluation of whether or not victim participation beyond that of 'the victim as a witness' is always in the best interests of victims or justice. It would seem that the need to critically enquire how victim participation is being practised on the ground has been muddled by the comfortable liberal discourse on this issue. More concretely, the interviews conducted with both key expert actors in legal proceedings at the ECCC and, more recently, civil parties and victims in Cambodia, have revealed a less sanguine view and have shed further light on complexities and implications of the application of this novel legal mechanism. As a senior legal officer in Chambers argued,

> I am often a bit puzzled when this is described as very innovative and groundbreaking. To me it is the most conservative reactionary system you can imagine. There was no creativity in setting it up. Basically it was incorporating wholesale the civil party system as it exists in France into this environment here.[11]

She does not stand alone in holding that opinion, as similar views have been shared across the board by members of the Office of the Co-Prosecutors, Defence, Victims Support Section, as well as others who have a stake in the proceedings. As a senior prosecutor highlighted,

> This court has not done a very good job in creating and managing victims' expectations. They put in place this model of full participation as parties in proceedings, went out and advertised it to the world that here is a system that is

[11] See Lamb (n 4).

> so different and more inclusive, without giving careful consideration to the implications that this system would have for the court and the victims.[12]

This further underlines the point made in the previous chapter,[13] namely that the ECCC appeared unprepared to deal with victim participation adequately. The fact that the participation of victims as civil parties in proceedings before the ECCC did not even find a mention in the UN-Cambodia Agreement or the ECCC Law explains to some extent why it is perceived as a foreign judicial transplant. The complexity of designing, establishing, and operating a viable civil party participation regime at the ECCC proved to be a complex endeavour that is still a work in progress.

1.1 Victims' Participation in Domestic Cambodian Law

An examination of the legal framework governing victim participation in domestic Cambodian law – which is one of the ECCC's sources of applicable law – will further advance our understanding of the unique role afforded to victims to participate as civil parties at the ECCC. Although domestic jurisdictions vary to a considerable extent in terms of the role accorded to victim involvement in the context of criminal proceedings, many legal systems belonging to the civil law tradition recognise, as examined in chapter 3, the right of victims to attach civil claims to a criminal prosecution. Such is the position in French law and in legal systems deriving from the French, such as Cambodia's, which have granted extensive rights to victims in criminal proceedings. As civil parties, they have the right to lead and challenge evidence regarding damages.[14]

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[12] Interview with Tarik Abdulhak (Participant 5) Senior Assistant Prosecutor, Office of the Co-Prosecutors, ECCC (Phnom Penh 9 April 2012), notes on file with the author.

[13] See footnote 118 in chapter 4.

[14] Jonathan Doak, 'Victims' Rights in Criminal Trials: Prospects for Participation' (2005) 32 Journal of Law and Society 311.

In the Cambodian domestic legal system, victims have several rights, including the right to file charges against individuals, to participate as witnesses for the court, and to participate as civil parties in criminal proceedings. Thus, the notion of incorporating victim participation into ECCC proceedings is well-suited to the Cambodian context, given its belonging to the civil law tradition. More specifically, under Cambodian law the rights of victims are almost always exercised individually. This is mainly related to the fact that the majority of cases brought forward involve only one or two direct victims.[15] However, representation of victim groups through victim associations has occasionally been present in Cambodia.[16] Such representation was afforded by domestic Cambodian courts in previous prosecutions of the Khmer Rouge leaders for mass crimes, where the authorities recognised the rights of groups of victims to participate as civil parties.[17] Nonetheless, the vast majority of victims participating before Cambodian courts exercise their right individually, and the application to act as a civil party is usually accompanied by a request for monetary compensation. However, such a system of victim participation would be almost unfeasible in the context of the ECCC, in view of the magnitude of the Khmer Rouge atrocities and the vast number of victims.

1.2 Victim Participation at the ECCC

As with domestic criminal proceedings, the ECCC Internal Rules allow victims to participate in one of three ways: as victim complainant, witness or civil party.

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[15] ibid.

[16] Projet de Code de Procédure Pénale (Phnom Penh: Mission d'Assistance Technique Française, 25 February 2005, Draft Art L 131–5–7 (CCP)).

[17] David Boyle, 'The Rights of Victims: Participation, Representation, Protection, Reparation' (2006) 4 Journal of International Criminal Justice 309.

1.2.1 Victim Complainant

The ECCC Internal Rules define 'victim' as referring to a natural person or legal entity that has suffered harm as a result of the commission of any crime within the jurisdiction of the ECCC.[18] Ultimately this boils down to a question of causation, and it has fallen to the ECCC to flesh out the precise implications of that definition. In the event, the ECCC has adopted a broad view, and has allowed both 'primary victims', who have suffered harm directly, and 'secondary victims', who have suffered harm indirectly such as through the death, torture, or detention of a relative, to act as victim complainants in proceedings.[19] This is in line with developments in other international criminal tribunals and human rights bodies, as discussed in chapter 3.

According to the Internal Rules, victims, like other individuals, may file complaints with the Court for the purpose of informing the Office of the Co-Prosecutors about particular alleged crimes.[20] In practice, this right is exercised by completing an application form, providing information about their complaints. That application form is relatively brief and requires no more than a general statement of grounds for making the application.[21] If the Co-

[18] ECCC Internal Rules, glossary. In similar but more comprehensive terms, the Victims Support Section (VSS) at the ECCC has defined a victim as, 'any person or legal entity who has suffered from physical, psychological, or material harm as a direct consequence of the crimes committed in Cambodia by the Democratic Kampuchea regime between 17 April 1975 and 6 January 1979 that are under the jurisdiction of the ECCC.' See <www.eccc.gov.kh/en/victims-support/participation> (accessed 22 March 2015).

[19] The VSS provides the following non-exhaustive list of victims: 'if you were detained or tortured, if you suffered from forced starvation, if you were forced to leave your home and to work hard labour against your will; if your parents, grandparents or other family members were killed, abducted, detained or tortured…' See <www.eccc.gov.kh/en/victims-support/participation> (accessed 22 March 2015).

[20] Completing a complaint does not however initiate a prosecution. Rather, the Co-Prosecutors have a discretion to decide whether to reject a complaint, to include it in or to commence a preliminary investigation, or to forward the complaint to the Co-Investigating Judges: see ECCC, Practice Direction on Victim Participation, para 2.7 available at <www.eccc.gov.kh/sites/default/files/legal-documents/pd_victims_participation_rev1_en.pdf> (accessed 22 March 2015).

[21] ibid. Appendix A to ECCC, Practice Direction on Victim Participation (n 20).

Prosecutors find the complaint well-grounded, they may seek further investigation from the Co-Investigating Judges. Also, they may request that the complainant act as a witness.

However, it is important to emphasise that victim complainants are not afforded as many rights and safeguards as civil parties. A key difference between victim complainants and civil parties is that the former, during the interview with the Co-Investigating Judges, do not have the right to have counsel present.[22] Further, in contrast with Cambodian domestic proceedings,[23] the ECCC legal framework stipulates that if the Co-Prosecutors decide not to take any actions upon the complaint filed, victim complainants are in no position to initiate investigations or prosecutions themselves.

1.2.2 Witness

It is without a doubt that one of the most important roles of the victim in any criminal proceedings is that of witness, since direct victims are in the best position to provide information regarding various aspects of an alleged crime. It is important to highlight that, as with Cambodian domestic criminal procedure, at the ECCC, a victim may not simultaneously act as both civil party and as witness. The underlying justification for this is that the civil party may gain some form of reparation, financial or otherwise, by the conviction of the accused. In domestic criminal proceedings, however, an individual who wishes to attach a claim for damages and act as a witness, first testifies as a witness and after doing so applies to participate as a civil party. In contrast, at the ECCC, it is not possible for the victim to act first as a witness and then as a civil party because the deadlines for the application to become a

[22] Internal Rules, r 55 (5) (a).

[23] Cf. Cambodian Code of Criminal Procedure (2007), arts 138-142.

civil party are set before the trial commences.[24] By virtue of this lack of procedural space, the victim is compelled to decide early on in the proceedings if he or she wishes to act as a witness (if approached by one of the parties) or to participate as a civil party.

1.2.3 Civil Party

Distinctive in its scope and form, participation of victims at the ECCC as civil parties has given a whole new dimension to the accountability mechanism established to address the Khmer Rouge atrocities. This dimension has been enhanced principally by the unprecedented characterisation of victims as full 'parties' to proceedings, rather than just as 'participants', in contrast to the status granted by the ICC.[25] However, this characterisation requires some interpretation, since the role of civil party participation in trial proceedings does not fit the profile of participation by the conventional full parties, namely the prosecution and the defence. This requires a realistic understanding of the fact that the scheme was adopted to give a voice to those who had suffered harm, without undermining either the ability of the Tribunal to proceed against those who had committed the crimes or the objectives of fairness and efficiency.

Victims at the ECCC have the right to participate as civil parties in criminal proceedings if their harm is a direct result of at least one of the crimes found in the Introductory Submission, Supplementary Submissions or Closing Order.[26] The circumstances in which a victim may act as a civil party are therefore more limited than those applied to victim complainants, as seen above. A 'civil party' is defined as a victim whose application to

[24] ECCC Internal Rules, r 23 (4).

[25] In the terminology of the Statute and Rules of Procedure and Evidence, the Prosecution and Defence are referred to as 'parties' and participating victims as 'participants'.

[26] ECCC Internal Rules, r 23*bis* (1) (b).

become a civil party has been declared admissible by the Co-Investigating Judges or the Pre-Trial Chamber.[27] In practice, this right is exercised by completing a four-page application form. As with domestic criminal proceedings, the admission as a civil party allows victims to participate in all stages of the criminal process and to attach a claim for reparation. However, being a hybrid tribunal, the ECCC has shaped civil party participation to fit in with the contours and needs of the Court.

Most importantly, Rule 23(1) of the Internal Rules states that the purpose of a civil party action is to participate in the proceedings 'against those responsible by supporting the prosecution' and to allow victims to 'seek moral and collective reparations.' The language of this provision is remarkable. First, it presupposes the guilt of the accused by failing to include the word 'allegedly' before 'responsible'. Second, the phrase 'by supporting the prosecution' leaves room for interpretation and it could have unfortunate consequences. The wording suggests the possibility that civil parties may support the prosecution similar to the way an auxiliary prosecutor supports the public prosecutor in many domestic legal systems, such as through submitting evidence on the guilt of the accused, and that participation is not limited to their interest in reparations. It also suggests that victims joining as civil parties must seek the conviction of the accused. Victims calling for a dismissal of charges, for example in the name of national reconciliation, would be unlikely to fit the criterion. Ultimately, the wording relating to reparations is important because it recognises that victims are entitled to redress and that, together with supporting the prosecution, this is a primary interest of their participation. However, since there is no trust fund (as is the case at the ICC) or similar fund established at the ECCC, which would have offered victims an opportunity to claim reparations without acting as civil parties, victims claiming reparations must attach claims to

[27] ECCC Internal Rules, glossary.

the criminal proceedings. As a result, while it may not be the case that all civil parties seek reparations, it is nevertheless imperative for all those victims wishing to seek reparations to join as civil parties.

Further to the primary purposes – that is, supporting the prosecution and allowing victims to seek moral and collective reparations – the participation of victims as civil parties stems from two fundamental rights that are inherent to victims: the right to truth and the right to justice. However, neither of these rights is enshrined in any of the Court's governing documents. In shaping the jurisprudence and the legacy of the ECCC, it has been incumbent upon the judges to recognise the importance of these rights. As such, the Pre-Trial Chamber in Case 002/01 has stated that 'a victim's interest in participating in pre-trial proceedings stems from two core rights: the right to truth and the right to justice.'[28]

1.3 Civil Party Participatory Rights

In contrast with victims acting as complainants, civil parties enjoy a number of important participatory rights. They are entitled to five days' notice before an interview with the Co-Investigating Judges takes place.[29] During this time, the lawyer for the civil party may consult the case file. Moreover, unlike victim complainants, civil parties may only be questioned by the Co-Investigating Judges in the presence of a lawyer.[30] During the pre-trial stage, civil parties may request investigations and may appeal decisions by the Co-Investigating Judges not to investigate to the Pre-Trial Chamber. At trial, a civil party, just

[28] *Case of Ieng Sary (Case 002),* Directions of Unrepresented Civil Parties' Rights to Address the Pre-Trial Chamber in Person, Pre-Trial Chamber, 29 August 2008, para 5.

[29] ECCC Internal Rules, r 59 (1).

[30] ibid r 59 (1).

like the accused, does not testify under oath,[31] which in itself diminishes the weight of any evidence given, compared to the testimony given by a witness. Through their lawyers the civil parties are granted a number of rights, including the right to have full access to the case file,[32] to make limited pre-trial and trial appeals,[33] to make legal and factual submissions, to attend hearings, to request witnesses,[34] to question witnesses,[35] to question the accused,[36] to make closing arguments,[37] to rebut the closing arguments of the accused,[38] and to request reparations.[39] The role played by the lawyers for the civil parties is vital in exercising the rights of victims.

2. Case 001 and Case 002/01: The Participation of Civil Parties in Practice

The participation of victims as civil parties before the ECCC has been subject to both praise and criticism. It has been praised because for the first time a significant number of victims of mass atrocities were able to actively participate as civil parties in an international criminal trial. It has been criticised because civil party participation has noticeably been associated with unnecessary delays in trial proceedings as well as a perceived infringement of the right of the accused to a fair and expeditious trial. Civil party participation has been characterised as a cumbersome legal instrument. The trial proceedings in Case 001 and Case 002/01 have been the testing grounds upon which the Court is shaping the form and scope of

[31] ibid r 24 (2).

[32] ibid r 86.

[33] ibid r 23 (a) and r 74 (f).

[34] ibid r 139.

[35] ibid r 91.

[36] ibid r 90.

[37] ibid r 94.

[38] ibid r 94 (2).

[39] ibid r 23*quinquies*.

civil party participation. Understanding the practical implications of this experiment requires an examination of the stages of civil party participation, including the application and admissibility processes, as well as the pre-trial and trial proceedings in Case 001 and Case 002.

2.1 Application Process and Admissibility Criteria

With respect to Case 001, the third revision of the Internal Rules was applicable. The rules governing the admissibility of civil party claims were however not sufficiently lucid, and did not provide specific guidance. Rule 23(2) (Rev 3) provided that,

> The right to take civil action may be exercised by Victims of a crime coming within the jurisdiction of the ECCC, without any distinction based on criteria such as current residence or nationality. In order for Civil Party action to be admissible, the injury must be: (a) physical, material or psychological; and (b) the direct consequence of the offence, personal and have actually come into being.

The wording of this article indicates, first, that civil party applicants must have suffered harm as a result of a crime coming under the Court's jurisdiction.[40] That would require that judges examine whether the harm alleged fell within both the subject-matter and temporal jurisdiction of the Court. The temporal jurisdiction of the Court is from 17 April 1975 to 6 January 1979.[41] Complaints falling outside this jurisdiction are automatically denied. Crimes falling under the subject-matter jurisdiction of the Court include the national crimes of homicide, torture, and religious persecution, as well as the international crimes of genocide, crimes against humanity and grave breaches of the Geneva Conventions of 1949.[42] Applications alleging harm suffered as a result of crimes other than those listed above are

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[40] ECCC Law, arts 2, 4, 5, 6, 7 and 8.

[41] ibid art 2.

[42] ibid arts 3, 4, 5 and 6.

equally denied. Second, the injury suffered by the civil party had to be (a) physical, (b) material or (c) psychological. Third, the injury or harm had to be the direct consequence of the offence; it must have been personal and actually come into being. The Court has determined that this criterion means that a victim can only become a civil party if his or her harm arose as a result of the factual situation underpinning the case against an accused.[43] Although the wording of Rule 23(2) implies that only direct victims may participate, the Court has granted both direct and indirect victims civil party status. Despite the fact that the injury suffered must be 'personal', the Trial Chamber found, in part based on domestic practice, that under certain conditions a claim may be pursued by a deceased applicant's successors, not by virtue of the harm which they suffered as a result of their own loss, but on behalf of the deceased victim.[44] In addition, in respect of the evaluation of admissibility, at the Initial Hearing in Case 001 the Trial Chamber determined that sufficient proof of identity would be required.[45] Furthermore, the Trial Chamber noted that, 'the degree of proof required will be assessed by the Chamber on a case-by-case basis based on the materials before it.'[46] However, it was also noted that, 'if the Chamber is to permit an Applicant to participate in criminal proceedings and to seek collective and moral reparations as provided in Rule 23(2), the identity of that person must be *unequivocal.*'[47]

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[43] *Case of Kaing Guek Eav (Case 001),* Transcript 17 February 2009, p 26: 'when reviewing the civil party applications received in this case the Chamber must satisfy itself, from the information provided, that it is possible to consider whether the applicant has indeed suffered damage, and whether this damage is the direct consequence of an offence under the jurisdiction of the Chamber.'

[44] *Case of Kaing Guek Eav (Case 001),* Trial Chamber Judgement, 26 July 2010, para 641; The Trial Chamber cited *Case of Kaing Guek Eav (Case 001)*, Decision on Motion Regarding Deceased Civil Party, Trial Chamber, 13 March 2009, paras 10-12, allowing the widower to continue the civil party action of his wife after she had passed away before the start of trial.

[45] *Case of Kaing Guek Eav (Case 001),* Transcript 17 February 2009, p 33.

[46] ibid 34.

[47] *Case of Kaing Guek Eav (Case 001),* Decision of the Trial Chamber Concerning Proof of Identity for Civil Party Applicants, Trial Chamber, 26 February 2009, para 6 (emphasis added).

Taking into consideration that the Internal Rules provide little or no guidance as to how the Court should go about granting applications for civil party status, the Co-Investigating Judges, who are the first to assess the request, decided to apply a *prima facie* standard of review regarding admissibility. The Trial Chamber applied the same standard of review when the case was sent to trial. In Case 001, 93 victims were granted civil party status. An important but confusing development in Case 001 relates to the criteria applied by the Trial Chamber for the civil parties to retain their status. In the final judgement, the Trial Chamber found that, 'once declared admissible in the early stages of the proceedings, civil parties must satisfy the Chamber of the existence of wrongdoing attributable to the accused which has a direct causal connection to a demonstrable injury personally suffered by the Civil Party.'[48] As a result of this decision, the Trial Chamber revoked civil party status from almost two dozen civil parties. Such criteria are not to be found anywhere in the Internal Rules governing the trial proceedings.

The demarcation of the parameters of civil party participation in Case 001 has provided the grounds for Case 002 (which has been severed by Trial Chamber's Decision 301/9/1 into Case 002/01 and Case 002/02, as will be discussed further below), which is notably more complicated due to a higher number of accused, a more complex factual situation and a greater number of victims. About 4,000 individuals applied to participate as civil parties in Case 002, represented by some 30 lawyers. Of those applicants, 3,866 were granted civil party status. This followed a number of orders granted by the Co-Investigating Judges in this

[48] See (n 44) para 639.

Case on the issue of admissibility, pursuant to which the civil parties are required to demonstrate specific standing or *locus standi.*[49]

In Case 002, the Pre-Trial Chamber held that the Internal Rules require a factual nexus between the injuries suffered and 'one of the crimes alleged,'[50] but that applications for civil party status would not be required to show a link between the injuries and the specific crime sites listed in the Closing Order. This broader view of the spatial requirements for admissibility was adopted by the Pre-Trial Chamber because:

> While the facts investigated are limited to certain areas and crime sites, the legal characterisation of such facts…include crimes which represent mass atrocities allegedly committed by the Charged Persons by acting in a joint criminal enterprise together and with others against the population and *throughout* the country.[51]

The increase in the number of civil parties from a mere 93 in Case 001 to 3,866 in Case 002 can thus be explained by the wider view adopted by the Pre-Trial Chamber, resulting in the inclusion of civil parties in Case 002 who suffered from atrocities charged in the indictment, but not necessarily in parts of Cambodia where specific crime sites were investigated.[52]

2.2 Participation in Pre-Trial Proceedings

In both Case 001 and Case 002, civil parties exercised a number of important participatory rights during the pre-trial stage. The beginning of the pre-trial proceedings in

[49] Case 002/01, Order on the Admissibility of Civil Party Applicants from Current Residents of Prey Veng province, Co- Investigating Judges, 9 September 2010, para 8. Beginning in September 2010, all orders on admissibility of civil applications provide the same guidelines.

[50] Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, Case No.002/19-09-2007-ECCC/OCIJ 29 (24 June 2011).

[51] ibid 42 (emphasis in original).

[52] See Anne Heindel, 'Impact of Severance on Individual Civil Parties' Legal Status and Right to Reparations', Cambodia Tribunal Monitor, 22 February 2013, available at <www.cambodiatribunal.org/ep/content/uploads/2013/08/commentary_130223-english.pdf> (accessed 22 March 2015).

Case 001 was characterised by a favourable approach by the Co-Investigating Judges, where victims were afforded the right to access the case file, submit motions for specific investigations, confront the accused, file written and oral interventions as well as appeal decisions to the Pre-Trial Chamber.

One of the most significant rights afforded to civil parties is their right to consult and examine the case file. In practice that would mean that all parties – the prosecution, defence and civil parties – have access to the file. Unlike the disclosure procedure prevalent in adversarial systems and as practiced in other ad hoc tribunals, at the ECCC it is up to each legal team to familiarise itself with the material in the file. Another important right exercised by the civil parties is the right to request Co-Investigating Judges to carry out specific investigations on their behalf.[53] However, the Co-Investigating Judges have the right to delimit the investigations to the Introductory Submission and Supplementary Submissions provided by the Co-Prosecutors. In practice, due to the fact that many victims had not obtained civil party status until the beginning of the trial, very few submissions were made regarding the investigations in Case 001. The situation was slightly different in Case 002, where due to the long investigatory stage, civil parties filed a higher number of requests.

In addition to gaining access to the case file and submitting requests for investigations, civil parties may be called by the Co-Investigating Judges to confront the accused.[54] This procedure is common in civil law jurisdictions as a way to test the credibility of the evidence. In Case 001, such a procedure was organised by the Co-Investigating Judges at S-21, with *Duch*, his lawyers, and a handful of surviving victims attending. Further to these fundamental

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[53] ECCC Internal Rules, r 59 (5).

[54] ibid r 58 (4).

procedural rights, the civil parties are granted the right to make oral or written submissions during the pre-trial proceedings, subject to limitations set by the Co-Investigating Judges and where appropriate in the circumstances. For example, Rule 63(1) on provisional detention makes clear that at a hearing on such detention, the Co-Investigating Judges shall only hear from the Co-Prosecutors and the charged person and his or her lawyer.

2.3 Participation in Trial Proceedings

The trial against *Duch* marked the first internationalised[55] trial where victims of mass atrocities actively participated as civil parties. Ninety-three direct and indirect victims responded to the call to participate as civil parties. They were represented by four civil party legal teams, comprised of both national and international lawyers. Even though the work of the legal teams was characterised by a shared goal, working together proved to be a challenge. Marked by a number of disagreements on legal and procedural issues as well as advocacy tactics, the practice at trial meant that civil parties did not speak with one voice in the courtroom. Such disagreements ranged from whether the victims could participate with regards to sentencing issues, whether to support the Prosecution's pleading for the use of Joint Criminal Enterprise as a mode of criminal responsibility, and whether to pursue monetary reparations. However, despite the disagreements among the legal teams, civil parties exercised many important rights during the trial proceedings in the *Duch* trial. The majority of these participatory rights were envisaged in the Internal Rules, which provided the framework upon which civil party participation unfolded. However, the exact parameters of such participation were not fully mapped out, which required that the Trial Chamber determine the boundaries along the course of the trial.

[55] 'Internationalised' is a notion used to denote the characterisation of several mixed tribunals, such as those composed of both international and national judges and court officers, and/or applying international as well as national law. It can thus be regarded synonymous with the term 'hybrid'. See chapter 3, footnote 196.

Two significant points of contention concerning the boundaries of civil party participation arose during the trial proceedings in Case 001: first, civil parties' right to put questions to, and elicit inculpatory information from, a witness, not otherwise done by the Co-Prosecutors; and second, civil parties' right to participate in sentencing. With respect to the first matter, the Judges found that civil parties are entitled to pose questions 'in support of the prosecution,[56] so long as they are not repetitious, long-winded or outside the confines of the topic.[57] Accordingly, this ruling granted civil parties the right to elicit evidence to assist in establishing the guilt of the accused. However, it should also be noted that the role of civil parties to 'support' the prosecution is limited and may very well be contentious. There is a danger that civil party lawyers may in effect exceed their mandates by becoming secondary prosecutors. This much was acknowledged by prosecutors interviewed as part of a study conducted by Hoven. Her findings were that,

> The prosecutors found that civil parties do not dispose of the power to prove the charges, and should thus refrain from developing a 'whole theory of the case'. Since the prosecution was 'better equipped' to establish the guilt of the accused, it should not be the civil party lawyers' task to prove liability.[58]

Rather than taking an active role in case management and evidence handling, civil parties and their lawyers should 'play a passive role' and not interfere with prosecutorial strategy.[59]

The Trial Chamber too was soon to embrace a more restrictive approach towards participation. This was reflected more concretely in relation to the scope of participation with regards to sentencing in Case 001. The Trial Chamber determined that civil party lawyers had

[56] One possible interpretation of this aim is that while civil parties are undeniably 'parties' to the proceedings, their role is mainly aligned with the overall aims of the prosecution.

[57] *Case of Kaing Guek Eav* (*Case 001*), T, 22 June 2009, p 98.

[58] Elisa Hoven, 'Civil Party Participation in Trials of Mass Crimes' (2014) 12 Journal of International Criminal Justice 81, 92.

[59] ibid.

no standing to make submissions in relation to sentencing, finding that making submissions relating to sentencing falls within the exclusive prerogative of the prosecution.[60] Furthermore, the Chamber ruled that the civil party lawyers were prohibited from posing questions to the accused and expert witnesses on issues related to the accused's character.[61] The rationale behind this decision is that character evidence is directly related to sentencing and has no relevance towards the guilt of the accused or reparations.[62] These rulings were not well received by the civil parties, prompting 28 of the civil parties to boycott later proceedings. At a press conference, these civil parties argued that truth and justice were illusory if they were not given the chance to understand the motivations of the accused.[63]

Such disillusionment and disappointment were further exacerbated by the Trial Chamber verdict in which *Duch,* convicted of crimes against humanity and grave breaches of the 1949 Geneva Conventions, was sentenced to only 35 years' imprisonment and where the number of civil parties was reduced from 93 to 64.[64] The Accused and the Co-Prosecutors appealed the Trial Chamber verdict to the Supreme Court Chamber. In total, 41 civil parties, including 22 rejected civil party applicants, also filed appeals against the Trial Chamber's decision on their admissibility and/or claims for reparations. The Supreme Court Chamber rendered its decision on 3 February 2011, quashing the 35-year sentence handed down by the Trial Chamber on 6 July 2010 and instead sentencing *Duch* to life imprisonment (the

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[60] *Case of Kaing Guek Eav* (*Case 001*), T, 27 August 2009, pp 41-42.

[61] *Case of Kaing Guek Eav (Case 001),* T, 27 August 2009, pp 43-66.

[62] ibid 74.

[63] Michael Saliba, 'Civil Parties Boycott Start of Character Witness Testimony while Experts Offer Psychological Assessment of *Duch'*, Cambodia Tribunal Monitor, 31 August 2009.

[64] *Case of Kaing Guek Eav (Case 001),* Trial Chamber Judgement, 26 July 2010, paras 632 and 633. His sentence was reduced by five years as a remedy for his illegal detention by the Cambodian Military Court between 10 May 1999 and 30 July 2007. He also received credit for time already spent in detention under the authority of both the Cambodian Military Court and the ECCC.

maximum possible term under the law). The Supreme Court Chamber also granted the appeal of 10 civil party applicants who had been previously rejected in the judgement of the Trial Chamber. On appeal, these civil party applicants substantiated their applications and were subsequently readmitted as civil parties in Case 001.[65] From the very beginning, civil party participation in Case 001 was undoubtedly characterised by significant legal and procedural challenges stemming primarily from the lack of clear and comprehensive rules and procedures.

To a similar extent, civil party participation in Case 002/01 also constituted a trial management issue, resulting in a process marked by constant amendments and reinterpretations. Recognising the importance of this participation but acknowledging that important problems from the first trial had to be addressed, the judges have repeatedly revised the Internal Rules with regards to civil party participation in an attempt to ensure fair and efficient proceedings. To date, the Internal Rules have been revised nine times, the last revision taking effect from 16 January 2015. In February 2010 the judges made the most significant revisions concerning participation, which have affected the trial proceedings in Case 002. One of the key amendments relates to the establishment of two civil party Lead Co-Lawyers, comprising both a national and an international lawyer, selected and funded by the ECCC.[66] At trial, the two Lead Co-Lawyers are jointly responsible for the bulk of the advocacy, strategy, and in-court representation on behalf of all civil parties.[67] In addition to being represented by the two Lead Co-Lawyers during the trial stage, civil parties are also represented during the pre-trial stage by their own lawyers. Although they may not actually

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[65] *Case of Kaing Guek Eav (Case 001),* Supreme Court Chamber Judgement, 03 February 2012, available at < http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/Case%20001AppealJudgementEn.pdf> (accessed 12 March 2015).

[66] ibid r 12*ter*.

[67] ibid.

appear before the Court, these lawyers will nevertheless continue to play a significant role by submitting requests for investigations during the pre-trial stage, and by providing support to the Lead Co-Lawyers at trial. The Lead Co-Lawyers consult the independent civil party lawyers in order to coordinate strategy and advocacy.

In its Severance Order of 22 September 2011[68] the Trial Chamber, spurred on by the Pre-Trial Chamber's broader perspective on civil party participation, decided to split the trial into two: Case 002/01 was to deal exclusively with 'population movement phases 1 and 2' as charged in the original indictment, with the remaining charges – genocide, forced marriages, establishment of cooperatives, worksites and security centres, as well as forced movement from the Eastern Zone – to be heard in a much more substantial, separate trial in Case 002/02. As a result, it was argued by the defence that only 750 out of originally 3,866 civil parties should be admitted to the severed proceedings. The Trial Chamber decision unsurprisingly prompted a number of complaints from the Lead Co-Lawyers and Civil Party lawyers.[69] The Trial Chamber justified its decision by stating that the civil parties did not participate in proceedings as individuals, but instead as a 'consolidated group with collective interests.'[70] Thus, the Trial Chamber held that 'limiting the scope of the facts to be tried during [Case 002/01]… has no impact on the nature of Civil Party participation at trial.'[71]

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[68] Severance Order pursuant to Internal Rule 89*ter*, Case No. 002/19-09-2007-ECCC/TC (Severance Order) (22 September 2011).

[69] See Lead Co-Lawyers' and Civil Party Lawyers' Request for Reconsideration of the Terms of the Severance Order E124, Case No. 002/19-09-2007-ECCC/TC (18 October 2011), and Lead Co-Lawyers' Urgent Request on the 19 October 2011 Hearing Following the Chambers' Memorandum E125, 12-13 (Trial Chamber, 7 October 2011).

[70] Heindel (n 52) 2.

[71] Severance Order (n 68) 8.

The Severance Decision was subsequently appealed to the Supreme Court Chamber, which quashed the Trial Chamber's Severance Order, stating that it lacked clarity and reasoning, and that the parties' right to be heard had not been adhered to.[72] It should however be noted that the Supreme Court Chamber nullified the scope and extent of the severance of Case 002/01 and Case 002/02; it did not nullify the *decision* to sever in principle and remitted the decision back to the Trial Chamber for further submissions from the parties. Following the issuance of the Supreme Court Chamber's nullification order, and having heard the parties on the severance question, the Trial Chamber decided to proceed with the division of the case into separate trials, and not to include further charges in Case 002/01.[73] The Trial Chamber further stated in a later decision that the resulting evidentiary record from Case 002/01 would serve as the foundation for the remaining charges in Case 002/02. Thus, many charges in the indictment will be 'expressly included within the scope of Case 002/02 insofar as they contain factual allegations previously or fully examined.'[74]

The history of Case 002 and its severance into two separate trials is instructive, as it highlights the multi-dimensional complexities engendered by civil party participation, in particular in view of the high number of civil parties that met the admissibility criteria initially applied by the Pre-Trial Chamber. The severance decisions of the Trial Chamber were a response to the broad approach adopted by the Pre-Trial Chamber in relation to the admissibility criteria for civil parties.

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[72] Decision on the Co-Prosecutors' Immediate Appeal of the Trial Chamber's Decision Concerning the Scope of Case 002/01 (8 February 2013).

[73] Decision on Severance of Case 002 Following Supreme Court Chamber Decision of 8 February 2013, E284 (26 April 2013).

[74] Trial Chamber Decision E301/9/1, Case No. 002/19-09-2007-ECCC/TC.

Case 002/01 drew to a conclusion on 31 October 2013. The trial judgement was handed down on 7 August 2014, finding the two remaining accused, Nuon Chea and Khieu Samphan, guilty of crimes against humanity, and sentencing each to life imprisonment.[75] The complexity of this Case, involving two ageing accused, a crime scene covering diverse sites throughout Cambodia, and a group of 3,866 civil parties, undoubtedly called for significant reforms to the civil party participation scheme at the ECCC. The evidentiary hearings in Case 002/02 began on 17 October 2014. It remains to be seen what the overall implications of the 'collectivised' participation at the trial stage in Case 002/02 will continue to be.

3. A Victim's Right to Remedies

The right of victims to redress for violations of human rights is a fundamental legal principle recognised as both a general principle of law and customary law. It is applied in all legal systems. As such, this important principle is recognised and upheld in proceedings before the ECCC. An individual right to redress includes two elements, a procedural right to obtain a remedy, and a substantive right to an adequate and effective reparation measure. A victim's right to remedies[76] encompasses three overarching rights: (i) the right to equal and effective access to justice; (ii) the right to adequate, effective and prompt reparation for the

[75] *Prosecutors v Nuon Chea and Khieu Samphan* Case No. 002/19-09-2007/ECCC/TC, Judgement (7 August 2014), available at <http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2014-08-07%2017:04/E313_Trial%20Chamber%20Judgement%20Case%20002_01_ENG.pdf> (accessed 17 March 2015)

[76] M. Cherif Bassiouni, 'International Recognition of Victim's Rights' (2006) 6 Human Rights Law Review 203, 260. 'The victims' right to a remedy for violations of human rights has been recognised in the following international and regional instruments: Article 2(3), ICCPR; Article 13, CAT: Article 6, ICERI; Article 6(2), Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children: Article 13, ECHR: Article 47, Charter of Fundamental Rights of the European Union; Article 7(l)(a)(25), ACHR: Article XVIII, American Declaration of the Rights and Duties of Man: Article III(1), Inter-American Convention on Forced Disappearance of Persons; Article 8(1), Inter.-American Convention to Prevent and Punish Torture: Article 7(a), AfrCHPR; Article 9, Arab Charter on Human Rights; Article 8, Universal Declaration; and Articles 9 and 13, Declaration on the Protection of All Persons from Enforced Disappearance. In addition, the victims' right to a remedy has also been recognised in the following jurisprudence: UNCHR General Comment 29, para 14; and *Chahal v United Kingdom*. 1996-V 1831; (1997) 23 EHRR 413 at paras 150-1 (scope of the remedy varies with the nature of the right).'

harm suffered, and (iii) the right to truth. The importance of all three rights has been acknowledged by the ECCC, which is also reflected in the governing instruments and case law of the Court. However, the most contentious and complex issues have surrounded the question of reparations, which has presented the ECCC with an array of challenges and difficulties.

3.1 Reparations for Victims of the Khmer Rouge

Reparations for victims of atrocities have come to the fore as an essential component of a more victim-oriented process of justice. For a long time, reparations for international crimes were closely linked with the principle of State responsibility. According to that doctrine, a State engaged in wrongful acts is under an obligation to cease the wrong and provide appropriate reparations. In this context, individual claimants would have 'to resort to their State of nationality to espouse their claims, and present them as a State claim against another State.'[77] However, in recent years, developments in international law have given a whole new dimension to the notion of reparation by increasing the focus on individual victims as rights-holders. As highlighted above, an individual right to redress includes two elements, a procedural right to obtain a remedy, and a substantive right to an adequate and effective reparation measure. The most pronounced acknowledgment of this development is enshrined in the 2006 Basic Principles,[78] the adoption of which marked a monumental achievement in the history of human rights and international criminal justice. According to this Resolution, victims of mass atrocities have a right to 'adequate, effective and prompt reparation for the

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[77] ibid 212; see also James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentary* (Cambridge University Press 2002) 209.

[78] See (n 2) above; and see chapter 3, section 1.2.

harm suffered.'[79] The importance of such recognition was also reflected in the words of UN Secretary-General Ban Ki-moon,

> Reparations are arguably the most victim-centred justice mechanism available and the most significant means of making a difference in the lives of victims. UN experiences demonstrate that reparations may facilitate reconciliation and confidence in the [S]tate, and thus lead to more stable and durable peace in post-conflict societies.[80]

Although the principle of reparation is recognised in Cambodian law,[81] during the more than thirty-five years since the fall of the Khmer Rouge regime, reparations have been unattainable for victims and their families. Indeed, the establishment of the ECCC as the first internationalised tribunal with a specific reparations mandate has given this process new momentum. As highlighted above, the twofold aim of civil party participation, namely the support for the prosecution and the claim for collective and moral reparations, is clearly specified in the ECCC Internal Rules.[82] In light of this affirmation, the provision of reparation measures for victims of gross violations of human rights is regarded not only as a form of justice to victims but as Bassiouni contends, it is also regarded 'as a way of inducing victims to participate in the process as to enhance successful prosecution.'[83] In principle, any successful reparations measure ordered by the ECCC has the potential of becoming one of the Court's most remarkable contributions to Cambodian victims and society, as well as of setting a very important standard for other tribunals of the future.[84]

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[79] ibid art 11.

[80] See 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary General to the Security Council' (S/2011/634), October 2011.

[81] Article 14 of the Code of Criminal Procedure provides that, 'An injury can be compensated by paying damages, by giving back to the victim the property that has been lost or by restoring damaged or destroyed property to its original state.'

[82] ECCC Internal Rules, r 23 (1).

[83] Bassiouni (n 76) 205.

[84] Eric Stover et al., 'Confronting *Duch*: Civil Party Participation in Case 001 at the Extraordinary Chambers in the Courts of Cambodia' (2011) 93 International Review of the Red Cross 503.

However, the practical implications of the reparations scheme, as demonstrated in the trials at the ECCC, have offered a rather discouraging prospect of meaningful reparations for victims. As Judge Cartwright has argued,

> The process of participation and the seeking of reparation was, to my mind, most unsatisfactory…After working through a complex, time-consuming and traumatic process, often sitting hour after hour in court listening to what might have happened to their parents, husband or brother or sister, the victims found that the Trial Chamber had no jurisdiction to order anything except formal recognition in the judgement.[85]

At a glance, this unpromising development can be attributed to two major barriers. First, the legal and procedural limitations stemming from the legal framework that governs the ECCC, whereby the mandate of the ECCC as a criminal court is limited to individual responsibility, with the result that the reparations should be awarded against and be borne by individual perpetrators. Within that framework, funding reparations solely from perpetrators in the context of mass victimisation is inherently insufficient. And second, the absence of a formal civil enforcement jurisdiction on the part of the ECCC restricts the reparations mandate even further. In addition, any measure of reparation awarded by the ECCC that demands institutional reform, would effectively require the support and involvement of the Cambodian government.

One of the principal objectives of victims' participation at the ECCC is to recognise the right of victims to receive reparation for the harm suffered. Within that framework, only victims who have been recognised as civil parties in proceedings have the right to seek reparations. Although the right to claim reparations was held from the outset to be an essential element of the civil party participation scheme, remarkably it did not feature in the

[85] Cartwright (n 4).

ECCC's founding statute. This important right was instead reflected in the ECCC's Internal Rules, which provide that the Chamber in question may award collective and moral reparations to civil parties. Rule 23*quinquies*[86] envisages that,

> If an Accused is convicted, the Chambers may award only collective and moral reparations to Civil Parties. Collective and moral reparations for the purpose of these Rules are measures that:
>
> a) acknowledge the harm suffered by Civil Parties as a result of the commission of the crimes for which an Accused is convicted and
>
> b) provide benefits to the Civil Parties which address this harm.
>
> These benefits shall not take the form of monetary payments to Civil Parties.

According to this rule, the right of victims to reparation is limited only to 'collective and moral reparations', as opposed to individual and material reparations. At the ECCC, these collective reparations are possible only through the defendant, as no victim trust fund has been established. More specifically, the ECCC Internal Rules do not provide for a legal definition of 'moral and collective reparations.' We could, however, draw from the provision that a distinction has been made between *material* reparations – specifically compensation – and *individual* reparations. The Internal Rules clearly state that no monetary payment will be awarded to civil parties. This constitutes a rather different approach from that of the ICC, which provides for both individual and collective awards either through payment by a convicted defendant or through the Trust Fund for Victims.[87] Further, Rule 23*quinquies* denotes that the request for reparations should be made in a single submission, which may seek a limited number of awards. It is important that such a submission provides a description of the awards sought as well as a reasoned argument as to how they address the harm suffered

[86] Adopted on 9 February 2009 and amended on 17 September 2010.

[87] Christoph Sperfeldt, 'Reparations for Victims of the Khmer Rouge' (2009) Oxford Transitional Justice Research (OTJR) Working Paper Series, available at < http://www.csls.ox.ac.uk/documents/SperfeldtFinal.pdf > (accessed 10 February 2012).

and specify in relation to each award, the single specific mode of implementation.[88] Furthermore, the rule stipulates that in respect of each award, the Chamber in question may either order that 'the costs of the award shall be borne by the convicted person; or recognise that a specific project appropriately gives effect to the award sought by the Lead Co-Lawyers…'[89] In addition, it is a requirement that such a project be designed or identified in cooperation with the Victims Support Section (VSS) and has secured sufficient external funding.[90] Essentially, with currently only three convicted, this provision limits significantly the potential scope of any Court-ordered reparations. In addition, it nullifies any realistic opportunity for victims to receive reparations because all defendants are deemed indigent and are therefore in receipt of legal aid.

Apart from the legal and procedural limitations undermining the reparations mandate, it appears that the issue of reparations, like many other aspects of civil party participation at the ECCC, has been a very slow affair hobbled by constant changes and interpretations in seeking the most viable working scheme. As the Defence Counsel of the second accused in Case 002/01 stated,

> This tribunal has not been very sophisticated with regards to reparations. Too much of it has been handled on an ad hoc basis.[91]

In addition, the ECCC has struggled throughout the trial to manage victims' high expectations regarding reparations. As a senior legal officer in Chambers articulated,

> People who are divorced from the realities of legal proceedings, have unbelievably high expectations of this reparations scheme. Sadly it was never

[88] ECCC Internal Rules, r 23*quinquies* (2).

[89] ibid (3).

[90] ibid.

[91] Interview with Michael Karnavas (Participant 7) Defence Counsel, Ieng Sary's Defence, Case 002, ECCC (Phnom Penh 10 April 2012) notes on file with the author.

> grounded in reality. We have a system forced upon us, because that is what everybody wanted, but when we apply it we are accused of lack of creativity. The reparations scheme was completely misdesigned.[92]

However, when evaluating victims' high expectations, one must be mindful of the fact that victims' views on reparations were greatly influenced by the information provided to them. During Case 001, as illustrated by the findings below, the ECCC's under-resourced VSS, established to assist victims in filing their complaints and civil party applications, was insufficiently proactive in providing clear and concrete information, as well as guidance to civil parties with regards to possibilities and limitations inherent in the reparations mandate. On the contrary, the effort to inform the victims and the general Cambodian public about reparations and other aspects of civil party participation, was led by various civil society groups, human rights organisations[93] and civil party lawyers. As a result, the VSS did not have much control over exactly what information was given out, making the task of managing expectations with regards to reparations all the more challenging.

3.1.1 Case 001 and Civil Parties' Reparations

Although civil parties' representation in Case 001 was characterised by several disagreements among civil party legal teams, the claims for reparations were filed under a joint agreement. The joint submission emphasised the rights of victims of gross human rights violations to reparations and requested: the compilation and dissemination of statements of apology made by *Duch* throughout the trial acknowledging the suffering of victims, including comments by the civil parties; access to free medical care (both physical and psychological), including free transportation to and from medical facilities; funding of educational

[92] Simonneau-Fort (n 6).

[93] DC-Cam, the German Development Service (DED), Civil Peace Services (ZFD), and the French and the British embassies, for example, played an important role in supporting these legal assistance projects.

programmes which inform Cambodians of the crimes committed under the Khmer Rouge regime and at S-21 in particular; erection of memorials and pagoda fences at S-21 as well as in the local communities of the civil parties; and inclusion of the names of the civil parties in Case 001 in the final judgement, along with a description of their connection to S-21.[94] In its judgement rendered on 26 July 2010, victims' reparations were addressed as follows: 'The Chamber declares all Civil Parties listed in paragraphs 645 and 650 to have suffered harm as a direct consequence of the crimes for which KAING Guek Eav [*Duch*] has been convicted. …The Chamber shall compile all statements of apology and acknowledgments of responsibility made by KAING Guek Eav during the course of the trial. This compilation shall be posted on the ECCC's official website within 14 days of the date of this judgement becoming final. It rejects all other Civil Party claims.'[95] Thus, with regards to 'moral and collective reparations', the Trial Chamber granted only two of the reparation requests. First, it granted the request that the names of the civil parties be included in the judgement. Second, it granted the request that *Duch*'s statements of apology be compiled, published and disseminated. It denied all other requests made by the civil parties because they either lacked specificity or were beyond the scope of reparations available to the ECCC.

The Trial Chamber found that it had no authority to award individual monetary reparations (as requested in the final submission of civil party legal teams) and specifically stated that reparations were 'intended to be essentially symbolic rather than compensatory.'[96] Furthermore, the Trial Chamber noted that, 'the ECCC lacks the competence to enforce reparations awards. Reparations awarded by the ECCC against an accused can therefore only

[94] *Case of Kaing Guek Eav (Case 001),* Trial Chamber Judgement, 26 July 2010, paras 652, 654- 657.

[95] ibid paras 682 and 683.

[96] ibid para 661, footnote 1144.

be enforced, where necessary, within the ordinary Cambodian court system.'[97] Such a limitation stems from a lack of procedural space provided in the Internal Rules, whereby the Court does not have authority over Cambodian officials not party to the proceedings,[98] described as a 'loophole' by one of the civil parties interviewed.[99] The Trial Chamber stressed that it 'could merely encourage national authorities, the international community and other potential donors to show solidarity with the victims by providing financial and other forms of support that contributes to their rehabilitation, reintegration, and restoration of dignity.'[100] In its judgement of 3 February 2012, the Supreme Court Chamber affirmed the Trial Chamber's decision to compile and post on the ECCC website all statements of apology and acknowledgments of responsibility made by *Duch* during the course of the ECCC proceedings.[101]

The outcome of the first trial has undoubtedly come as a big blow to victims' expectations, and it has further limited the scope and parameters of a viable victim reparations scheme. According to a 2011 survey, the opinions of the civil parties mirrored to a great extent the varied expectations which they had had before trial.[102] For some, while recognising the symbolic consequence of reparations, the question of some form of

[97] ibid.

[98] ibid paras 663 and 664.

[99] Transcript of interview on file with the author (Civil Party Case 001 and Case 002/01, Phnom Penh, 18 December 2014).

[100] *Case of Kaing Guek Eav (Case 001),* Trial Chamber Judgement, 26 July 2010, paras 663 and 664.

[101] *Case of Kaing Guek Eav (Case 001),* Supreme Court Chamber Judgement, 03 February 2012.

[102] Phuong Pham et al., 'So We Will Never Forget: A Population-Based Survey on Attitudes about Social Reconstruction, and the Extraordinary Chambers in the Courts of Cambodia', Human Rights Center, University of California, Berkeley, CA, January 2009, 43 and 44. According to this survey of 1,000 Cambodians, around 88% expressed that reparation should be provided to victims, while 68% expressed that they should be provided to the community as a whole. Over half (53%) would prefer that reparations focus on measures that affect their daily lives, including social service, infrastructure, and economic development.

compensation that contributed to individual and social repair was of importance. Others spoke of the significance of 'individual material reparations, especially in the form of medical and psychological care.'[103] Overall, civil parties considered reparations to be a form of 'official recognition and acknowledgment of their suffering, and that of the Cambodian people.'[104] This was also reflected in strong terms in the interviews conducted with civil parties in September to November 2014. Thus, as was said by one civil party,

> There are two types of reparations; moral reparation and collective reparation [at the ECCC]… The two kinds of reparations are already good but it lacks individual reparation. The Court should have individual reparation for all civil parties because they have a very low standard of living. Therefore, the Court should at least provide a little amount of money by way of individual reparation. In fact, the lives of relatives they lost during the Khmer Rouge regime are invaluable.[105]

In somewhat stronger terms, another civil-party interviewee took the ECCC to task with regards to its approach to reparations:

> As a victim, I have received no individual reparation. This makes me disappointed. So the ECCC is just a make-up court. It is just to show the world there is a trial, but there is no individual reparation. So this Court does not promote humanity. For more than 15 to 20 years, there is no individual reparation for victims, and this will not be a model for the world to follow.[106]

Whilst the implications of the reparations measures awarded to victims, as well as their reactions and perceptions, will be the subject of more detailed analysis in chapter 6, it should be stated as this stage that there was general dissatisfaction on the part of civil parties. It should equally be noted that the ECCC's rather stringent approach to victims' reparations measures was greeted with scepticism also from other stakeholders in the trial proceedings,

[103] Stover et al. (n 84) 534 and 535.

[104] ibid.

[105] Transcript of interview on file with the author (Civil Party Case 002/01, Phnom Penh, 18 September 2014).

[106] Transcript of interview on file with the author (Civil Party Case 001 and Case 002/01, Tuol Sleng Genocide Museum, 18 September 2014).

including many lawyers and legal observers, who felt that the test which the Court applied to its reparations mandate and the narrow interpretation of 'collective and moral reparations', meant that the Court had failed to award substantive awards that adequately acknowledge the harm suffered. As a civil party lawyer in Case 001 stated,

> The reparations ruling was really the most minimal, most conservative, and perhaps it is fair to say unimaginative that could have been ordered.[107]

Similar poignant views were shared not only by the civil party lawyers, but also by other stakeholders in trial proceedings. A senior counsel for the Office of the Co-Prosecutors did not hesitate to express his strong views on the matter, when he said that,

> Of course, the first case was a good illustration of how little the court can do for you if you are a civil party. There is nothing we gave to participants in the trial that was in addition to anyone else rather than the recognition as civil parties.[108]

Similar views were shared by members of the defence, with one defence counsel arguing that,

> I think there is a danger in raising false hopes of what can be achieved in terms of reparations. I am still not sure whether the civil parties realise that. Yes, it is a grand aspiration and good intention to have civil party participation, but it could easily be said that it is lost in translation.[109]

Another counsel for the defence added,

> They are offering victims nothing here. When you read the Appeals Judgement in the *Duch* case, you cannot help but be astonished. Is it a meaningful reparation for someone in Cambodia only to have the names of civil parties published on a website, I really do not know, but I would assume it is not.[110]

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[107] Interview with Karim A. A. Khan (Participant 2) Civil Party Co-Lawyer Case 001, ECCC (The Hague 20 March 2012), notes on file with the author. The Phnom Penh Post, 27 July 2010.

[108] Abdulhak (n 12).

[109] Interview with Michiel Pestman (Participant 8) Defence Counsel, Nuon Chea's Defence, Case 002, ECCC (Phnom Penh 10 April 2012), notes on file with the author.

[110] Interview with Andrew Ianuzzi (Participant 11) Legal Consultant, Nuon Chea's Defence, Case 002, ECCC (Phnom Penh 12 April 2012), notes on file with the author.

3.1.2 Case 002/01 and Civil Parties' Reparations

Mindful of the constraints on reparations in the *Duch* Case, outcries by victims, strong criticism voiced by human rights advocates, as well as insufficient clarity on the issue of reparations, the ECCC has embarked on a series of reforms aimed at amending the reparations scheme by introducing new rules and procedures in the Internal Rules. The importance of this development was most notably addressed in the Trial Chamber judgement in Case 001: 'The Chamber is nonetheless constrained in its task by the requests before it and type of reparations permitted under its Internal Rules. Limitations of this nature cannot be circumvented through jurisprudence but instead require Rule amendments.'[111]

Case 002 offered the ECCC a fresh opportunity to look more critically and creatively at the reparations framework, with the Court adopting a new comprehensive strategy on reparations. As part of this endeavour, the Court encouraged the civil party lawyers and other stakeholders in the proceedings to engage in discussions on addressing key issues pertaining to reparations in Case 002/01. As part of those discussions, several considerations were put forward that related to the parameters of the reparations scheme. It was striking to learn through the interviews conducted at the ECCC, that the Chambers had even proposed at an early stage in discussions to abolish the whole civil party participation scheme. However, faced with the adamant resistance of the civil party lawyers, this was held to be a non-starter. As a legal officer in charge of the VSS said at the time of trial proceedings in Case 002/01,

> Even though the civil parties know that this scheme cannot deliver much, the idea that it is awarded against the accused, is emotionally important to them in some way.[112]

[111] *Case of Kaing Guek Eav (Case 001),* Trial Chamber Judgement, 26 July 2010, para 662.

[112] Interview with Jeanne Sulzer (Participant 10) Legal Officer, VSS Civil Party Lead Co Lawyers Section, ECCC (Phnom Penh 12 April 2012), notes on file with the author.

Aware of its legal and procedural limitations with regards to reparations, whereby reparation measures awarded against the accused are inherently incapable of satisfaction, and in an effort to think creatively, the Court has focused on the second limb of the reparations scheme, which enables civil party lawyers to identify projects that are funded through third parties, *viz.* potential donors. More concretely, the civil party Lead Co-Lawyers were required to design or identify in cooperation with the VSS a project for which sufficient external funding had been secured.[113] Undoubtedly, the civil party Lead Co-Lawyers found themselves in very difficult territory, being tasked with a challenging job in identifying reparation measures that were seen as both appropriate by the civil parties and implementable by the Court.[114] As the international Lead Co-lawyer argued at the time,

> It is extraordinary to me what this Court expects victims to work on figuring out reparations for themselves. We are expected to provide the Court with some projects at the end of the process that are feasible both legally and materially.[115]

The need for a comprehensive advocacy strategy meant that the civil party lawyers were expected to advocate beyond the Court for financial and administrative assistance in reparation. The outcome of the amended provisions in the Internal Rules on reparations unfolded in the course of the trial, ultimately culminating in a judgement that took a broader approach, at least by comparison to Case 001, to victims' reparations. Thus, 11 out of 13 requests in total were granted by the Court, namely:

- Projects 1 and 3, concerning Remembrance and Memorialisation;
- Projects 5 and 6, concerning Therapy and Psychological Assistance to Victims;
- Projects 7, 8, 9, 10, 11, 12 and 13 concerning Documentation and Education.[116]

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[113] ECCC Internal Rules, r 23(3)(b).

[114] Interview with Pich Ang (Participant 9) Civil Party Lead Co-Lawyer, Case 002, ECCC (Phnom Penh 11 April 2012), notes on file with the author; Interview with Eleonor Fernandez (Participant 13) Associate Legal Officer, Civil Parties, Case 002, ECCC (Phnom Penh 13 April 2012), notes on file with the author.

[115] Simonneau-Fort (n 6).

Projects 2 and 4 were not endorsed by the Trial Chamber, which stated that those projects did not contain sufficiently detailed descriptions or an itemised budget, nor did they guarantee that funding would be secured.[117]

The question of reparations was complicated even further by the severance of Case 002 into distinct and separate trials. As seen above, 3,866 civil parties were admitted by the Pre-Trial Chamber, and the latter Chamber's decision on this matter is final and remained unaffected by the Trial Chamber's subsequent decision to sever the Case.[118] This means that, even though the defence argued unsuccessfully for the inclusion of only 750 civil parties who were victims of the crimes charged in Case 002/01, all 3,866 original civil parties, whether they have a connection to the severed Case or not, remain as such. However, it is questionable what right to reparations they might have, if any, as the Internal Rules limit reparations awards to measures (a) acknowledging the harm suffered by the civil parties as a result of the commission of the crimes *for which an accused is convicted*, and (b) providing benefits to the civil parties addressing that harm.[119] The Trial Chamber has so far refused civil parties' requests for a reasoned decision on the matter, although the Supreme Court Chamber's dictum in the appeal in Case 001 that reparations should 'benefit as many victims as possible'[120] has undoubtedly given guidance to the Trial Chamber in making the reparations awards summarised above, and will continue to provide guidance for the upcoming trials in Case 002/02 and other potential future proceedings.

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[116] *Prosecutors v Nuon Chea and Khieu Samphan* Case No. 002/19-09-2007/ECCC/TC (7 August 2014), paras 1151-1164.

[117] ibid, paras 1161 to 1164.

[118] See Internal Rules, r 23*bis* (2), (3).

[119] ibid, r 23*quinquies* (1) (emphasis added).

[120] *Case of Kaing Guek Eav (Case 001),* Supreme Court Chamber Judgement, 03 February 2012, para 659.

The outcome of these new provisions and rulings on reparations remains to be seen as the trial in Case 002/02 is ongoing. However, it is important to acknowledge that efforts led by the civil party lawyers and the Court in identifying the appropriate moral and collective reparations should be with a view to victims' specific needs and demands as well as cultural considerations. Above all, it is a crucial imperative for the ECCC and any other international criminal tribunal to honour and give a true meaning to the recognition of the right to a remedy for victims of mass atrocities. This is a step further in the recognition of the pain and suffering of victims as well as a reaffirmation of the principles of accountability, justice, and the rule of law.[121]

4. A Balancing Act: Civil Party Participation and Equality of Arms

In spite of this noteworthy development, the complex civil party process has not been without challenges. One of the most evident procedural issues arising out of participation has been the frequent criticism that this 'impedes the equilibrium between prosecution and defence'[122] and that it impinges upon the right of the accused to a fair and expeditious trial. When analysing the purpose and role of civil party participation, careful consideration should be given to the practical implications that such participation has for the interests of all parties as well as court proceedings. The trials in Case 001 and Case 002/01 have clearly demonstrated that civil party participation has had a bearing on equality of arms and the functionality of trial proceedings. Furthermore, the outcome of trial proceedings has also led to questions about the assumption that expansive participation in criminal proceedings furthers victims' interests. The application of the complex civil party participation scheme at

[121] Bassiouni (n 76) 279.

[122] Elisabeth Baumgartner, 'Aspects of Victim Participation in the Proceedings of the International Criminal Court' (2008) 90(870) International Review of the Red Cross 432.

the ECCC has also raised, from a legal and procedural standpoint, some important questions regarding the intended and unintended effects on civil parties and victims.

4.1 Prolongation of Court Proceedings

One major challenge posed by civil party participation relates to the impact that civil party participation has had on the prolongation of trial proceedings, thus increasing the cost of trials.[123] According to a conservative estimate, even in Case 001, a confined case with a narrow scope of criminal responsibility with one accused who admitted guilt and with a mere 96 civil parties to start with, civil party participation added four months to the length of the trial.[124] More specifically, in the *Duch* trial delays occurred due to additional filings, constant discussions on the scope of civil party participation as well as 'repetitive questioning on the part of civil parties.'[125] A requirement of first principle in any criminal trial is the protection of the defendant's right to a fair and expeditious trial. The right of the accused to be tried without delay is enshrined in Art 35(c) of the ECCC Law.

Bearing in mind the shortcomings of victim participation as it played out in the *Duch* trial, and being aware in advance of the complexities of Case 002, it became evident to the Court, as a senior legal officer in Chambers asserted, that 'the civil party participation scheme on its own as applied in the *Duch* trial would have sunk the [second] trial.'[126] As she further elaborated,

> We have 4,000 civil parties in Case 002, four accused all of whom challenge the charges, and if we allowed 4,000 civil parties under the model that we had in

[123] Brianne McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings* (Intersentia 2011) 204.

[124] Lamb (n 4).

[125] McGonigle (n 123) 205.

[126] Lamb (n 4).

> Case 001, let us assume that by some miracle, only 10% of those civil party applications were challenged in some way, let us further assume that each of those challenges could be resolved with a mere one half of allocated court time, we recognised in a conservative estimate that that would add a year to the trial, for no added benefit.[127]

As a result, the new scheme of collectivised participation in trial proceedings has endeavoured to remove the worst of the limitations from the civil party system that jeopardised the first trial. Also, in an effort to expedite trial proceedings in Case 002/01, given the exigencies of time due to the old age of the accused, and the complexity of proceedings, including civil party participation, the Trial Chamber in Case 002/01 issued a memorandum on 3 August 2012. The purpose of this memorandum was to inform the parties about the implementation of additional measures such as the reduction of oral testimony by the civil parties, witnesses and experts, and thereby to promote trial efficiency in the remaining trial phases in Case 002/01.[128] In this context, given the high number of witnesses, experts and civil parties in Case 002/01, it became clear to the Trial Chamber that the only feasible way to secure a fair and expeditious trial was by allowing only a small percentage of the most relevant civil parties to be heard in trial proceedings. Such restrictions, whilst arguably necessary in view of the important objective of conducting the trial with due efficiency, have an undoubted adverse effect on victims' legitimate aspirations to tell their stories, and to have their voices heard.

[127] ibid.

[128] See Trial Chamber Memorandum (Case 002) Scheduling of Trial Management Meeting to Enable Planning of the Remaining Trial Phases in Case 002/01 and Implementation of Further Measures Designed to Promote Trial Efficiency', 3 August 2012, available at
< http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E218_EN.PDF> (accessed 22 March 2015).

4.2 Disclosure issues

Another important concern arising out of civil party participation in trial proceedings relates to the issue of disclosure. According to the model adopted by the ECCC, both the Office of the Co-Prosecutors and the Defence are required to disclose exculpatory evidence. However, civil parties are not under this obligation. The imbalance is further noticeable with regards to proofing. At the ECCC, which is strongly based on a civil law procedural framework, the conventional parties in proceedings (the Office of the Co-Prosecutors and the Defence) are not allowed to proof witnesses.[129] However, as became apparent on one occasion during the *Duch* trial, the Judge specifically required civil parties to be better prepared in anticipation of their testimony, encouraging in this way proofing by the civil party lawyers.[130] Now, this in itself raises an issue of concern, and as a senior prosecutor argued,

> When going over witnesses' applications and testimonies, civil parties are actually collecting evidence, even though it may not be called like that. If in that process, they are collecting material, which might be exculpatory, they are actually not required to disclose it. [131]

Although the rationale behind allowing proofing of civil parties is to encourage better preparation prior to civil parties giving testimony, as well as trial efficiency, this consequently

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[129] See ECCC Internal Rules (Rev 9), rr 24, 50, 55, 60, 80, 84, 91 (regarding procedures for investigations and interviewing witnesses by Co-Investigating Judges and submission of the case file to the Trial Chamber). The practice of witness proofing encompasses preparation of witnesses for giving testimony by the parties to a case. As Garry argues, 'much of the debate over proofing has centred on *who* should be allowed access to witnesses pre-testimony and *what* should be the nature of their interaction with the witnesses before giving evidence at trial.' See Hannah Garry, 'Witness Proofing' in Linda Carter and Fausto Pocar (eds), *International Criminal Procedure: The Interface of Civil Law and Common Law Legal Systems* (Edward Elgar Publishing 2013) 66. Unlike other international criminal tribunals such as the ICTY, the ICTR, and the SCSL, which allow the practice of witness proofing, although often a contested issue, the ECCC in line with Cambodian procedural law, which has its roots in the French civil law tradition, does not allow witness proofing by the parties to a case. See also Rupert Skilbeck, 'Frankenstein's Monster: Creating a New International Procedure' (2010) 8 Journal of International Criminal Justice 451; Ruth Mackenzie, Cesare Romano, Philippe Sands, and Yuval Shany, *The Manual of International Courts and Tribunals* (2nd edn Oxford University Press 2010) 227-8. In relation to witness proofing in the common law and civil law traditions generally, see also chapter 3, footnote 112.

[130] *Case of Kaing Guek Eav (Case 001),* T, 6 July 2009, p 56.

[131] Abdulhak (n 12).

impinges yet further on the principle of equality of arms between the parties, in particular at the expense of the defence.

4.3 Effects on Prosecution and Defence

The implications of and the costs created by victim participation for the prosecution and defence have brought into sharper focus the need for the ECCC and other international criminal tribunals to shape victim participation so as best to accommodate competing interests. The effects of civil party participation on the rights of the defendant came to the fore during the *Duch* trial, and despite amendments to reduce unnecessary delays, the tension remained in the second trial. One of the fundamental principles upon which the ECCC functions is that proceedings shall 'be fair and adversarial and preserve a balance between the rights of the parties.'[132] Although the Internal Rules provide the 'skeleton guidance' on how to balance the respective rights of the parties,[133] it has been incumbent upon the judges to determine the parameters of civil party participation, which in itself can lead to 'legal uncertainty for all parties involved.'[134]

At the ECCC trials, civil party participation often became a trial management issue, prompting the Chamber to impose a system of time limits on all the parties as a 'response to concerns over the slow pace of the proceedings.'[135] The defence has often objected to the time allocated to them, arguing that they faced 'two prosecutors' and expected 'to respond to

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[132] ECCC Internal Rules, r 21 (1) (a).

[133] Karim A. A. Khan and Daniella Rudy, 'The Right of the Civil Parties to Participate v. the Right of the Accused to a Fair and Expeditious Trial: Challenges at the ECCC?' (2010) Oxford Transitional Justice Research (OTJR) Working Paper Series, 2 available at <http://www.csls.ox.ac.uk/documents/KhanandRudy_TheRightofCivilPartiesvTheRightoftheAccused.pdf> (accessed 22 March 2015).

[134] ibid

[135] McGonigle (n 123) 209.

a barrage of motions by the civil parties,'[136] and that the imbalance amounted to a violation of the rights of the defendant.[137] As a defence counsel argued,

> From a Defence perspective, it is a waste of valuable court time. I do not mean it in a kind of disparaging way, but the civil party lawyers stand up and ask questions to every witness, without adding much to what the prosecution has already covered.[138]

The defence concerns over equality of arms and fairness to the accused was also acknowledged by the Trial Chamber. As Hoven argues, 'the Chamber's concerns about procedural fairness found expression in its tendency to strengthen the role of the Defence in order to ensure an equality of arms.'[139] Accordingly, the Chamber announced its intention to allocate additional time to the defence on a case-by-case basis. Interestingly, it was observed that judges from a common law background expressed their concerns explicitly and 'invoked the argument of equality of arms,'[140] whereas those from civil law legal systems disagreed in principle with the legal classification, but nonetheless recognised 'a feeling of unfairness' created by the operation of civil party participation. Disagreements of this nature inherent to hybrid tribunals with mixed composition further highlight the multi-layered complexities of this transitional justice mechanism.

Another defence lawyer described civil party participation as 'a cumbersome legal mechanism, which sometimes becomes more of an ego thing for lawyers rather than necessary for victims. Like many things in this Tribunal, it is also a failure of

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[136] Pestman (n 109).

[137] *Case of Kaing Guek Eav (Case 001)* T, 16 June 2009, p 11.

[138] Karnavas (n 91).

[139] See Hoven (n 58) 18. See also Khmer Rouge Tribunal Trial Monitor, Asian International Justice Initiative, Report, No.15, week ending 2 August 2009, available at <http://krtmonitor.org/> (accessed 19 March 2015).

[140] ibid.

personalities.'[141] However, it is worth noting that despite the issues facing the defence, counsel for the defence understand the difficult territory in which civil party lawyers find themselves, more specifically in the second trial. As has been argued by yet another defence lawyer,

> If I were to be in the shoes of the Lead Co-Lawyers, I would be much upset by the way civil parties are being side-lined in trial proceedings. Either they are going to come and take a much more forensic approach, by advancing the points which the Office of the Co-Prosecutors have not touched upon, or they are going to accept to be treated as 'second-class citizens' in the courtroom.[142]

Apart from the unnecessary delays and management of court time, another objection raised by the defence concerns the actual scope of civil party participation. For instance, during the *Duch* trial, the defence argued that 'civil parties should not be permitted to question *Duch* or other witnesses on topics not directly related to their clients' harm.'[143] Such tension continued to characterise the proceedings in Case 002/01, and it is likely that will continue to be present also in the trial of Case 002/02.

Another remarkable angle, which is not instinctively apparent, is that civil party participation can have a bearing not only on the defence, but also on the prosecution's job, often resulting in continuous tension over inconsistencies that range from theories of criminal responsibility to questionable evidence and so forth. As Trumbull has argued, 'the claim that victim participation may assist the prosecution is dubious, and, in many cases, false.'[144] A concrete example of these inconsistencies was evident in the *Duch* trial, where the Co-Prosecutors and civil party lawyers took conflicting views on Joint Criminal Enterprise as a

[141] Interview with Tanya Pettay (Participant 12) Legal Consultant, Ieng Sary Defence, Case 002, ECCC (Phnom Penh 12 April 2012), notes on file with the author.

[142] Ianuzzi (n 110).

[143] McGonigle (n 123) 209.

[144] Trumbull (n 8) 807.

mode of responsibility, which one could interpret as having inadvertently undermined the Prosecution's strategy at trial and caused further delays. As a senior legal officer in Chambers elaborated,

> One could argue that this issue could be resolved with a greater calibre of counsel or more effective lawyering, nonetheless the potential [for inconsistency] is always there.[145]

Several instances in the first and second trials have demonstrated that the risk of tension on the prosecution's efforts will remain present, mainly due to the fact that civil party lawyers do not have access to all the evidence in a given case, as the prosecution is not under a legal obligation to divulge information to them beforehand. This could easily lead to scenarios where civil party lawyers would take the focus of the cross-examination beyond or in a different direction from that of the prosecution, potentially 'providing defence witnesses [with] an opportunity to redeem mistakes made during the Prosecutor's cross-examination.'[146] In a classic example, in the *Duch* trial, 'a civil party lawyer questioning a victim-witness argued that his testimony contradicted previous statements on record with the Court'[147] thereby inadvertently undermining the Prosecution's efforts by pointing to the inconsistencies of the witness's statements and his credibility. Most of the representatives of the Office of the Co-Prosecutors question whether civil party participation could bring any valuable procedural contribution regarding evidence and case management. Thus far, however, the Court, aware of the fact that prolonged criminal proceedings consume more judicial resources, took several steps in the second trial (Case 002/01) by streamlining the process and by lessening the effects of civil party participation on the prosecution and defence. It remains to be seen how such a delicate balance between all parties involved will

[145] Lamb (n 4).

[146] Trumbull (n 8) 809.

[147] McGonigle (n 123) 212.

continue to be maintained, particularly in Case 002/02, which is more complex and greater in scope than its predecessors.

4.4 Unintended Effects on Victims

While acknowledging that efforts to enhance victims' rights can lead, at least in theory, to the realisation of the aspiration of restorative justice for victims, a practical evaluation demands a careful consideration of the often unquestioned assumption that expanded participation is in the victims' best interests. There are two dimensions to the effects of victim participation; first in respect of victims recognised as civil parties, and second in respect of un-recognised victims.

With regards to the former, because of the lack of procedural space in the Internal Rules, as highlighted above the victim is required to choose quite early on in the proceedings whether he or she wants to participate as a witness or as a civil party. Therefore participating victims may be denied the opportunity to testify under oath as witnesses, which on the other hand affects the prosecution's opportunity to present information that could further assist in incriminating the accused.[148] For instance, in the *Duch* trial, several direct victims 'who potentially could have provided sworn testimony on the guilt of the accused opted instead to participate as civil parties.'[149] By contrast, civil party testimony is not given under oath, and it should therefore carry less weight than witness evidence, especially since civil parties, unlike witnesses, attend all closed and public hearings before testimony, which could have an impact on the information that they provide.

[148] Trumbull (n 8) 810.

[149] McGonigle (n 123) 212.

With regards to the second dimension, compared to approximately 1.7 million people who perished under the Khmer Rouge, victims recognised as civil parties by the ECCC represent only a fraction of the overall number of direct and indirect victims. In determining the role and impact of victim participation at the ECCC, one should be cautious about the effects that such participation could have on victims who are not granted permission by the Court to take part in the proceedings. Granting permission to some victims at the exclusion of others could potentially bring about unintended and undesirable consequences, especially in light of the quest for national reconciliation and victims' aspirations to unearth the truth, both key objectives of any international criminal tribunal.

Although the victim-oriented approach endorsed by the ECCC is likely to contribute positively to victims' experiences, it remains to be seen whether expanded participatory rights 'will provide an additional benefit to the victim.'[150] Chapter 6 analyses in detail victims' views, perceptions and attitudes with regard to their participation, and seeks to substantiate the presumed benefits as well as shed light on the potential shortcomings of victim participation.

What emerges from the way in which civil party participation has been crafted and applied so far at the ECCC is the understanding that despite victim involvement being a salient feature of the ECCC, the first and second trials have appeared more as 'experimenting laboratories' than as processes guided by sound and well-crafted rules and procedures. In this context, a careful examination of the complexities arising from the recognition and application of greater procedural rights and substantive remedies afforded to victims has informed our analysis and deepened our understanding of the role and impact of victim

[150] Trumbull (n 8) 811.

participation, not only on the criminal justice system, but also on victims themselves. Furthermore, a better comprehension of the dynamics of victim participation as applied at the ECCC has contributed to the debate underpinning the victim-centred approach to transitional justice.

It is important in terms of the legitimacy and effectiveness of victim participation at the ECCC for comprehensive, consistent and clear rules and procedures to be developed 'early on in the life of the court'[151] in order to avoid a legal and procedural vacuum that would most certainly undermine the successful application of the civil party participation scheme. Although still in its infancy, the findings from the first and second trials at the ECCC have shown that there is a critical need for careful evaluation and development of sound common legal and normative standards to guide the processes at the ECCC and other international criminal tribunals.

In line with this contextual and substantive perspective on civil party participation, the next chapter provides a critical and thorough evaluation of victims' insights and attitudes regarding their participation as civil parties in proceedings at the ECCC. In addition to an analysis of theoretical underpinnings, case law, and the perspectives of legal practitioners who shape and define the parameters of civil party participation, an examination of victims' perspectives enriches, and offers further depth and dimension to, our understanding of civil party participation as a transitional justice mechanism in post-conflict societies.

[151] Stover at al. (n 84) 546.

CHAPTER 6

Victim Participation at a Crossroads: A Promising Route Forward

The journey of victims of the Khmer Rouge towards recognition and empowerment has been a long and painstaking one. It is only through the lens of victims as primary stakeholders in Cambodian transitional justice that one can develop a profound and thorough understanding of the role, value and scope of victims' participation. As Judge Cartwright has acknowledged, victims bring a human face to the proceedings and make an invaluable contribution to the process and to justice as a whole.[1] Nowhere is this more palpable than in Cambodia, where the incorporation of victims in the proceedings of the ECCC has been at the heart of the transitional justice process.

Chapters 4 and 5 provided a comprehensive and detailed analysis of the contextual, substantive and procedural framework of victim participation at the ECCC. This chapter builds on the foundations of the exposition in the preceding chapters and seeks to offer more depth and understanding of the complex and multifaceted victim participation regime by bringing to light the views, insights, and experiences of victims themselves. The qualitative research with victims conducted on the ground in Cambodia provides a thorough normative and empirical examination of the implications of the incorporation of victim participation as a restorative justice element into a retributive justice mechanism. It critically examines the ways in which civil party participation has been interpreted and shaped in the trials before the ECCC. It does so by analysing how the rights of victims to remedies for gross violations of

[1] Interview with Dame Silvia Cartwright (Participant 6) Trial Chamber Judge, ECCC (Phnom Penh 10 April 2012), notes on file with the author.

human rights have been dealt with by the ECCC, and by evaluating, on a more specific level, how such participation has shaped victims' perceptions, attitudes and experiences.

This qualitative research, which was part of a consultancy project carried out with Impunity Watch[2] between September and November 2014, into the participation of victims in proceedings before the ECCC, has provided empirical evidence of and further insights into the dynamics of victim participation at the ECCC, as highlighted in chapter 1. The research study explores how a number of victims and affected communities have experienced various forms of participation, and it offers practical understanding of the assumed benefits and harms resulting from victim participation. The data gathered through the interviews with victims have made an invaluable contribution to the thesis and have further enriched the overall analysis of victim participation.

In this chapter, the argument is structured around two main sections. The first section provides a thorough empirical analysis of the virtues, the role, scope and impact of participation. It evaluates whether and how participation leads to the benefits that are commonly assumed, what are the unintended consequences of victim participation, as well as what are the possible negative dynamics, if any. In essence, this section examines how participation has helped victims obtain justice from within; seek truth through participation by learning more about the regime and the motivations behind the crimes committed; foster reconciliation; and equally importantly, obtain meaningful reparations through participation. The second section builds on the analysis proffered in the preceding chapter, which analysed in detail the shortcomings that have arisen from the application of the ECCC's regime of civil

[2] See chapter 1, footnote 95.

party participation, from both a legal and a procedural perspective.[3] As highlighted above, during the first and second, and possibly only, trials at the ECCC, the Court has wrestled with nearly every aspect of civil party participation – from the purpose and admissibility of civil parties to procedural rights, reparations and so forth – as the Court endeavoured to best define the scope and contours of civil party participation. The analysis was based primarily on the views and experiences of legal practitioners, such as judges, prosecutors, defence lawyers and victims' legal representatives, as well as my own observations in the courtroom at the ECCC. The present chapter is based on the premise that when reflecting on the overall study of victim participation, it is important to take account of victims' views and insights with regard to the limitations of victim participation as perceived and experienced by victims themselves. Thus, the effects of participation on victims and affected communities are examined by incorporating invaluable information elicited from interviews with victims. It is through the analyses and experiences of the victims interviewed that this research is able to shed light on the form, scope and implications of civil party participation regarding the presumed benefits as well as some of the anticipated harms resulting from victim participation.

1. Victim Participation: Role and Impact

The direct and active participation of Khmer Rouge victims at the ECCC has brought into sharper focus the need for a more critical and comprehensive understanding of the virtues and impact of victim participation, with an emphasis on its benefits and possible negative dynamics. The incorporation of victims as civil parties is a novelty in the realm of international criminal justice, but the application of this mechanism – as it sailed through unchartered waters at the ECCC – has undoubtedly revealed potential advances and limitations.

[3] Chapter 3, section 4.

1.1 Victims' Motivations to Participate

As a precursor to a thorough appreciation of the role and impact of victim participation, it is crucial to understand the motivations underlying this mechanism, building on the foundations laid in section 3.1 of chapter 3. Certain core motivations forming the foundation of victim participation were identified by Stover and others in their instructive research in 2011.[4] These themes encompassed: the need to know; the quest for justice; the need to tell one's story; and the need to educate the world. Importantly, the research conducted recently with victims in Cambodia has broadly confirmed these findings. However, as will be elaborated upon shortly, this chapter will also look at how these themes have evolved, and will extend the analysis. Furthermore, the interviews conducted with victims and focus groups conducted in Cambodia have shown the significance, in terms of victims' motivations to participate, of seeking reparations and fostering reconciliation. Therefore these key motivations will form the core of the following analysis:

Seeking justice;

Seeking truth;

Telling one's story;

Educating the world;

Seeking reparations;

Fostering reconciliation.

There are thus different reasons why victims are motivated to participate in proceedings before the ECCC as civil parties. These are brought out in the following comments made by

[4] Eric Stover et al., 'Confronting *Duch*: Civil Party Participation in Case 001 at the Extraordinary Chambers in the Courts of Cambodia' (2011) 93 International Review of the Red Cross 503.

civil parties in the course of interviews conducted with victims in Cambodia. For example, one of the victims interviewed said,

> At first, I did not understand the procedures or goals of the court. Primarily, when I filed a lawsuit at the time, I just wanted justice so that the victims and my deceased relatives would receive their justice. And I myself would be able to find peace of mind.[5]

In the same context, one civil party from Kampong Cham recalled:

> The factors that motivated me to file the application to the ECCC are: Firstly, I was a direct victim and lost many relatives so first I want it be the history for the next generation to learn about history. Secondly, I want to find justice for my siblings and relatives … Next, I would like to provide inculpatory evidence to those accused … to inform that they had done something wrong.[6]

Another civil party, who participated in Case 001 and who was subjected to torture and degrading treatment, stated as follows:

> The purpose I applied to be a civil party in Case 001 is to seek the truth for the people who survived and those who died, see the accused admit that they really committed the crimes at that time and ask for the reparation, moral and collective reparation.[7]

A slightly different perspective was put forth by yet another civil party, stating that,

> When the ECCC conducted the trial, with my suffering I have endured, I wanted to fill a complaint so that my suffering could be eased. I want a country that has the rule of law. So that in the future, people will not be executed without standing trial.[8]

The following sections will examine these points individually, as well as their inter-connections with each other. In the course of the analysis, reference to victims' personal

[5] Transcript of interview on file with the author (Civil Party Cases 001 and 002, Phnom Penh, 29 October 2014).

[6] Transcript of interview on file with the author (Civil Party Cases 001 and 002, Kampong Cham, 4 November 2014).

[7] Transcript of interview on file with the author (Civil Party Case 001, Phnom Penh district, 19 September 2014).

[8] Transcript of interview on file with the author (Civil Party Case 001, Phnom Penh, 29 October 2014).

stories and perceptions is crucial to a thorough understanding of the motivations of, and reasons for, victims to participate in proceedings at the ECCC.

1.2 Seeking Justice

Seeking justice for others and oneself is undoubtedly the fundamental theme common to virtually all interviews conducted. Clearly, justice is a protean word. In a broad sense, integral to the idea of justice is the notion of making restitution to right an *injustice*, to right the wrong. In the context of victim participation, it may be said that justice denotes victims' pursuit of a guilty verdict, as highlighted in the majority of interviews and focus group discussions. This is however a debatable point, as a guilty verdict will not in and of itself 'right the wrong.' This points to another notion of justice, which is inseparable from the other motivations underlying victim participation: the quest for truth and reconciliation, as well as the question of reparations in particular, all ultimately flow from the ideal of justice. It should also be noted that justice may be understood from both an individual and a collective perspective, as was put by one interviewee:

> I was a direct victim of the Khmer Rouge. My participation at the ECCC is important for two reasons: first, to seek justice for myself and my relatives. Second, help the system to provide inculpatory evidence towards establishing accountability, in this way serving justice.[9]

As will also be seen below, the notion of justice was prevalent in virtually all interviews. What follows from this is that, from victims' perspectives, they believe their participation as civil parties to be meaningful in terms of achieving justice in Cambodia, often on both an individual and a collective level. Yet, the question whether justice can be obtained *outside* the confines of the courtroom, i.e. other than through civil party participation, can only be

[9] Transcript of interview on file with the author (Civil Party Cases 001 and 002, Phnom Penh, 4 November 2014).

answered by looking at the discrete manifestations of the abstract ideal of justice in the subsequent discussion. This ultimately raises the question whether civil party participation really does take the most effective and meaningful form to enhance justice.

As highlighted in chapter 5, Rule 23(1) of the ECCC Internal Rules states that the purpose of an action brought by a civil party is to participate in proceedings before the Court 'against those responsible by supporting the prosecution', and to allow victims to 'seek moral and collective reparations.' The duality of victims' role in proceedings before the ECCC should be noted: supporting the prosecution is essentially related to the definition of justice mentioned above.

Stover and others in their study found that victims' concern was primarily related to personal justice, as victims,

> For the most part… grounded their need to testify in personal and intrinsic terms rather than in feeling a responsibility to perform a universal good for all Cambodians or all humanity, although such sentiments were not completely absent.[10]

To an extent, this picture is reflected in the research conducted for this project in Cambodia. Thus, one civil party from Prey Veng who was imprisoned at Prey Sor during the Khmer Rouge spoke about his quest for justice and his understanding of the role of victim participation at the ECCC in this context in the following words:

> Primarily, when I filed my complaint at that time, I just wanted justice so that the victims of my deceased relatives would receive their justice. And I myself would be able to find peace of mind, not having any regrets for not filing a complaint in order to find justice for myself.[11]

[10] See Stover et al. (n 4) 520.

[11] Transcript of interview on file with the author (Civil Party Case 002, Prey Veng, 10 October).

The most recent research conducted with victims in Cambodia did however reveal a slightly more nuanced picture, in that the quest for justice was not only seen as denoting seeking justice and accountability for personal suffering, but also for Cambodian people in general for whom, 35 years after the horrors of the Khmer Rouge regime, reconciliation and other communal goals have become indispensable for moving forward.

This duality becomes apparent in other interviews conducted with civil parties. Thus one civil party who had been subjected to forced evacuation and to cruel treatment, and who had been given the opportunity to testify before the Court, emphasised her determination to hold the perpetrators of the atrocities of the Khmer Rouge regime accountable for the benefit of herself and wider Cambodian society:

> The establishment of the ECCC gave me so much hope. When ADHOC came to our district searching for victims who wanted to file complaints in Case 002, I thought this was a very good opportunity for me to have my voice heard and seek justice. So, I joined the proceedings in order to hold the perpetrators accountable for what they had done to me and my family and I wanted justice for myself *and Cambodian people*. I thought it was important that I help the court to find the guilt of the accused...[12]

A similar sentiment was expressed by another civil party, who said that,

> I would like to tell you that I want to seek justice for me *and all victims around the country*. And I wanted the tribunal to help me seek justice. I believe that the tribunal will be able to find justice for me. When the tribunal can find justice for the victims, I am happy because it helps me and the victims seek justice, and to let the next generation know it so that they will not commit such cruel acts.[13]

It is clear from the foregoing that seeking justice is intrinsically linked to the other motivations for victims to participate in proceedings, and to other core rationales for victim

[12] Transcript of interview on file with the author (Civil Party Case 002, Phnom Penh, 4 November 2014); emphasis added. ADHOC, the Cambodian Human Rights and Development Association, is an NGO that has become prominent in the realm of victims' support services. See <http://www.adhoc-cambodia.org/> (accessed 15 August 2015).

[13] Transcript of interview on file with the author (Civil Party Case 002, Phnom Penh, 3 November 2014); emphasis added.

participation at the ECCC, such as seeking truth, telling the next generation about the horrors of the Khmer Rouge, and obtaining moral and collective reparations. For this reason, an 'ordinary' criminal trial which may attain the objectives and motivations that underlie civil party participation only in an attenuated form, if at all, and which has an almost exclusive focus on accountability, would not be sufficient to bring about justice, at the very least as that term is understood in an individual as opposed to a collective sense. Such findings were reflected also in the study conducted by Pham and others, whereby civil parties interviewed emphasised in addition to the guilty verdict (which was the most frequently cited positive outcome of the trial), other important outcomes such as: the contribution of the trial to establishing a historical record; an opportunity for civil parties to tell their story; allowing the accused to provide a direct account of what happened from his perspective, and recognise and offer apologies for what he had done.[14]

1.2.1 Reactions to the verdicts

The attainment of justice for victims can only be measured by reference to the verdicts handed down by the ECCC. As will be recalled, the Supreme Court Chamber on 3 February 2012 overturned the first-instance decision of the Trial Chamber in Case 001, increasing *Duch*'s sentence from a mere 35 years to life imprisonment.[15] In Case 002/01 the Court sentenced the two remaining individuals convicted of crimes against humanity committed during the Khmer Rouge regime to life imprisonment, the maximum penalty under the ECCC Law.[16]

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[14] Phoung N. Pham et al., 'Victim Participation and the Trial of *Duch* at the Extraordinary Chambers in the Courts of Cambodia' (2011) 3 Journal of Human Rights Practice 280.

[15] *Case of Kaing Guek Eav (Case 001),* Supreme Court Chamber Judgement, 03 February 2012, available at <http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/Case%20001AppealJudgementEn.pdf> (accessed 8 February 2015).

[16] *Case 002/01*, Trial Chamber Judgement, 7 August 2014, available at

In broad terms, the research has shown that victims are in general in agreement with the imposition of life sentences on those convicted. However, concerns and a lack of understanding remain in relation in particular to appeal rights. Thus, as regards the verdicts delivered in Case 002/01, one civil party who had been evacuated from the capital, describing his suffering under the Khmer Rouge as 'immeasurable', further stated that,

> I am satisfied with this verdict. If they were sentenced to one or two years in prison, they could still be able to live freely after the time has passed. But life imprisonment, we are satisfied with it. But the only thing is that they are now appealing against the verdicts and their lawyers have already filed the appeal papers, and are now waiting for the decision from the higher [Supreme] Court.[17]

This concern regarding the length of procedures, in particular in respect of appellate rights, was shared by most civil parties interviewed, as exemplified by the following comments made by a civil party who is one of the seven or so remaining survivors of S-21 prison and who had participated in both cases before the ECCC:

> My concern is that the accused may die before the [appeal] hearing. If so, there will be no justice for the victims, as well as for the world… So we tried to push the proceedings to be conducted as quickly as possible. But now I heard that the accused would appeal in Case 002… So that would take time.[18]

Victims' key concerns thus appear to be, first, that the perpetrators convicted of crimes against humanity do not see the light of day again; and, secondly, that there be a degree of finality with regards to the verdict. This is also reflected in the following comment made by the same civil party in relation to the first-instance verdict in Case 001:

<http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2014-08-07%2017:04/E313_Trial%20Chamber%20Judgement%20Case%20002_01_ENG.pdf> (accessed 9 February 2015).

[17] Transcript of interview on file with the author (Civil Party Case 002, Phnom Penh, 3 November 2014); emphasis added.

[18] Transcript of interview on file with the author (Civil Party Cases 001 and 002, Tuol Sleng Genocide Museum, 18 September 2014); emphasis added.

> The judge sentenced *Duch* to 35 years in prison. We, the 93 civil parties, were not satisfied with the decision and we appealed to the Supreme Court… As a result, *Duch* was sentenced to life imprisonment, and this is justice for me and other victims.[19]

1.3 Seeking Truth

As Stover and others, who conducted field research with victims soon after the end of the trial in Case 001, have argued,

> This palpable need for details about a loved one's fate – however painful – reverberates in families of the disappeared around the world, regardless of cultural or political context.[20]

There is no denying the desire of victims to participate directly in trial proceedings by asking questions of the accused and witnesses, and that this is inextricably linked to their desire to confront the accused. This sets civil party participation apart from other forms of participation in transitional justice, such as indirect participation, notification etc. As discussed in chapter 5, civil parties may take an active role in proceedings by asking questions and liaising with the prosecution. This will not normally be possible with regards to other forms of participation, which are more passive in nature. Indeed, for many of the victims who participated as civil parties in the *Duch* trial, confronting *Duch* and having an opportunity to ask questions as to the individual fates of their friends and loved ones constituted a key moment in their search for truth. This was also the conclusion of Stover, already mentioned above. Thus, it was found that the encounter with *Duch* during the trial proceedings,

> Represented a pivotal moment in their quest to uncover the truth about the fate of their loved ones. When reflecting on the overall process, it is important to acknowledge that there have been some advances arising from the participation of victims. As highlighted in a survey conducted by Stover and others following the completion of the Duch trial, the participation of victims as civil parties at the

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[19] ibid.

[20] See Stover et al. (n 4) 519.

> ECCC has been perceived as valuable and often transformative for some, underscoring their motivation to bear witness on behalf of their deceased family members.[21]

The foregoing quote highlights the point that, at least for some, victim participation can be of transformative value. Transformative justice mechanisms encompass structural and institutional transformation, socio-economic and political justice, and involve recognising and addressing the multiple needs and expectations of the local population, drawing upon local approaches to justice that coexist with the dominant worldview and practice of transitional justice.[22] However, the extent to which such transformation occurs on a broader, societal level, rather than just on the individual plane as envisaged by Stover, requires observation of the effects of victim participation over a longer period of time.

What the present research has found is that even after Case 002/01, the findings of Stover and others still hold true: the confrontation of the accused is one of the drivers of victim participation at the ECCC. This is expressed in no clearer terms than in the interview conducted with one civil party, in a quote which is best set out in full:

> I asked them that as you were the head of state of Democratic Kampuchea, have you ever thought about the purpose of establishment of this Democratic Kampuchea, and what the benefits of killing Cambodian people are? Who was in charge? Who was behind the killings of Cambodian people? This is my first question. The second question is, during the evacuation of people out of Phnom Penh city, why did you arrest and kill students, scholars, and the Khmer Republic civil servants? Was it the policy of Democratic Kampuchea, or was it the policy of other powerful countries? The third question is, after the evacuation of people out of Phnom Penh on 17 April 1975, why did you kill the evacuees? Why did you do so even with children … The fourth question is, have you ever thought about the destiny of Cambodia when you formed the cruel Communist ideology, and victimised the people under your leadership? The fifth question is, as you are one of the scholars who had studied abroad, why did you create such a deranged concept to kill your own people? Because

[21] ibid 536.

[22] Paul Gready and Simon Robins, 'From Transitional to Transformative Justice: A New Agenda for Practice' (2014) 8 International Journal for Transitional Justice 339.

> human beings need their right to live in a society with dignity … Why did you kill people? So I wanted them to reveal [the answers thereto]. These are the five questions I asked Nuon Chea and Khiev Samphan.[23]

These five questions were asked of the two accused, and ultimately convicted, in Case 002/01. The ECCC provided a forum in which to ask such questions. However, the degree to which victims' desire for the truth is satisfied naturally depends on the extent of information divulged by the accused. Thus, as the same civil party interviewed for this research continued in trenchant terms:

> … the most important point that made me dissatisfied is that they did not answer comprehensively the five questions I asked. That means that they are still hiding some information … According to my view, what I wanted is for them to be open and to concede that human beings deserve dignity and being treated morally; and to admit that what they had done to the Cambodian people was not acceptable. For me especially, and for my parents, this was a very serious tragedy. I still have traces of remorse, and I am not happy because my parents were killed, and the prospects for justice for my parents seem to be dark.[24]

Another civil party interviewed in Phnom Penh was more upbeat about the benefits of the truth-seeking role of victim participation before the ECCC, stating that,

> I have learnt a lot from it. It has opened my eyes to the revolutionary ideology of which we had not previously been aware. Now it makes us, the victims, know the dark policies and cruel acts of the people in charge of Democratic Kampuchea. We have never known this, but now we do know it from the ECCC. I would like to thank the ECCC for helping open my eyes to the acts of those in Democratic Kampuchea.[25]

In similar tones, a civil party from Kampong Cham has been positively disposed towards the truth-seeking mechanism provided by victim participation at the ECCC, underlining the very

[23] Transcript of interview on file with the author (Civil Party Case 002, Siem Reap, 24 October 2014); emphasis added. The interviewee was an academic during the Khmer Rouge regime.

[24] ibid.

[25] Transcript of interview on file with the author (Civil Party Case 002, Phnom Penh, 3 November 2014).

limited information that was available during the Khmer Rouge regime and arguably even in the years following, up to this day:

> With regards to the truth, before we only had DC-CAM,[26] which is the place where we can learn about the truth. But ever since its establishment the court, as well as the investigating judges, has tried to find the truth. At the time, we did not know what Khiev Samphan, Ieng Sary, Ieng Thearith were doing, but later on I learnt about it through the court: those leaders were well-educated but why did they do such awful acts to lead the country?[27]

A better understanding of the power dynamics, ideological underpinnings and political structures of the Khmer Rouge has been offered by the combination of two means of involvement: namely victims' participation in the trial proceedings, including interactions with lawyers, on the one hand; and the information received by the Victims Support Section (VSS), ADHOC and further NGOs on the other hand. This was a common theme amongst interviewees, as manifested by a further example in which attention is drawn to the extent of suffering under the regime:

> As a result of the court, I have a better understanding. There are some terrible atrocities that I have learned from the trial. Before I knew only about what I had gone through and a few people around me. Having participated in the trial, I know more about the stories of people all over the country who suffered from the atrocities committed by the Khmer Rouge, especially sexual violence in Case 002, in relation to which I was listed as a victim.[28]

This sentiment is brought out yet more strongly in the following extract from an interview conducted in Phnom Penh with a civil party in Case 002/01, who opined that attending the trial proceedings,

> Has helped to have a better understanding about the Khmer Rouge. Before, we did not know the Khmer Rouge well. Under the Lon Nol regime, we just heard the word 'Khmer Rouge', but we did not know their leaders, such as Ieng Sary,

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[26] See chapter 4, footnote 25.

[27] Transcript of interview on file with the author (Civil Party Cases 001 and 002, Kampong Cham, 4 November 2014).

[28] Transcript of interview on file with the author (Civil Party Case 002, Phnom Penh, 3 November 2014); emphasis added.

> Pol Pot, Noun Chea. After the establishment of the ECCC, we know much better than before, because the court revealed the leaders of the Khmer Rouge for us to see, and we now know who ordered the wilful killing of people… At that time, we only heard the word 'Angkar', but we did not know who or what 'Angkar' was.[29]

In many cases, therefore, the quest for truth poses new questions, and it may very well be questioned whether all of these are necessarily suited to trial proceedings before the ECCC. It remains a live issue whether the goal of unearthing the truth, considering the implications of the complex civil party scheme, can be equally ascertained in a forum outside the realm of international criminal tribunals.

What is clear, however, is that truth-seeking requires a considerable degree of support for victims, involving both judicial and non-judicial actors. As adumbrated above, organisations such as ADHOC, the Cambodian Defenders Project (CDP), Legal Aid of Cambodia (LAC) and the Transcultural Psychosocial Organisation (TPO), have been instrumental in the provision of victim support services. The VSS at the ECCC, in co-operation with civil party lawyers, as the designated body for the facilitation of the dissemination of information to civil parties, has also organised on-site workshops as part of its outreach programme.

One civil party spoke of such engagement in positive terms, underlining the important work done by such outreach programmes:

> Previously I did not know much, but ever since I started attending the workshops at many places… I have a better understanding of [the Khmer Rouge leaders'] actions. When I visited torturing places such as Tuol Sleng prison, I saw it with my own eyes. They also took me to Cheung Ek. Before, I

[29] Transcript of interview on file with the author (Civil Party Case 002, Phnom Penh, 3 October 2014). The "Angkar" referred to in the text is Khmer for "the organization" and denotes the Communist Party of Democratic Kampuchea. The spelling "Angka" is also occasionally encountered.

> had not known about this. I have never known where the torturing places were, but now I know better and see more.[30]

It was not, however, only civil parties who stressed the importance to them of discovering the truth through the trial proceedings. As one interviewee who had not filed a complaint or an application to become a civil party stated,

> This is my second time attending the trial from the public gallery. I have learnt a lot about the history and structure of the Khmer Rouge, and the motivations behind the regime… I have benefited from attending the trial even though I cannot be a civil party.[31]

This was echoed in other interviews with non-participant victims, as the following quote demonstrates:

> For me, it is very important to be here in the court to attend the trial. The Victims Support Section has done a good job reaching out to victims like myself, because this has helped educate Cambodians on our shared painful history. But not being able to ask questions of the accused was a drawback, particularly where I did not seem to understand a difficult point.[32]

Two things are notable about the foregoing quotes: first, the quest for truth may be pursued through means of participation other than as a civil party, but the passivity inherent in such indirect participation as a trial observer limits victims' ability to ask questions of the accused and generally to take a more active role in the proceedings. The second point to note is that the interviews conducted with both civil parties and non-participant victims did not in any way reveal that the exclusion of some from participating directly in proceedings caused resentment on the part of others. Presumably this is attributable to an appreciation, based on information disseminated by the VSS, ADHOC and civil party lawyers, that civil party

[30] Transcript of interview on file with the author (Civil Party Case 002, Phnom Penh, 3 November 2014).

[31] Transcript of interview on file with the author (Phnom Penh, 2 November 2014).

[32] Transcript of interview on file with the author (Phnom Penh, 2 November 2014).

participation is linked to the charges brought in the specific case, and is therefore limited to those who were directly affected by the crimes charged.

The above quotes demonstrate clearly the importance for victims of learning the truth and understanding about the past. They also show that the issues of truth-seeking, telling one's story and teaching the world about the horrors and atrocities of the Khmer Rouge regime are closely-related.

1.4 Telling one's story

Whilst the dimension of truth-seeking represents the results-oriented view of the participation of victims as civil parties, telling one's story reflects a more input-based view, the importance of which can hardly be overstated. Thus, as psychoanalyst Dori Laub has argued, 'there is in each survivor, an imperative need to tell and thus come to know one's story.'[33] References to the need to give expression to experiences during the Khmer Rouge are thus found in almost all interviews conducted for this research, usually by implication rather than being expressly spelt out. As one interviewee who elaborated on this specific point explained,

> When testifying before the court, firstly I was proud because among thousands of civil parties, I was selected by the tribunal to testify and describe my suffering and difficulties during Democratic Kampuchea to the public, so that they knew the suffering of the people. I was proud because I described this suffering to the court before the accused. I was proud and excited to represent all the victims.[34]

This is not to say that telling one's story, even though often a psychological imperative, is easy, and testifying in court as a civil party, or as a witness for that matter, is more difficult

[33] Dori Laub, 'An Event Without a Witness: Truth, Testimony and Survival' in Shoshala Felman and Dori Laub (eds), *Testimony: Crisis of Witnessing in Literature, Psychoanalysis, and History* (Routledge 1992) 98.

[34] Transcript of interview on file with the author (Civil Party Case 002, Phnom Penh, 3 November 2014).

still. Psychophysiological reactivity – the phenomenon that when describing past traumatic episodes survivors often react physically as well as psychologically – has been described in the literature.[35] The difficulty of coming to terms with and reliving the past could also be observed in the interviews conducted. Thus, as one civil party stated,

> I do not want to recall my story. I do not want to imagine again what happened under the Khmer Rouge regime as I thought that all my life is meaningless. I think I will have to ensure this until I die. This is my perception.[36]

The difficulty of testifying apart, its importance is generally recognised by victims and other actors in the proceedings. As noted by de Hemptinne,

> Granting victims the right to convey their suffering and claim compensation can help victims recover from the harm experienced. Besides this reparative purpose, victim participation also serves a symbolic value. Giving victims a 'say' in the proceedings could render the tribunal's work more transparent and accessible for the victims.[37]

There are thus a variety of goals and values that victim participation is designed to serve that relate directly to victims' needs to share their stories.[38] First, telling the court and thereby the wider world about their experiences is part of victims' self-healing processes, or what de Hemptinne calls the 'reparative purpose.' Connected therewith is the idea that victims' dignity is guarded by giving them participatory rights before the courts, regarding them as active participants rather than as mere objects of the inquiry: we can call this the dignitarian perspective, regarding the right to tell one's story as an essential component of human dignity following mass victimisation.

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[35] See for example Stover et al. (n 4) 524.

[36] Transcript of interview on file with the author (Civil Party Case 002, Phnom Penh, 3 October 2014).

[37] Jérôme de Hemptinne, 'Challenges Raised by Victims' Participation in the Proceedings of the Special Tribunal for Lebanon' (2010) 8 Journal of International Criminal Justice 167.

[38] ibid.

The goals considered so far had an intrinsic value. There are however more instrumental reasons why allowing victims to give a voice to their stories could be beneficial. This includes the symbolic value of victim participation, which as de Hemptinne rightly argues, enhances transparency and accessibility on the part of the tribunal.[39] This leads on to the final point, which is that being exposed to victims' direct testimonies – whether as witnesses or civil parties – enhances the Court's appreciation of what occurred during the Khmer Rouge regime. Thus, as one civil party co-lawyer has argued in an interview conducted separately, civil parties' testimonies 'bring life to the facts.'[40] Another lawyer argued that civil parties 'bring something different as protagonists of facts, what the civil parties bring is something they have suffered for which they seek a conviction and ask for reparations.'[41]

These underlying goals and values, intrinsic as well as instrumental, should be borne in mind in evaluating the extent to which the victim participation regime at the ECCC meets victims' expectations in relation to ensuring that their voices are heard. However, despite the noble aspiration of victims to face the accused and have their voices heard, doing so in the context of trial proceedings does not necessarily offer the forum for them freely to share their stories. The courtroom is beset with inherent limitations. Civil parties will usually respond to specific questions put to them rather than present a coherent, personal narrative. This

[39] ibid.

[40] Transcript of interview on file with the author (Civil Party Cases 001 and 002, Tuol Sleng Genocide Museum, 18 September 2014).

[41] Conversation with Elisabeth Simonneau-Fort, ECCC Civil Party Lead Co-Lawyer in Case 002/01, notes on file with the author.

perception was present in most interviews, and expressed in particularly trenchant terms in the following extract from an interview conducted with an S-21 survivor:

> Yes, I had the chance to tell my story. But it was very short. In this regard, in the first trial [Case 001], I told the court about what I had gone through during the Pol Pot regime. I was tortured even though I had not done anything wrong… So I am very regretful since there is no justice for me.[42]

1.5 Educating the World

The educative value of victims' testimonies is perceived as an equally important dimension of civil party participation. As another civil party, known for her strong voice in support of victims' rights and needs, has argued in relation to victim participation at the ECCC,

> The whole idea is that you create narratives, build an archive, a record to the Cambodian history that can be read by family members, their children and the world.[43]

Naturally, the idea of educating the world, and in particular of imparting knowledge about the Khmer Rouge atrocities on the younger Cambodian generation, remains an imperative beyond the confines of the courtroom, and is inextricably linked to the psychological observations examined in the context of the need to tell one's story. As a former lecturer and civil party in Case 002/01 has said,

> I can turn my anger into story-telling. When I have free time at night, I would tell my grandchildren about what happened under the Khmer Rouge regime. In this generation, some young people don't believe that people can survive with a bowl of porridge per meal and still be able to work from dusk till dawn. And when there is a civil party meeting and a regional meeting, I recall my story, and I can see that nowadays, I have calmed down. Unlike before, when we recalled what we had been through, we wanted to kill them, or ourselves. Recalling these events made us suffer.[44]

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[42] Transcript of interview on file with the author (Civil Party Cases 001 and 002, Tuol Sleng Genocide Museum, 18 September 2014).

[43] Transcript of interview on file with the author (Civil Party Case 001, Phnom Penh, 30 October 2014).

[44] Transcript of interview on file with the author (Civil Party Case 002, Phnom Penh, 3 November 2014).

The ECCC however provides a formal, institutionalised venue for the educative value of victims' testimonies, and indeed, this aspect of victim participation was at the forefront of the motivations to take part in proceedings of many of the persons interviewed. Thus, in the context of a request for reparation asking for the inclusion of the Khmer Rouge in Cambodia's national curriculum, one participant of a focus group meeting at Thon Serey pagoda said that,

> By including the history in the curriculum, the next generation will know about the atrocities that happened during the Khmer Rouge regime… I also want to include the judgement made by the ECCC, and also reparations awarded to the victims, so that they will know both the history of the Khmer Rouge and the result of the trial of the perpetrators.[45]

This sentiment was echoed among all other participants of the focus group. The essence of historical studies and education is two-fold, in that knowing about one's past is intrinsically valuable in understanding present circumstances. Understanding history has the further objective of allowing people to shape the future. In the present context, this primarily denotes the preventative aim of ensuring that atrocities such as those committed by the Khmer Rouge do not occur again, as exemplified by the following extract:

> When the tribunal finds justice for the victims, I will be happy because it helps me and the victims seek justice, and lets the next generation know about it, so that they will not commit such cruel acts.[46]

Indeed, this notion of history is at the very heart of international criminal justice broadly conceived. While recognising the considerable value that victims attach to receiving information and the educative value of their participation, we equally have to acknowledge

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[45] See Focus Group Civil Parties Case 002, Thon Serey Pagoda, Kampong Trabek Village, Trabek Commune, Kampong Trabek district, Prey Veng province, 10 October 2014. Transcript of meeting on file with the author.

[46] Transcript of interview on file with the author (Civil Party Case 002, Phnom Penh, 3 November 2014).

that the goal of education can be achieved by wider outreach programmes. In this regard, the various outreach activities in local communities are arguably as important as is the work of the ECCC itself. These outreach activities are organised primarily by the Court's VSS, and they have proven remarkably successful. Thus, more than 100,000 people have come so far to observe the proceedings at the ECCC. We ought to be mindful of the question whether the goal of educating the Cambodian people and the world can ultimately be attained through the Court's judicial record or the outreach programmes. This brings us back to the point made at the outset of this section, which places emphasis on personal engagement with young people, as well as governmental programmes, over and beyond the confines of the courtroom.

This point is clearly important. We saw in the discussion of the quest for truth that, to an extent, this may be pursued even without having the formal status of civil party. A similar point can be made more strongly here: taking part in the many outreach programmes offered by the Court and a range of NGOs may itself be regarded as a form of meaningful participation, both through the dissemination of information and the facilitation of observance of trial proceedings. In relation to the need to educate the world, the outreach programmes are arguably an even more effective form of participation, as they are able to take account of the polycentric complexities that a criminal trial, with or without civil party participation, cannot possibly consider – provided at least that the right mediums of communication are used, as literacy levels are still low in Cambodia.

Related to the foregoing points is the idea implicit in many interviews, that truth-seeking, the need to tell one's story, and educating the world are different sides of the same coin. As was aptly pointed out by one interviewee, the establishment of the ECCC and the inclusion therein of the civil party participation scheme,

> Really helped them reveal the truth, so that they know about crimes committed by the Khmer Rouge, and so people understand this better. Moreover, the next generation also has the opportunity to know more about the regime.[47]

1.6 Seeking Reparations

1.6.1 Legal and practical implications

One of the most contentious and complex issues, the question of reparations – described by the Court as 'intended to be essentially symbolic rather than compensatory'[48] – has presented the ECCC with an array of challenges and difficulties. The legal and procedural complexities of reparations were discussed in detail in chapter 5. Nonetheless, it is important to highlight here that such complexities arise for both legal and practical reasons, which will briefly be addressed in turn. It should however be borne in mind that the legal and practical implications and limitations are necessarily intertwined.

In legal terms, reparations were traditionally seen as remedies for inter-State disputes rather than as redress for victims. However as seen in chapter 3, international law has taken great strides since then, notably culminating in the 2006 Basic Principles, which state in unequivocal terms that victims of mass atrocities have a right to 'adequate, effective and prompt reparation for the harm suffered.'[49]

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[47] Transcript of interview on file with the author (Victim-complainant, Srah Kaev Village, Veang Chas Sub-district, Odongk district, 4 November 2014).

[48] *Case of Kaing Guek Eav (Case 001),* Trial Chamber Judgement, 26 July 2010, para 661, footnote 1144.

[49] UN General Assembly, 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law: resolution/adopted by the General Assembly' 21 March 2006, A/RES/60/147. <www.ohchr.org/en/professionalinterest/pages/remedyandreparation.aspx> (accessed 26 March 2015).

The availability of reparations is at the core of the ECCC's approach to victim participation. Although notably absent from the ECCC founding statute, Rule 23*quinquies* of the ECCC Internal Rules states that the underlying goal of civil party participation in proceedings is two-fold.[50] On the one hand, victim participation provides support for the prosecution. On the other hand, as seen above, it also allows for 'collective and moral reparations' to be claimed, albeit only by civil parties. 'Moral' harm has been interpreted as meaning designed to repair moral as opposed to material harm, and 'collective' as precluding the grant of individual financial awards.[51] Reparations are, in the words of Bassiouni, 'a way of inducing victims to participate.'[52]

In practical terms, the absence of any kind of trust fund for victims is remarkable. In view of the fact that only three accused have been convicted to date, and that those convicted had all been deemed indigent and were in receipt of legal aid, the theoretical availability of reparations does not stand the test of impecuniosity.

Furthermore, it has been argued forcefully that the prospect of meaningful reparations to victims is in fact discouraged by the very way in which proceedings are conducted, often on an ad hoc basis; displaying both procedural and substantive shortcomings of the reparations regime. Rule 23*quinquies* already hints at the problems encountered by victims seeking reparations: first, reparations may be awarded only against individual perpetrators, which is inherently insufficient to grant redress to those who have suffered from mass

[50] ECCC Internal Rules, r 23*quinquies*.

[51] *Case of Kaing Guek Eav (Case 001),* Trial Chamber Judgement, 26 July 2010, para 662- 663.

[52] M. Cherif Bassiouni, 'International Recognition of Victim's Rights' (2006) 6 Human Rights Law Review 203, 205.

victimisation. Secondly, the ECCC lacks any formal enforcement jurisdiction. In its judgement in Case 001, the court made clear that 'the ECCC lacks the competence to enforce reparations awards. Reparations awarded by the ECCC against an accused can therefore only be enforced, where necessary, within the ordinary Cambodian court system.'[53] Such co-operation from Cambodian judicial authorities may not be forthcoming, and reform of the ECCC's legal framework would be even more difficult to agree upon.

Evidently these numerous shortcomings stand in stark contrast to victims' high expectations in relation to reparations. As seen in the previous chapter, in Case 001, the ECCC only granted two of the victims' joint reparations requests, namely the inclusion of the names of all civil parties in the judgement, and the compilation, publication, and dissemination of *Duch'*s statements of apology. The remaining requests – such as access to free medical care, the funding of education programmes, and the erection of memorials – were rejected on various grounds, either due to lack of specificity or because they went beyond the ECCC's jurisdiction.[54] The ECCC itself stated in its judgement in Case 002/01 that '[a]s evidenced by Case 001, where convicted persons are indigent, reparations awarded under the classic Civil Party model are unlikely to yield significant tangible results for Civil Parties.'[55]

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[53] Case of *Kaing Guek Eav* (Case 001), Trial Chamber Judgement, 26 July 2010, para 661, footnote 1144.

[54] The judgement was described by one civil party lawyer as 'the most minimal, most conservative, and perhaps it is fair to say unimaginative that could have been ordered.' See Conversation with a Civil Party Co-Lawyer Case 001 ECCC, notes on file with the author.

[55] *Prosecutors v Nuon Chea and Khieu Samphan* Case No. 002/19-09-2007/ECCC/TC, Judgement (7 August 2014), para 1112, available at <http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2014-08-07%2017:04/E313_Trial%20Chamber%20Judgement%20Case%20002_01_ENG.pdf.> (accessed 20 March 2015).

This disconnect between expectation and reality on the ground has been brought out in virtually all the interviews conducted with legal practitioners. Their views and criticisms were highlighted in chapter 5. However, to understand whether the limited approach reflected in the reparations awarded by the Court in Case 001 and Case 002/01 has met victims' expectations, it is essential that we examine victims' perspectives in this regard.

1.6.2 Victims' perspectives

The success of any transitional justice mechanism relies on an interplay of the legal conditions and practical circumstances on the one hand, and of the reactions of participants in proceedings on the other. This section will focus on victim's perceptions and views on, as well as insights into, reparations in light of the aforementioned implications, reinforcing the analysis in the previous and the present chapters, with a particular emphasis on the conceivable benefits and harms relating to victim participation. As has been seen, victims' expectations with regards to reparations tend to be high, but realities on the ground may not match those expectations. We shall return to this point below, after examining victims' testimonies regarding their experiences with the ECCC's reparations regime.

As a preliminary point, it is of some significance to draw a distinction between civil parties and victims. The importance of reparations was powerfully reflected not only amongst the 35 civil parties interviewed who have a stake in the proceedings and are therefore, at least arguably, better informed, but also amongst the 15 victim-complainants. The latter have no right to reparations. Nonetheless, they do have an expectation, as victims of the same regime, to obtain similar redress to formal civil parties. Probably the most commonly expressed view was that access to free health care is crucial. These points are

clearly brought out in the following statement by a victim-complainant interviewed in Siem Reap:

> I want a card that allows me to access free health care and free high education for my children. I want this kind of reparation offered to *all victims*.[56]

The fundamental need for free health care is also apparent in this extract from an interview conducted with a civil party in Case 001:

> Personally, I would like the court to collaborate with the Cambodian government, to provide a system to the victims by distributing health cards to the victims who survived the Khmer Rouge regime, so that they can access health services without paying money, because they are poor.[57]

The reasons for the need for free access to health care are set out by another interviewee, who said that,

> If they have hospitals and organisations for the victims, it's good so that we won't have to pay a lot for these services. Nowadays we do have commune health centres, but if we are sick and do not have money, it's not easy for us… During the meeting, I have already raised my concerns that hospitals should be available for the victims, so that we don't have to pay a lot. We, the victims, have already suffered a lot from that period, and now when we get sick and go to the hospital, we have to pay full fees. This is the only thing I want.[58]

Whilst health care was the predominant concern of victims interviewed, another common theme in the interviews conducted concerned the ECCC's jurisdiction being limited to the award of collective as opposed to individual reparations. Opinion on this point was in general divided, with one interviewee asserting that,

> With regard to reparation, some victims want individual reparation and some want collective reparation. But lastly, the individual reparation is impossible. And this is the impact related to their demand: if the court, for example, offers each victim $10,000, the court needs to spend millions of dollars as there are

[56] Transcript of interview on file with the author (Civil Party Cases 001 and 002, Siem Reap, 24 October 2014); emphasis added.

[57] Transcript of interview on file with the author (Civil Party Case 001, Phnom Penh district, 19 September 2014).

[58] Transcript of interview on file with the author (Civil Party Case 002, Phnom Penh, 3 November 2014).

> millions of victims. So we just can't do that. The total number of civil parties is over 4,000 people, and this number would increase if the court did not close the application for being a civil party.[59]

In a similar vein, the following comment was made during a different interview:

> Talking about reparations, it has nothing to make me worry because the reparation cannot be made to each individual. So it must be in the forms of collective reparation because not only my family members died but a lot of people. Therefore, it is impossible to have individual reparation. So it must be collective reparation as the symbol, and it is acceptable for me. And I also think the state does not have enough money to pay to each individual. So it is acceptable for us with regards to the reparation awarded. So it is reasonable for me.[60]

Two significant points emerge from these comments: first, civil parties acknowledge that resources are finite and that reparations to those who suffered from mass victimisation will necessarily be limited. Secondly, it is also acknowledged that suffering was wide-spread and not limited to one particular family.

However, not everyone shares this view, with a greater focus on the individual harm suffered. Thus, the absence of jurisdiction to award individual reparations has been described as a 'loophole' by one interviewee.[61] Another interviewee stated that,

> There are two types of reparations: moral reparation and collective reparation… The two kinds of reparations are already good but it lacks individual reparation. The court should have individual reparation for all civil parties because they have a very low standard of living. Therefore, the court should at least provide a little amount of money by way of individual reparation. In fact, the lives of relatives they lost during the Khmer Rouge regime are invaluable.[62]

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[59] Transcript of interview on file with the author (Civil Party Cases 001 and 002, Tuol Sleng Genocide Museum, 18 September 2014).

[60] Transcript of interview on file with the author (Civil Party Case 002, Siem Reap, 24 October 2014).

[61] Transcript of interview on file with the author (Civil Party Cases 001 and 002, Phnom Penh, 18 September 2014).

[62] Transcript of interview on file with the author (Civil Party Case 002, Phnom Penh, 18 September 2014).

Yet another interviewee made short shrift of the argument from limited resources, drawing the distinction between civil parties and victim-complainants adumbrated above, stressing that,

> The victims requested the individual reparation as they are old and need money to support their life and to pay for their health treatment. This was the request made by the victims. I'm also a representative of civil parties in Phnom Penh, and I also requested the same thing. We just tried to request even if we know that will not be granted. Some people said there are a lot of victims, so victims should not request that. And some people argued that no, there are 4,000 people only who filed the application. So the individual reparation is for those who filed the application, and it is not for those who did not file the application. Of course, there will be millions of victims, but according to the proceedings in the court, only the ones who filed the application will be given compensation.[63]

The strongest tones emerged in an interview conducted with a civil party and survivor of S-21, where it was said, in critical comments in relation to the ECCC, that,

> As a victim, I have received no individual reparation. This makes me disappointed. So the ECCC is just a make-up court. It is just to show the world that there is a trial, but there is no individual reparation. So this court does not promote humanity. For more than 15 to 20 years, there is no individual reparation for victims, and this will not be a model for the world to follow.[64]

Similar disagreements could also be observed in the five focus group sessions held in Cambodia, with some approving of the sole availability of collective reparations, and others lamenting the absence of jurisdiction to award individual reparations, in particular with a view to obtaining free health care.[65]

An analysis of the focus groups meetings and the interviews conducted reveals that the importance of memorials is readily apparent. Within Cambodian culture and religion,

[63] Transcript of interview on file with the author (Civil Party Case 002, Phnom Penh, 3 October 2014).

[64] Transcript of interview on file with the author (Civil Party Cases 001 and 002, Tuol Sleng Genocide Museum, 18 September 2014).

[65] See Focus Group Civil Parties Case 002, Borseth district, Kompong Speu province, 10 October 2014; Civil Parties Cases 001 and 002, Prey Veng province, 28 October 2014. Transcripts of meetings on file with the author.

memorials are seen as a focal point of both ceremony and social life. As one interviewee put it, 'I want to have a stupa in a place for memorial. With that, we can perform our ritual easily and it's not difficult for us to go somewhere far.'[66] In this context, the majority of victims interviewed expressed satisfaction with the reparations measures awarded by the Court in Case 002/01 with regard to the erection of memorials. However, there were certain reservations in respect of the number of memorials, as well as their geographical location, as exemplified in the following comment made by a civil party in Case 002/01:

> Nowadays we kept the Purchrey Hill intact, and we awaited from the court in case the court orders a memorial to be built there. If the memorial will only be built in Phnom Penh to go there to pray for the dead relatives, since it is far away from here, and… we requested the court to build a memorial in each province.[67]

For some interviewees, the construction of memorials ranked equally highly as the provision of free health care, already discussed above, in terms of reparations. As one put it,

> … what we want the most is health care service card and the construction of more memorials in each province and district. However, we do not know whether we will get what we requested… According to the information I received, the construction of memorials needs land for building, and also approval from the local authority.[68]

In contrast, during an interview conducted with a different civil party, a link was drawn between the question of memorials on the one hand, and the issue of collective versus individual reparations on the other hand:

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[66] Transcript of interview on file with the author (Civil Party Case 002, Phnom Penh, 3 November 2014). A stupa is a place of prayer and pilgrimage in Buddhist religion.

[67] Transcript of interview on file with the author (Civil Party Case 002, Phnom Penh, 3 November 2014).

[68] See Focus Group Civil Parties Case 002, Borseth district, Kompong Speu province, 10 October 2014. Transcript of meeting on file with the author.

> It's impossible to build a memorial in each province. I want individual reparation.[69]

There are thus real issues raised by victim complainants and civil parties interviewed concerning reparations. Of most concern were the non-availability of individual reparations, limited access to free health care, and the construction of memorials in Cambodian provinces. Undoubtedly, this disappointment of their expectations has affected victims' perspectives on their participation in the proceedings before the ECCC, the issue of reparations being the most contested and most discussed. It remains to be seen how the reparations awarded in Case 001 and Case 002/01 will have an impact on victim participation, and whether it will discourage applications from victims to participate as civil parties in potential upcoming trials (Case 003 and Case 004). What should not however be forgotten is that, as highlighted in the quotes in this section, the collective reparations awarded by the ECCC are nevertheless regarded as meaningful and important by civil parties. Their dissatisfaction with the current reparations regime must be assessed not only against the non-availability of individual reparations but also against victims' recognition of the significance of collective reparations, all the while bearing in mind that most Cambodians regard themselves as poor and therefore do have a focus on obtaining monetary reparations.

Standing back from the above, one must be mindful of the fact that information is key to expectations, and in this context the limited availability of resources regarding outreach and the distribution of information plays a hugely important role. Public discourse on reparations with regards to civil parties was driven by civil society groups, human rights

[69] Transcript of interview on file with the author (Civil Party Cases 001 and 002, Siem Reap, 24 October 2014).

lawyers and NGOs, and may to some extent have painted a distorted image that artificially raised expectations. This is illustrated by the very fact that individual civil parties do not necessarily have a clear understanding of the limitations of the ECCC's jurisdiction, in particular with regards to the lack of individual reparations, despite it being incumbent on civil party lawyers to ensure that civil parties are adequately informed as to their procedural rights and substantive remedies.

1.7 Reconciliation

Thoms and others show that a common theme in the literature on transitional justice is the healing effect of international criminal trials on survivors of mass atrocities, including fostering forgiveness and reconciliation among the population in the aftermath of widespread violence.[70] Gee-kin Ip describes the need for national reconciliation as the 'overriding objective' of the ECCC.[71] The Agreement between the United Nations and the Royal Government of Cambodia recognises the 'legitimate concern of the Government and the people of Cambodia in the pursuit of justice and national reconciliation, stability, peace and security.'[72] Reconciliation is thus a core aim of what the ECCC ultimately aims to achieve.

It was interesting to note that the reconciliation theme was brought up by civil parties and victim complainants in virtually all interviews conducted. It will however become apparent in the following analysis that there is by no means a clear, universally accepted

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[70] Oskar N. T. Thoms, James Ron and Roland Paris, 'State-Level Effects of Transitional Justice: What Do We Know?' (2010) 4 International Journal of Transitional Justice 329.

[71] Ken Gee-kin Ip, 'Fulfilling the Mandate of National Reconciliation in the Extraordinary Chambers in the Courts of Cambodia (ECCC) - An Evaluation Through the Prism of Victims' Rights' (2013) 13 International Criminal Law Review 867.

[72] See <http://www.eccc.gov.kh/sites/default/files/legal-documents/Agreement_between_UN_and_RGC.pdf > (accessed 18 March 2015).

definition of what ‘reconciliation’ actually denotes, although it will also be seen that there is a common understanding shared by the majority of interviewees.

For one civil party who survived the S-21 prison camp, reconciliation is essentially the antithesis of segregation and separation. Thus, he argues that,

> People celebrate religious ceremony here [at the Tuol Sleng Genocide Museum], so both victims and perpetrators can come together. As a result, they are no longer angry and want to exercise revenge on each other. If we separate the victim and the perpetrator, they will still pursue revenge and so Cambodia will not reconcile at all. But if we act throughout the country in the way we act here at Tuol Sleng, then our whole nation can reconcile.

This extract draws attention to the importance of the Buddhist faith in Cambodian society, already examined in the context of the socio-cultural background of victim participation at the ECCC in chapter 4. The centrality to Buddhist thought of reconciliation as opposed to retribution should not be underestimated. As Gee-kin Ip has further argued, in view of the fact that the ECCC focuses on accountability aimed at ending impunity, ‘it is doubtful whether the Cambodian people can appreciate this given that notions such as acceptance, tolerance and compassion often gain greater currency in the Cambodian community.’[73]

These values also feature strongly in the following replies. One victim-complainant for example struck a remarkably conciliatory note:

> They [Cambodian people] can live together in the community peacefully as now people even in the rural area have a better understanding and good friendship, and they should know about their wrong actions and that those actions should not have been committed. [74]

[73] See Gee-kin Ip (n 71) 868.

[74] Transcript of interview on file with the author (Victim-complainant, Phnom Penh, 3 November 2014).

For this civil party in Case 002/01, forgiveness rather than retribution was also a direct result of the ECCC verdicts:

> What the court does is to encourage me to reconcile with the perpetrators. After what the court has done, I can accept it now. The court has found justice for me and proved that the perpetrators did commit the crimes. Thus, it is acceptable for me, as the accused did confess to committing the crimes, and I can forgive the perpetrators and do not wish for any retaliation against them. [75]

The same theme was picked up by yet another optimistic interviewee who linked forgiveness and peacefulness with the advancement of Cambodian society:

> We were told and recommended to love and live with each other in peace. We should reunite and move our country forward because we are all Khmer. The victim and the perpetrator live together in a village. Sometimes we see the person who tried to kill us and we feel afraid. But I think everything will be ok in the future.[76]

It would however be inaccurate to assume that the sentiment expressed in the above examples were universally shared. As stated at the outset, reconciliation can mean different things to different people. Thus, another set of interviewees, that can for present purposes be grouped together, believed that retribution is inextricably linked with punishment. As one civil party in this group put it, reconciliation and retribution are polar opposites. However, he 'can reconcile only with the people on the sub-national level. As for the leaders and higher responsible officials, [he] can reconcile only once sentenced to life imprisonment.'[77] Similarly, another civil party stated during an interview that,

> Before attending the hearing at the ECCC, I felt that I was not satisfied, because how could we reconcile when we had lost everything! Later on, we felt relieved after listening to the news that the ECCC was working to find justice for victims by holding the perpetrators to account. I am satisfied with this because the hybrid court, the ECCC, in collaboration with the United Nations, would search for the

[75] Transcript of interview on file with the author (Civil Party Case 002, Srah Kaev Village, Veang Chas Sub-district, Odongk district, 4 November 2014).

[76] Transcript of interview on file with the author (Civil Party Cases 001 and 002, Siem Reap, 24 October 2014).

[77] Transcript of interview on file with the author (Civil Party Cases 001 and 002, Phnom Penh, 19 September 2014).

> perpetrators and sentence them so that future leaders would never do as the perpetrators did. Lastly, the ECCC really did sentence them to life imprisonment, and I am satisfied with this.[78]

For one civil party, who believed that strengthening 'social equity' and restoring human dignity are paramount, two conditions have to be satisfied before the Cambodian people could move on from the past:

> We need to have national reconciliation. But we have to consider as well the importance of law and punishment. We need to have national reconciliation because we cannot let our country immersing itself in war crimes again. The second point is that we need to punish the perpetrators. Reconciliation is acceptable for us but we need to punish the Khmer Rouge leaders and the perpetrators... What I want most is to strengthen social equity. We want not just the Cambodian leaders but leaders around the world to prioritise care for humanity and the right to live. Human beings need dignity.[79]

This view effectively elevates the punishment of Khmer Rouge cadres to a condition precedent without which reconciliation and restoration of social equity and human dignity are impossible. This might appear to be a tall order which will be difficult if not impossible to achieve, in light of the limitations of the ECCC considered in the first section of this chapter. The necessary limitations of punishing the perpetrators and of 'finding justice' are recognised in the following extract, all the while reiterating the close inter-connectedness of reconciliation and punishment:

> It's a very hard question to answer about mental reconciliation between the victims and the perpetrators who have not been arrested. As I know the feelings of the civil parties and my own, similarly the key is that if we want to attain mental reconciliation, firstly we have to find justice for victims; not 100 per cent of justice, but between 60 to 70 per cent of justice would be acceptable. But now, we have not reached that target. [80]

[78] Transcript of interview on file with the author (Civil Party Case 002, Phnom Penh, 4 November 2014).

[79] Transcript of interview on file with the author (Civil Party Case 001, Siem Reap province, 24 October 2014).

[80] Transcript of interview on file with the author (Civil Party Cases 001 and 002, Phnom Penh, 29 October 2014).

This naturally raises difficult questions as to quantification – how to measure 'justice'? This does not even consider the distinction between justice and punishment, although as stated above, from victims' perspectives, the two concepts are virtually indistinguishable. These two broad camps or groups of civil parties and victim-complainants differ in their attitude towards retribution or punishment, and its connection with national reconciliation. There is furthermore an intermediary group who clearly reject any notion of revenge or vindictiveness, all the while recognising that retributive justice is, and should be, part of Cambodians' post-conflict society. However, retribution and reconciliation are not regarded as mutually conditioned upon each other.

Thus for a participant in a focus group meeting held on 28 October 2014, the very institutionalisation of retributive justice in the form of the ECCC has itself made great strides towards reconciliation:

> I stopped thinking about revenge when I heard about the establishment of the ECCC. It makes me feel relieved from our suffering and the bad treatment we endured during that time. Our anger demanded that they pay with their lives for the dead victims, but we felt relieved after the establishment of the court, as the court is trying very hard to bring us justice. So we should control our feelings.[81]

A similar point was made in a focus group meeting on 10 October 2014, during which one participant, stressing the importance of educational campaigns and the dissemination of information, commented that,

> Of course, it [the ECCC] has really helped to reconcile and we have already reconciled; otherwise we would still seek revenge. Immediately after the collapse of the Khmer Rouge, we felt angry with them and sought revenge. But later on, after the establishment of the ECCC, we were educated and things were explained to us. So we do not have any anger, nor any intention of vengeance, even though they [the perpetrators] are also living with us.[82]

[81] See Focus Group Civil Parties Cases 001 and 002, Serey Sakor Pagoda, Prey Veng province, 28 October 2014. Transcript of meeting on file with the author.

[82] See Focus Group Civil Parties Case 002, Thon Serey Pagoda, 10 October 2014. Transcript of meeting on file with the author.

It may be recalled that, broadly speaking, the group of interviewees who favoured separating punishment from reconciliation regarded the latter as already having been achieved, whereas the other group opined that obstacles still remained on the path to national reconciliation. As a matter of fact, the number of interviewees who believed that reconciliation had already been achieved, or was at least in the process of being achieved, was remarkably high. For some, reconciliation was limited to those who had been civil parties for a number of years, and who through their participation have been able to reconcile with the perpetrators. As was said at the time,

> For those who have participated as a civil party in the court proceedings for 6 to 7 years, I can say that it is acceptable to reconcile. *We have already reconciled*. This just refers to those who participated in the court as a civil party. For those who do not participate, they just do their business, they never care.[83]

We should guard ourselves against ready assumptions that victim-complainants without the formal status of civil party 'do not care.' As seen above, there may be a variety of reasons why a victim cannot or will not take part in proceedings. In any event, national reconciliation must involve all people, not just the quantitatively negligible number of civil parties. This requires the system to foster reconciliation beyond the confines of the court room. In this context, another civil party was of opinion that the mere passage of time was enough to heal many wounds. In his words,

> It is about the duration. It was 35 years ago, so our malice and sufferings have been reduced gradually over time until the ECCC was established to try the accused. And the court is searching for evidence to hold those accused accountable for the crimes they committed, and we as civil parties as well as the victims were allowed to participate in the court process. We can see that our minds have calmed down, and now we are becoming calmer and calmer. Before, when I saw those perpetrators, I wanted to kill them instantly when we

[83] Transcript of interview on file with the author (Civil Parties Case 002, Phnom Penh, 3 October 2014); emphasis added.

> saw them… But now we also know that our country follows the rule of law, we obey the law and human rights.[84]

Also, many other considerations should be taken into account when discussing the issue of reconciliation. As Bockers and others have argued, 'how soon a post-conflict country is able to reconcile and reconstruct depends on various factors, including the nature of the conflict, the present-day situation of the society, and the manner in which the society deals with its past.'[85]

2. Presumed Benefits and Anticipated Harms of Victim Participation: A Reality Check

The foregoing analysis offered essential insights into the 'virtues' and presumed benefits of victim participation, such as ensuring that victims' interests are taken into account, dignifying victims, offering a platform for their voices to be heard, supporting them in the process of seeking justice, truth, reparations, and of fostering reconciliation. As has been seen in the detailed analysis of the various aspects of victim participation, the empowerment of victims in the form of active participation has led to some meaningful benefits for victims themselves as well as for the very institution of transitional justice. It may be argued that the empirical evidence supports the idea that 'participation equals empowerment' and that such participation has allowed victims to gain 'a sense of control, an ability to lessen their isolation and be reintegrated into their community' as well as 'the possibility of finding meaning through participation.'[86]

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[84] Transcript of interview on file with the author (Civil Party Case 002, Phnom Penh, 3 November 2014).

[85] Estelle Bockers, Nadine Stammel and Christine Knaevelsrud, 'Reconciliation in Cambodia: Thirty Years After the Terror of the Khmer Rouge Regime' (2011) 21(2) Torture 71.

[86] Naomi Roht-Arriaza, *Impunity and Human Rights in International Law and International Law Practice* (Oxford University Press 1995).

In that context, the various benefits of participation seem to extend beyond those victims who engaged actively with the Court. Victims' participation is seen to have a wider impact on the transitional justice process itself, particularly since the ECCC is located in the country of transition and therefore the presumed benefits are more tangible. Nonetheless, it remains an empirical question as to whether such benefits are attributed to civil party participation primarily, or whether the outreach programmes, combined with the Court's geographical proximity to the victims, have had an equally or even more important impact on the overall engagement with the ECCC. Nonetheless, civil party participation at the ECCC – as a restorative justice element incorporated into an inherently retributive justice mechanism – has revealed the multifaceted and complex nature of this novel institution. The foregoing analysis has shed light on the multitude of issues, tensions, and outstanding needs among civil parties, victims, affected communities, practitioners as well as policymakers. In this context, it is important that we analyse from the victims' perspectives the implications that participation has had on victims and affected communities.

2.1 Unintended Effects of Victim participation on Victims and Affected communities

While acknowledging that efforts to enhance victims' rights can lead, at least in theory, to the realisation of the aspiration of restorative justice for victims, a practical evaluation demands careful consideration of the often unquestioned assumption that expanded participation is in the victims' best interests. In the preceding chapter, a distinction was drawn as to the effects of victim participation on different types of victims: first in respect of victims recognised as civil parties, and second in respect of non-recognised victims.

As discussed in the previous chapter, a victim must choose early on in the proceedings whether to act as civil party or victim, the key difference being that victims, unlike civil parties, give evidence under oath, with the result that their evidence will be accorded greater weight by the Court. When asked what the reasons were for choosing to become a civil party rather than a witness in proceedings, the majority of victims interviewed indicated that the issue of reparation is the primary motivation underlying their decision. As one of the civil parties interviewed in Prey Veng province highlighted,

> For me it is important to participate in the court's proceedings. My decision to become a civil party was based on the information that I received from ADHOC and VSS. I would have been happy to participate as both a witness and a civil party. Unfortunately, the court does not allow that and we have to choose early on in the trial whether we want to be a civil party or a witness. And I know that I can have reparations only if I act as a civil party but not as a witness.[87]

This view was shared among other victims during the focus group interviews in Prey Veng.[88] What emerged from the interviews is that victims' decisions are greatly influenced by the information given to them by the VSS and ADHOC and that many of them did not know in the beginning what the key differences were between the two statuses. In this context, as another civil party expressed,

> I did not know what the main difference was between a witness and civil party. I thought both of them offered an opportunity to face the accused and talk about suffering. Only later I learned that one of the main differences is that civil parties can ask for reparations and witnesses cannot.[89]

A number of civil parties interviewed expressed disappointment when they learned that their testimony was not given under oath and therefore may carry less weight than that of a witness. One civil party argued, 'I know reparation is important, but to me finding

[87] Transcript of interview on file with the author (Civil Party Case 002, Prey Veng, 10 October).

[88] See Focus Group Civil Parties Case 002, Thon Serey Pagoda, Kampong Trabek Village, Trabek Commune, Kampong Trabek district, Prey Veng province, 10 October 2014. Transcript of meeting on file with the author.

[89] Transcript of interview on file with the author (Civil Party Case 002, Borseth district, Kompong Speu province, 10 October 2014).

the accused guilty is equally important. I want to feel that my participation has helped the court.'[90]

Thus, it is essential for a meaningful system of victim participation that victims are provided with the most complete and adequate information on the advantages and disadvantages of both civil party status and witness status, thereby allowing/enabling them to make a more informed decision early on in the proceedings.

With regards to non-recognised victims (victim complainants), compared to approximately 1.7 million people who perished under the Khmer Rouge, victims recognised as civil parties by the ECCC represent only a fraction of the overall number of direct and indirect victims. In determining the role and impact of victim participation at the ECCC, one should be cautious about the effects that such participation could have on victims who are not granted permission by the Court to take part in the proceedings. Granting permission to some victims at the exclusion of others could potentially bring about unintended and undesirable consequences, especially in light of national reconciliation and victims' aspiration to unearth the truth, both key objectives of any international criminal tribunal. In this context, the interviews with victim complainants showed a varied perspective on the effects of civil party participation on both victims and Cambodian society as a whole. As one victim argued,

> I filed a complaint to inform the court about my suffering. However, I was never invited to talk in front of the court. I think this court does not give many Cambodian victims an opportunity to tell their painful story. It is only for a few victims. Nonetheless, I have learned a lot about the Khmer Rouge by following the trial.[91]

[90] Transcript of interview on file with the author (Civil Party Case 002, Phnom Penh, 4 November 2014).

[91] Transcript of interview on file with the author (Victim-complainant, Srah Kaev Village, Veang Chas Sub-district, Odongk district, 4 November 2014).

It appears that this degree of disappointment among victims who are not recognised as civil parties is closely related to the lack of clear and adequate information provided to them. Most victims interviewed did not seem to have a full and clear understanding of the scope and parameters of civil party participation and the nature of the ECCC in general.

However, the picture was slightly more nuanced among victims with higher levels of education, who seem to recognise the limits of the ECCC as a criminal tribunal. A victim who is also an academic argued,

> The ECCC is a court and not a truth commission. It would be impossible for a court to listen to all the victims. The primary objective of the court is to establish accountability. It is great that the court has allowed some victims to participate as civil parties.[92]

Although the victim-oriented approach endorsed by the ECCC has made a largely positive contribution to victims' experiences, it remains to be seen whether expanded participatory rights will provide an additional benefit to victims. The empirical outcomes of this major experiment in incorporating victim participation into criminal proceedings have clearly revealed that the ECCC faces significant challenges in fully defining the role, purpose, and ambit of such participation.

[92] Transcript of interview on file with the author (Victim-complainant, Siem Reap province, 24 October 2014).

CONCLUSION

This conclusion provides a summary of the main findings, and outlines the contribution of this study to a theoretical understanding of the role and scope of victim participation in international criminal proceedings, as well as the specific policy relevance for the practice of international criminal tribunals. This thesis began with a contextual perspective on the notion of victim participation in international criminal justice. It proceeded with a critical and comprehensive normative and empirical examination of victim participation as both an approach and a principle, primarily through the lens of the ECCC, drawing from the development of human rights doctrine, victimology, and practices in domestic and international criminal justice systems. The research has shown through consideration of philosophical and theoretical underpinnings the breadth of the contribution that various theories of criminal justice have made to international criminal law and procedure, with particular emphasis on the role of victims in these processes. It highlighted the synthetic and hybrid approach embraced by international criminal tribunals whereby various elements of different theories are combined, demonstrating that a plurality of values and policy rationales can be adopted in a given society (or post-conflict society).

As this thesis has demonstrated, there has been a significant shift on the domestic and international planes where the focus is no longer solely on retribution or the utility of punishment, but also on restorative principles. This development has led to enhanced service and procedural rights for victims, and to greater recognition of the harm suffered. However, given the nature of international criminal trials including subject-matter limitations, the structure and composition of international criminal tribunals, as well as the magnitude of cases and the nature of mass victimisation – distinguishing them in many significant ways from domestic criminal proceedings – victim participation in international criminal

proceedings has posed some unique and specific questions and themes, which in turn, as this thesis has shown, have given rise to complex answers and challenges.

The incorporation of victim participation as a restorative justice element into an inherently retributive justice process is a novelty in international criminal law and the inclusion of various provisions relating to victims' rights within international criminal tribunals has in principle broadened the scope of procedural and substantive rights afforded to victims. However, as the detailed analysis of the civil party participation regime at the ECCC has demonstrated, the incorporation of victims as civil parties into proceedings raises significant questions and gives rise to a number of challenges inherent in the tension between an increase in the rights afforded to victims on the one hand, and the established due process rights available to the defence on the other. Thus, the examination of the complexities arising from the recognition and application of enhanced procedural rights and substantive remedies afforded to victims has informed our analysis and deepened our understanding of the role, impact, and dynamics of victim participation, not only on the criminal justice system, but also on victims themselves, and has further contributed to the debate about a victim-centred approach to transitional justice.

Developing Theory and Policy Implications of Victim Participation

The goal of this research has been to contribute to the developing theory and policy concerning victim participation through methodical theoretical and empirical analysis of the complex and multi-faceted civil party participation regime at the ECCC. Six key findings have emerged:

First, whilst victims have taken advantage of their procedural rights at the ECCC, their role remains largely symbolic and they have yet in full to realise their substantive rights. As the interviews with civil parties and victims as well as legal practitioners have amply illustrated, the ECCC is fraught with limitations and inadequacies when it comes to granting substantive rights to victims, especially the right to reparation. Evidently there is a disconnect between victims' expectations and practice on the ground, and the ECCC's shortcomings stand in stark contrast to victims' high expectations in relation to reparations. Although symbolic justice for victims may be the current approach at the ECCC, as well as other international criminal tribunals that have afforded victims greater participatory rights, it is important that these tribunals take the necessary measures to overcome jurisdictional and structural limitations inherent in their reparations mandate in order to move beyond rhetoric by delivering more meaningful justice to victims of international crimes. As Bassiouni asserts, 'by honouring victims' rights to benefit from remedies and reparation, the international community expresses solidarity with victims and reaffirms the principles of accountability, justice and the rule of law.'[1] The interviews with victims affirmed that providing victims with the right to participate implies an obligation not to create false hopes or place victims in situations where their physical or psychological safety may be at risk. Thus, it is essential that victims be provided with clear information about what the Court can offer so as to avoid unrealistic expectations and secondary victimisation.

Second, if the ECCC and other international criminal tribunals afford victims the right to participate in proceedings, it is imperative that they develop a sound statutory and procedural foundation with clear and detailed rules and procedures from the outset. Legislation needs to clearly specify the rights of victims recognised as civil parties and the

[1] M. Cherif Bassiouni, 'International Recognition of Victim's Rights' (2006) 6 Human Rights Law Review 203, 279.

responsibilities of the criminal justice system and the Court's personnel regarding victims. The first and second trials at the ECCC appeared more as 'experimenting laboratories' as opposed to processes guided by clear and well-crafted rules and procedures. As analysed in this thesis, at various points in the trial proceedings, the ECCC has wrestled with several significant legal and procedural issues, underscoring the Court's difficult position on how best to define the exact purpose and ambit of civil party participation. In this regard, realising justice for victims of gross violations of human rights demands that their participation be guided by well-structured legal and procedural foundations, which are a prerequisite for any meaningful prospect of justice.

Third, the implications of the civil party participation scheme at the ECCC suggest that any effort to valorise expanded participatory rights by affording victims a role beyond that of complainant or witness demands first of all careful consideration of whether increased participation is in the best interests of victims and of justice more generally. We need to develop a realistic understanding of the potential shortcomings that civil party participation could have with regards to the vital objectives of fairness, functionality of court proceedings, and victims' needs and interests. In determining the optimal scope of civil party participation, the ECCC must carefully evaluate the marginal benefits to the participating civil party against the potential infringement of the defendant's rights and the effects of participation on court proceedings. This is not a straightforward or easy exercise, and opinion about whether the Court has struck the 'right' balance may be divided. However, as this study shows, the rhetoric of balance is, to some extent, misplaced.[2] Edwards correctly asserts that '[t]o speak of 'balance' assumes a duality of positions in diametric opposition', and it would therefore be

[2] Brianne McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings* (Intersentia 2011) 361.

inappropriate to regard the position of victims and the accused in this light.[3] Undoubtedly, judges will need to delineate the parameters of, and weigh up the rights of all parties in the proceedings throughout the trial. However, as the examination of the Court's decision-making and interpretative processes has demonstrated, judges recognise that the fundamental principles of fair trial and due process as well as the minimum rights of the accused *must* be preserved.

Fourth, what emerged from the manner in which civil party participation was dealt with in the first and second trials at the ECCC, is that members of the Court, including judges, legal officers, prosecutors, defence lawyers, and victims' legal representatives, all seemed to be caught 'off guard' by this recent development, and not fully prepared to implement such a novel mechanism. This level of 'unreadiness', reflected in their hesitation, and to some degree, reluctance to fully embrace civil party participation, was indicative of the way in which victim participation at the ECCC was dealt with from its inception and throughout the trials. It is, therefore, important to have a knowledgeable and supportive criminal justice community. The Court's personnel are in the best position and vested with the authority and discretion to give full scope to victims' participatory rights. Victims' views, insights and experiences are guided by the information provided to them, as well as by the way their requests are received by the Court. Giving due consideration to victims' interests and needs in this regard is crucial.

Fifth, as Stover and others have affirmed, courts should not afford victims greater participatory rights unless 'they are able and willing to provide adequate funding and

[3] See Ian Edwards, 'An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making' (2004) 44 British Journal of Criminology 967, quoted in McGonigle (n 2) 361.

manpower to process applications and deal with victim participation.'[4] The success of any transitional justice mechanism, and more specifically that of international criminal justice, is predicated on a well-functioning, practical legal framework, and reception by the participants. If victims, who are at the receiving end of the justice system, are not granted sufficient resources to enable their adequate participation in the proceedings, efforts to give 'voice' to victims' suffering and grief are substantially undermined. Thus, resources need to be devoted to victims' services as well as the necessary funds to support their legal representation.

Finally, victim participation is still in its nascent stage on the international scene, and is therefore quite fluid, and at times vague and contradictory. There is a critical need for well-developed common standards, at both a legal and normative level, to guide the application of victim participation in practice. So far, the research has shown that it would be unwise for international criminal tribunals to expand the scope of victims' participatory rights beyond that which courts can deliver. The inherent nature and structure of the legal process is not always compatible with notions of personal narrative and social memory, which would find better application in non-legal mechanisms.[5] As Judge Meron asserts, 'one must not forget, … that international criminal law does not provide all the answers. It is only one component of the highly complicated reactions to humanitarian emergencies.'[6] Ultimately, this study suggests that recognising victims' rights to equal and effective access to justice, providing protection and support as well as adequate and prompt reparation for harm suffered demands

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[4] Eric Stover, Mychelle Balthazard and K. Alexa Koenig,'Confronting Duch: Civil Party Participation in Case 001 at the Extraordinary Chambers in the Courts of Cambodia' (2011) 93 International Review of the Red Cross 503, 545.

[5] McGonigle (n 2) 365.

[6] Theodor Meron, 'Reflections on the Prosecution of War Crimes by International Tribunals' (2006) 100 American Journal of International Law 551, 578.

a comprehensive and integrated approach, something that courts are not best placed to achieve on their own.

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