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Cambodia and the progressivist 'imaginary': the limitations of international(-ised) criminal tribunals as mechanisms for implementing human rights

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Abstract

This chapter explores the limitations of international criminal justice in implementing positive human rights changes in countries devastated by atrocity. Focusing on 'hybrid' criminal tribunals that blend domestic and international characteristics, the chapter interrogates the coherence of the human rights 'imaginary' – an unachievable vision of a future driven by ideas of inevitable progress from authoritarianism to democracy and other Western liberal assumptions. The chapter focuses on a case study of one such hybrid justice mechanism, the Extraordinary Chambers in the Courts of Cambodia ('ECCC'), an internationalised tribunal created to bring to justice those responsible for the atrocities of the Khmer Rouge era between 1975-1979. Reflecting on how the broader domestic human rights situation in Cambodia is significantly worse in 2022 than before the ECCC commenced its work in 2006, the chapter argues that an overly narrow focus on an 'anti-impunity' agenda does a disservice to the broader contexts within which human rights sit. Drawing on the scholarship of Hinton and Fletcher, who respectively call for a consideration of individual lived experiences of the affected population and for a culture of 'solidarity of practice' with local processes, this chapter argues for a more inclusive understanding of human rights beyond the understandable but limited reflex to prosecute.

Introduction

The devastating consequences for people living in countries affected by conflict and atrocity are only too well-known. Egregious violations of the most fundamental human rights result in loss of life, liberty, bodily integrity, dignity and livelihood on a vast scale, the impact of which can be felt for generations after the violence has ended. Re-establishing peace, security and the organs of government, and rebuilding society, infrastructure and economic stability poses a complex and multifaceted set of challenges. In parallel to a state's responsibility to its citizens to restore, respect and protect their human rights – and one state's obligations to compensate another where international law has been violated – comes the call to bring to justice those responsible for human rights violations amounting to serious crimes. The reflex to investigate and prosecute – under the banner of 'no peace without justice'[1] – has become a driving force for the international human rights movement for much of the last three decades. This 'turn towards the criminal' has most clearly been evidenced by the movement's 'explicit fight against impunity'[2], re-purposing the principle of individual criminal responsibility for mass human rights violations established in the post-World War II trials at Nuremberg.[3] There has been an exponential growth of international criminal law and a proliferation of courts and tribunals, as prosecution (and conviction) of egregious human rights abusers has come to be seen not only as a goal in its own right, but as a prerequisite for achieving a progressivist social and political transformation and as the vehicle for delivering a range of other human rights, and human rights adjacent, benefits.

This chapter explores the limitations of international criminal justice in implementing positive human rights changes in countries previously affected by atrocity, with a focus on 'hybrid' mechanisms that blend both domestic and international characteristics. The chapter interrogates the coherence of the claimed human rights benefits of hybrid international justice mechanisms through a case study of Cambodia's Extraordinary Chambers in the Courts of Cambodia ('ECCC'), the internationalised tribunal created to bring to justice those responsible

[1] The organisation *No Peace Without Justice* provides a focal point for this campaign to this day: http://www.npwj.org/.
[2] Engle, K., 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (2014) 100 *Cornell Law Review,* 1069, 1071.
[3] Sander, B., 'The Anti-Impunity Mindset' in Bergsmo, M. and others (eds), *Power in International Criminal Justice* (Torkel Opsahl Academic EPublisher 2020); Engle, K., Miller, Z. and Davis, D.M., *Anti-Impunity and the Human Rights Agenda* (Cambridge University Press 2016) 325-355.

for the atrocities of the Khmer Rouge era between 1975-1979. However, the ECCC's 'experiment' in hybrid international justice has been the subject of considerable criticism.[4] The ECCC's promised influence over the country's human rights and rule of law[5] has not materialised. Cambodia is demonstrably far less democratic and more repressive than when the Court commenced operations; rather than the rule of law, rule *by* law is an unquestionable contemporary reality.[6] Claims that the Court has finally challenged the culture of impunity for mass human rights violations ring hollow in the face of clear evidence of pressure from the Cambodian Government on the ECCC's Cambodian judges and Co-Prosecutor. Such political interference severely restricted the scope of the Court's investigations and prosecutions, underscoring how many of the initial hopes that the Court would be a model for human rights dissemination and practice for a domestic audience would never be realised. The example of the ECCC serves as a cautionary tale of the limitations of (hybrid) international justice and the limits of the anti-impunity model for the human rights movement. However, the Court's widely reported benefits for truth-telling, memory making and the creation of national conversations in Cambodia suggest that there is a perspective other than the failure of the progressivist narrative. Drawing on the work of anthropologist (and ECCC expert witness) Alexander Laban Hinton, and Berkeley law professor (and longstanding human rights professional) Laurel Fletcher, this chapter explores the limits of the human rights 'imaginary'.[7] Writing in the context of transitional justice, for Hinton the 'imaginary' is an unachievable vision of a better future, driven by ideas of inevitable progress from authoritarianism to democracy and other Western liberal assumptions. As an alternative to this framing, Hinton argues for a phenomenological approach, refocusing attention on the individual lived experiences of the affected population. In her work, Fletcher calls for a culture of 'solidarity of practice' with local processes as a way to decolonise human rights and as an alternative focus to the long-held assumptions and priorities in the field.

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[4] McCargo, D., 'Politics by Other Means? The Virtual Trials of the Khmer Rouge Tribunal' (2011) 87 (3) *International Affairs* 613-627 at 613; Hamilton, T., and Ramsden, M., 'The Politicisation of Hybrid Courts: Observations from the Extraordinary Chambers in the Courts of Cambodia' (2014) 14 (1) *International Criminal Law Review* 115-147; Maguire, Peter. "The Khmer Rouge trials: The good, the Maguire, P., 'The Khmer Rouge Trials: The Good, the Bad, and the Ugly' (2018) 14 *The Diplomat*.

[5] Horsington, H., 'The Cambodian Khmer Rouge Tribunal: The Promise of a Hybrid Tribunal' (2004) 5 *Melbourne Journal of International Law* 462; Holligan, J., and Mohan, M., 'ECCC's Legacy for the Rule of Law in Cambodia: Workshop Report: Implementation of the ECCC Legacies for Domestic Legal and Judicial Reforms'. 2008 *Asian Business & Rule of Law Initiative* <https://ink.library.smu.edu.sg/sol_aprl/18> last accessed 6 December 2023.

[6] Bennett, C., 'Cambodia 2018-2021: From Democracy to Autocracy' (2021) 32 *Asia Maior*; Human Rights Watch, 'Cambodia: Events of 2022' *World Report 2023* <https://www.hrw.org/world-report/2023/country-chapters/cambodia> last accessed 6 December 2023.

[7] Hinton, A. L., *The Justice Facade: Trials of Transition in Cambodia* (Oxford University Press 2018).

Part one of this chapter explores the relationship between human rights and international criminal law, and how the concept of anti-impunity became the cornerstone of human rights advocacy. The chapter traces the development of hybrid accountability mechanisms and discuss their claimed benefits, which stray far beyond simple retributive justice into the territory of human rights implementation and post-violence reconstruction as mechanisms of transitional justice. Part two of the chapter focuses on the case study of Cambodia's ECCC, its anti-impunity aims and the additional claims that it would be a domestic human rights and rule of law success story, not only as a 'model court' for due process rights in the domestic legal system, but also as an exemplar of human rights culture inculcating broader 'socio-pedagogical goals'.[8] The chapter then offers an evaluation of the ECCC's hybrid model in the light of the apparent failure of the envisaged human rights dividends of the Court. Part three of the chapter introduces Hinton's theory of the 'imaginary' as it applies to human rights in the context of the ECCC's hybrid justice 'experiment'. The chapter examines what the Cambodia experience can tell us about our expectations of international(-ised) criminal tribunals as mechanisms for implementing human rights after conflict or atrocity, and the utility of Hinton's 'phenomenological' approach in seeing their value from an alternative perspective as well as Fletcher's call for solidarity of practice. The chapter concludes by suggesting that although there should be more realistic aims and expectations of international(-ised) criminal justice mechanisms insofar as implementing domestic human rights is concerned, we should also see their wider socio-cultural benefits that are not necessarily connected to democracy and progress.

The role of international criminal law in enforcing human rights

As is well known, the Universal Declaration of Human Rights and many of the major international human rights treaties have their origin in the international community's response to the mass crimes committed in World War Two. In addition to the post-war focus on developing the international legal architecture to better protect individuals from abuse at the hands of the state, there was both an appetite and a clearly articulated rationale for holding culpable individuals criminally responsible for their conduct that had led to the atrocities.[9] It is

[8] Scully, S., 'Judging the Successes and Failures of the Extraordinary Chambers of the Courts of Cambodia' (2011) 13 *Asian-Pacific Law and Policy Journal* 300.
[9] Robert H Jackson Center, 'Robert Jackson's Opening Statement Before the International Military Tribunal', <https://www.roberthjackson.org/speech-and-writing/opening-statement-before-the-international-military-

from these intertwined logics that we can understand what Eric Posner describes as the impulses behind human rights law that animate international criminal law.[10] Gerhard Werle and Florian Jessberger go further, insisting that 'the direct criminalization of human rights violations under international criminal law is the highest level of protection that a human right can achieve'.[11] However, after the initial efforts at Nuremberg to hold individuals accountable for mass atrocity, it took nearly fifty years for the disciplines of human rights and international criminal law to intersect again. When the International Criminal Tribunals for the Former Yugoslavia and for Rwanda ('ICTY' and 'ICTR') were established by the United Nations Security Council in 1993 and 1994 respectively, the geo-political situation and prevailing ideological climate was ripe for resurrecting the animating impulses of international criminal law. Individual accountability was once more at the forefront of the human rights movement, which sought to confront the 'culture of impunity'[12] for egregious human rights violations, where 'impunity' has come to mean a blatant lack of (criminal) punishment for wrongs.[13] Prosecutions were driving the reinvigoration of post-war human rights norms, in what became popularly known as the 'justice cascade'.[14] As Barrie Sander explains, rights activists began promoting criminal prosecution in the mid-1990s 'as an indispensable requirement of securing justice and truth in the aftermath of mass atrocity'.[15]

As the 'justice cascade' narrative in human rights grew, so the concept of combatting impunity became the dominant *leitmotif* of the newly resurgent field of international criminal law. The July 1998 Rome Conference at which the statute of the International Criminal Court ('ICC') was finally agreed recorded 'a unanimous call by the international community to break with the past and put an end to impunity',[16] a phrase that was taken up in both the academic and

tribunal/ > last accessed 6 December 2023; see also Stahn, C., *A Critical Introduction to International Criminal Law* (Cambridge University Press 2019), 1-2.

[10] Posner, E., *The Twilight of Human Rights Law* (Oxford University Press 2014), 52.

[11] Werle, G. et al (eds), *Principles of International Criminal Law* (Fourth edition, Oxford University Press 2020), 4.

[12] As summarised in Engle, *supra,* note 2.

[13] Lambourne, W., 'Justice after Genocide: Impunity and the Extraordinary Chambers in the Courts of Cambodia' (2014) 8 *Genocide Studies and Prevention* 7, 41, fn. 1.

[14] Sikkink, K., *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics (the Norton Series in World Politics)* (WW Norton & Company 2011); Sikkink, K. and Kim, H.J., 'The Justice Cascade: The Origins and Effectiveness of Prosecutions of Human Rights Violations' (2013) 9 *Annual Review of Law and Social Science* 269.

[15] Sander, *supra* note 3, at 326.

[16] United Nations, 'UN Diplomatic Conference Concludes in Rome With Decision to Establish Permanent International Criminal Court', United Nations Press Release L/2889, 20 July 1998 <https://press.un.org/en/1998/19980720.l2889.html> last accessed 6 December 2023.

practitioner communities.[17] Flushed with the success in Rome and buoyed by the optimism generated by the ICTY and ICTR and the creation of the ICC, international criminal justice began to acquire an ever-broadening list of goals beyond retributive justice and ending impunity. The aims of international criminal courts expanded to include truth-telling and establishing a historical record, rehabilitation of and reparations for victims, prevention and deterrence, and societal reconciliation, to name but a few.[18]

However, by the turn of the new millennium it was being acknowledged that exclusively international mechanisms might be unsuitable for realising many of the aims of international criminal justice. Assistant Secretary-General for Legal Affairs at the United Nations Ralph Zacklin wrote in 2004 that the ICTY and ICTR were costly, inefficient and ineffective, pointing to the undue length of proceedings, excessive delays in bringing suspects to trial, remoteness from victims and witnesses, and perceived legitimacy problems among the affected populations.[19] In response to such criticisms, the field pivoted towards 'hybrid' internationalised justice, a midway point between exclusively international and purely domestic justice. Hybrid accountability mechanisms blended national and international elements, operating either outside the domestic court system (as in the Special Court for Sierra Leone established in 1996) or within the domestic courts system (as in the Regulation 64 Panels in Kosovo and the Special Panels in East Timor, both established in 2000, and as we shall see, the ECCC in Cambodia established in 2001 but commencing operations in 2006). As Carsten Stahn notes, such hybrid justice mechanisms had wide appeal because they captured the 'dual' nature of atrocity as both a local and a global crime, and because they were a means of accommodating the difficult politics of international criminal justice.[20] More concretely, however, hybrid justice mechanisms have been fêted for their ability to fulfil the broader goals of international criminal justice, from enhanced legitimacy and local ownership of the process, greater domestic norm penetration in the fields of human rights and the rule of law, more

[17] Engle, Miller, and Davis *supra*, note 3; Robertson, G., 'Ending Impunity: How International Criminal Law can Put Tyrants on Trial', 38 *Cornell International Law Journal* (2005) 649.

[1818] Space prohibits extensive referencing, but for a representative sample in the (relatively) early literature see Wilson, R.A., 'Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia' [2005] *Human Rights Quarterly* 908-942; Bachrach, M., 'The Protection and Rights of Victims under International Criminal Law' (HeinOnline 2000) 7; Wippman, D., 'Atrocities, Deterrence, and the Limits of International Justice', *Genocide and Human Rights* (Routledge 2017) 473; Méndez, J.E., 'National Reconciliation, Transnational Justice, and the International Criminal Court' (2001) 15 *Ethics & International Affairs* 25-44.

[19] Zacklin, R., 'The failings of ad hoc international tribunals' *Journal of International Criminal Justice* 2 (2004): 541; Dickinson, L.A., 'The Promise of Hybrid Courts' (2003) 97 *American Journal of International Law* 295.

[20] Stahn, *supra* note 9, at 198.

sustainable capacity building and 'technology transfer' in the local justice sector – all at a lower cost and more expeditiously than exclusively international tribunals.[21]

Nevertheless, even the strongest proponents of hybrid justice acknowledged that these mechanisms were not a panacea for resolving the challenges of international criminal justice at a local level.[22] Beth van Schaack identifies the susceptibility of hybrid mechanisms to political manipulation in countries where the rule of law is not established.[23] More sceptical voices such as Pádraig McAuliffe caution against overloading hybrid international justice with too many ambitious aims, describing arguments of greater legitimacy and capacity building as 'idealised post-hoc rationalizations of what, in truth, were politically contingent compromises concerned more with expedient punishment than the reconstruction of justice systems.'[24] As the ICC began to operate at something approaching full capacity, perhaps there would be a reduced need for mixed domestic-international mechanisms, and apart from the creation of the Special Tribunal for Lebanon in 2006, there was a hiatus in the creation of hybrid tribunals until they experienced a revival in the second half of the second decade of the new millennium.[25] Once again, the impact of hybrid justice mechanisms on domestic rule of law and on the local justice sector was being heralded,[26] with some scholars even going as far as suggesting that hybrid tribunals were essential to address the renewed impunity crisis for mass human rights violations.[27]

This brings us back to the suitability and inherent limitations of international criminal justice mechanisms for implementing human rights. Writing in the years of hybrid hiatus in 2008, Mirjan Damaška summarises the growing sense that international criminal courts were

[21] Dickinson, 'The Promise of Hybrid Courts' (above); Van Schaack, B., 'The Building Blocks of Hybrid Justice' (2015) 44 *Denver Journal of International Law and Policy* 169; Stromseth, J., 'Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?' (2009) 1 *Hague Journal on the Rule of Law* 87; Leyh, B.M., 'National and Hybrid Tribunals. Benefits and Challenges' in Peter Malcontent (ed), *Facing the Past* (1st edn, Intersentia 2016).
[22] Dickinson, *supra* note 21, at 310.
[23] Van Schaack, *supra* note 21, at 173.
[24] McAuliffe, P., 'Hybrid Tribunals at Ten How International Criminal Justice's Golden Child Became an Orphan' (2011) 7 Journal of International Law & International Relations 1, 2.
[25] Kersten, M., 'As the Pendulum Swings–the Revival of the Hybrid Tribunal' [2017] *International Practices of Criminal Justice* 251-273.
[26] Dame, F., 'The Effect of International Criminal Tribunals on Local Judicial Culture: The Superiority of the Hybrid Tribunal' (2015) 24 *Michigan State International Law Review,* 211; Keenen, R., 'When All Else Fails, Look to the Courts: Using Hybrid Tribunals to Build Judicial Capacity and End Environmental Destruction in Post-Conflict Countries' (2018) 43 *William and Mary Environmental Law and Policy Review* 949.
[27] Ochs S.L., 'A Renewed Call for Hybrid Tribunals' (2019) 52 New York University Journal of International Law and Policy 351.

attempting to do too much. In the absence of a settled consensus as to the purpose of international criminal justice, his core argument is that the primary role for international (and hybrid / internationalised) criminal courts should be to advance accountability for egregious atrocity crimes. By overloading courts with ambitious aims, Damaška says, disillusionment would inevitably follow, as unfulfilled expectations and inconsistency would damage the legitimacy of the mechanisms among the affected communities and harm the fragile local systems of justice.[28] However, drawing on Damaška's later work, Scully argues how achieving 'socio-pedagogical goals' – leaving a positive legacy through affecting social change and ensuring victims are satisfied with the process – is more important than achieving fair trial standards.[29] Stuart Ford argues that it is possible to empirically identify a hierarchy of the goals of international criminal justice – the most important of which in his model (likelihood of the goal in question being achieved multiplied by the value of the goal) is the prevention of future violations of international criminal law – to guide our expectations of international courts and tribunals.[30] This invites parallels with the literature on the 'anti-impunity mindset' in human rights,[31] and its similarly reflexive impulses. As Sander notes, the turn towards the criminal in human rights was driven by the argument that prosecutions can positively transform both individuals (by validating the experience of victims through a state-sanctioned process that offers truth-telling, the creation of an historical record and proportionate retributive justice) and societies (by deterring commission of similar acts in future).[32] These claims, Sander says, should not be accepted without scrutiny – and he is not alone in noting that criminal prosecutions have their limitations, particularly in tackling issues of deeper structural violence and economic inequality that are often at the root of mass violence.[33] To make this discussion more concrete, we turn to the example of the ECCC in Cambodia.

The promise(s) of hybrid justice in Cambodia

During Cambodia's Democratic Kampuchea ('DK') regime between 1975 and 1979, an estimated 1.7 to 2.2 million people lost their lives through execution, starvation, disease and

[28] Damaška, M., 'What Is the Point of International Criminal Justice?' (2008) 83 *Chicago-Kent Law Review* 329.
[29] Scully, *supra* note 8, at 306.
[30] Ford, S., 'A Hierarchy of the Goals of International Criminal Courts' (2018) 27 *Minnesota Journal of International Law* 179.
[31] Engle, *supra* note 2; Engle, Miller and Davis, *supra* note 2; Sander, B., 'The Human Rights Agenda and The Struggle Against Impunity' [2017] *Lawfare Book Review Series* 2017; McAuliffe, P., 'The Roots of Transitional Accountability: Interrogating the "Justice Cascade"' (2013) 9 *International Journal of Law in Context* 106.
[32] Sander, *supra* note 3, at 329.
[33] Ibid.; McAuliffe, *supra* note 31.

other forms of mistreatment.[34] Apart from a perfunctory *in absentia* show trial of two of the most senior Khmer Rouge leaders (Pol Pot and Ieng Sary) in 1979,[35] there was no accountability for the crimes of the DK era until the ECCC began its operations in 2006. The prevailing anti-impunity human rights climate, and the momentum generated in the second half of the 1990s by the ongoing operations of the ICTY and ICTR as well as the agreement of the ICC's Rome Statute, undoubtedly fuelled the negotiations for the ECCC.[36] The international community was receptive to a criminal mechanism and the various factions within Cambodia saw political capital in it, but the diplomatic process proved extremely difficult. The final format of the ECCC as agreed in 2001 was a risky compromise. A UN-appointed Group of Experts had previously reported that Cambodia so lacked a 'culture of respect for an impartial justice system' that any tribunal should be held outside Cambodia as a wholly international court.[37] However, the eventual mechanism was located in Phnom Penh and was hybrid in nature, with a bifurcated United Nations / Cambodian administration, mixed panels with a majority of Cambodian judges, and a pair of equal Co-Prosecutors, appointed by the UN and the Royal Government of Cambodia respectively. The Court drew its authority from the Law on the Establishment of the ECCC, as amended in 2004,[38] and its legal process was loosely based on the French-inspired Cambodian civil law system, with a bespoke set of Internal Rules governing the procedural framework.[39] The ECCC finally closed its doors in September 2022, after 16 years of operation, three convictions and an estimated total cost of $337 Million.[40]

In prosecuting the 'senior leaders' of the Khmer Rouge and others 'most responsible' for the DK-era crimes, the ECCC's formal mandate was the pursuit of 'justice and national

[34] Etcheson, C., *After the Killing Fields: Lessons from the Cambodian Genocide* (Greenwood Publishing Group 2005), 117-119; Kiernan, B., *The Pol Pot Regime: Race, Power, and Genocide in Cambodia under the Khmer Rouge, 1975-79* (Yale University Press 2002).
[35] De Nike, H., Quigley, J., and Robinson, K., *Genocide in Cambodia: Documents from the Trial of Pol Pot and Ieng Sary: Documents from the Trial of Pol Pot and Ieng Sary* (Pennsylvania Studies in Human Rights 2000).
[36] Etcheson, C., 'A "Fair and Public Trial": A Political History of the Extraordinary Chambers' in Open Society Justice Initiative *Justice Initiatives,* Spring 2006 7-24.
[37] United Nations 'Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135, 18 February 1999', United Nations Assistance to the Khmer Rouge Trials, <https://www.unakrt-online.org/documents/report-group-experts> last accessed 6 December 2023, Para 129.
[38] Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Crimes Committed During the Period of Democratic Kampuchea, as amended, 27 October 2004, <https://www.eccc.gov.kh/en/documents/legal/law-establishment-extraordinary-chambers-amended> last accessed 6 December 2023.
[39] Beauvallet, O. and Schmit, J., "The Extraordinary Chambers in the Courts of Cambodia" In *International Conflict and Security Law: A Research Handbook*, pp. 619-632. The Hague: TMC Asser Press, 2022.
[40] DeFalco, R.C., 'Reassessing the Rule of Law Legacy of the Khmer Rouge Tribunal' *University of Pennsylvania Journal of International Law,* (Forthcoming 2024).

reconciliation, stability, peace and security'.[41] The Court's core retributive function of accountability for crimes of genocide, crimes against humanity and war crimes reflected its place within international criminal justice, but the modern human rights anti-impunity impulse has also been prominent in the narrative. During the ECCC's negotiations, both sides referenced the ending of impunity as a central goal, as did Cambodia's King Norodom Sihanouk,[42] and much of the academic literature. Writing in 2005 before the ECCC had commenced, Craig Etcheson noted how the 'disease' of impunity within Cambodia's political institutions had persisted throughout its history and into the present day, linking this to the lack of respect for the rule of law past and present. Etcheson insisted that criminal accountability for the crimes of the Khmer Rouge, achieved through fair trials at the ECCC, was central to establishing the rule of law in Cambodia – although he added a proviso that this would only transpire if the rule of law was eventually 'institutionalised in the structures of the government and internalised in the hearts and minds of the leader and the people'.[43] Indeed, it was frequently claimed that the ECCC would result in a rule of law dividend for Cambodia's domestic courts and legal system.[44] Deputy Cambodian Prime Minister Sok An claimed that in addition to seeking justice, the Cambodian government's aims for the ECCC were for it to 'assist the wider process of legal and judicial reform', to 'provide a model court meeting international standards' and to 'serve as an inspiration for other countries in search of justice.'[45] Similarly, the UN's Office for the High Commissioner of Human Rights championed the exemplary impact of the ECCC, which it was said would occur both through a 'demonstration effect' for the local legal system of hybrid trials functioning according to international due process standards, as well as a 'capacity building effect' of Cambodian legal professionals learning from their international counterparts.[46]

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[41] Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, Preamble <https://treaties.un.org/pages/showDetails.aspx?objid=080000028007c9d0> last accessed 6 December 2023.

[42] Hammarberg, T., 'How the Khmer Rouge tribunal was agreed: discussions between the Cambodian government and the UN: Part I: March 1997–March 1999' Documentation Center of Cambodia, <https://d.dccam.org/Tribunal/Analysis/How_Khmer_Rouge_Tribunal.htm> last accessed 6 December 2023.

[43] Etcheson, *supra* note 34, at 171 and 174; note that Eisenbruch discusses how 'for transitional justice to be tailored to the Cambodian experience, the local cultural notion of impunity and the way it works need to be conveyed to Cambodians in their own idiom': Eisenbruch, M., 'The Cloak of Impunity in Cambodia II: Justice' (2018) 22 *The International Journal of Human Rights* 822 at 836.

[44] For a summary of these, see West, L., 'Governance and Rule of Law in Cambodia' in McCarthy, S. and Thompson, M. (eds) *Governance and Democracy in the Asia-Pacific* (Routledge 2020), 136; DeFalco, R.C., 'The Uncertain Relationship Between International Criminal Law Accountability and the Rule of Law in Post-Atrocity States: Lessons From Cambodia' (2018) 42 *Fordham International Law Journal* 1.

[45] Sok An, 'The Khmer Rouge Tribunal: What it Means for Cambodia' in *Justice Initiatives,* Open Society Justice Initiative, 24-31 at 29-30.

[46] Office of the High Commissioner for Human Rights Cambodia 'Promotion of ECCC Legacy', 28 September 2015, <https://cambodia.ohchr.org/en/rule-of-law/promotion-eccc-

The ECCC has also been seen as an instrument of transitional justice, through which goals of truth telling, memory making and national reconciliation have been advanced. Although some have argued that establishing the rule of law is key to these additional transitional justice aim,[47] in reality they are qualitatively different, as demonstrated through the work of the Documentation Centre of Cambodia (DC-Cam).[48] As the principal independent Cambodian research institute since 1995 documenting the DK era, DC-Cam does not focus exclusively on justice, but also on memory, health, peace and growth. DC-Cam's director, Youk Chhang, has long maintained the importance of the ECCC (as one of many other processes and initiatives, including a Peace Center, education and training) for the purposes of national reconciliation with the past, and the need for country-wide conversations about that period in Cambodia's history that was for so long never spoken about.[49] However, over time, such transitional justice goals appear to have been folded in to the narrative about the ECCC and legacy, mixing its international criminal justice mandate *and* the broader human rights aims of anti-impunity, developing and reinforcing the rule of law, building capacity and improving the Cambodian justice sector, as well as other progressivist goals. As will be argued later, in the absence of any broader social and transitional justice framing, these disparate aims lack both local context and – importantly – coherence.

On the day the ECCC's Supreme Court Chamber upheld the convictions against the accused Khieu Samphan, in the final judgment in the Court's last case, the Office of the Co-Prosecutor issued a joint press release, concluding with the following paragraph:

> This Court has made an immeasurable contribution to the global effort to combat impunity for mass atrocity crimes. It has strengthened respect for the rule of law in Cambodia and helped to heal the wounds of the past, allowing the people of this country

legacy#:~:text=The%20OHCHR%20has%20endeavored%20to,of%20the%20court%20is%20complete'. > last accessed 6 December 2023; Scully 'Judging the Successes and Failures of the Extraordinary Chambers of the Courts of Cambodia' (above) 341; Ciorciari, J.D. and Heindel, A., *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia* (The University of Michigan Press 2014). For a critique of the capacity building effect, see Coughlan, J., Ghouse, S., and Smith, R., 'The Legacy of the Khmer Rouge Tribunal: Maintaining the Status Quo of Cambodia's Legal and Judicial System' *Amsterdam Law Forum* 4 (2012) 16; Un, K. and Ledgerwood, J., 'Is the Trial of Duch a Catalyst for Change in Cambodia's Courts?' (2010) *Analysis from the East-West Center* No.95, June 2010; DeFalco, *supra* note 40.

[47] Etcheson, *supra* note 34, at 174.

[48] For the history of DC-Cam, see <https://www.dccam.org/homepage/our-history/> last accessed 6 December 2023.

[49] Maguire, P., 'Youk Chhang: A Cambodian National Treasure' *The Diplomat* April 2017.

to look to the future. It has reinforced the principle that those responsible for atrocities cannot evade justice forever, and will be held accountable.[50]

In addition to explaining how the Court had fulfilled its stated goals of accountability and justice, global anti-impunity, rule of law enhancement in Cambodia, and societal 'healing', the Co-Prosecutors also alluded to the ECCC's role in public education, history-making and truth telling. Similar praise was expressed by the United Nations Assistant Secretary-General for Legal Affairs (who referred to the 'historic moment' for Cambodia and international criminal justice, demonstrating the commitment of the United Nations to 'ensure an enduring legacy')[51] and by the US Ambassador to Cambodia (who spoke of the Court's 'important legacy' in documenting some of the worst crimes against humanity in modern history, and 'making contributions to truth, reconciliation and justice' in Cambodia).[52]

Outside the ECCC and those circles, the opinion is distinctly mixed on its achievements. The Co-Prosecutors are the lone voices in suggesting that Cambodia's domestic rule of law has in any sense been strengthened by (or since) the Court began. Over the course of the Court's 16 years of operation, former Prime Minister Hun Sen presided over – and orchestrated – a dramatic decline in Cambodia's human rights situation. Violence, intimidation, persecution and imprisonment for critics and dissenters has become the norm; opposition political parties and human rights NGOs have been shut down; lawyers accused of treason and sedition have been disbarred; freedoms of speech and of peaceful assembly, and a free Media, are no more.[53] As to ending impunity, Sebastian Strangio (among many others) documents how Hun Sen, his Cambodian People's Party (CPP) and their associates continue to be above the law.[54] Rule *by* law and the language of control and security continue to dominate Cambodia's socio-political reality, and if anything is getting worse. Randle deFalco posits the theory that the ECCC has

[50] ECCC Press Release On Behalf of the Co-Prosecutors 22 September 2022, <https://www.eccc.gov.kh/en/articles/press-release-behalf-co-prosecutors> last accessed 6 December 2023

[51] United Nations, 'Statement of Mr Stephen Mathias, Assistant Secretary-General for Legal Affairs' 22 September 2022, < https://www.eccc.gov.kh/sites/default/files/media/Statement%20of%20Mr.%20Stephen%20Mathias%20Assistant%20Secretary-General%20for%20Legal%20Affairs%20%28002%29.pdf> last accessed 6 December 2023

[52] U.S. Embassy in Cambodia, 'A Statement from U.S. Ambassador to Cambodia W. Patrick Murphy on the ECCC's Final Legal Case and Upheld Conviction of Khieu Samphan' <https://kh.usembassy.gov/a-statement-from-u-s-ambassador-to-cambodia-w-patrick-murphy-on-upheld-conviction-of-khieu-samphan-former-khmer-rouge-head-of-state/> last accessed 6 December 2023.

[53] Morgenbesser, L., 'Cambodia's transition to hegemonic authoritarianism' *Journal of Democracy* 30, no. 1 (2019): 158-171; Lawrence, B., "Authoritarian constitutional borrowing and convergence in Cambodia." *Contemporary Southeast Asia* 43, no. 2 (2021): 321-344.

[54] Strangio, S., *Cambodia: From Pol Pot to Hun Sen and Beyond* (Paperback edition, Yale University Press 2020).

in fact had a *net negative* capacity building effect and impact on the rule of law in the country. Not pulling his punches, he says:

> The ECCC has acted in a similar fashion as the CPP has in recent years: engaging in inconsistent, outcome-driven decision-making that, while covered by a legal gloss, remains fundamentally at odds with basic rule of law principles of generality, clarity, and consistency.[55]

Relatedly, Hurst Hannum argues that focusing on combating past impunity in Cambodia through international(-ised) criminal justice appears 'to have necessitated turning a blind eye to the rampant human rights violations committed under the rule of Hun Sen.'[56]

These scholars echo the dissenting international judicial opinion in the ECCC's Supreme Court Chamber, when Judge Maureen Clark wrote of the core failure at the heart of the Court: the inability of international assistance to insulate the court from national politics and the influence of Hun Sen and the CPP.[57] Other critics of the ECCC have decried its limited impact on the domestic human rights situation and rule of law.[58] Even before the Court began its operations, prescient forecasts were also made by commentators who suggested that there were unspoken ulterior political motives of the ruling Cambodian People's Party, including using the ECCC as an opportunity to bolster its own power and prestige, and to cement the 'liberation myth' that it had saved the country from further Khmer Rouge bloodshed.[59] On the other hand, writing two years before the final judgment was delivered, Diane Orentlicher pointed to the public opinion surveys conducted after the first two trials had concluded. Cambodians had expressed high levels of satisfaction with the Court, and referred to the role that it had played in giving victims a platform to voice their grief and to gain acknowledgement and recognition of their

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[55] DeFalco, , *supra* note 40, at 37; DeFalco, R.C., 'The Uncertain Relationship Between International Criminal Law Accountability and the Rule of Law in Post-Atrocity States: Lessons From Cambodia' (2018) 42 *Fordham International Law Journal* 1.

[56] Hannum, H., *Rescuing Human Rights: A Radically Moderate Approach*. (Cambridge University Press, 2019), 21.

[57] Dissenting Judgment of Judge Maureen Harding Clark, *Decision on International Co-Prosecutor's Appeal of the Pre-Trial Chamber's Failure to Send Case 004 to Trial as Required by the ECCC Legal Framework* Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, 28 December 2021 Case File No. 004/23-09-2021-ECCC/SC(06), as also discussed in Ryan, H. 'And Then, Finally, a Judge Wrote the Shameful End of the Khmer Rouge Tribunal' *JusticeInfo.Net* 4 February 2022 <https://www.justiceinfo.net/en/87248-finally-judge-wrote-shameful-end-khmer-rouge-tribunal.html> last accessed 6 December 2023.

[58] Stensrud, E.E., 'The Politics of the ECCC: Lessons From Cambodia's Unique and Troubled Accountability Effort' October 13, 2022, *Just Security* < https://www.justsecurity.org/83534/the-politics-of-eccc-lessons-from-cambodias-accountability-effort/> last accessed 6 December 2023.

[59] Strangio, *supra* note 54, at 616-617.

suffering.[60] Such sentiments were echoed after the final appeal judgment was delivered in September 2022. DC-Cam's Executive Director Youk Chhang explained how the ECCC was 'a very meaningful process' for all Cambodians. He continued: 'Any international court is not a perfect institution, but we must look higher. We would have lost everything had we not agreed to establish the ECCC.'[61]

Such diversity of opinion on what the ECCC has – and has not – achieved is not merely a debate of facts that can be proved or discounted: it is also a reflection of the different standpoints from which hybrid justice institutions are judged. Hinton argues that there are three categories into which critics of the Court fall: firstly, the 'legal purists' (for most of whom the ECCC has failed as a justice institution given the political interference and corruption within the Court); next, the 'progressivists' (who approach the evaluation from a transitional justice perspective, most of whom would say the ECCC has failed to transform an authoritarian regime into a democratic one); and finally the 'pragmatists' (for whom the Court cannot be judged solely from an international criminal – or transitional – justice perspective, but instead from the collection of 'modest achievements that can help a post-conflict society attain a measure of justice and healing').[62] It is to these more pragmatic and less clear-cut consequences of hybrid justice, involving in Hinton's framing a 'phenomenological' alternative to the 'imaginary' of progress, to which we will now turn as we seek understand the limitations of criminal justice mechanisms in advancing human rights.

Hybrid tribunals and the human rights 'imaginary'

> *'We need to overcome the limits of what we have imagined human rights to be so that we continue to be relevant to a global rather than a merely international human rights movement.'*[63]

[60] Orentlicher, D., "'Worth the Effort'? Assessing the Khmer Rouge Tribunal." *Journal of International Criminal Justice* 18, no. 3 (2020): 615-640.
[61] Faulder, D., '"Spotlighting horror": Tribunal helps Cambodia find closure' *Nikkei Asia online*, 28 September 2022 <https://asia.nikkei.com/Politics/International-relations/Spotlighting-horror-Tribunal-helps-Cambodia-find-closure> last accessed 6 December 2023.
[62] Hinton, A.L., 'Justice at Last for Cambodia's Killing Fields?' *The Diplomat*, September 21, 2022.
[63] Fletcher, L., 'Power and the International Human Rights Imaginary: A Critique of Practice.' *Journal of Human Rights Practice* 14, no. 3 (2022): 749-768, 766.

In the face of critiques that the human rights movement is a neo-colonial, neoliberal, 'civilising' project,[64] Laurel Fletcher urges us to move beyond the 'imaginary' – those conventional understandings and traditions that make up the unreflective practices that have defined the human rights era to date.[65] Grounded in the work of Charles Taylor[66] and José Julián López,[67] Fletcher draws candidly upon her long and varied career in peacebuilding, international criminal justice and advocacy to illustrate how well-meaning but dominant Western / Global North human rights practices displace, silence or side-line local human rights priorities. She illustrates how the post-Cold War human rights movement is driven by a theory of change predicated upon the traditional canon of universalism, altruism, a focus on civil and political freedoms (rather than social, cultural and economic freedoms), a foregrounding of legalism, identifying and publicising egregious physical abuses and the cultivation of and insistence on expert knowledge.[68] Although Fletcher only refers to it in passing, it is clear that for her the human rights imaginary also encompasses the anti-impunity mindset discussed earlier in this chapter. The 'justice cascade' theory and the 'no peace without justice' reflex falls squarely within the conventional understandings of the human rights movement. When it comes to hybrid international criminal tribunals, the goal of individual criminal accountability is allied to claimed legacy benefits of capacity building to create a seemingly unchallengeable iteration of the human rights imaginary.

As this section has sought to demonstrate through discussing the example of the ECCC in Cambodia, the narrative of progress and change for a country in which a hybrid international justice mechanism operates is open to considerable debate. Perhaps, however, we are asking the wrong question. Instead of looking at whether the human rights goals were in fact achieved by the hybrid international justice mechanism, we might challenge our preoccupation with the purpose(s) for which such mechanisms are created in the first instance, and in its place explore the extent to which local rather than international priorities are satisfied. Hinton focuses on the ECCC as an instantiation of the *transitional justice* imaginary, which has a very close parallel to Fletcher's human rights imaginary. For Hinton, the ECCC embodies the transitional justice

[64] Samson, C., 2020 *The Colonialism of Human rights: Ongoing Hypocrisies of Western Liberalism* (Medfor, MA: Polity); López, J. J., 'Human Rights as Ends or Means of a Global Moral Horizon.' *Research Handbook on the Sociology of Globalization: 0* (2023); Mutua, M., "Savages, Victims, and Saviors: The Metaphor of Human Rights." *Harvard International Law Journal* 42 (2001): 21.
[65] Fletcher, *supra* note 63, at.
[66] Taylor, C., *Modern Social Imaginaries*. Duke University Press, 2004.
[67] J López, J.J., *Human Rights as Political Imaginary* (Springer, 2018).
[68] Fletcher, *supra* note 63, at 755-756.

imaginary through a progressivist concept of a 'better future', where teleological transformations take place from authoritarianism to democracy, lawlessness to the rule of law, a violent society to a peaceful one, and so on.[69] He argues that this imaginary is problematic on two fundamental levels. Firstly, it is an 'impossible vision', a narrative of progress for a point in the future that never arrives, even as it corresponds to well-worn tropes of justice, accountability and reconciliation, all of which are highly contingent on one's perspective. Secondly, this imaginary dangerously masks inequality, pays no attention to structural violence, and is prone to rhetorical manipulation by the parties in power or those whose voices control the narrative, all of which has come to pass in Cambodia during the lifetime of the ECCC. For Hinton, the ECCC therefore represents a 'justice façade' – or as he explains it, 'a metaphor emphasising that the transitional justice imaginary provides a distanced and surface-level view that masks power and the complexities of everyday experience.'[70] Exclusively viewing the Court as a mechanism through which to fulfil the human rights goals of anti-impunity, rule of law creation and domestic capacity building draws directly upon the human rights imaginary.

Neither Hinton nor Fletcher are asserting that there is no place for international criminal justice mechanisms, nor that the investigation and prosecution of culpable individuals is *per se* a regressive and essentialising exercise in neo-colonialism. However, their point is that viewing such mechanisms *exclusively* through the lens of the human rights imaginary is limiting and does little to encourage local priorities and forms of social transformation through processes such as truth telling, memory-making, education and national conversation. The limitations of such hybrid international justice mechanisms are most clearly seen in the inevitable disappointments that flow from their teleological failures. Over-promising and inflating the expectations of victims and stakeholders is the stock-in-trade of international criminal justice. As well as the frustrations of realisation, both international criminal lawyers and the human rights community are, as Makau Mutua puts it, 'prone to narratives of optimism but blind to the sins of conception.'[71] In the Cambodian context, as Hinton notes, many view the ECCC as a failure because of the limited number of trials, the evidence of political interference and corruption, and its lack of beneficial impact on the domestic justice system, rule of law and

[69] Hinton, *supra* note 7, at 5-23.
[70] Ibid., at 7.
[71] Mutua, M., "The International Criminal Court: Promise and Politics." In *Proceedings of the ASIL Annual Meeting*, vol. 109, pp. 269-272 (Cambridge University Press, 2015).

enjoyment of human rights. Amnesty International and Human Rights Watch, as human rights 'gatekeepers',[72] have at various points during its operation criticised the ECCC for not doing enough, not only by failing to bring more people to justice but also in failing to deliver on the progressivist promises made.[73] Similarly, Ellen Stensrud describes the 'sobering lesson' of the ECCC's limited impact on Cambodia's 'authoritarian legal and political culture'.[74]

Some commentators explore the concept of 'thick accountability', where human rights mobilisation goes beyond narrow legal conceptions of justice by appealing to 'empirical and sociological' concepts and which views accountability as part of the process and the struggle.[75] However, in common with Hinton and Fletcher, the core argument of this chapter is to suggest that there is more to viewing hybrid justice mechanisms through the lens of accountability; simply acknowledging the limitations of hybrid international justice mechanisms for the implementation of human rights and other teleological purposes does not take us beyond the imaginary. Hinton's alternative is that of a 'dynamic' approach, to 'unmask' the core assumptions of the field, and to look beyond the narratives of more-or-less linear progress, or as he describes it, 'phenomenological transitional justice'. [76] Drawing upon his core field of anthropology, Hinton encourages us to consider a 'phenomenological' approach, which 'shifts the focus from totalizing universals to lived experiences embedded in historical, social, and political contexts.'[77] In other words, instead of fixating on a hybrid justice mechanism's impact on accountability, democracy, rule of law and capacity-building (all of which fall squarely within the human rights imaginary), we should also look at how the process was variously experienced by those within the affected population. Such experiences are unlikely to be an homogenous bloc, and capturing them is unlikely to fit within neat parameters. However, domestic actors can provide the insight and phenomenological perspective that might be lacking from the traditional human rights imaginary. As Hinton notes, in the case of Cambodia,

[72] Fletcher, *supra* note 63, at 754; Linde, R., 2018 'Gatekeeper Persuasion and Issue Adoption' *Journal of Human Rights*. 17(2) 245-264.
[73] Amnesty International, 'Cambodia: Genocide Verdict is Bitter, Belated Justice' November 16, 2018 <https://www.amnesty.org/en/latest/press-release/2018/11/cambodia-genocide-verdict-bitter-belated-justice/>; and Human Rights Watch, 'Cambodia: Khmer Rouge Convictions: "Too Little, Too Late"' August 8, 2014, <https://www.hrw.org/news/2014/08/08/cambodia-khmer-rouge-convictions-too-little-too-late>, both last accessed 6 December 2023.
[74] Stensrud, *supra* note 58.
[75] Destrooper, T., 'Accountability for Human Rights Violations in Cambodia: Mapping the Indirect Effects of Transitional Justice Mechanisms' 19 *Asia-Pacific Journal on Human Rights and the Law* 113-139 (2018) at 115, citing McEvoy, K., 'Beyond Legalism: Towards a Thicker Understanding of Transitional Justice' (2007) *Journal of Law and Society* 34(4), 411-440.
[76] Hinton, *supra* note 7, at 24.
[77] Ibid., at 25.

DC-Cam's original slogan of 'justice and memory' offers a more 'nuanced' vision of local experiences than the primarily accountability-focused.[78] The 'reconciliation' that can result from Cambodians talking to Cambodians, finding paths to coexistence in ways that do not match the imaginary progressive narratives of harmony, may nevertheless be the realities that transpire.

From a slightly different perspective, Laurel Fletcher focuses on the concept of 'transformative solidarity'. Drawing on the recent work of Amnesty International's Sarah Jackson[79] this concept 'takes the agency of affected people and communities as its starting point'.[80] In other words, if the human rights movement wishes to decolonialise its practice, it needs to recognise how the imaginary has previously subordinated local priorities, and to look instead to a pluralist approach as a baseline. Fletcher explains the need for solidarity to be a core principle that both informs international human rights practice and enables a plurality of norms and practices: without a conscious effort to do otherwise, international human rights practice will continue along its Global North path, marginalising, overriding or ignoring the agency of local actors. As she puts it:

> The commitment to respecting the agency of local human rights groups fundamentally alters how international human rights organisations understand themselves in relation to the other tenants [sic] of the imaginary – universality; civil and political rights; political neutrality; international documentation; and expertise.[81]

Pursuing a 'principled solidarity' with local actors will preserve the relevance and legitimacy of the global human rights movement, she argues. Translated to hybrid international justice mechanisms, this would mean that instead of exclusively considering the teleological purposes of accountability, anti-impunity, (re-)building the rule of law and strengthening human rights, we might look at how the local population has experienced the mechanism, what conversations have been stimulated by it, and what social processes have been engaged – beyond outreach work focusing on the convictions of the accused.

[78] Ibid., at 251.
[79] Jackson, S 'Towards Transformative Solidarity; Reflections from Amnesty International's Global Transition Programme' *Emory International Law Review* 34(3) 2020 705-56.
[80] Fletcher, *supra* note 63, at 764, quoting Jackson 'Towards Transformative Solidarity' (above) 709.
[81] Fletcher, *supra* note 63, at 765-6.

A further point follows on from this: the complex role played by victims of atrocity. The victim has become the central animating figure in international criminal justice,[82] and in human rights terms Fletcher notes that the credibility of violations 'require international NGOs to recognize victims as such and document and interpret their experiences within the established human rights cannon.'[83] Victims are core to the human rights imaginary – it is 'for' them that hybrid justice mechanisms seek accountability – but there is increasing scholarship questioning the instrumental purpose for which the victim is invoked, typically by political and legal elites.[84] Relatedly, Maria Elander explores the value in requiring victims to 'perform' grief on the stage of international(-ised) criminal courts, discussing Martti Koskenniemi's point that criminal trials have a symbolic function of enabling through ritual the creation of a 'workable "moral community"'.[85] However, victims can also play a significant role in broader phenomenological understandings of hybrid justice mechanisms beyond the courtroom. This has been seen extensively in Cambodia in the wider work of DC-Cam as discussed above, where the hybrid justice mechanism is but a jumping off point for a wider and deeper examination of related processes such as memory, peace, health and growth, as well as education and national conversations. These processes will continue long after the ink is dry on the final court judgment and the attention spotlight of international criminal law and the international human rights movement moves on.

Conclusion

Hybrid criminal justice mechanisms, far more than their purely international counterparts, seem to suffer from an identity crisis, as the Cambodia example starkly illustrates. As a criminal court, the ECCC deals with the investigation, prosecution and punishment (if convicted) of named individual accused. Viewed through a human rights lens, it is tasked with being a mechanism through which the rights of individuals are expressed and enforced. Seen as a form of transitional justice the aims are different again, where the focus is on helping Cambodian

[82] Moffett, L., "Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and the Hague." *Journal of International Criminal Justice* 13, no. 2 (2015): 281-311.
[83] Fletcher , *supra* note 63, at 763.
[84] Schwöbel-Patel, C., "The 'Ideal' Victim of International Criminal Law." *European Journal of International Law* 29, no. 3 (2018): 703-724; also Killean, R., *Victims, Atrocity and International Criminal Justice: Lessons From Cambodia*. Routledge, 2018; Batesmith, A., '"Poetic Justice Products": International Justice, Victim Counter-Aesthetics, and the Spectre of the Show Trial' in Schwöbel-Patel, C. and Knox, R. (eds) *Aesthetics and Counter-Aesthetics of International Justice* (Counterpress, 2023).
[85] Elander, M., 'The victim's address: Expressivism and the victim at the extraordinary chambers in the courts of Cambodia' *International Journal of Transitional Justice* 7, no. 1 (2013): 95-115 citing Koskenniemi, M., "Between Impunity and Show Trials." *Max Planck Yearbook of United Nations Law* 6, no. 1 (2002): 1-32, 10.

society to reckon with the past through truth-telling and memory making. Internationalised or hybrid criminal justice mechanisms such as the ECCC blur the boundaries of these disciplines: at once an instrument of retributive justice, a catalyst for human rights and democratic development, and a process to heal the wounds of the past. The justification of their very existence, location and composition is bound up in the promises of broader socio-political change as well as in their legal relevance, legitimacy, and impact. This chapter has sought to argue that the overall coherence of human rights goals suffers when the overwhelming focus is criminal accountability.

Hannum suggests that there is no 'inherent conflict' between the human rights and criminal prosecution goals (to which we could add transitional justice goals) because they both benefit society, but argues that by focusing exclusively on accountability there is a serious risk that priorities will be distorted and attention diverted from what he calls the more 'pervasive' human rights violations 'faced by most of the world's population most of the time.'[86] Hannum speaks to the need within the human rights movement for a focus other than exclusively on accountability. This pushback on the 'justice cascade' and the 'anti-impunity mindset' is not a call to dispense with investigations and prosecutions altogether, nor is it an argument for individual or institutional amnesty as the solution to re-establishing peace. Rather, there is considerable value in recognising the limitations from a human rights perspective of criminal prosecutions. Of necessity, even prosecuting the most senior civilian or military accused for the most egregious crimes is an individual process, and as is consistently seen, a very lengthy and expensive one at that. Bringing high-profile serial human rights abusers to justice undoubtedly has a stigmatising and shaming effect on the perpetrators (although most scholars question whether there is any meaningful deterrent effect),[87] and may express important socio-political norms, but the evidence that this process has any meaningful impact on deeper structural violence and economic inequalities is limited. As critical scholars have identified, adopting an exclusively anti-impunity mindset when it comes to the high-level, spectacularised human rights violations amounting to international crimes creates 'simplified and incomplete narratives' of atrocity.[88] This not only misses the countless systemic and everyday grievances

[86] Hannum, *supra* note 56, at 23, 25.
[87] In one major recent study, there was little evidence of 'actual deterrence' being correlated to the work of international criminal tribunals, though it was argued that the 'perceived deterrent' effect among certain stakeholders was a factor of some relevance: Schense, J. and Carter, L. (eds) *Two Steps Forward, One Step Back: The Deterrent Effect of International Tribunals* (Brussels: Torkel Opsal Academc EPublisher, 2017), 427-458.
[88] Sander, *supra* note 3, at 354.

of the population and the domestic human rights deficits across many fields, but as Barrie Sander argues risks 'anti-impunity practices being co-opted in support of oppressive regimes' as damaging power structures remain unchallenged.[89]

Whether we take the view that hybrid justice mechanisms should concentrate only on the investigation and prosecution of those accused of committing human rights atrocities amounting to violations of international criminal law, or we argue that they should also look to bring about wider socio-pedagogical benefits, influence rule of law and other normative creation, and deliver capacity building to local actors to promote human rights in the domestic setting, there is a second fundamental question to be answered, as Hinton and Fletcher's work illustrates. As this chapter discusses above, the universalist, progressivist imaginary – with its traditional assumptions of what human rights should be and what human rights should do – omits an entire perspective from the respective fields in which the priorities of local activists and stakeholders are minimised, marginalised and ignored. This second question, then, is to ask where we want the human rights movement to go. If we recognise the limitations of the imaginary, we might be better able to acknowledge the critical importance of taking local voices seriously. If one of the core animating ideas of human rights is inclusion, it is self-defeating and incoherent to persist in a singular process that undermines the movement as a whole.

Word count (excluding abstract and biog): 8,852

[89] Ibid.