

THE FLUCTUATING VISIBILITY OF EVERYDAY ATROCITY VIOLENCE IN KHMER ROUGE–ERA CAMBODIA

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ABSTRACT

This Article explores how the atrocities committed in Cambodia during the Khmer Rouge period (1975–1979) have been narrated over time and how, through such narration, slow and attritive everyday forms of atrocity violence have been alternately rendered visible or invisible. It does so by looking at how Khmer Rouge-era atrocities have been framed, while focusing on identifying what forms of violence and killing have been branded, legally and socially, as “atrocity crimes,” and what forms of violence have been obscured, backgrounded, or otherwise deemphasized. In doing so, this Article assesses the relationship between international, national, and local understandings of this complex history, expressing concern that dominant narratives developed by national and international elites may be influencing or even displacing localized notions of violence, atrocity, and justice. This Article concludes by calling for efforts to actively foreground everyday as well as spectacular manifestations of atrocity violence and experiences thereof.

I. INTRODUCTION

Given international criminal law’s (“ICL”) precipitous rise in influence within the broader arena of post-conflict, justice-seeking, and social reconstruction efforts, whether and how harms are dominantly reconceptualized, both socially and legally, as “atrocity” (i.e., international) crimes matters a great deal.¹ Harms framed as manifestations of war crimes, crimes against humanity, or genocide are viewed as those most in need of redress and are, hence, prioritized over other harms and injustices viewed as falling within alternative rubrics, such as human rights or development. Larissa van den Herik describes this visibility amplification effect of ICL as a “spotlight” or “black hole” dynamic, wherein the visibility of harms prosecuted as international crimes is amplified or spotlighted, while other harms not subjected to prosecution are relegated to veritable black holes in which they are invisible.² Concerns regarding what harms are and are not recognized and prioritized during and following periods of conflict and mass

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¹ On the rise of ICL and the implications thereof, see generally Kenneth Anderson, *The Rise of International Criminal Law: Intended and Unintended Consequences*, 20 *EUR. J. INT’L L.* 331, 331–32 (2009); ANTI-IMPUNITY AND THE HUMAN RIGHTS AGENDA, (Karen Engle, Zinaida Miller & D.M. Davis eds., 2016).

² Larissa van den Herik, *International Criminal Law as a Spotlight and Black Holes as Constituents of Legacy*, 110 *AJIL UNBOUND* 209, 209 (2016).

violence also transcend ICL. Scholars in disciplines such as transitional justice, human rights, genocide studies, and peace studies have all expressed concerns relating to which harms are recognized as atrocities and thus prioritized, as well as how this affects crucial issues such as memory, social reconstruction, and efforts aimed at building sustainable, just, and resilient societies.³ For example, Zinaida Miller argues, “[t]ransitional justice as both literature and practice offers more than just a set of neutral instruments for the achievement of the goals of justice, truth[,] and reconciliation. It also serves to narrate conflict and peace, voice and silence, tolerable structural violence[,] and intolerable physical atrocity.”⁴ Thus, according to Miller, transitional justice is far more than a neutral set of technocratic tools, but rather is “a definitional project, explaining who has been silenced by delineating who may now speak.”⁵ To extend this analysis, whereas transitional justice “narrates” conflict and peace, ICL operates as a metaphorical exclamation point, designating the worst harms by socially and juridically branding them “atrocious crimes.”⁶ In turn, those considered responsible for such crimes are deemed among the world’s worst criminals, while those directly affected are given the status of victim. As such, ICL, like transitional justice, is a definitional project, not only delineating who may speak, but also drawing the parameters of individualized responsibility and victimhood.

This Article assesses how this definitional project has played out in post-atrocity Cambodia by examining how the nation’s Khmer Rouge-era history has been framed during Cambodia’s long, and arguably still incomplete, period of transition following the ouster of the Khmer Rouge from power in 1979.⁷ Through this analysis, this Article offers insights concerning two

³ See generally, Lisa J. Laplante, *Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence Through a Human Rights Framework*, 2 INT’L J. TRANSITIONAL JUST. 331, 333–34, 351 (2008); Zinaida Miller, *Effects of Invisibility: In Search of the ‘Economic’ in Transitional Justice*, 2 INT’L J. TRANSITIONAL JUST. 266, 266 (2008); WENDY S. HESFORD, *SPECTACULAR RHETORICS: HUMAN RIGHTS VISIONS, RECOGNITIONS, FEMINISMS* (Indrapal Grewal et al. eds., 2011); SUSAN MARKS, *Human Rights and Root Causes*, 74 MOD. L. REV. 57, 57–60 (2011); DIANA SANKU, *Towards Recognition of Subsistence Harms: Reassessing Approaches to Socioeconomic Forms of Violence in Transitional Justice*, 8 INT’L J. TRANSITIONAL JUST. 121, 121–22 (2014); Sheri P. Rosenberg & Evertita Silima, *Genocide by Attrition: Silent and Efficient*, in GENOCIDE MATTERS: ONGOING ISSUES AND EMERGING PERSPECTIVES 106 (Joyce Apsel & Ernesto Verdeja eds., 2013); Pauline Wakeham, *The Slow Violence of Settler Colonialism: Genocide, Attrition, and the Long Emergency of Invasion*, J. GENOCIDE RESCH. MAR. 2021, at 1; DUSTIN N. SHARP, *Emancipating Transitional Justice from the Bonds of the Paradigmatic Transition*, 9 INT’L J. TRANSITIONAL JUST. 150, 150 (2014).

⁴ Miller, *supra* note 3, at 266–67.

⁵ *Id.* at 267.

⁶ For discussions of the common problematic assumption that international crimes are necessarily the most important global justice issues as well as the tendency to conceptually conflate *global* justice with *international criminal* justice, see, for example, Sara Kendall, *Donors’ Justice: Reconfiguring International Criminal Accountability*, 24 LEIDEN J. INT’L L. 585 (2011); Sarah M. H. Nouwen & Wouter G. Werner, *Monopolizing Global Justice: International Criminal Law as Challenge to Human Diversity*, 13 J. INT’L CRIM. JUST. 157, 157–162 (2015); Frédéric Mégret, *What Sort of Global Justice is ‘International Criminal Justice’?*, 13 J. INT’L CRIM. JUST. 77, 77–78 (2015); CHRISTINE SCHWÖBL-PATEL, *MARKETING GLOBAL JUSTICE: THE POLITICAL ECONOMY OF INTERNATIONAL CRIMINAL LAW* (Lianisa van den Herik & Jean d’Aspremont eds., 2021).

⁷ On Cambodia’s unclear “transitional” status, see, for example, Kirsten Ainley, *Transitional Justice in Cambodia: The Coincidence of Power and Principle, in TRANSITIONAL JUSTICE IN THE ASIA-PACIFIC 125* (Reece Jeffrey & Hun Joon Kim eds., 2013); ALEXANDER LABAN HINSON, *THE JUSTICE FACADE: TRIALS OF TRANSITION IN CAMBODIA* (2018); Maurice Eisenbruch, *The Clock of Impunity in Cambodia II: Justice*, 22 INT’L J. HUM. RTS. 822 (2018); Rebecca Gidley, *Illiberal Transitional Justice: The Extraordinary Chambers in the Courts of Cambodia 157–80* (Nov. 2016) (Ph.D. dissertation, Australian National University).

interconnected sets of relational dynamics: first, the relationships between structural, slow, or attritive forms of mass violence and human rights, transitional justice, and ICL;⁸ and, second, the relationships between varying understandings of atrocity, law, rights, peace, development, and justice within and among various constituencies, ranging from local actors, to political elites, to international organizations.⁹ It does so by examining variations in the visibility of spectacular versus everyday forms of violence within dominant legal and social narrations of Khmer Rouge–era atrocities at the international, national, and local grassroots levels. To conduct this assessment, this Article considers how this violent history has been framed—juridically, socially, and politically—by powerful national and international actors, and how such framings have interacted with understandings of the violence of the Khmer Rouge period—and its lasting social and individual ramifications—at the local level, especially among survivor populations.

More specifically, this Article considers how Khmer Rouge–era atrocities have been legally and socially framed by the Vietnamese-installed People’s Republic of Kampuchea (“PRK”) government that assumed power after ousting the Khmer Rouge regime in 1979; its successor, the Cambodia People’s Party (“CPP”), which remains in power; and the Extraordinary Chambers in the Courts of Cambodia (“ECCC”), a hybrid tribunal tasked with prosecuting Khmer Rouge–era atrocity crimes.¹⁰ This Article then compares these framings, as they have been developed by various national and international elites,¹¹ to those that have emerged at the local level in rural Cambodia in the form of survivor narratives and memorial, ceremonial, and religious practices relevant to the Khmer Rouge period. To do so, it assesses how, over time, various forms of violence have been recognized and, possibly, solidified as Khmer Rouge–era atrocities. Moreover, this Article considers how dominant understandings of Khmer Rouge–era atrocity violence developed by national and international elites shape those developed at the local grassroots level in rural Cambodia.

⁸ See generally, Helen Fein, *Genocide by Attrition 1939–1993: The Warsaw Ghetto, Cambodia, and Sudan: Links Between Human Rights, Health, and Mass Death*, 2 HEALTH & HUM. RTS. 10 (1997); Rosenberg & Silina, *supra* note 3; Adam Jones, *Genocide and Structural Violence: Charting the Terrain*, in NEW DIRECTIONS IN GENOCIDE RESEARCH 132 (Adam Jones ed., 2012); Krista K. Thomason, *Transitional Justice as Structural Justice*, in THEORIZING TRANSITIONAL JUSTICE 71 (Claudio Corradetti et al. eds., 2015); Kiera L. Ladner, *Political Genocide: Killing Nations Through Legislation and Slow-Moving Poison*, in COLONIAL GENOCIDE IN INDIGENOUS NORTH AMERICA 226 (Andrew Woolford et al. eds., 2014); Kjell Anderson, *Colonialism and Cold Genocide: The Case of West Papua*, 9 GENOCIDE STUD. & PREVENTION 9 (2015); Lars Waldorf, *Anticipating the Past: Transitional Justice and Socio-Economic Wrongs*, 21 SOC. & LEGAL STUD. 171 (2012); Amanda Cahill-Ripley, *Foregrounding Socio-Economic Rights in Transitional Justice: Realising Justice for Violations of Economic and Social Rights*, 32 MICH. Q. HUM. RTS. 183 (2014); Waketani, *supra* note 3.

⁹ See generally, Lars Waldorf, *Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice*, 79 TEMP. L. REV. 1 (2006); Diane F. Orentlicher, *Settling Accounts Revisited: Reconciling Global Norms with Local Agency*, 1 INT’L J. TRANSITIONAL JUST. 10 (2007); TRANSITIONAL JUSTICE FROM BELOW: GRASSROOTS ACTIVISM AND THE STRUGGLE FOR CHANGE, (Kieran Mclevey & Lorna McGregor eds., 2008); Jaya Ramji-Nogales, *Designing Bespoke Transitional Justice: A Pluralist Process Approach*, 32 MICH. J. INT’L L. 1 (2010); HINTON, *supra* note 7; Eisenbruch, *supra* note 7.

¹⁰ See generally JOHN D. CIORCIARI & ANNE HEINDL, *HYBRID JUSTICE: THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA* (2014) for an overview of the ECCC.

¹¹ We use the term “elites” to refer generally to international technocratic experts, especially those involved in the creation and operation of the ECCC, as well as powerful Cambodians with ties to the nation’s sprawling patronage network. The term is used to distinguish between these constituencies and ordinary Cambodians without powerful social, political, and economic connections. For an overview of Cambodia’s patronage networks, see, e.g., SEBASTIAN STRANGIO, *HUN SŨN’S CAMBODIA* (2014).

Through this analysis, this Article seeks to better understand how numerous and disparate individual experiences of atrocity violence are selectively recognized, catalogued, and categorized by international, national, and local constituencies, and how powerful or even hegemonic narrations of histories of mass violence are or are not able to subtly shape or even outright dictate local ways of understanding and memorializing such histories. More specifically, it considers how and why everyday forms of violence and oppression continue to be marginalized in both legal and nonlegal approaches to post-atrocity justice seeking, including in Cambodia, despite sustained calls for greater engagement by scholars, practitioners, and activists.¹² Indeed, this Article raises the possibility that dominant notions of atrocity violence developed internationally and by local elites within post-conflict nations such as Cambodia may shape, and even displace, how victims perceive and express their own experiences of atrocity and desires for justice.

These issues are explored in three parts. First, the Article provides an overview of the Khmer Rouge period and relevant atrocity processes. This section highlights the centrality of everyday forms of violence, oppression, and mass killing to the overall experience of those who lived and died under the Khmer Rouge regime. It demonstrates that everyday forms of violence—namely overwork, lack of sanitation, starvation, denial of medical care, and various other restrictions on basic freedoms—were critically important components of atrocity commission in Khmer Rouge-era Cambodia, as they were responsible for approximately half of the period's total death toll (between 800,000 and 1.2 million lives) and the brutalization of the entire civilian population, including the roughly six million survivors.¹³ Second, the Article juxtaposes the centrality of relatively slow, attritive processes of harm causation with the emphasis placed on more familiar atrocity processes involving the commission of spectacular acts of interpersonal violence in dominant narratives of this history emanating from the PRK and CPP governments, as well as emerging from the ECCC as it winds down operations. This second part pays special attention to the role that legal processes have played in the production of dominant narratives of Cambodia's histories of violence. Third, drawing on self-narrated survivor oral histories collected by the Documentation Center of Cambodia ("DC-Cam") and contemporary religious and cultural memorialization practices relevant to the Khmer Rouge period in contemporary Cambodia, the Article considers how dominant understandings of Khmer Rouge-era atrocities may

¹² See, e.g., Miller, *supra* note 3; Laplante, *supra* note 3; Cahill-Ripley, *supra* note 8; Evelyn Schmid & Aoife Nolan, "Do No Harm"? Exploring the Scope of Economic and Social Rights in Transitional Justice, 8 INT'L J. TRANSITIONAL JUST. 362, 362 (2014); Larissa van den Herik, *Economic, Social, and Cultural Rights: International Criminal Law's Blind Spot?*, in ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN INTERNATIONAL LAW: CONTEMPORARY ISSUES AND CHALLENGES 343 (Eibe Riedel et al. eds., 2014); Tine Destroopt, *Neglecting Social and Economic Rights Violations in Transitional Justice: Long-Term Effects on Accountability*, 37 J. CURRENT SE. ASIAN AFFS. 95, 95 (2018).

¹³ The total number of excess deaths that occurred in Cambodia during the Khmer Rouge period is unknown. For an overview, comparison and review of estimates, see generally EWA TABENG & THY KHEAM, *KHMER ROUGE VICTIMS IN CAMBODIA, APRIL 1975 – JANUARY 1979: A CRITICAL ASSESSMENT OF MAJOR ESTIMATES* (Sept. 30, 2009), https://www.eccc.gov.kh/sites/default/files/documents/court/DC/D140_1_1_Public_Redacted_EN.PDF [<https://perma.cc/RYZ8-9VDZ>], see also Patrick Heugeline, *The Boundaries of Genocide: Quantifying the Uncertainty of the Death Toll During the Pol Pot Regime (1975–1979)*, POPULATION STUD. (CAMBODIA), July 2015, at 201.

shape and be shaped by local understandings of such atrocities among survivor populations in rural Cambodia.

Through this analysis, the Article reveals the persistence of binary notions of harm causation and victim-versus-perpetrator identities within dominant ICL and transitional justice discourses that continue to frame harms as being neatly divisible into mutually exclusive categories of inherently non-criminal “structural” forms of violence and presumptively criminal “direct” forms of violence.¹⁴ This neat, easily categorizable division of harm causation processes remains inaccurate because it belies the complexity and heterogeneity of atrocity situations and falsely assumes that *all* forms of violence failing to involve easily recognizable acts of direct interpersonal violence are necessarily wholly structural in nature, precluding criminal accountability. While this neat yet artificial division of harms has, by now, been subject to various critiques, this Article expresses a concern that such dominant, narrow understandings of atrocity violence appear to have influenced local understandings over time as survivors have felt the need to situate their experiences of deprivation and violence within dominant broader frames of atrocity in order to be recognized (and perhaps recognize themselves) as victims. This backgrounding of everyday forms of Khmer Rouge-era violence is further encouraged by the absence of still-existing, easily identifiable material markers of such slow, everyday violence, serving as a reminder that to properly understand mass atrocities as the complex social phenomena they are requires active efforts to know and see, rather than solely relying on the currently dominant “know it when you see it” approach¹⁵ to identifying international crimes as well as perpetrators and victims thereof.¹⁶

After making this argument, the Article offers some concluding thoughts on strategies of framing and representing atrocity crimes that may present opportunities to resist hegemonic, overly narrow understandings of atrocity violence fixated on highly visible, spectacular forms of interpersonal

¹⁴ See generally Sheri P. Rosenberg, *Genocide is a Process, Not an Event*, 7 GENOCIDE STUD. & PREVENTION: AN INT'L J. 16 (2012); Jones, *supra* note 8; Randle C. DeFalco, *International Crimes as Familiar Spectacles: Socially Constructed Understandings of Atrocity and the Visibility Politics of International Criminal Law* (2017) (Ph.D. Dissertation, University of Toronto) [hereinafter DeFalco 2017 Dissertation]; Randle C. DeFalco, *Conceptualizing Famine as a Subject of International Criminal Justice: Towards a Modality-Based Approach*, 38 U. PA. J. INT'L L. 1113 (2017).

¹⁵ For example, Roger O'Keefe argues that “the approach one adopts to the concept of an international crime is as much a matter of taste as of law” amounting often to a “know-it-when-you-see-it” approach to identifying international crimes. ROGER O'KEEFE, *INTERNATIONAL CRIMINAL LAW* 56 (2015). Both of the Article's authors have explored issues of the visibility of differing forms of atrocity violence, legally and socially. See DeFalco 2017 Dissertation, *supra* note 14; Randle C. DeFalco, *INVISIBLE ATROCITIES: THE AESTHETIC BIAS OF INTERNATIONAL CRIMINAL JUSTICE* (forthcoming Feb. 2022); Savina Sirik, *Everyday Experiences of Genocide Survivors in Landscapes of Violence in Cambodia* (Dec. 2015) (M.A. thesis, Kent State University).

¹⁶ On the selective recognition of potential forms of atrocity violence, see DeFALCO, *supra* note 15. On problematic, oversimplified framings of both perpetrators and victims of international crimes, including within the context of Cambodia, see, for example, Christine Schwöbel-Patel, *Spectacle in International Criminal Law: The Fundraising Image of Victimhood*, 4 LONDON REV. INT'L L. 247, 247 (2016); Mark A. Drumbl, *Victims Who Victimise*, 4 LONDON REV. INT'L L. 217, 217 (2016); Sofia Stolk, *A Sophisticated Beast? On the Construction of an ‘Ideal’ Perpetrator in the Opening Statements of International Criminal Trials*, 29 EUROPEAN J. INT'L L. 677, 677 (2018); MARIA LEANDER, *FIGURING VICTIMS IN INTERNATIONAL CRIMINAL JUSTICE: THE CASE OF THE KHMER ROUGE TRIBUNAL* (2018); RACHEL KILLEAN, *VICTIMS, ATROCITY AND INTERNATIONAL CRIMINAL JUSTICE: LESSONS FROM CAMBODIA* (Kieran McEvoy ed. 2018).

violence. In this vein, in light of the scale, complexity, and heterogeneity of atrocities, including those committed during the Khmer Rouge era in Cambodia, we emphasize the importance of multiplicity and diversity in terms of representations of both how atrocities may be committed, and how they are experienced by victims. We also highlight the importance of recognizing that certain forms of atrocity violence, especially those that are slow, bureaucratic, or otherwise seemingly banal in nature, may require explanation and contextualization in order to be rendered visible and recognizable as modalities of atrocity commission. Thus, we conclude that there is a pressing need for dominant representations of atrocities to be accompanied by alternative forms of representation that highlight everyday forms and experiences of atrocity violence. This is true in both legal and nonlegal contexts, as dominant social and legal understandings of atrocity and international crime mutually reinforce one another. Moreover, rather than continuing to play a largely prescriptive role in terms of recognizing and classifying varying forms of atrocity violence, this Article calls for ICL and other forms of transitional justice-seeking to be refashioned to be far more reactive in nature. That is, in our view, the role of ICL and transitional justice actors and institutions should not be to dictate experiences to directly affected populations. Rather, such actors and institutions should strive to be more responsive and flexible in nature, including in the very identification of what counts as atrocity violence in the first place. Otherwise, such actors and institutions risk compounding the harms suffered by victims by failing to listen to and acknowledge their experiences.¹⁷

II. EVERYDAY ATROCITY VIOLENCE IN KHMER ROUGE-ERA CAMBODIA

Following a brutal five-year civil war, the Communist Party of Kampuchea (“CPK”)—more commonly known as the Khmer Rouge—seized power in Cambodia on April 17, 1975.¹⁸ After seizing power, CPK Secretary Pol Pot and an inner circle of compatriots set about consolidating their power and radically overhauling Cambodian society.¹⁹ In doing so, the new regime expelled or killed all noncitizens, closed the borders, and reorganized Cambodia (itself renamed “Democratic Kampuchea”) into administrative “Zones.”; each zone was administered by a Zone Secretary who reported to the CPK’s central command, which typically referred to itself collectively as the “revolutionary organization” (*Angkar Padevat*).²⁰

¹⁷ Jill Stauffer refers to the failure to meaningfully listen to experiences of survivors of oppression and mass violence as a form of double “abandonment” by humanity. First, victims are abandoned when they experience severe violations. Second, they are further abandoned when actors and institutions tasked with addressing their suffering fail to listen to and acknowledge their experiences—a state of affairs Stauffer refers to as “ethical loneliness.” JILL STAUFFER, *ETHICAL LONELINESS: THE INJUSTICE OF NOT BEING HEARD* 1, 2 (2015).

¹⁸ See generally DAVID P. CHANDLER, *THE TRAGEDY OF CAMBODIAN HISTORY: POLITICS, WAR, AND REVOLUTION SINCE 1945* (1991); KHAMBOLY DY, *A HISTORY OF DEMOCRATIC KAMPUCHEA (1975–1979)* (David Chandler & Wynne Coggill eds., 2007); BEN KIERNAN, *THE POL POT REGIME: RACE, POWER, AND GENOCIDE IN CAMBODIA UNDER THE KHMER ROUGE, 1975–79* (3d ed. 2008).

¹⁹ See KIERNAN, *supra* note 18, at 1–17; see generally POL POT PLANS THE FUTURE: CONFIDENTIAL LEADERSHIP DOCUMENTS FROM DEMOCRATIC KAMPUCHEA, 1976–1977 (David P. Chandler et al. eds., David P. Chandler et al. trans., 1988) [hereinafter *POL POT PLANS THE FUTURE*].

²⁰ For histories of the Khmer Rouge period in Cambodia, see CHANDLER, *supra* note 18; KIERNAN, *supra* note 18; ELIZABETH BECKER, *WHEN THE WAR WAS OVER: CAMBODIA AND THE KHMER ROUGE*

The leadership's general plan was to pursue a strategy of "independence and self-mastery," under which the nation would rapidly and self-reliantly "leap forward" to become a model socialist state through revolutionary vigor and without significant reliance on foreign aid.²¹ Key components of this plan were ending the use of currency; closing all markets; collectivizing all labor and agricultural production; overhauling Cambodia's irrigation infrastructure and agricultural practices. The plan also banned all vestiges of private ownership, including food production; possession of medicines, foodstuffs, or cooking implements; and the very acts of cooking or eating privately.²² Accompanying this plan were a concurrent policy of extreme secrecy, and continual efforts to identify and eliminate any and all perceived enemies of the revolution, most often through violent, extensive purges and mass executions.²³

One direct consequence of the regime's efforts to radically overhaul the nation was the brutalization of Cambodia's entire civilian population, who were subjected to forced labor under extremely harsh conditions; starved; placed in wretched, unhygienic living conditions; denied access to basic medical care; and placed at constant risk of being arrested, tortured, or executed for the slightest misdeed.²⁴ The experience of the vast majority of Cambodia's approximately seven million citizens under the Khmer Rouge was one of suffering from a host of everyday forms of violence, enforced and punctuated by the ever-present threat of horrific acts of extreme interpersonal violence. Through this combination of slow, attritive, and more immediate forms of oppression and violence, the Khmer Rouge regime killed up to 2.2 million Cambodians and brutalized many millions more.²⁵ While precisely determining both the aggregate death toll from this period and apportioning it by proximate cause of death is impossible for a variety of reasons, expert demographers have estimated that approximately half of the Khmer Rouge-era death toll can be attributed to causes other than direct interpersonal violence.²⁶ Thus, while the regime undoubtedly committed

REVOLUTION (1998); DY, *supra* note 18. For a discussion of famine causation in Khmer Rouge-era Cambodia, see generally Randle C. DeFalco, *Justice and Starvation in Cambodia: The Khmer Rouge Famine*, 2 CAMBODIA L. & POL'Y J. 45 (2014).

²¹ For analyses of these policies, see generally KIERNAN, *supra* note 18; DeFalco, *supra* note 20. See also James A. Tyner, *Dead Labor, Landscapes, and Mass Graves: Administrative Violence During the Cambodian Genocide*, 52 GEOFORUM 70, 71–76 (2014); James A. Tyner & Stian Rice, *To Live and Let Die: Food, Famine, and Administrative Violence in Democratic Kampuchea, 1975–1979*, 48 POL. GEOGRAPHY 1, 4 (2015). For examples of primary Khmer Rouge documents outlining these policies, see generally POL POT PLANS THE FUTURE *supra* note 19.

²² See generally POL POT PLANS THE FUTURE, *supra* note 19 (for translated examples of such policies in primary Khmer Rouge documents. See also CHANDLER, *supra* note 18; BECKER, *supra* note 20; KIERNAN, *supra* note 18).

²³ See generally DAVID CHANDLER, VOICES FROM S-21: TERROR AND HISTORY IN POL POT'S SECRET PRISON (1999); CHANDLER, *supra* note 18; ALEXANDER LABAN HINTON, WHY DID THEY KILL? CAMBODIA IN THE SHADOW OF GENOCIDE (2005).

²⁴ See generally CHANDLER, *supra* note 18; BECKER, *supra* note 20; HINTON, *supra* note 23; KIERNAN, *supra* note 18. Civilians were also at constant risk of being discovered as falling into any one of a number of categories of individuals perceived to hold anti-revolutionary sentiments, such as former government workers, urban dwellers, professionals, and the like.

²⁵ For death toll estimates and breakdowns thereof by cause of death, see generally Patrick Heuveline, *Between One and Three Million: Towards the Demographic Reconstruction of a Decade of Cambodian History (1970–79)*, 52 POPULATION STUDS. 49, 60 (1998); TABEAU & KHEAM, *supra* note 13; Heuveline, *supra*, note 13.

²⁶ See, e.g., TABELAU & KHEAM, *supra* note 13, at 42–44.

many acts of horrific violence, everyday forms of violence and oppression remain central components of the Khmer Rouge experience in Cambodia.

This reality is borne out in the statements of survivors of this dark period of Cambodian history, who regularly frame experiences of starvation along with horrible living and working conditions as criminal actions perpetrated against them by the regime.²⁷ In oral histories collected from survivors of the Khmer Rouge era and transcribed by DC-Cam, experiences of overwork and deprivation of food, medicine, rest, and other basic necessities are routinely intermingled and used interchangeably with more familiar forms of violence, such as imprisonment, torture, or beatings.²⁸ These collected accounts coincide with our own impressions of survivor experiences while conducting field work in Cambodia between 2008 and 2012, and between 2004 and present, respectively. Through such work, we have found that, especially in interactions with survivors in isolated rural communities, the cumulative effects of being starved, overworked, and denied freedom of movement and basic medical care are often highlighted as particularly serious sources of suffering that merit a great deal of attention at the ECCC or within other justice-seeking fora. Indeed, according to many of the survivors with whom we have interacted, suffering the slow, attritive process of being overworked and underfed while under constant threat of death for over three years was, in a holistic sense, the essential “crime” these victims suffered at the hands of the Khmer Rouge regime. Moreover, unlike more focused forms of violence, experiences of suffering and trauma attributable to being forcibly overworked, underfed, and placed in squalid living conditions, while under the constant threat of arrest, torture, and summary execution, were uniquely near-universal among Cambodia’s civilian population during the Khmer Rouge period.²⁹ While experiences of interpersonal violence varied greatly, experiences of severe deprivation tended to be constant.

II. DOMINANT NARRATIVES OF KHMER ROUGE-ERA ATROCITIES

During the Khmer Rouge period, accurate, verifiable information concerning what was happening in Democratic Kampuchea was hard to come by. For the most part, the country was closed to foreigners and journalists.³⁰ Aside from horrific accounts of violence and oppression related by refugees who had managed to flee to Thailand,³¹ information emanating from the country consisted mainly of propaganda produced by the CPK in

²⁷ For an example of such a narrative, see DeFalco, *supra* note 19, at 45–49.

²⁸ The Documentation Center of Cambodia (“DC-Cam”) has conducted over 2,500 such interviews. For a sampling of such interviews that have been translated into English, see *Interviews, DOCUMENTATION CTR., CAMBODIA*, <http://d.dccam.org/Archives/Interviews/Interviews.htm> [https://perma.cc/KM52-L29J] (last visited June 13, 2019). Both authors have reviewed the transcripts of many such interviews. Author Savina Sink has conducted many such interviews as a former employee of DC-Cam.

²⁹ For an analysis of the nationwide policies that produced these conditions, see generally CHANDLER, *supra* note 18; KIERNAN, *supra* note 18; DeFalco, *supra* note 20; Tynar & Rice, *supra* note 21; Tynar, *supra* note 21.

³⁰ See KIERNAN, *supra* note 18, at 39–44; *Communications Blackout Limits News of Cambodia*, N.Y. TIMES, Apr. 20, 1975, at 1.

³¹ For examples of such accounts, see Karl D. Jackson, *Cambodia 1977: Gone to Pot*, 18 ASIAN SURV. 76, 89 (1978); Henry Kamm, *The Agony of Cambodia*, N.Y. TIMES, Nov. 19, 1978, at SM10.

the form of radio broadcasts and other statements boasting of the regime's accomplishments.³² As a result, precisely what was happening in the country remained largely a mystery to the international community until Vietnam invaded Democratic Kampuchea in January 1979.³³

As the Vietnamese military rapidly advanced, taking Phnom Penh on January 9, 1979, it encountered evidence of horrific atrocities. Perhaps most notably, Vietnamese military officers and journalists discovered the recently abandoned Tuol Sleng "S-21" prison on the outskirts of Phnom Penh. Drawn to the site by the putrid smell of decomposing corpses, those who entered the prison at the time were confronted by a gruesome house of horrors.³⁴ Recently executed victims remained chained to the metal bed frames where they had been tortured and killed several days earlier. Floors were stained with blood. Torture implements were scattered around the interrogation rooms, while squalid prison cells were surrounded by razor wire.³⁵ The Vietnamese forces preserved S-21 largely in this viscerally horrific state, using the site as evidence of the murderousness of the Khmer Rouge and thereby helping to legitimate their invasion.³⁶

To this day, visiting S-21—currently one of Cambodia's largest tourist attractions operating as the Tuol Sleng Genocide Museum—remains a visceral experience. Immediately upon entering the compound, visitors are faced with the graves of the victims found at the site in 1979 and a series of interrogation rooms containing torture implements; noticeable blood stains on the floors; and large, grainy black and white photographs of the mutilated corpses of the prison's final victims.³⁷ Other rooms contain thousands of mug shots of victims before they were tortured and executed that were taken as each entered the prison.³⁸

Choeng Ek, another site discovered and preserved at first by the Vietnamese military and currently by the Cambodian government, presents a similarly visceral experience.³⁹ As the site where the majority of S-21's

³² For examples and discussions of CPK propaganda in radio broadcasts and other media, see Raulle C. DeFalso, *Justice and Starvation in Cambodia*, International Criminal Law and the Khmer Rouge Famine (2013) (LL.M. thesis, University of Toronto) (on file with the University of Toronto Libraries at <https://hdl.handle.net/1807/67245>).

³³ See generally CHANDLER, *supra* note 18; KIERNAN, *supra* note 18; BECKER, *supra* note 20; DY, *supra* note 18.

³⁴ For accounts of this discovery, see CHANDLER, *supra* note 23, at 1–6; CATHY J. SCHLUND-VIALS, *WAR, GENOCIDE, AND JUSTICE: CAMBODIAN AMERICAN MEMORY WORK* 27–30 (2012).

³⁵ See CHANDLER, *supra* note 23, at 2–3; SCHLUND-VIALS, *supra* note 34, at 36.

³⁶ CHANDLER, *supra* note 23, at 5–6; Maria Elander, *The Victim's Address: Expressivism and the Victim at the Extraordinary Chambers in the Courts of Cambodia*, 7 INT'L J. TRANSITIONAL JUST. 95, 103–04 (2012); Lior Zylberman & Vicente Sánchez-Biosca, *Reflections on the Significance of Images in Genocide Studies: Some Methodological Considerations*, 12 GENOCIDE STUD. & PREVENTION: AN INT'L J. 1, 7 (2018); see also CHANDLER, *supra* note 23, at 3–13.

³⁷ Both authors have visited Tuol Sleng numerous times. For an overview and images of Tuol Sleng prison, see *Permanent Exhibition, TUOL SLENG GENOCIDE MUSEUM*, <https://tuolsleng.gov.kh/exhibition/> (permanent) (last visited Sept. 25, 2021).

³⁸ *Id.*

³⁹ Both authors have visited Choeng Ek numerous times. For overviews and descriptions of Choeng Ek, see CHANDLER, *supra* note 23, at 203; James A. Tyner, Gabriela Brindis Alvarez & Alex R. Colucci, *Memory and the Everyday Landscape of Violence in Post-Genocide Cambodia*, 13 SOC. & CULTURAL GEOGRAPHY 853, 860–61 (2012); Rachel Hughes, *Memory and Sovereignty in Post-1979 Cambodia: Choosing Ek and Local Genocide Memorials*, in GENOCIDE IN CAMBODIA AND RWANDA: NEW PERSPECTIVES 257 (Susan E. Cook ed., Routledge 2017); Julie M. Hirschman, *Working With the Remains in Cambodia: Skeletal Analysis and Human Rights After Atrocity*, 10 GENOCIDE STUD. & PREVENTION: AN INT'L J. 121, 121 (2016).

victims were actually executed and buried in mass graves, Choeung Ek is often referred to as Cambodia's "killing fields," evoking the title of the Oscar-winning 1984 film of the same name.⁴⁰ Visitors at Choeung Ek are confronted by a two-hundred-foot glass-enclosed stupa containing the bones and skulls of thousands of victims exhumed from the nearby mass graves.⁴¹ While touring the grounds, visitors are also apt to see fragments of clothing and human bone slowly being exposed by rain and other environmental forces. Signs describe the horrific acts of violence that occurred at Choeung Ek, such as the bayonetting or smashing of small children against trees or the systematic killing of victims with farm implements in order to save bullets.⁴²

While S-21 and Choeung Ek remain the predominant sites that provide evidence of the cruelty of the Khmer Rouge regime, together they represent but one aspect of a much larger mosaic of atrocities committed in Cambodia from 1975 to 1979. S-21 was but one of nearly two hundred prisons established under the Khmer Rouge and Choeung Ek is just one of thousands of mass graves.⁴³ Many of these prisons and grave sites were larger than S-21 and Choeung Ek in terms of the total number of victims tortured and killed at them.⁴⁴ Some of these lesser-known atrocity sites have been at least partially preserved by local authorities, or even individuals, often originally at the behest of the PRK or CPP, which pursued strategies of encouraging local Cambodians to build and preserve memorial sites dedicated to the violence of the Khmer Rouge period.⁴⁵ The physical landscape of Cambodia also bears witness to the violence and carnage committed before, during, and after the Khmer Rouge era in the form of bomb craters, victims with missing limbs or other gruesome injuries, older homes or other structures pockmarked with bullet and artillery holes, and areas strewn with mines and other forms of unexploded ordnance.

Most of these physical reminders—bomb craters, human remains, torture implements, etc.—are intuitively recognizable as evidence of Cambodia's recent history of violent conflict and atrocity. These material reminders serve to refute efforts to deny or minimize the atrocities committed by the Khmer Rouge. They also serve as sites of memory as well as makeshift memorial sites that help anchor dominant social understandings of this history.⁴⁶ Yet, not all sites of atrocity leave such obvious traces of their violent pasts. For example, in the Cambodian context, many sites of atrocity,

⁴⁰ See, e.g., Tyner et al., *supra* note 39, *passim*; Fleischman, *supra* note 39, at 121.

⁴¹ Tyner et al., *supra* note 39, at 860; Fleischman, *supra* note 39, at 121–22. For a photograph of the stupa, see Fleischman, *supra* note 39, at 122.

⁴² See generally Fleischman, *supra* note 39.

⁴³ For an interactive map of Khmer Rouge-era prisons and mass grave sites in Cambodia, see *Cambodian Genocide Program Geographic Database*, YALE MACMILLAN CIR (2019), <https://yalemaps.maps.arcgis.com/apps/webappviewer/index.html?id=695677d4ce434c27a78d7f4685ab02ca> [https://pcrma.ce/ZT6V-RLHG]. For more on additional prisons and mass grave sites, see generally CHANDLER, *supra* note 18; HINTON, *supra* note 23; Tyner et al., *supra* note 39.

⁴⁴ See, e.g., *Cambodian Genocide Program Geographic Database*, *supra* note 43.

⁴⁵ For a discussion of this political strategy to encourage memorialization and preservation practices in post-Khmer Rouge Cambodia, see MONA LILJA, *RESISTING GENDERED NORMS: CIVIL SOCIETY, THE JURIDICAL, AND POLITICAL SPACE IN CAMBODIA* 71–72 (Jane Parpart et al. eds., Routledge 2016). For general discussions of the PRK and CPP's policies of preserving evidence of the brutality of the Khmer Rouge regime and encouraging memorialization practices, see David Chandler, *Cambodia Devils with His Past: Collective Memory, Demonisation and Induced Amnesia*, 9 *TOTALITARIAN MOVEMENTS & POLITICS* 355 (2008); Hughes, *supra* note 39; Caroline Bennett, *Living with the Dead in the Killing Fields of Cambodia*, 49 *J. SE. ASIAN STUD.* 184, 194 (2018).

⁴⁶ See generally Tyner et al., *supra* note 39; Sirik, *supra* note 15.

such as dams and other irrigation projects built utilizing forced labor under extremely traumatizing conditions, now appear benign or neutral rather than sinister in nature.⁴⁷ Such physical remnants may only be recognizable as sites of atrocity by survivors who already understand the massive human toll that went into the production of such structures under the Khmer Rouge or by those with a relatively deep preexisting knowledge of the Khmer Rouge period.

Many other atrocities, meanwhile, may leave little or no physical trace whatsoever. This is especially true of atrocities committed attritively over time through the cumulative impact of various forms of everyday violence and oppression. For example, while certain structures such as former communal mess halls, makeshift Khmer Rouge-era hospital buildings, or rice storehouses may persist as physical reminders of the extremely harmful living and working conditions enforced on the civilian population from 1975 to 1979, such structures, when they still exist, invariably fail to be immediately recognizable as sites of atrocity.⁴⁸ Unlike prisons, torture implements, bloodstains, scarred human bodies, or mass graves, structures like communal mess halls or granary storage facilities fail to be intuitively perceptible as sites of atrocity, and many such sites and structures have been returned to everyday uses⁴⁹ instead of being preserved and demarcated as sites of atrocity violence. Rather than reminding us of such violence, the only legacy of these forms of atrocity may be one of absence, not presence. The corporeal remains of victims are somewhere else, and there is no singular location that can be marked as where such victims were harmed or killed. Meanwhile, surviving victims—while likely suffering from a host of continuing physical and mental traumas from their experiences, and while watching those around them, often loved ones, slowly deteriorate as well—may not bear any physical scars as perceptible evidence of such trauma.⁵⁰ Thus, there are (at least) two sides to atrocity in Cambodia: one that is material, visceral, and self-evident in its violence; and one that is quiet, interior, and visually indiscernible or at least difficult to see and properly contextualize.

Given the prominent role of visceral aesthetic reminders of violence in shaping how atrocities are recognized and perceived, slow and attritive atrocity processes tend to either be ignored altogether or relegated to the background as “root causes” or collateral consequences of more visually

⁴⁷ See generally Tyler et al., *supra* note 39; DeFalco, *supra* note 22; Sirik, *supra* note 15.

⁴⁸ Sirik, *supra* note 15.

⁴⁹ For examples of atrocity sites returned to everyday uses, see *id.*

⁵⁰ On the prevalence of mental health and other enduring, yet potentially invisible, traumas of the Khmer Rouge period in Cambodia, including intergenerational consequences, see generally CAMBODIA'S HIDDEN SCARS: TRAUMA PSYCHOLOGY IN THE WAKE OF THE KHMER ROUGE (Beth Van Schaack et al. eds., Documentation Ctr. of Cambodia 2011); Nigel P. Field, Sophear Muong & Vannavuth Sochanvimean, *Parental Styles in the Intergenerational Transmission of Trauma Stemming from the Khmer Rouge Regime in Cambodia*, 83 AM. J. ORTHOPSYCHIATRY 483 (2013); PTSD, Depression Epidemic Among Cambodian Immigrants, NAT'L INST. MENTAL HEALTH (Aug. 2, 2005), <http://www.nimh.nih.gov/news/science-news/2005/ptsd-depression-epidemic-among-cambodian-immigrants.shtml>; Greg Mellen, *PTSD from Cambodia's Killing Fields Affects Kids Who Were Never There*, LONG BEACH PRESS TELEGRAM (Sep. 1, 2017, 4:43 AM), <http://www.presstelegram.com/article/ZZ20120422/NEWS/120429216> [<https://perma.cc/WY88-C5RQ>].

familiar atrocities, rather than manifestations of atrocity in their own right.⁵¹ As Susan Sontag argues, “Something becomes real—to those who are elsewhere, following it as ‘news’—by being photographed.”⁵² According to Sontag, this general proposition is especially true when it comes to atrocities, “the very notion of [which] [are] associated with the expectation of photographic evidence. Such evidence is, usually, of something posthumous: the remains, as it were—[such as] the mounds of skulls in Pol Pot’s Cambodia.”⁵³

While Sontag argues that photographic images of atrocity and war may remain able to emotionally shock—even “haunt”—us on an affective level, she contends that such images “are not much help if the task is to understand.”⁵⁴ Instead, it is “narratives” that “can make us understand” war and atrocity, unlike images.⁵⁵ This assertion—that carefully constructed narratives can help us understand atrocities in ways that images cannot—supports the claim often made by international criminal justice advocates that it is only the law, in combination with associated rigorous evidentiary standards and forms of factfinding, that can make sense of atrocities.⁵⁶ And yet, as scholars such as Martti Koskenniemi remind us, arrival at a set of singular definitive “truths” in the wake of mass atrocity, be it through law or other techniques, may be an exercise in futility.⁵⁷ The ECCC experience in Cambodia certainly demonstrates that complete reliance on the law—as with complete reliance on physical remnants—to accurately and fulsomely explain atrocity situations may produce a similarly thin set of historical truths, grounded, as such material evidence tends to be, in an aesthetics of horror and violent spectacle.⁵⁸

Nonetheless, since at least the close of World War II, atrocities have been increasingly viewed through the lens of law. ICL prosecutions operate to, among other things, legally certify situations as genocides or atrocities. Consequently, Sontag was only partially correct in asserting that atrocities are not, in a broad social sense, deemed real, at least by Western audiences, until conveyed to them in the form of grisly photographic images.⁵⁹ Increasingly, atrocities are not deemed real until a court or other juridical body confirms their existence through some legal process, transfiguring visceral remains of violence into evidence of atrocity crimes. Even in 1979,

⁵¹ DEFALCO, *supra* note 15; *see also* Milley, *supra* note 3, at 288; EVELYNE SCHMID, TAKING ECONOMIC, SOCIAL AND CULTURAL RIGHTS SERIOUSLY IN INTERNATIONAL CRIMINAL LAW 28 (2015); Defalco 2017 Dissertation, *supra* note 14.

⁵² SUSAN SONTAG, REGARDING THE PAIN OF OTHERS 21 (2003).

⁵³ *Id.* at 83.

⁵⁴ *Id.* at 89.

⁵⁵ *Id.* Along these lines, *see also* Dmubl, *supra* note 16.

⁵⁶ On the role of international criminal justice in writing histories, *see generally* LAWRENCE DOUGLAS, THE MEMORY OF JUDGMENT: MAKING LAW AND HISTORY IN THE TRIALS OF THE HOLOCAUST (2001); Richard Ashby Wilson, *Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia*, 27 HUM. RTS. Q. 908 (2005); Sofia Stolk, “The Record on Which History Will Judge 1’s Tomorrow”: *Auto-History in the Opening Statements of International Criminal Trials*, 28 LEIDEN J. INT’L L. 993 (2015).

⁵⁷ Martti Koskenniemi, *Between Impunity and Show Trials*, 6 MAX PLANCK Y.B. U.N. L. 1, 35 (2002).

⁵⁸ *See* Defalco 2017 Dissertation, *supra* note 14. *See generally*, Filip Strandberg Hasselblad & Mikael Baaz, *Just Another Battleground: Resisting Contrivance Historiography in the Extraordinary Chambers in the Courts of Cambodia*, 13 J. POL. POWTR. 252 (2020) (analyzing efforts to challenge dominant historical narratives at the ECCC itself).

⁵⁹ SONTAG, *supra* note 52, at 21.

the invading Vietnamese were well aware of this power of law. The PRK ordered that mass graves and other self-evident sites of atrocity be exhumed and preserved as evidence, including, but not limited to, Tuol Sleng and Choeung Ek.⁶⁰ The PRK government also quickly convened a “People’s Revolutionary Tribunal” (“Tribunal”) in Phnom Penh after ousting the Khmer Rouge from power.⁶¹ This Tribunal was tasked with prosecuting, *in absentia*, Pol Pot and Ieng Sary for the crimes of the “genocidal Pol Pot-Ieng Sary clique.”⁶²

The Tribunal process, widely derided as a “show trial,”⁶³ proceeded rapidly and relied primarily on the testimony of survivors and grisly evidence, including photographs of S-21 prison and human remains exhumed from mass graves.⁶⁴ Notably, the Tribunal did address living and working conditions, including starvation, overwork, and lack of medical care, in its judgment.⁶⁵ However, the Tribunal did so in a highly cursory manner, finding that “herding . . . the population into “people’s communes,” which were disguised concentration camps where they were forced to work and live in physically and morally destructive conditions that caused deaths in large numbers,” amounted to one of the “acts of genocide” committed by the “Pol Pot-Ieng Sary clique.”⁶⁶ Yet even this rather cursory analysis of the potential criminality of the slow violence committed by the Khmer Rouge regime was conceptually moored to the Holocaust paradigm when the Tribunal referred to the communal living system implemented by the Khmer Rouge as a form of “disguised concentration camps,” a clear evocation of Nazi regime practices.⁶⁷ The emphasis of the Tribunal’s cursory analysis also focused on horrific crimes linked with the enforcement of starvation conditions, such as the alleged execution and partial cannibalism of a starving Cambodian civilian accused of stealing food from the regime.⁶⁸

Ultimately, both Pol Pot and Ieng Sary were convicted *in absentia* by the Tribunal on charges of genocide and sentenced to death on August 19, 1979.⁶⁹ The Tribunal’s judgment was one key component in the construction of a master narrative of the PRK and, subsequently, the CPP as Cambodia’s saviors who delivered the nation from the horrors of the Khmer Rouge period.⁷⁰ The sentences were, however, never carried out. Pol Pot died after

⁶⁰ See generally Chandler, *supra* note 45; Hughes, *supra* note 39.

⁶¹ For a background on the formation of the Tribunal, see CRAIG ETCHESON, EXTRAORDINARY JUSTICE: LAW, POLITICS, AND THE KHMER ROUGE TRIBUNALS 26–29 (2020). For a collection of documents from the Tribunal, and analysis thereof, see GENOCIDE IN CAMBODIA: DOCUMENTS FROM THE TRIAL OF POL POT AND IENG SARY (Howard J. De Nike et al. eds., 2000).

⁶² GENOCIDE IN CAMBODIA, *supra* note 61, *passim*.

⁶³ *Id.* at 29–25; see also Chandler, *supra* note 45.

⁶⁴ GENOCIDE IN CAMBODIA, *supra* note 61, at 5–6.

⁶⁵ *Id.* at 534–35, 548.

⁶⁶ *Id.* at 533, 547–48.

⁶⁷ *Id.* at 533–34.

⁶⁸ *Id.* at 534.

⁶⁹ For an English language version of the Tribunal’s judgment, see *id.* at 523–49. See also Rachel Hughes, *Ordinary Theatre and Extraordinary Law at the Khmer Rouge Tribunal*, 33 ENV’T & PLAN. D. SOC’Y & SPACE 714, 717–19 (2015); ETCHESON, *supra* note 61, at 30–31.

⁷⁰ Judy Ledgerwood describes the creation of Tuol Sleng, for example, as a component in the construction of the “metanarrative of the PRK state, of criminals committing genocide ousted by patriotic revolutionaries.” Judy Ledgerwood, *The Cambodian Tuol Sleng Museum of Genocidal Crimes: National Narrative*, 21 MUSÉUM ANTHROPOLOGIQUE 82, 93 (1997). Kirsten Ataley describes the CPP’s master narrative as one of its “rescue” of Cambodia from the Khmer Rouge regime. Ataley, *supra* note 7, at 149.

being arrested by his own troops in 1998.⁷¹ Likewise, Ieng Sary was pardoned before being charged with various international crimes by the ECCC and ultimately died in 2013 before trial proceedings against him could be completed.⁷²

No further serious efforts to prosecute Khmer Rouge-era atrocity crimes occurred until the creation of the ECCC in 2003.⁷³ This Court, mandated to try “senior leaders of Democratic Kampuchea and those who were most responsible for [enumerated domestic and international] crimes . . . committed during the period from 17 April 1975 to 6 January 1979,”⁷⁴ has, to date, reached trial judgments against three accused: Kaing Guek Eav (commonly referred to by his revolutionary *nom de guerre*, “Duch”), Nuon Chea, and Khieu Samphan.⁷⁵ Of these three convicted persons, only Khieu Samphan remains alive at the time of writing.⁷⁶ In contrast to the People’s Revolutionary Tribunal, which was convened hastily by the Vietnamese, the ECCC was designed as a joint endeavor between the Cambodian government and the United Nations following protracted, oft-contentious negotiations.⁷⁷ Depending on one’s view, the ECCC, which has been dogged by corruption, government interference, and other scandals,⁷⁸ may be seen as a more or less politicized endeavor than the People’s Revolutionary Tribunal. Nevertheless, the Court has definitely played a

⁷¹ M.S. Shivakumar, *Pol Pot: Death Deprives Justice*, 33 ECON. & POL. WKLY. 952, 952 (1998).

⁷² See Rachel S. Karas, *Thriller No. 3: Ieng Sary Dies Ahead of Verdict in Cambodian War Crimes Trial*, WASH. POST (Mar. 14, 2013), https://www.washingtonpost.com/local/obituaries/brother-no-3-ieng-sary-dies-ahead-of-verdict-in-cambodian-war-crimes-trial/2013/03/14/7851aa4e-8cc1-11e2-9f54-63dd70ac2d2_story.html [<https://perma.cc/L5KJ-UEK8>].

⁷³ 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, Cambodia-U.N., June 6, 2003, 2329 U.N.T.S. 41723.

⁷⁴ *Id.* at 118–19.

⁷⁵ *Prosecutor v. Duch*, 001/18-07-2007/ECCC/TC, Judgement (July 26, 2010) [hereinafter *Duch Trial Judgement*]; *Prosecutor v. Nuon*, 002/19-09-2007/ECCC/TC, Case 002/01 Judgement (Aug. 7, 2014) [hereinafter *Case 002/01 Trial Judgement*]; *Prosecutor v. Nuon*, 002/19-09-2007/ECCC/TC, Case 002/02 Trial Judgement (Nov. 16, 2018) [hereinafter *Case 002/02 Trial Judgement*].

⁷⁶ Seth Mydans, *Nuon Chea, Khmer Rouge’s Chief Ideologist, Dies at 93*, N.Y. TIMES (Aug. 4, 2019), <https://www.nytimes.com/2019/08/04/obituaries/nuon-chea-dead-cambodia.html> [<https://perma.cc/4KQ8-CXXU>]; Seth Mydans, *Duch, Prison Chief Who Slaughtered for the Khmer Rouge, Dies at 77*, N.Y. TIMES (Sept. 1, 2020), <https://www.nytimes.com/2020/09/01/world/asia/duch-kaing-guek-eav-dead.html> [<https://perma.cc/5N2P-2YXJ>].

⁷⁷ For accounts of these negotiations, see STEVE HEDER, *THE PERSONAL JURISDICTION OF THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA AS REGARDS KHMER ROUGE “SENIOR LEADERS” AND OTHERS “MOST RESPONSIBLE” FOR KHMER ROUGE CRIMES: A HISTORY AND RECENT DEVELOPMENTS*, (2012), <http://www.cambodiatribunal.org/sites/default/files/reports/Final%20Revised%20Heder%20Personal%20Jurisdiction%20Review.120426.pdf> [<https://perma.cc/4CDK-3QUJ>]; DAVID SCHEPPER, *ALL THE MISSING SOULS: A PERSONAL HISTORY OF THE WAR CRIMES TRIBUNALS* 341–405 (2012).

⁷⁸ For overviews and analyses of some of these controversies, see generally Douglas Gillison, *Crime Scenes of the Khmer*, TYPE INVESTIGATIONS (Feb. 27, 2012), <https://www.typeinvestigations.org/investigation/2012/02/27/crime-scenes-khmer> [<https://perma.cc/L392-VGCP>]; Stephanie Guy, *Necessary Scapegoats? The Making of the Khmer Rouge Tribunal*, N.Y. REV. BOOKS (July 23, 2012), <https://www.nybooks.com/daily/2012/07/23/necessary-scapegoats-khmer-rouge-tribunal/> [<https://perma.cc/PJ7Q-ZUXB>]; Randle C. DeFalco, *Cases 003 and 004 at the Khmer Rouge Tribunal: The Definition of “Most Responsible” Individuals According to International Criminal Law*, 8 GENOCIDE STUD. & PREVENTION: AN INT’L J. 45 (2014); HEATHER RYAN & LAURA MCGREW, *PERFORMANCE AND PERCEPTION: THE IMPACT OF THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA*, (2016); Randle C. DeFalco, *The Uncertain Relationship Between International Criminal Law-Accountability and the Rule of Law in Post-Atrocity States: Lessons from Cambodia*, 42 FORDHAM INT’L L.J. 1 (2018); MICHELLE FLASH, *INVESTIGATIONS, MISCONDUCT, AND UNCERTAINTY IN THE ECCC REGARDING CASE 003*, (2012), <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1866&context=lr-brief> [<https://perma.cc/V39M-MDAX>].

major role in refining and solidifying dominant understandings of Cambodia's Khmer Rouge period, both internationally and locally within Cambodia. Indeed, commentators have suggested that one of the major factors shaping the CPP's vacillating support for the ECCC has been the degree to which the Court has supported or undermined the CPP's uncomplicated narrative of the Khmer Rouge history.⁷⁹

Perhaps even more so than the 1979 Tribunal, the ECCC has primarily focused its energy and resources on the most visible, spectacular acts of violence committed by the Khmer Rouge regime. Case 001, the Court's first case, involved the prosecution of Duch, who was the commander of S-21 prison for the entirety of the Khmer Rouge period.⁸⁰ Because Duch held authority within the regime only in the context of the operations of S-21 and executions of S-21 prisoners at Choeng Ek, Case 001 focused exclusively on crimes occurring at these two sites. As such, one of Case 001's functions was to legally confirm and categorize the atrocities committed at the already infamous sites of S-21 and Choeng Ek.⁸¹

Case 002, meanwhile, originally involved a long list of charges against the alleged most senior former Khmer Rouge officials still alive in 2003: Nuon Chea, Ieng Sary, Ieng Thirith, and Khieu Samphan. Case 002's Closing Order, the Court's charging document, includes allegations of crimes spanning most of Cambodia.⁸² Notably, the Order includes charges predicated on living and working conditions at various worksites and cooperative villages under the Khmer Rouge.⁸³ However, in an effort to expedite proceedings in light of the advanced age of the four accused, the Trial Chamber bifurcated Case 002 into a pair of trials.⁸⁴ The first such trial focused exclusively on crimes committed during the evacuation of Cambodia's cities in April 1975 and during mass population movements in 1975 and 1976.⁸⁵ This initial trial was completed, but not before Ieng Sary and Ieng Thirith died, leaving Nuon Chea and Khieu Samphan as the sole remaining Case 002 accused.⁸⁶ The evacuation of Cambodia's cities was a major news event⁸⁷ that produced iconic images of Khmer Rouge soldiers, such as of child soldiers brandishing weapons, and of startled civilians being forcibly herded out of Phnom Penh.⁸⁸ Indeed, in a 1975 Pulitzer Prize-

⁷⁹ Gity, *supra* note 78; Aitley, *supra* note 7; SIRANGIO, *supra* note 11, at 236–57.

⁸⁰ Duch Trial Judgement, *supra* note 75; Prosecutor v. Duch, 001/18-07-2007-ECCC/SC, Appeal Judgement, ¶ 4 (Feb. 5, 2012) [hereinafter Duch Appeal Judgement].

⁸¹ While Case 001 did touch upon living conditions of prisoners, it did so within the familiar context of a prison setting.

⁸² Prosecutor v. Nuon, Case No. 002/19-09-2007-ECCC-OCIJ, Closing Order (Sept. 15, 2010) [hereinafter Case 002 Closing Order].

⁸³ *Id.*

⁸⁴ Prosecutor v. Nuon, Case No. 002/19-09-2007-ECCC/TC, Decision on Additional Severance of Case 002 and Scope of Case 002/02 (Apr. 4, 2014) [hereinafter Case 002 Severance Decision]. For an analysis of the severance decision, see Sarah Williams, *The Severance of Case 002 at the ECCC: A Radical Trial Management Technique or a Step Too Far?*, 13 J. INT'L CRIM. JUST. 815, 815 (2015).

⁸⁵ Case 002/01 Trial Judgement, *supra* note 74, at ¶ 5.

⁸⁶ Karas, *supra* note 72; Thomas Fuller, *Ieng Thirith, Khmer Rouge Minister in Cambodia, Dies at 83*, N.Y. TIMES (Aug. 22, 2015), <https://www.nytimes.com/2015/08/23/world/asia/ieng-thirith-khmer-rouge-minister-in-cambodia-dies-at-83.html> [<https://perma.cc/58BB-N5F4>].

⁸⁷ See, e.g., *Cambodia: The Last Days of Phnom Penh*, TIME (Apr. 28 1975), <http://content.time.com/time/subscriber/article/0,33009,917365,00.html> [<https://perma.cc/BB73-CSGR>].

⁸⁸ For examples of these iconic images, see Phelim Kine, *Being A Rockoff: Shooting from the Hip in Cambodia*, TABLET (Apr. 16, 2000), <https://www.tablet.com/News/asia/archives/2000/04/16/0000052498> [<https://perma.cc/232C-E622>]; Alan Parkhouse, *The Day the Nightmare Started*,

winning article for *The New York Times*, journalist Sydney Schanberg described the forced evacuation of Phnom Penh's estimated two million residents as an "astonishing spectacle."⁸⁹

The second Case 002 trial included charges related to allegations of genocide committed against Cham Muslims and Vietnamese-Cambodians; forced marriage and rape; internal purges of the Khmer Rouge; and responsibility for crimes committed at S-21 prison, three additional prisons (Kraing Ta Chan, Au Kanseng, and Phnom Kraol Security Centers), two major dam worksites (1st January and Trapeang Thma dams), an airport construction site, and Tram Kok cooperative.⁹⁰ In Case 002/02, the Trial Chamber found that the crimes against humanity of murder, enslavement, and persecution on political grounds, as well as other inhumane acts of attacks against human dignity and through conduct characterized as enforced disappearances, were committed at cooperatives and worksites.⁹¹

While this judgment represented an opportunity for the Trial Chamber to delve far deeper into possible relationships between nationwide living and working conditions enforced on the civilian population by the Khmer Rouge leadership and ICL, the Chamber predictably retreated from such a bold endeavor, opting instead to focus on the culpability of the accused for a narrow set of discrete acts occurring at a very limited subset of worksites and cooperatives. The Chamber did take some small steps toward addressing the extreme violence of everyday conditions of life the regime imposed on Cambodians by recognizing individual murders committed via the enforcement of extreme living and working conditions at specific worksites and cooperatives, such as in Tram Kok.⁹² Nevertheless, based on the ECCC Supreme Court Chamber's precedent that extermination requires the *mens rea* of a "direct intent to kill on a large scale," the Chamber conversely found that conditions at the worksites and cooperatives assessed did not serve as grounds for convicting Nuon Chea or Khieu Samphan for the crime against humanity of extermination.⁹³ Ultimately, the ECCC as an institution declined to normatively link deaths caused by nationwide policies that directly produced deadly conditions of life yet occurred at differing locations. This was a choice of whether and how to see the violence of the Khmer Rouge regime. The Court opted for the predictable, conservative approach, drawing narrow temporal bounds around related events and assessments of *actus reus* and *mens rea*. Through this approach, the Trial Chamber found that, despite evidence strongly suggesting that Nuon Chea and Khieu Samphan were aware that the regime's socioeconomic policies were causing death on a massive scale, both accused lacked the subjective intent to kill on a massive scale.

ASIA TIMES (Apr. 16, 2019), <https://asiatimes.com/2019/04/the-day-the-nightmare-started> [<https://perma.cc/83EP-E85N>].

⁸⁹ Sydney H. Schanberg, *Cambodia Reds are Uprooting Millions as They Impose a 'Peasant Revolution'*, N.Y. TIMES, (May 9, 1975), <https://www.nytimes.com/1975/05/09/archives/cambodia-reds-are-uprooting-millions-as-they-impose-a-peasant.html> [<https://perma.cc/8KUR-V6MA>].

⁹⁰ See Case 002 Severance Decision, *supra* note 84.

⁹¹ See Case 002/02 Trial Judgement, *supra* note 75.

⁹² *Id.* at ¶¶ 1138–45.

⁹³ *Id.* at ¶¶ 657, 4198–99, 4326–27; Prosecutor v. Nuon, 002/19-09-2007-ECCC/SC, Appeal Judgement, ¶¶ 522, 525 (Nov. 23, 2016).

Through this process of prioritization and selective recognition of the many forms of atrocity violence committed in Cambodia from 1975 to 1979, the ECCC has largely reinforced preexisting dominant narratives of this period of Cambodian history as one of social rupture marked by repeated outbursts of spectacular violence. While the choice to prosecute Duch was partially based on the fact that he had already been illegally detained by the Cambodian government for nearly two decades, since his 1999 discovery and arrest when the Court began operations in 2007,⁹⁴ his position as the Court's first accused falls in line with the generally myopic focus on S-21 and Choeng Ek as the normative focal points of the Khmer Rouge experience in Cambodia. The Court emphasized these sites despite the fact that the S-21 prison was unique in many regards. Only certain classes of arrestees were sent to S-21, including purged Khmer Rouge cadres branded "internal enemies" for one reason or another, and foreigners.⁹⁵ It was also the only prison that systematically photographed detainees on arrival.⁹⁶ Largely erased from accounts of S-21 is the fact that the majority of victims tortured at S-21 and executed at Choeng Ek were themselves Khmer Rouge cadres, including numerous S-21 guards who themselves directly participated in atrocity violence before their arrest. This fact is routinely backgrounded as emphasis is placed on prominent survivors of S-21, such as Bou Meng, Chum Mey, Vann Nath, and Norng Chan Phal.⁹⁷ Indeed, in an interview conducted by one of the authors, a former director of the Tuol Sleng Museum stated that the obscuring of the fact that many S-21 prisoners were members of the Khmer Rouge was intentionally made in order to avoid confusing visitors by blurring the expected binary perpetrator-victim divide.⁹⁸

While the initial ECCC trial focused on S-21, the Khmer Rouge regime's brutal "house of horrors,"⁹⁹ Case 002 represented an opportunity to significantly broaden the purview of the Court's proceedings because it involved alleged former senior leaders of the regime with nationwide authority. Case 002's Closing Order charged Nuon Chea, Khieu Samphan, Ieng Sary, and Ieng Thirith with crimes spanning the geographical and

⁹⁴ The ECCC expressly found Duch's detention between May 10, 1999 and July 30, 2007 to be illegal. See Prosecutor v. Kaing, Case No. 001/18-07-2007/ECCC/TC, Decision on Request for Release (June 15, 2009); Duch Appeal Judgement, *supra* note 79, at ¶ 389.

⁹⁵ See generally Duch Trial Judgement, *supra* note 75, at ¶¶ 111–203; CHANDLER, *supra* note 23.

⁹⁶ These photographs are displayed at the current Tuol Sleng Genocide Museum and copies of them have been displayed at major museums throughout the world. See, e.g., *Photographs from S-21: 1975–1979*, MUSEUM OF MOD. ART, <https://www.moma.org/calendar/exhibitions/247> [https://perma.cc/X94E-4H63] (last visited May 28, 2021).

⁹⁷ Bou Meng and Vann Nath were both artists who survived because they were selected to produce artwork for the regime. Chum Mey believes he survived because he had experience fixing machines and was assigned to fix sewing machines and carry out other tasks within the prison. Norng Chan Phal was a young child when he was sent to the prison with his mother in the days leading up to the downfall of the regime. He was found by Vietnamese soldiers and journalists when they discovered the prison in January 1979. See generally HUY VANNAK, BOU MENG: A SURVIVOR FROM KHMER ROUGE PRISON S-21 (2010); Seth Mydans, *Vann Nath, Artist and Cambodia Torture Survivor, Dies at 65*, N.Y. TIMES (Sept. 5, 2011), <https://www.nytimes.com/2011/09/06/world/asia/06vann.html>; Zoe Murphy, *Chum Mey: Tuol Sleng Survivor*, BBC NEWS (July 26, 2010), <https://www.bbc.com/news/world-asia-pacific-10602689> [https://perma.cc/mn9r-38lj]; KOK-THAY ENG, NORNG CHAN PHAL: THE MYSTERY OF THE BOY AT S-21 (2018).

⁹⁸ Interview by Savina Strik with a former Tuol Sleng museum director (Nov. 20, 2018) (anonymity requested by interviewee) (notes on file with author).

⁹⁹ Kamjanta Kamjantatawe, *House of Horrors: A Former Khmer Rouge Prison Has Been Turned into the Tuol Sleng Genocide Museum, Least the Atrocities Be Forgotten*, BANGKOK POST (Mar. 24, 2016), <https://www.bangkokpost.com/life/social-and-lifestyle/909064/house-of-horrors> [https://perma.cc/AVC4-Z7QX].

temporal jurisdiction of the Court.¹⁰⁰ However, the Court bifurcated and eventually reduced the scope of Case 002, sacrificing a more fulsome examination of the potential criminality of everyday conditions of life enforced on civilians by the Khmer Rouge leadership. In sum, although the ECCC has, to some extent, recognized the importance of addressing everyday violence by including living and working conditions in its purview, for the most part, the Court has operated primarily to confirm the criminality of more familiar forms of atrocity involving highly visible acts of violence.

The selective recognition of atrocity sites, however, is not wholly limited to dominant transitional justice discourses developed by Cambodian elites and international actors or to those emanating from judicial processes such as the People's Revolutionary Tribunal and the ECCC. National commemoration events, such as Remembrance Day and Victory Day, play a significant role in constructing understandings of Khmer Rouge–era atrocity crimes. These annual events, officially sanctioned and actively promoted first by the PRK and now by the CPP, help maintain official CPP narratives of Cambodia's recent history, including that of the Khmer Rouge period.¹⁰¹ Following the fall of the Khmer Rouge regime, the newly formed PRK government held various commemorative events. These events served various functions, including justifying the continued presence of Vietnamese troops in the country by framing the Vietnamese military and their Cambodian allies as Cambodia's saviors and sole defense against a return to power by the Khmer Rouge.¹⁰² One aspect of this strategy was to emphasize the brutality of the crimes committed by the Khmer Rouge regime (derivatively referred to as the "Pol Pot clique") and to highlight the continuing danger that the regime could recapture power.¹⁰³ The PRK also directed local authorities to exhume human remains from known mass grave sites as further evidence of the national scope of the atrocities committed by the Khmer Rouge.¹⁰⁴

This evidence supports the narratives represented at Tuol Sleng and Choeng Ek by framing these sites as emblematic of nationwide experiences of violence, as well as by demonstrating the magnitude of Khmer Rouge atrocities.¹⁰⁵ Consequently, over time, statistics regarding mass graves and the human bodies exhumed from them were collected and reported, while local memorials were built across the country to display the remains of and commemorate victims. This rather visceral material evidence eventually became a central facet of commemorative events and broader efforts to document Khmer Rouge–era crimes.¹⁰⁶

The current CPP government, the PRK's anointed successor, continues this project in various capacities. The government continues to preserve and

¹⁰⁰ Case 002 Closing Order, *supra* note 82.

¹⁰¹ See generally Ledgerwood, *supra* note 70; Chandler, *supra* note 45; James Tynner, Savina Sirik & Samuel Henkin, *Violence and the Dialectics of Landscape: Memorialization in Cambodia*, 104 *Geog. Rev.* 277 (2014); Sirik, *supra* note 15; Bennett, *supra* note 45.

¹⁰² Ledgerwood, *supra* note 70; Chandler, *supra* note 45; Savina Sirik, *Memory Construction of Former Khmer Rouge Cadres: Resistance to Dominant Discourses of Genocide in Cambodia*, 13 *J. Pol. Power* 235, 240–42 (2020).

¹⁰³ See, e.g., Ledgerwood, *supra* note 70; Chandler, *supra* note 45; Ainsley, *supra* note 7.

¹⁰⁴ See, e.g., Chandler, *supra* note 45, at 362; Hughes, *supra* note 39, at 265.

¹⁰⁵ See generally Tynner et al., *supra* note 102.

¹⁰⁶ For a brief overview of the political use of these commemorative practices in Cambodia, see Sirik, *supra* note 103, at 239–41.

display human remains as reminders of the Khmer Rouge's brutality, despite such displays contradicting dominant Buddhist practices in the country.¹⁰⁷ In some villages, however, where there are no human remains on site, local authorities often make efforts to transport victim remains from elsewhere to display during ceremonies memorializing the victims of the Khmer Rouge regime.¹⁰⁸ During these events, physical remains are often presented alongside victim testimonies, artistic performances, and religious ceremonies such as *Bang Skol*, during which blessings are offered to the spirits of the dead, in order to commemorate victims of the Khmer Rouge regime. The purposes of these practices are not limited to commemoration of the past, but also serve a political function. The messaging at such events has come to include, albeit subtly, the notion that, so long as the CPP government remains in power, the history of the Khmer Rouge will be preserved, and peace and stability will be guaranteed. In this context, the material visibility of death and violence plays a significant role in commemorative processes and, in turn, the production and continuation of official and implicit CPP discourses. Meanwhile, other forms of everyday violence that leave little or no physical traces and that slowly emerge in survivor testimonies are relegated to the background as more spectacular visceral forms of violence are represented in commemorative events.

III. LOCAL NARRATIVES OF ATROCITY VIOLENCE IN CAMBODIA

Thus far, this Article has demonstrated the existence of a dominant framing of atrocity violence in Cambodia—one that foregrounds spectacularized forms of violence and backgrounds everyday experiences of oppression and deprivation. This framing evokes other well-known genocides and atrocities such as the Holocaust, the Rwandan Genocide, and the Balkan conflicts of the 1990s, all of which involved the wide dissemination of graphic depictions of horrific acts of violence. Immediately upon taking power, the post-Khmer Rouge PRK government took care to preserve especially horrific evidence of Khmer Rouge crimes at S-21, Choeng Ek, and elsewhere.¹⁰⁹ The People's Revolutionary Tribunal served a similar function by denouncing the criminality of the regime it had ousted to legitimate the new government. Duch has been characterized as "Cambodia's Eichmann"¹¹⁰ and other allusions are regularly made connecting the Khmer Rouge era in Cambodia with other prominent atrocities, including the Holocaust.¹¹¹

¹⁰⁷ Fiona Gill, *Human Remains, Materiality and Memorialisation: Cambodia's Bones*, 6 *HUM. REMAINS & VIOLENCE*, 61, 71 (2020).

¹⁰⁸ Interview by Savita Sirik with former commune council member in Takéo province, Cambodia (June 2014) (anonymity requested by interviewee) (notes on file with author).

¹⁰⁹ Chandler, *supra* note 45, at 360; Hughes, *supra* note 39, *passim*.

¹¹⁰ See, e.g., Pierre Hazan, *Cambodia's Duch and the Analysis of a Killer*, *JUST. INFO* (Nov. 14, 2017), <https://www.justiceinfo.net/en/tribunals/mixed-tribunals/35257-cambodia-s-duch-and-the-analysis-of-a-killer.html> [<https://perma.cc/Y8K9-P2F-71>].

¹¹¹ See generally REBECCA JINKS, *REPRESENTING GENOCIDE: THE HOLOCAUST AS PARADIGM?* (2016) (on the tendency generally to conceptually link representations of atrocity and genocide with the Holocaust).

While the ECCC has, to a limited extent, sought to address crimes beyond familiar acts of spectacular violence, the Court has not placed slow, attritive atrocity processes or their victims on the same footing as spectacularly violent ones. The handful of exemplary worksites and cooperatives examined in Case 002/02 have not been presented by the Court as typical examples of what became normal, everyday conditions throughout virtually all of Cambodia under the Khmer Rouge. Notably, as discussed above, the Trial Chamber did not find that extermination, a crime against humanity, had been committed in relation to the worksites and cooperatives addressed, thereby conceptually disaggregating deaths attributable to working and living conditions into individual murders as opposed to a systematized campaign of mass killing.¹¹² This finding fails to assess whether the Khmer Rouge's top leadership culpably caused mass death throughout Cambodia through the production of famine and the infliction of woefully inadequate living and working conditions.

Often, transitional justice and peacebuilding activities other than criminal prosecutions are viewed as being as important as, and even superior to, prosecutions because they are able to more fulsomely address structural, economic, and social justice issues perceived to be situated wholly outside the reach of criminal law.¹¹³ This is especially true of local, grassroots transitional justice initiatives, such as community truth-telling events, ceremonies, or memorialization practices, as well as other outlets outside of law, such as the arts and narrative, as means of helping us understand and address dark histories of atrocity, conflict, and violence.¹¹⁴ Indeed, such approaches are often placed in opposition to traditional transitional justice modalities and praised for their ability to fill the gaps inherent in institutionalized, legal forms of justice-seeking.¹¹⁵ However, as is discussed below in the context of Cambodia, even the most local efforts to understand, remember, and memorialize atrocities are unlikely to be fully insulated from dominant narratives developed by national and international political actors and elites.¹¹⁶ Moreover, the same aesthetic familiarity and ease of recognition that operates in tandem with power politics to focus attention predominantly on forms of atrocity violence that leave behind easily recognizable material remnants, such as human remains or the like, may shape narrations of

¹¹² Case 002/02 Trial Judgement, *supra* note 74, ¶¶ 657, 4198–99, 4326–27.

¹¹³ See Shadrack C. Agbakwa, *A Path Least Taken: Economic and Social Rights and the Prospects of Conflict Prevention and Peacebuilding in Africa*, 47 J. Afr. L. 38, 49 (2003); Laplante, *supra* note 3, at 333–34; Kamari Maxine Clarke, *We Ask For Justice, You Give Us Law: The Rule of Law, Economic Markets and the Reconfiguration of Victimhood*, in *CONTESSTO JUSTICE: THE POLITICS AND PRACTICE OF INTERNATIONAL CRIMINAL COURT INTERVENTIONS* 272–301 (Christian De Vos et al. eds., 2015); see generally Waldorf, *supra* note 8.

¹¹⁴ For an overview of this “turn” to the local (and away from ICL) in transitional justice, see generally Adam Kochanski, *The ‘Local Turn’ in Transitional Justice: Curb the Enthusiasm*, 22 INT’L STUD. REV. 26 (2018).

¹¹⁵ For example, in a review essay, Catherine Cole asserts, “[T]he instrumentalist aims of transitional justice may seem fundamentally at odds with a strongly noninstrumentalist bias within the world of art making. Artists often value opacity, ambiguity, irony, indirection, instability, indeterminacy of meaning, deep questioning of norms and disruption of linear narratives.” Catherine M. Cole, *At the Convergence of Transitional Justice and Art*, 8 INT’L J. TRANSITIONAL JUST. 314, 315 (2014).

¹¹⁶ See, e.g., Adam Kochanski, *Framing, Truth-Telling, and the Limits of Local Transitional Justice*, 47 REV. INT’L STUD. 468, 487 (2021) (voicing concern that “localism [in transitional justice may be used] as a pretext to mask the truth, insulate powerful political elites, and legitimise abusive governments,” including in Cambodia).

atrocity experiences at the grassroots level as well. This is especially true as time passes, memories dim, and survivor populations dwindle.

On the one hand, in the context of post-Khmer Rouge Cambodia, the various forms of structural and socioeconomic violence committed by the Khmer Rouge left behind few visible, easily recognizable reminders, despite the massive human toll they exacted on the country's population.¹¹⁷ On the other hand, familiar, visceral reminders of interpersonal violence—in the form of bomb craters, landmines, unexploded ordnance, mass graves, former prisons, and execution sites—pockmark Cambodia's landscape. In the immediate post-Khmer Rouge period, the PRK government instructed local authorities to preserve sites of atrocity violence as evidence of the crimes of the Khmer Rouge regime.¹¹⁸ The violence committed at such sites—exemplified by, but not limited to, Tuol Sleng and Choeung Ek—continue to be the predominant focus of major memorials and commemoration practices.¹¹⁹ These and other similar preserved, but smaller-scale or less well-known, sites throughout Cambodia play a prominent role in maintaining dominant narratives of Cambodia's recent history. These sites, especially those of Tuol Sleng and Choeung Ek, both of which are internationally known memorial and tourist sites, have come to serve as material conduits through which the history of the Khmer Rouge period is narrated to both Cambodian and international audiences.¹²⁰ Indeed, Tuol Sleng and Choeung Ek cater predominantly to international, rather than Cambodian, visitors.¹²¹

Although prominent sites such as Tuol Sleng and Choeung Ek serve as national and international memorials reminding the world of the crimes committed by the Khmer Rouge regime, less visible and recognizable sites of atrocity that have not been turned into memorials dot the Cambodian landscape. Many such sites, however, retain little or nothing in the way of material evidence of atrocity commission and thus fail to be recognizable as sites of atrocity. Such sites are situated outside the constructed realm of what is recognizable as an atrocity. These invisible, or at least unrecognizable, sites of atrocity appear mundane at first glance, yet stand as silent testimonies to the atrocities committed by the Khmer Rouge and the experiences of the victims who lived and died at such sites between April 1975 and January 1979 when properly contextualized.¹²² Examples of such seemingly banal atrocity sites include former meeting houses, Khmer Rouge hospitals, rice storehouses, rice fields, dams, and canals. These remnants, despite their presence, typically fail to retain any recognizable trace of the killings and

¹¹⁷ For discussions of this dynamic, see, for example, Sirik, *supra* note 15; Tyner et al., *supra* note 39.

¹¹⁸ See generally LILJA, *supra* note 45; Chandler, *supra* note 45; see also Hughes, *supra* note 39; Bennett, *supra* note 45.

¹¹⁹ See, e.g., Sirik, *supra* note 103, at 240–42.

¹²⁰ See, e.g., Ledgerwood, *supra* note 70; Chandler, *supra* note 45; Sirik, *supra* note 103.

¹²¹ While in the years immediately following the ouster of the Khmer Rouge regime the S-21 prison was primarily visited by Cambodians, currently non-Cambodian visitors vastly outnumber Cambodian visitors to the museum each year. See J. John Lennon, *Tragedy and Heritage: The Case of Cambodia*, 34 *TOURISM RECREATION RSCH.* 35 (2009), cited in Rami K. Isaac & Erdinc Çakmak, *Understanding the Motivations and Emotions of Visitors at Tuol Sleng Genocide Prison Museum (S-21) in Phnom Penh, Cambodia*, 2 *INT'L J. TOURISM CITIES* 232, 237 (2016).

¹²² See Savina Sirik & James Tyner, *Violence and Memorialization in Cambodia*, in *THE HANDBOOK OF CONTEMPORARY CAMBODIA* 368, 368–77 (Katherine Brickell & Simon Springer eds., 2017).

abuse associated with them during the Khmer Rouge period. Instead, they appear neutral and unremarkable, rather than dramatic and spectacular.¹²³

When properly framed and contextualized, however, such remnants become material reminders of the hard labor, poor living conditions, and lack of medical care endured by Cambodians under the Khmer Rouge regime—conditions that ultimately killed many hundreds of thousands of victims.¹²⁴ Since 1979, some of these remnants have been restored to their original functions as Buddhist temples, schools, or houses, while structures such as rice fields, dams, or canals constructed during the Khmer Rouge period at massive human cost, often continue to be used by local populations.¹²⁵ For example, after the collapse of the regime, a commune hospital established by the Khmer Rouge in Kandal province was converted into the home of a local occupant and thereby incorporated into the daily life of this particular survivor who lived in the area before, during, and after the Khmer Rouge period.¹²⁶ Consequently, for the current occupant—who is himself a survivor of the Khmer Rouge period—a site of atrocity where victims were routinely sent to waste away and die after becoming ill from a combination of overwork, starvation, and lack of basic hygiene and sanitation has become a site of everyday life.

On a more diffuse level, many canal and dam structures built by the Khmer Rouge have been repaired and now function as part of the hydraulic infrastructure of local communities.¹²⁷ Innumerable experiences of everyday violence are embedded in these seemingly benign and mundane sites. For local survivors, such sites may stand as constant reminders of such violence. However, while these physical sites continue to bear witness to everyday violence experienced by local survivors, they remain less recognizable and less remarkable as sites of atrocity, especially to new residents, those born after 1979, and non-Cambodians.¹²⁸ Moreover, as the survivor population continues to age and dwindle, so, too, will such contextualized memories of otherwise invisible atrocity sites. Unlike more well-known sites of atrocity such as Tuol Sleng and Choeng Ek, sites such as these only become recognizable as atrocity sites when contextualized through survivor narratives or other explanatory mechanisms that can reframe them as sites of violence, suffering, and death.

As discussed previously, since the fall of the Khmer Rouge regime, Cambodians have utilized human remains and other material remnants of violence in memorializing this dark historical period. However, this emphasis on corporeal remains is at least partially a product of a set of quite intentional political interventions in Cambodian society by the PRK and CPP governments, who encouraged the collection of physical evidence of Khmer Rouge atrocities in order to legitimate themselves politically and position themselves as bulwarks against the nation backsliding into conflict and

¹²³ For photographs of two such seemingly neutral sites of atrocity, see Tyner et al., *supra* note 39, at 854, 865.

¹²⁴ See generally TABBEAL & KHEAM, *supra* note 13; Heuveline, *supra* note 15; DeFalco, *supra* note 22.

¹²⁵ See, e.g., Sirik, *supra* note 15, at 68; Tyner et al., *supra* note 39, *passim*.

¹²⁶ Sirik, *supra* note 14, at 41–44.

¹²⁷ Tyner et al., *supra* note 39, at 864; Tyner et al., *supra* note 101, at 277–78; Sirik, *supra* note 15, at 2–3.

¹²⁸ See, e.g., Tyner et al., *supra* note 39, at 867.

atrocity. This emphasis on physical remnants and human remains, however, is not necessarily dictated by traditional Cambodian cultural practices. Rather, local survivor populations have been practicing memorialization alongside Cambodian religious systems continually since 1979, often in ways that do not rely on physical objects or remains and which take a more holistic view of the violence of the Khmer Rouge era. Major religious ceremonies, such as *Pchum Ben* (a festival honoring deceased ancestors), Khmer New Year, *Bon Phkar Samaki* (the Solidarity Flower Ceremony), and *Bang Skol*, have all become significant aspects of commemorating Khmer Rouge-era atrocities in Cambodia. These religious ceremonies are conducted both to bestow merit upon those who died under the Khmer Rouge as well as revive Buddhist traditions. For example, anthropologist Judy Ledgerwood argues that the *Pchum Ben* festival has become an important means for individuals and families to commemorate family members who died during the Khmer Rouge period.¹²⁹ In this traditional festival, people make offerings to their deceased loved ones, including those who continue to wander in the living world and have not passed on to the next rebirth.¹³⁰ Ledgerwood adds that the festival is even more important for Cambodians today than it was before the atrocities of the 1970s because there are more people who suffered “bad” deaths (either violent or resulting from a combination of starvation and disease) during the Khmer Rouge period.¹³¹ Even here, there is a risk that those who were executed or otherwise violently killed may be viewed as especially worthy of veneration during the *Pchum Ben* festival. According to Yvonne Guillou, in Cambodia, as in Southeast Asia more generally, “people who commit suicide, are murdered, have fatal accidents[,] or die during childbirth are perceived as ‘bad dead’ (*khmaoch tai hong*, meaning literally ‘violent death’) as opposed to those having a ‘normal death’ caused by old age and ordinary diseases (that is, associated with natural actiology).”¹³²

While there has, thus far, been a practice of including victims of everyday, as well as spectacular, forms of violence in veneration and commemoration practices carried out during events such as *Pchum Ben*, the focus on human remains in such events subtly reorients social memory to focus on material remnants of the past. This focus on the materiality of human remains is not necessarily an inevitable result of Cambodian cultural and religious practices. Cambodian religious practices and associated death rituals do not necessarily require the remains of the deceased.¹³³ Along these lines, Guillou suggests that Cambodia’s religious system remains significant in constructing memories of those who died under the Khmer Rouge regime, yet whose remains have not been found or identified.¹³⁴ Such ceremonies allow families and relatives to come together to remember loved ones by seeking merit on behalf of the dead through offerings to local monks while

¹²⁹ Judy Ledgerwood, *Buddhist Ritual and the Reordering of Social Relations in Cambodia*, 20 SE: ASIA RSCH. 191, 195 (2012).

¹³⁰ *Id.* at 194.

¹³¹ *Id.* at 196.

¹³² Anne Yvonne Guillou, *An Alternative Memory of the Khmer Rouge Genocide: The Dead of the Mass Graves and the Land Guardian Spirits [Neak ta]*, 20 SE: ASIA RSCH. 207, 216 (2012).

¹³³ See *id.* at 216–17.

¹³⁴ See generally Guillou, *supra* note 132.

giving the dead person's name to a local *achar* (layperson who conducts Buddhist rituals). For example, during *Bang Skol*, people often seek merit on behalf of their dead family members during rituals and by calling out the name of the dead person when their physical remains have not been located.¹³⁵ By doing so, survivors are able to build and maintain relationships with the dead while forging important social connections amongst themselves through religious ceremonies, regardless of whether they located the remains of their deceased loved ones. Such rituals not only commemorate the victims of the Khmer Rouge, but also help to rebuild social connections among the survivors.

Incorporating physical remains in local commemorations of Khmer Rouge atrocities, however, is not the only way that Cambodians interact with and construct their understandings of the past. While narrating their everyday banal working and living conditions, survivors also often frame their violent experiences in direct relation to dominant narratives that have centered spectacular forms of atrocity, such as torture, imprisonment, and execution. These local narratives, although personally significant to the survivors, are not necessarily divergent from dominant understandings of Khmer Rouge atrocities that have emerged from national and international discourses. Indeed, some survivors have drawn upon the spectacularly violent harms constructed by and reproduced within dominant narratives to discuss their own Khmer Rouge experiences in order to emphasize the scope of their pain and suffering.¹³⁶ For example, one interviewee who was detained and mistreated at a local prison during the Khmer Rouge period referred repeatedly to the notorious practices that occurred at Tuol Sleng prison, including interrogation and torture techniques and mass executions, when relating her own experiences of being arrested, detained, and mistreated, and when describing the treatment of other prisoners she witnessed firsthand. This survivor described how confessions were extracted from prisoners, discussed the role torture played in interrogation processes, and noted that photographs of prisoners were not systematically taken, unlike at Tuol Sleng. Thus, the interviewee was clearly using her knowledge of highly publicized practices at Tuol Sleng as reference points against which she compared and contrasted her own experiences and framed herself as a victim.¹³⁷ Referential processes like these help survivors draw comparisons between well-known practices at nationally and internationally recognized atrocity sites in Cambodia and atrocity violence at less notorious sites that are now physically invisible or unrecognizable as sites of atrocity. This comparison may be understood as a way that survivors situate or contextualize their personal experiences within a more widely recognized context of violence. Yet it might also help to frame a survivor's atrocity within the dominant forms of spectacular violence, in order to make their experiences relevant or their victim status recognized, perhaps even to themselves.

Thus, in sum, dominant international and national narratives of the Khmer Rouge history, which focus primarily on extraordinary acts of spectacular violence at the expense of paying attention to more attritive,

¹³⁵ *Id.* at 213–14.

¹³⁶ Sirik, *supra* note 15, at 66.

¹³⁷ Interview with Khmer Rouge-era survivor by Savina Sirik (June 6, 2014) (anonymity requested by interviewee) (notes on file with the author).

everyday experiences of violence and oppression, clearly influence how Cambodians understand and interact with this dark period of their shared history. By personifying the Khmer Rouge in the figure of Pol Pot and a “clique” of genocidal compatriots out to destroy Cambodian society and culture, the PRK, and later the CPP, have framed themselves as Cambodia’s saviors and positioned themselves as a bulwark against the ever-present threat of the nation backsliding into chaos and violence. Highlighting the spectacular acts of horrific violence committed by the Khmer Rouge at sites such as Tuol Sleng and Choeung Ek and displaying visceral reminders of such violence in the form of human remains and war remnants has undoubtedly helped this narrative gain national acceptance. This focus on violent spectacles and the disturbing material remains they have left behind has, to some extent, arguably influenced local processes of understanding and commemorating the Khmer Rouge history, as evidenced by the prominence of human remains in such practices and the narrations of their experiences. However, other local practices of remembering and commemorating the Khmer Rouge period and those who died during it offer a more nuanced account of experiences under the regime. Survivors, when narrating their own experiences, often highlight the banal, rather than spectacular, cruelty of the regime by emphasizing suffering from being denied basic needs while some ceremonies and religious practices are conducted without any need for material remnants from the Khmer Rouge period whatsoever.

IV. CONCLUSION

The goal of this Article has been to think through how different constituencies frame the Khmer Rouge period and how such differing lenses shape and interact with one another, and, in doing so, to identify opportunities to challenge overly simplistic representations of the Khmer Rouge history. The Article has demonstrated that the social and legal visibility of banal experiences of suffering and violence under the Khmer Rouge regime has fluctuated. While the dominant overarching narrative of the Khmer Rouge history purposefully constructed by the PRK and CPP governments has generally solidified, local understandings of this history are, at times, more nuanced. Nonetheless, as the ECCC winds down operations, survivor populations dwindle, and Cambodia ceases to be viewed as a prominent transitional society by key international and institutional actors, the risk of a further (over)simplification of the Khmer Rouge era as a period of spectacular violence committed by a small group of radicals led by Pol Pot remains on the horizon. Indeed, as this Article has observed, emphases on torture and execution sites in the preservation of evidence of Khmer Rouge atrocities has arguably already subtly shaped not only international but also local memories of this dark period of Cambodian history. Survivors have been continuously subjected to tales of horror emphasizing grisly acts of violence committed at sites such as Tuol Sleng and Choeung Ek as indicative of the broader Khmer Rouge experience. A subtle shaping of whether and how survivors (and perhaps more importantly now, their descendants) who did not experience such extreme acts of interpersonal violence view themselves as victims of the Khmer Rouge

regime is evident in self-narrations of lived experiences and emphases on human remains in memorialization and commemoration practices. Consequently, this Article concludes that, aside from its other problematic effects, the doubly narrow focus in identifying and categorizing atrocity violence—first, in the myopic focus on law (most notably ICL) and, second, in the tendency *within* ICL to narrowly focus on a subset of spectacularly violent harms—risks permeating even local understandings of atrocities by those who directly experienced them. Through repeated exposure to hegemonic, generalized understandings of atrocities as eruptions of spectacular violence, rather than slow processes of violent, everyday oppression, and specific understandings of the Cambodian Khmer Rouge period conforming to this model, survivors of this period are told how to qualify as a victim.

This general conclusion, that overly simplistic narrations of atrocity violence are constructed by elites and legal institutions and presented to not only international, but also to local constituencies (including survivors), as the definitive accounts of complex histories of violence and oppression, raises questions regarding strategies of resistance. How should we move beyond current tendencies to represent atrocities, in Cambodia and elsewhere, simplistically as largely decontextualized eruptions of spectacular violence, followed ineluctably by transitions to (neo)liberalism and democracy? Such simplistic progress narratives, which permeate transitional justice and ICL, invite prurient interest and (self-)congratulatory claims to justice being fully accomplished through the narrow lens of ICL prosecutions, but do little in the way of encouraging critical reflection and understanding. The goal of this Article has been to unmask certain biases in narrations of atrocity violence in order to reveal such underlying blind spots and power dynamics, which will facilitate further discussions of how to actually achieve better, more “bespoke”¹³⁸ forms of justice in the wake of atrocity.

While these discussions merit sustained attention, in closing, we offer some preliminary thoughts within the specific context of post-atrocity Cambodia. One way may be to purposefully create alternative forms of documentation and memorialization that resist problematic, mutually exclusive binaries of both violence (direct versus structural) and identity (victim versus perpetrator). Examples of such purposeful deconstructive approaches could include efforts to contextualize otherwise banal locations and objects, to (re)situate them as sites and objects of atrocity violence. Objects such as cookware or images such as those depicting traditional Cambodian subsistence gardens—both of which were outlawed by the Khmer Rouge—may become visible and understandable as facets of Cambodian experiences of atrocity when properly framed. Efforts to highlight self-narrations of everyday experiences of suffering (and resilience) by survivors of the regime could also represent a potentially productive pathway toward broadening notions of violence and violation under the Khmer Rouge.

These are but two of a wide array of more reflective, more nuanced ways of framing experiences and processes of atrocity violence in Cambodia.

¹³⁸ Ramji-Nogales, *supra* note 9, *passim*.

While many other approaches would also be useful in this regard, it is the underlying commitment to actively placing everyday experiences of slow atrocity processes on equal footing with spectacular ones that remains the key if we are to move beyond reductive understandings of mass violence in Cambodia and elsewhere.