

Criminal Responsibility for Structural Violence: The Case of Patronage System in Cambodia

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I. INTRODUCTION

When the term *violence* is discussed, people often picture wars, clashes, and their physical effects such as deaths and severe trauma to the body. It is seldom that violence is equated with structural ills such as poverty, social exclusion, or inequality. These ills, which are generally referred to in this Article as *structural or indirect violence*, more often than not, prompt the brutal conflicts that the world is facing today. As stated by Nancy Sheper-Hughes and Philippe Bourgoise in *Violence in War and Peace: An Anthology*, “[v]iolence gives birth to itself”¹ such that one can never fully understand violence “solely in terms of [] physicality[.]”² Rather, one must look at violence as a continuum or chain where social and cultural dimensions give its power and meaning.³ This thinking, however, does not represent mainstream discussions as there is a propensity among scholars to focus their attention to a narrow conceptualization rather than a broader notion of violence which takes into account more complex processes that include social and cultural factors. Reducing violence to visible acts, in a way, simplifies efforts in achieving accountability for gross violations of human rights and international humanitarian law at the expense of a better understanding of why individuals act the way they do and why brutal atrocities happen at all. However, understanding the context allows for the development of intervention measures that will correspond not only to what is visible but also to the factors that give rise to mass violence.

Structural violence (SV), which harms victims not with “bullets, knives, or implements of torture,”⁴ is often considered a *normal* occurrence that is embedded in the system, thus making traditional mechanisms, such as

1. Nancy Scheper-Hughes & Philippe Bourgois, *Introduction, in VIOLENCE IN WAR AND PEACE: AN ANTHOLOGY* 1 (2004).

2. *Id.*

3. *Id.*

4. Paul Farmer, *Introduction, in PATHOLOGIES OF POWER: HEALTH, HUMAN RIGHTS, AND THE NEW WAR ON THE POOR* 8 (2005).

criminal prosecutions, seem inapplicable.⁵ The neglect on SV is likewise reflected in the emphasis on establishing mechanisms and processes that would bring about an end to direct violations but not those harms that are built into the structure of the society.

Current literature lacks studies on whether those who perpetuate structural violence can be prosecuted under International Criminal Law (ICL). This is perhaps a product of the narrow notion of criminal responsibility for mass violence which proceeds from the basis that “crimes are committed by [people rather than] by abstract entities”⁶ — as seen in the practice of international criminal tribunals such as the International Criminal Court (ICC) and the Nuremberg Tribunal.⁷ Likewise, the issue of SV is not as straightforward as direct violations, considering the usual absence of persons who can be held accountable.⁸ Thus, there is an assumption that harms arising from SV can neither be prosecuted nor be a subject of transitional justice mechanisms.⁹

In other words, the mainstream notion of criminal responsibility can be described as follows: *first*, it is limited to direct violence or damage to the physical body, as this is easiest to recognize; and *second*, it is limited only to those who commit the direct harm or to those who “intentionally encourage[] or aid[] ... [its] commission[.]”¹⁰ These limitations are brought about by the influences of the Anglo-American tradition which focuses on intent.¹¹ As a consequence, a bias exists in how violence is dealt with —

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5. See Ismael Muvingi, *Sitting on Powder Kegs: Socio-Economic Rights in Transitional Societies*, 3 INT’L J. TRANSITIONAL JUST. 163, 164 (2009).
 6. Chao Yi, *The Concept of International Criminal Responsibility for Individuals and the Foundational Transformation of International Law*, in PHILOSOPHICAL FOUNDATIONS OF INTERNATIONAL CRIMINAL LAW: FOUNDATIONAL CONCEPTS 88 (Morten Bergsmo & Emiliano J. Buis eds., 2019).
 7. JOSEPH NEVINS, A NOT-SO-DISTANT HORROR: MASS VIOLENCE IN EAST TIMOR 191 (2005) (citing Roger S. Clark, *East Timor and the International Criminal Court*, in THE EAST TIMOR PROBLEM AND THE ROLE OF EUROPE 97 (Pedro Pinto Leite ed., 1996).
 8. These traditional mechanisms include prosecutions and truth commissions. RAMA MANI, BEYOND RETRIBUTION: SEEKING JUSTICE IN THE SHADOWS OF WAR 7 (2002).
 9. Muvingi, *supra* note 5, at 165.
 10. NEVINS, *supra* note 7, at 191.
 11. *Id.*

allowing impunity for some acts to occur.¹² This conclusion is reflected in Norwegian sociologist Johan Galtung's comment that peace and related concepts, such as ethical systems, are often directed only against that violence which is intended but not against structural violence which is more difficult to address.¹³ Hence, Galtung said that while society may be catching the small fry, society lets loose the big fish.¹⁴

The patronage system, which is the power to control rights and privileges in a society by a Ruling Elite, is an SV that exists in different States today. Yet, it is assumed that there can be no criminal responsibility arising from this type of violence as it is often considered normal within a society. In Cambodia, the traditional social structure is characterized by a patron-client relationship wherein the leadership of the ruling group is about "exploitation rather than service, patronage rather than cooperation[.]"¹⁵ This structure became more pronounced after the Khmer Regime and the civil war that ensued.¹⁶ It ensured the dominance of the Cambodian People's Party (CPP) — not just in politics but likewise in controlling the people's lives.¹⁷ The system allows the Ruling Elite to self-enrich and maintain power at all costs, even to the extent of committing assassinations, murders, illegal detention, and prosecution of people who oppose them. Despite evidence of the commission of these criminal acts, there were no prosecutions of either the persons who committed the direct harms or those who perpetuated the SV which caused these harms.

Using a literature review and a case study of Cambodia, this Article departs from and critiques the mainstream notion of criminal responsibility insofar as it is focused only on the individual. It seeks to answer the question of whether criminal responsibility can, in certain instances, arise in the

12. *Id.*

13. *Id.*

14. *Id.*

15. Sung Yong Lee & Wook Beom Park, *Nurturing Local Voice: The UNDP's local empowerment programmes in Cambodia*, in LOCAL OWNERSHIP IN INTERNATIONAL PEACEBUILDING: KEY THEORETICAL AND PRACTICAL ISSUES 146 (Sung Yong Lee & Alpaslan Özerdem eds., 2015) (citing DAVID CHANDLER, *FACING THE CAMBODIAN PAST: SELECTED ESSAYS, 1971-1994* 302 (1996)).

16. Lee & Park, *supra* note 15, at 146 (citing SEANGLIM BIT, *THE WARRIOR HERITAGE: A PSYCHOLOGICAL PERSPECTIVE OF CAMBODIAN TRAUMA* 77-84 (1991)).

17. Lee & Park, *supra* note 15, at 146.

context of SV and whether there can be a theoretical or perhaps ideological basis on how such responsibility can be triggered. Ultimately, this Article aims to invite its readers to examine the assumptions they make when engaging in the discourse on violence and criminal responsibility. More often than not, society employs flawed notions of responsibility, and, thus, the tendency is to shy away from exalting criminal responsibility for crimes and atrocities committed for or under the auspices of collective entities.

II. THEORETICAL FRAMEWORK: STRUCTURAL VIOLENCE AND MAINSTREAM NOTION OF CRIMINAL RESPONSIBILITY

Violence is defined by Galtung as an “avoidable impairment of ... human life, which lowers the actual degree to which someone is able to meet their needs below that which would otherwise be possible.”¹⁸ Galtung described SV by contrasting it with personal or direct violence.¹⁹ For the purpose of this Article, SV or indirect violence is defined as consisting of “economic, political[,] and cultural dynamics that work systematically through social structures to create human suffering and constrain human agency.”²⁰ Unlike direct violence, SV harms its victims by preventing them from meeting their basic needs.²¹

In both indirect or direct violence, individuals may be killed, hurt, or harmed.²² Unlike the latter where the consequences may be traced to a concrete actor, the former is “built into the structure and shows up as unequal power and consequently as unequal life chances”²³ in the form of

18. Kathleen Ho, *Structural Violence as a Human Rights Violation*, ESSEX HUM. RTS. REV., Volume No. 4, Issue No. 2, at 3 (citing Johan Galtung, *Kulturelle Gewalt*, 43 DER BUEGERER IM STAAT 106 (1993)).

19. Ho, *supra* note 18, at 4.

20. This definition is based on the synthesis made by Matthew Sparke on the work of Galtung and Paul Farmer. Matthew Sparke, *How Research on Globalization Explains Structural Violence*, available at <https://www.washington.edu/omad/ctcenter/projects-common-book/mountains-beyond-mountains/how-research-on-globalization> (last accessed Aug. 15, 2020).

21. Pádraig McAuliffe, *Rhetoric and Realpolitik: Interrogating the Relationship Between Transitional Justice and Socio-Economic*, in FINNISH YEARBOOK OF INTERNATIONAL LAW, VOLUME 23, 2012-2013 248-49 (Jarna Petman ed., 2013) (citing Johan Galtung, *Violence, Peace, and Peace Research*, 6 J. PEACE RES. 167, 167 (1969) [hereinafter Galtung, *Violence, Peace, and Peace Research*]).

22. Galtung, *Violence, Peace, and Peace Research*, *supra* note 21, at 170.

23. *Id.* at 171.

poverty, marginalization, and uneven distribution of resources.²⁴ While direct violence is often equated with physical damage to the human body, SV is more observable at the societal level, taking the form of systematic shortfalls in the quality of life of certain groups of people.²⁵

A. Neglect of Structural Violence

The dichotomy between direct and indirect violence often leads scholars to focus more on the former and neglect the latter. This mainstream thinking is flawed as it is based on wrong assumptions of SV.

First, SV is often equated with violations of Economic Social and Cultural Rights (ESCR), and, as such, it suffers from the debunked traditional liberal-legalist assumptions that are likewise present in the human rights discourse.²⁶

24. Dustin N. Sharp, *Emancipating Transitional Justice from the Bonds of the Paradigmatic Transition*, 9 INT'L J. TRANSITIONAL JUST. 150, 158 n. 47 (2014).

25. Lindsey N. Kingston & Saheli Datta, *Strengthening the Norms of Global Responsibility: Structural Violence in Relation to Internal Displacement and Statelessness*, 4 GLOBAL RESPONSIBILITY TO PROTECT 475, 476 (2012) (citing George Kent, *Children as Victims of Structural Violence*, 1 SOCIETIES WITHOUT BORDERS 53, 55 (2006)).

26. McAuliffe, *supra* note 21, at 258 (citing MANI, *supra* note 8). Traditional human rights discourse created a hierarchy of rights such that ECSR are called second generation rights while CPR are referred to as first generation rights. This hierarchy is brought about by several assumptions: *first*, that ESCR are vague and indeterminate and entail progressive realization and thus, dependent on the availability of resources — whereas CPR are determinate and could be realized through state abstentions; *second*, violations of CPR are considered more egregious than violations of ESCR; and *lastly*, ESCR are considered non-justiciable. *Id.*

These assumptions are no longer acceptable as they run counter to the principle that all rights, regardless of their category are intersected, interrelated, interdependent, and indivisible as reflected in the Vienna Declaration and Programme of Action. Theo van Boven, *Categories of Rights*, in INTERNATIONAL HUMAN RIGHTS LAW 148 (Daniel Moeckli, et al. eds., 2014) (citing UNITED NATIONS, HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS OF THE UNITED NATIONS, VOLUME 1, PART 1 (1993) & VIENNA DECLARATION AND PROGRAMME OF ACTION, A/Conf.157/23 (1993)).

Likewise, these assumptions fail to take into consideration the threefold typology which encompasses the obligation to respect, protect, and fulfill. This reveals that ESCR can also entail negative obligations on the part of the state

Second, SV is often more difficult to identify than direct violence. Direct violence makes it easier to identify perpetrators, victims, the causal pathway between the perpetrator and victim, the form of violence used and, “even quantifying the extent of damage.”²⁷ This has a consequence in addressing victims since criminal prosecutions and some transitional justice measures would only focus on those who suffered physical or bodily harms.²⁸ As such, a “hierarchy of victims or of harm[s]” is created, leaving victims of SV without any redress or beyond the scope of measures that aims to deal with past atrocities.²⁹

Third, a limited understanding of SV would lead one to believe that it merely partakes in indirect violations and that it cannot permeate into other types of violations, much more direct harms. This assumption reflects the lack of understanding of the interdependence and interrelation between indirect and direct violence.³⁰ There is a nexus between these types of

and, thus, not always dependent on the availability of resources. Larissa van den Herik, *Economic, Social, and Cultural Rights: International Criminal Law's Blind Spot?*, in *ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: CONTEMPORARY ISSUES AND CHALLENGES* 350 (Eibe Riedel, et al. eds., 2014) & EVELYN SCHMID, *TAKING ECONOMIC, SOCIAL AND CULTURAL RIGHTS SERIOUSLY IN INTERNATIONAL CRIMINAL LAW* 27–28 (2015). For example, the obligation not to discriminate and the obligation not to evict from one’s home are negative obligations and are not dependent on the availability of resources nor connected to the obligation of the state to fulfill. *Id.*

27. Zimbabwe Human Rights NGO Forum, *Structural Violence and Organized Violence and Torture in Zimbabwe* (A Special Paper by the Zimbabwe Human Rights NGO Forum) at 2, available at <http://www.hrforumzim.org/wp-content/uploads/2014/05/Structural-Violence-Organised-Violence-Book.pdf> (last accessed Aug. 15, 2020).
28. LIA KENT, *THE DYNAMICS OF TRANSITIONAL JUSTICE: INTERNATIONAL MODELS AND LOCAL REALITIES IN EAST TIMOR* 38 (2012).
29. Heidy Rombouts, *Importance and Difficulties of Victim-Based Research in Post-Conflict Societies*, 10 *EUR. J. CRIM., CRIM. L. & CRIM. JUST.* 216, 227 (2002). This is illustrated in the case of Rwanda where the Rwandan Patriotic Front (RPF) “narrow[ed] down the definition [of victims] to the category of [Tutsi]” who experienced direct violence and excluded several Hutus who were themselves victims of indirect violence for decades. *Id.*
30. Galtung illustrates this interdependence, to wit —

Africans are captured, forced across the Atlantic to work as slaves: millions are killed in the process [—] in Africa, on board, in the Americas. This massive direct violence over centuries seeps down and

violations such that injustice, inclusion, or inequality can lead to people being killed or detained, and vice versa. In other words, “direct violence reinforces and perpetuates structural violence[,]”³¹ while the latter can permeate or transform into the former. This point will be elaborated in the case study of Cambodia discussed below.

Due to the core misunderstanding of SV, it is often marginalized in the discourse on criminal responsibility. A classic example of this can be found in the case of the South African Truth and Reconciliation Commission (SATRC) whose mandate was limited to individual acts of violence without considering apartheid as a crime in itself.³² Likewise, under South Africa’s Reconciliation Act, “gross violation of human rights is limited to physical violence or ‘bodily rights.’”³³ In this instance, SV (apartheid) which prompted the conflict remained unaddressed. As a result, the narrow focus on bodily injury let off the hook many beneficiaries of the apartheid system.³⁴ The measures taken failed to guarantee the non-recurrence of conflict as evidenced by recent deadly clashes involving students protesting against a government recommendation to increase tuition fee which affected more blacks than whites — the former who are still underrepresented in

sediments as massive [S]tructural [V]iolence, with whites as the master topdogs and blacks as the slave underdogs[.]

Johan Galtung, *Cultural Violence*, 27 J. PEACE RES. 291, 295 (1990) [hereinafter Galtung, *Cultural Violence*].

31. OLIVER RAMSBOTHAM, *TRANSFORMING VIOLENT CONFLICT: RADICAL DISAGREEMENT, DIALOGUE AND SURVIVAL* 53 (2010).
32. Mahmood Mamdani, *Reconciliation without Justice*, 46 S. AFR. REV. BOOKS 3, 3 (1996).
33. Ma. Venarisse V. Verga, *Transitional Justice and Structural Violence in the Context of Marginalization Through Land Dispossession: A Continuing Search for the Road to Sustainable Peace in the Bangsamoro Region*, at 17 (2006) (unpublished Master’s Thesis submitted to the Faculty of Law of Tilburg University). This refers to killing, abduction, torture, or severe ill-treatment of any person. *See also* South African Truth and Reconciliation Commission, Volume One Truth and Reconciliation Commission of South Africa Report at 78, available at <https://www.justice.gov.za/trc/report/finalreport/Volume%201.pdf> (last accessed Aug. 15, 2020).
34. *See* South African Truth and Reconciliation Commission, *supra* note 33, at 60.

universities and mostly coming from the lower strata of the society, compared to the latter.³⁵

B. Mainstream Notion of Criminal Responsibility

The mainstream notion of criminal responsibility involves different aspects. For the purpose of this Article, two will be highlighted: *first*, criminal responsibility being individualistic — which answers *who* is criminally liable — and *second*, the limited notion of criminal responsibility that only accommodates direct violations and violations of Civil and Political Rights (CPR) — which answers the question of *what* he or she is liable for.

1. Individualistic Approach to Criminal Responsibility

The Nuremberg and Tokyo Trials created fundamental principles which became the bases of the mainstream notion of criminal responsibility.³⁶ These tribunals asserted the dictum that “[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who committed such crimes can the provisions of international law be enforced.”³⁷ This wiped out the doctrine that limits the remedy, at least in the international level, to a claim of international responsibility on the part of the State.³⁸

The notion of criminal responsibility that focuses on the individual has been the accepted approach in ICL and used not just by international tribunals but most especially by domestic courts. Under national law, criminal responsibility is based on an individualistic causation and consists only of two elements: personal fault and conduct.³⁹ These elements are a product of an age-old principle that a person can only be liable to the extent

35. Aljazeera, South Africa: University fee protests turn violent, *available at* <https://www.aljazeera.com/indepth/inpictures/2016/09/south-africa-students-fees-protests-turn-violent-160921071225187.html> (last accessed Aug. 15, 2020).

36. International Law Commission of the United Nations, *Principle of International law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, U.N. Doc. A/CN.4/L.2 (1950).

37. INTERNATIONAL MILITARY TRIBUNAL NUREMBERG, 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 223 (1947).

38. Paola Gaeta, *International Criminal Law*, in INTERNATIONAL LAW FOR INTERNATIONAL RELATIONS 261 (Basak Cali ed., 2010).

39. Elies van Sliedregt, *Criminal Responsibility in International Law*, 14 EUR. J. CRIM., CRIM. L. & CRIM. JUST. 81, 81 (2006).

of his own will, as developed in canon law and later during the Enlightenment period.⁴⁰ While in the past, there existed traces of collective criminal responsibility (CCR) — such as the frank-pledge system where members of a group can be held liable for criminal charges if the perpetrator cannot be identified — such do not reflect the modern notion of individual responsibility⁴¹ which focuses “on the individual [and] not on society or systems.”⁴²

Whatever prosecutorial benefits and simplicity individual criminal responsibility (ICR) may offer, scholars still feel that “it remains a fiction.”⁴³ Mark Drumbl, an authority in international criminal law, argued that while mass atrocity is considered “extraordinarily transgressive of universal norms”⁴⁴ and thus, considered crimes against the whole community, the modality of punishment and process of determining guilt or innocence is still the same as ordinary crimes and premised on the idea of the individual as the central unit of action.⁴⁵ There is an inconsistency in how mass atrocities that systematically breach human rights are treated and this gap needs to be addressed. Hence, as noted by Ezra Vogel, a Professor Emeritus of the Social Sciences at Harvard University, the individualistic model has rendered criminal law inadequate if one takes into account criminal structures and

40. *Id.* at 83 (citing F. SCHAFFSTEIN, DIE ALLGEMEINEN LEHREN VOM VERBRECHEN IN IHRER ENTWICKLUNG DURCH DIE WISSENSCHAFT DES GEMEINEN STRAFRECHTS 94 (1972); M. Metz, *La responsabilité pénale dans le droit canonique medieval*, in LA RESPONSABILITÉ PÉNALE, TRAVAUX DU COLLOQUE DE PHILOSOPHIE PÉNALE DE L'INSTITUT DE SCIENCES CRIMINELLES ET PÉNITENTIAIRES (12 AU 21 JAVIER 1959) 83-116 (Jacques Léauté ed., 1961); & ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 19 (1981)).

41. van Sliedregt, *supra* note 39, at 83 (citing JOEL FEINBERG, DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 238-39 (1970)).

42. Joachim Vogel, How to Determine Individual Criminal Responsibility in Systemic Contexts: Twelve Models at 157, available at https://pdfs.semanticscholar.org/c386/oodf92f1fa79ofa55443684bb4aa454867cc.pdf?_ga=2.152027839.782273588.1582463779-1442860516.1582463779 (last accessed Aug. 15, 2020).

43. Mark A. Drumbl, *Accountability for System Criminality*, 8 SANTA CLARA J. INT'L L. 373, 374 (2010) [hereinafter Drumbl, *Accountability for System Criminality*].

44. Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539, 540-42 (2005).

45. *Id.*

offenses committed in a structured manner (i.e., crimes committed in the frameworks of bureaucracies or companies, for example).⁴⁶

As an answer to the seeming inadequacy of the individualistic approach to criminal responsibility, B.V.A. Röling, a prominent international lawyer, coined the term *system criminality* which is defined as a situation where “governments order crimes to be committed, or encourage the commitment, or [favor] and permit or tolerate the committing of crime.”⁴⁷ André Nollkaemper, a Professor of Public International Law, further developed the concept and argued that most international crimes are in fact part of system criminality.⁴⁸ Nollkaemper argues that the very definitions of genocide, crimes against humanity, and even war crimes under the Rome Statute make these crimes impossible without the involvement of a larger collectivity.⁴⁹ In the Darfur case, for example, the ICC Prosecutor noted the existence of a pattern of crimes committed with the mobilization of the whole State apparatus and which required the coordination of different bureaucracies.⁵⁰ However, instead of taking into account organizational context as a causal factor in the commission of the crime, the Prosecutor indicted Omar al Bashir and argued that he used the organization instead of the other way around.⁵¹

46. Vogel, *supra* note 42, at 157 (citing Marxen, in 3 AUFGEKLÄRTE KRIMINALPOLITIK ODER KAMPF GEGEN DAS BÖSE? 234-35 (Klaus Lüderssen ed., 1998)).

47. Bert Röling, *The Significance of the Laws of War*, in CURRENT PROBLEMS OF INTERNATIONAL LAW: ESSAYS ON U.N. LAW AND ON THE LAW OF ARMED CONFLICT 171 (Antonio Cassese ed., 1975).

48. André Nollkaemper, *Introduction*, in SYSTEM CRIMINALITY IN INTERNATIONAL LAW 1 (André Nollkaemper, et al. eds., 2009).

49. Genocide involves destroying a whole group which can only be done by a collective action; Crimes Against Humanity consist of a widespread or systematic attack; and War Crimes require that the act is committed as “part of a plan or policy or as part of a large-scale commission[.]” André Nollkaemper, *Systemic Effects of International Responsibility for International Crimes*, 8 SANTA CLARA J. INT’L L. 313, 317 (2010) (citing Rome Statute of the International Criminal Court, art. 8 (1), *opened for signature* July 17, 1998, 2187 U.N.T.S. 3).

50. Nollkaemper, *supra* note 49, at 315 (citing Office of the Prosecutor, *Seventh Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005)*, ¶ 98, United Nations Security Council, U.N. Doc. A/63/2 (June 5, 2008)).

51. Nollkaemper, *supra* note 49, at 315.

While States are usually the entities involved in system criminality, there are other forms of collectivities such as organized armed groups and ruling political parties.⁵² These collective entities contribute to system criminality either by using powerful apparatus such as the military or judiciary, or by enacting laws, plans, or policies that authorize or encourage acts of violence, by acquiescing or not acting when crimes are committed by individuals in order to further State objective, or simply by providing material conditions and a normative climate necessary for the commission of the crime.⁵³

Nollkaemper notes that the focus on system criminality results in CCR of the State and/or the population as a culpability mechanism of ICL.⁵⁴ Responsibility, in this case, should be understood as “the obligation to answer for an act done, and to repair or otherwise make restitution for an injury it may have caused.”⁵⁵ However, at present, system criminality suffers a drawback as there is no effective way to actually enforce or trigger CCR.⁵⁶

The acceptability of system criminality has been subject to debate between traditionalists and those who espouse adaptability in criminal law. As argued by Elies van Sliedregt, a Professor of International and Comparative Criminal Justice, the principle of criminal responsibility should be able to adapt to “the demands of a changed society where collective actors interact like individuals and crime is highly organized and carried out on a large scale.”⁵⁷ True enough and throughout history, the concept of criminal responsibility has in fact, evolved both in the domestic and international level. This is evidenced by the acceptance of principles such as vicarious liability, expansion of the notion of perpetration, and participation and introduction of concepts that penalize non-tangible support to the commission of the crime.⁵⁸ These developments show that while the notion

52. *Id.* at 318 (citing Jann K. Kleffner, *The collective responsibility of organized armed groups for system crimes*, in SYSTEM CRIMINALITY IN INTERNATIONAL LAW, *supra* note 48, at 238 & ARNE JOHAN VETLESEN, EVIL AND HUMAN AGENCY: UNDERSTANDING COLLECTIVE EVILDOING 44-45 (2005)).

53. Nollkaemper, *supra* note 49, at 319-20.

54. *Id.* at 321.

55. H.L.A. Hart, *Postscript: Responsibility and Retribution*, in PUNISHMENT AND RESPONSIBILITY 216 (1968).

56. Drumbl, *Accountability for System Criminality*, *supra* note 43, at 375.

57. van Sliedregt, *supra* note 39, at 84.

58. *Id.* at 83. For example, a superior can be held criminally responsible for the crimes of his or her subordinates in cases when he or she fails in his or her duty to prevent or punish crimes committed by the latter. *Id.* at 85-86.

of criminal responsibility is individualistic, it is now influenced by a return of the collective traits in criminal law and a partial return to CCR, albeit in a different form.⁵⁹

2. Focus on Direct Violence

Having established the answer to *who* is criminally responsible under mainstream ICL, next to be addressed is the question of *what* should they be responsible for. Under the principle of legality, a person may only be convicted and/or punished for an act which is a violation of a “clear and ascertainable law that was in force at the time of the conduct.”⁶⁰ The adherence to the principle of legality veers criminal lawyers away from engaging with SV as the latter is often seen as vague and difficult to address. This conclusion is brought about by the misconception that SV is necessarily a violation of ESCR — the latter being traditionally considered as second-generation rights entailing positive obligations that are vaguer than first generation CPR.⁶¹ Since ESCR, and consequently SV, are considered vague, this vagueness is seen as contrasting sharply with the requirements of the principle of legality.⁶²

As a consequence, criminal responsibility is generally limited to prosecution of direct violations and violations of CPR. This is apparent in how core crimes in ICL and their elements are defined. Genocide, crimes against humanity, and war crimes mostly constitute direct harms (killing, torturing, attacking, etc.). Moreover, atrocities which violate a person’s CPR often attract more attention, taking into account the perception that people in general are more interested in their physical security.⁶³ Hence, as argued by Evelyn Schmid, an Associate Professor of Public International Law, in a situation where a person was raped and her house looted/burned, she is

Likewise, case law of the ICTY and the ICTR shows the expansion of the notion of perpetration. See Part IV of this Article.

59. *Id.* at 84.

60. SCHMID, *supra* note 26, at 71.

61. *Id.*

62. *Id.*

63. Refer to, for example, Nigel Biggar’s comment that the moral responsibility of political leaders is to look after the genuine interest of their people to be physically secure. Nigel Biggar, *Conclusion*, in BURYING THE PAST: MAKING PEACE AND DOING JUSTICE AFTER CIVIL CONFLICT 313 (Nigel Biggar ed., 2005).

mostly considered a victim of sexual violence with the crime against her property deemed merely as context or background.⁶⁴

The example of the Extraordinary Chambers in the Courts of Cambodia (ECCC) is illustrative of this point. Charges brought before the ECCC failed to take into account indirect violations and disregarded altogether violations of ESCR. Instead, the prosecution focused more on the executions and detentions during the communist regime from 1975 to 1979, rather than violations that led to the widespread famine.⁶⁵ Thus, the ECCC was, at times, criticized for painting an inaccurate or incomplete picture of what the people endured during the Pol Pot regime.⁶⁶

This mainstream notion, which focuses on individuals, direct harms and violations of CPR, leads to an assumption that no criminal responsibility can arise from SV. This assumption will be tested in the case of the patronage system in Cambodia.

III. PATRONAGE SYSTEM IN CAMBODIA: A STRUCTURAL VIOLENCE WHICH PERMEATES INTO DIRECT HARMS AND WHICH PERPETRATES FURTHER STRUCTURAL VIOLENCE.

A. Development of the Patron-Client Relationship in Cambodia

The patron-client relationship in Cambodia has deep historical roots, perhaps existing as early as the Pre-Ankorean period and continuing until the fall of the empire.⁶⁷ By the 19th century, Cambodia was a relatively poor state with its population involved in subsistence farming.⁶⁸ The people, who had very little means, would often seek protection from those occupying higher positions in the society and in return for this protection, the former offered

64. SCHMID, *supra* note 26, at 4.

65. See Randle C. DeFalco, *Accounting for Famine at the Extraordinary Chambers in the Courts of Cambodia: The Crimes against Humanity of Extermination, Inhumane Acts and Persecution*, 5 INT'L J. TRANSITIONAL JUST. 142, 143-44 (2011).

66. In fact, some survivors recount that the hunger they experienced was even more traumatic than the murders and this feeling of hunger gave them a lasting impression of the regime. See Youk Chhang, *How Did I Survive the Khmer Rouge?*, WORDPRESS, Feb. 19, 2008, available at <https://khmerisation.wordpress.com/2008/02/19/how-did-i-survive-the-khmer-rouge/> (last accessed Aug. 15, 2020).

67. PAK KIMCHOEUN, ET AL., ACCOUNTABILITY AND NEO-PATRIMONIALISM IN CAMBODIA: A CRITICAL LITERATURE REVIEW 53 (2007).

68. DAVID CHANDLER, A HISTORY OF CAMBODIA 121-22 (4th ed. 2008).

their loyalty.⁶⁹ This reciprocal relationship is known today as patron-client relationship and was perceived as “normal” by the traditional Cambodian society.⁷⁰

While institutional reforms were imposed by the French colonizers, the patron-client relationship persisted, and was in fact key to the State’s independence in the 1950s.⁷¹ King Sihanouk consolidated power and portrayed himself as the nation’s father and a patron of the Cambodian people.⁷² King Sihanouk remained in power until 1970 and was succeeded by Lon Nol who was not as competent as his predecessor.⁷³ This incompetence gave the communist Democratic Kampuchea (DK) power to gain control of the State and to implement a revolutionary reform intent on erasing 2000 years of history.⁷⁴ The DK Regime, also known as Khmer Rouge, ended in 1979 when the Vietnamese coalition took over Phnom Penh.⁷⁵ By then, almost no social institutions existed.⁷⁶

The Vietnamese occupying force began to rebuild the government from the structural vacuum created by the Khmer Rouge by assembling the People’s Republic of Kampuchea (PRK), which consisted of former communist party officials that defected to Vietnam during the Khmer Rouge regime.⁷⁷ The PRK was composed of a small number of individuals mandated to rule, who did so by consolidating power and creating a network of personal relationships.⁷⁸ While in the early years, the PRK struggled to gain control over the State, the reforms initiated in 1989 paved the way to a more cohesive State apparatus.⁷⁹ The economic liberalization in the 1990s was used by the upper echelons of the political hierarchy to control some enterprises as well as land, which allowed them to strengthen their relationships with those individuals controlling the localities and to gain

69. *Id.* at 127.

70. *Id.*

71. See CHANDLER, *supra* note 68, at 126.

72. *Id.* at 231.

73. *Id.* at 241 & 244-45.

74. *Id.* at 247.

75. *Id.* at 265.

76. See CHANDLER, *supra* note 68, at 269.

77. *Id.* at 268.

78. CAROLINE HUGHES, THE POLITICAL ECONOMY OF CAMBODIA’S TRANSITION 59 (2003).

79. *Id.* at 60.

their loyalty.⁸⁰ The control over vital resources allowed those in power to consolidate political and economic power and to catapult the resurgence of the patron–client relationship, this time with the central government acting as an overarching umbrella.⁸¹

B. Post-Khmer Rouge Patronage System as a Form of Structural Violence

While the patron–client relationship was historically ingrained in Cambodian society, the post-Khmer Rouge variant of this relationship differed substantially as it created a system wherein political power is no longer localized nor dependent on personal relationships and reciprocal respect.⁸² Neither are there only two parties in the relationship. The modern patronage system in Cambodia created three parties: (1) the patrons in the upper echelons of the government, (2) their followers who gain societal positions and protection in exchange for their loyalty and for ensuring that the patrons can enrich themselves at the expense of the third party, and (3) the local populations.⁸³ This patronage system is better characterized by the exploitation of the third party — a purely extractive patronage system, instead of one where there is mutual and reciprocal benefit and respect.⁸⁴

Theorists characterize an SV system as unequal and exemplified by a disparity between those who have control over wealth, and are thus getting richer, and those who are deprived of basic necessities, and are therefore getting poorer.⁸⁵ Using this as a starting point, the question then is: what role does the patronage system play in creating this inequality?

The patronage system in Cambodia allows the patrons unbridled use of power not only to intimidate non-conformists but also to reward loyalty.⁸⁶ It allowed the PRK, which was later known as the Cambodian People’s Party (CPP), to amass more wealth and to control resources, particularly in the

80. *Id.* at 60–61.

81. *Id.* at 61.

82. *Id.*

83. *Id.* at 61–62.

84. HUGHES, *supra* note 78, at 62.

85. Ho, *supra* note 18, at 5.

86. HUGHES, *supra* note 78, at 62.

countryside.⁸⁷ This wealth and power was especially consolidated within those who were close to the Prime Minister (PM) of 30 years, Hun Sen.⁸⁸

Hun Sen was considered as the gatekeeper for high ranking positions in the government.⁸⁹ Through his position, he was able to appoint loyal powers to strategic positions and therefore manipulate these appointees.⁹⁰ This allowed him to construct a network of allies that constituted the Ruling Elite and to control a patronage system which aims to amass wealth and maintain power.⁹¹ In order to achieve these aims, the patronage system utilized local land concessions which allowed individuals, corporations, and businesses to control a piece of land for up to 99 years.⁹²

Land concessions were made possible by the enactment of the Land Law in 2001 which introduced the concept of State public land and State private land.⁹³ The law was formulated in such a manner that the lease of land can serve a *socio-economic purpose* of making more land available for private investors and landless sectors of the society.⁹⁴ While at first blush, the law seems to be protective of the local communities and landless Cambodians in general, Hun Sen and the Ruling Elite were able to use this legislation to their advantage and to further the patronage system.

An analysis of the Land Law would show that, even though it only allows land concessions for properties that are considered State public land and State private land, in essence, it allowed the government and the Ruling Elite to control prime properties at the expense of the original occupants, the

87. *Id.* at 61–62.

88. See Kheang Un, *The Cambodian People Have Spoken: Has the Cambodian People's Party Heard?*, 102 SOUTHEAST ASIAN AFFAIRS 102, 103 (2015).

89. Kheang Un, *State, Society, and Democratic Consolidation: The Case of Cambodia*, 79 PAC. AFF. 225, 228–29 (2006).

90. *Id.*

91. *Id.*

92. Christoph Sperfeldt, et al., *An Examination of Policies Promoting Large-Scale Investments in Farmland in Cambodia* (A Paper Submitted to the Cambodian Human Rights Action Committee in November 2012) at 53, *available at* https://www.academia.edu/4333006/An_Examination_of_Policies_Promoting_Large-Scale_Investments_in_Farmland_in_Cambodia (last accessed Aug. 15, 2020).

93. *Id.* at 51–52.

94. *Id.*

ordinary Cambodians.⁹⁵ Since Cambodians were dispossessed of their private properties during the Khmer Rouge, most people were occupying lands that were in fact, untitled.⁹⁶ The low literacy level in the rural areas hindered the villagers from registering the properties they occupied.⁹⁷ As a consequence, all lands were considered either State private land or State public land and available for economic land concessions; thus, giving patrons and their loyal followers the opportunity to *legally* grab land. This affected the lives of millions of Cambodians, 70-75% of which were still dependent on land and agriculture for their subsistence.⁹⁸

What is essential at this point, however, is the fact that the patronage system in Cambodia that developed following the Khmer Rouge regime created a glaring evidence of structural inequality within the State. It is a form of SV which creates a huge disparity between the Ruling Elite and the local populations. The quest for power and wealth have left the third parties in the system in a condition that makes the poor even poorer. The patronage system, then, creates an avoidable impairment of fundamental human needs and of human life which characterizes SV. It is considered normal as it is built up in the structure of the State. As Galtung elaborates, the underlying issue in SV is the fact that the “power to decide over the distribution of resources is unevenly distributed.”⁹⁹ This is clear in the patronage system wherein the Ruling Elite has the sole power to decide the distribution of resources at the expense of the ordinary citizens who do not hold any power in the society. At the heart of SV is exploitation,¹⁰⁰ which is reflected in the Cambodian society with the powerless populations being victimized in a

95. See Land Law, art. 58 (2001) (Cambodia).

96. SEAN BERGIN, *THE KHMER ROUGE AND THE CAMBODIAN GENOCIDE* 29 (2009).

97. It must be noted that the Khmer Rouge regime targeted the intellectuals and educated elites and considered them as traitors and saboteurs. Thus, many were forced to erase all traces of education — reading books and learning how to read and write. George Chigas & Dmitri Mosyakov, *Literacy and Education under the Khmer Rouge*, available at <http://gsp.yale.edu/literacy-and-education-under-khmer-rouge> (last accessed Aug. 15, 2020).

98. UNITED NATIONS DEVELOPMENT PROGRAM CAMBODIA, *RAISING RURAL INCOMES IN CAMBODIA: BEYOND SECTORAL POLICY, TOWARDS A FRAMEWORK FOR GROWTH* 3 (2007).

99. Galtung, *Violence, Peace, and Peace Research*, *supra* note 21, at 171 (emphasis omitted).

100. Ho, *supra* note 18, at 4 (citing Galtung, *Cultural Violence*, *supra* note 30, at 293).

one-way exploitative relationship by the patrons and their followers who get much more of the interaction in the structure.

C. Patronage System Permeates into a Direct Harm and Furthers Structural Violence

The patronage system as a form of SV produces suffering and even death. Like direct violence, it functions to deny people of their rights — including not only ESCR but also CPR. The recent years have been a witness to several cases showing how the patronage system in Cambodia permeates into direct violence. One of which is the case of Pheapimex.

Pheapimex is a logging concessionaire owned by Lao Meng Khin, a Senator of the CPP and his wife Yeay Phu, a close friend of Hun Sen's spouse.¹⁰¹ It was granted a 70-year lease of land totaling 7% of Cambodia's area,¹⁰² well beyond the maximum 10,000 hectares allowed by the law.¹⁰³ But due to the close ties of Pheapimex and the government, the company was able to make use of the Cambodian armed forces in the forcible evictions and harassment of those who were against the concessions.¹⁰⁴ Likewise, it was reported that those protesting against the concession were assaulted by the police.¹⁰⁵ Unfortunately, this incident was never investigated upon by the authorities.¹⁰⁶

The patronage system in Cambodia was described as a symbiotic relationship which “reinforce[s] the culture of impunity and limit[s] progress

101. Megha Bahree, In Cambodia, A Close Friendship With the PM Leads to Vast Wealth for One Power Couple, *available at* <https://www.forbes.com/sites/meghabahree/2014/09/24/who-you-know-inc-in-cambodia-a-close-friendship-with-the-pm-leads-to-vast-wealth-for-one-power-couple/#494dfc637be5> (last accessed Aug. 15, 2020).

102. *Id.*

103. *Id.* & Cambodia Land Law (promulgated in 1999 and amended in 2001; unofficial English translation) art. 59, *available at* https://www.wto.org/english/thewto_e/acc_e/khm_e/WTACCKHM5_LEG_1.pdf (last accessed Aug. 15, 2020).

104. LICADHO, Cambodian military police mobilised to protect land concession of ruling party Senator, *available at* <http://www.licadho-cambodia.org/articles/20070208/51/index.html> (last accessed Aug. 15, 2020).

105. *Id.*

106. *Id.*

on reforms[.]”¹⁰⁷ In this system, “business leaders contribute money to the ruling ... [CPP] and Hun Sen can call on them to fund charities and public works ... [—] achievements for which the CPP can claim credit. In return, the business tycoons enjoy the added credibility and legitimacy of having the [PM]’s support.”¹⁰⁸

Atrocities committed through the patronage system are not isolated in the Pheapimex case. In 2004, it was reported that one Mrs. Keat Kolney, the sister of the deputy PM and wife of the Secretary of State for Ministry of Land Management announced her purchase of 450 hectares of land in the village of Kong Yu and Kong Thom.¹⁰⁹ The local population disputed the purchase arguing that they, as an indigenous community, collectively owned the land.¹¹⁰ Mrs. Kolney claimed that the villagers actually sold the property to her.¹¹¹ However, it turned out that the villagers agreed under duress and after being subjected to acts of deception.¹¹² Court cases were filed by the villagers.¹¹³ However, news reports stated that local officials were actually complicit with Mrs. Kolney, the latter paying over U.S.\$90,000 in bribes to

107. U.S. Embassy in Cambodia, Cambodia’s Top Ten Tycoons, *available at* https://wikileaks.org/plusd/cables/07PHNOMPENH1034_a.html (last accessed Aug. 15, 2020).

108. *Id.*

109. Cheang Sokha, *Kong Yu families refuse to sign away Ratanakkiri land*, PHNOM PENH POST, Sep. 1, 2009, *available at* <https://www.phnompenhpost.com/national/kong-yu-families-refuse-sign-away-ratanakkiri-land> (last accessed Aug. 15, 2020) & Erik Wasson & Yun Samean, *Villagers Vow To Fight Land Sale in R’kiri*, CAMBODIA DAILY, Jan. 23, 2007, *available at* <https://english.cambodiadaily.com/news/villagers-vow-to-fight-land-sale-in-rkiri-60733> (last accessed Aug. 15, 2020).

110. See LICADHO, Reclamation of the indigenous land illegally taken in Rattanakiri, *available at* <http://www.licadho-cambodia.org/pressrelease.php?perm=139> (last accessed Aug. 15, 2020).

111. Sokha, *supra* note 109.

112. Cat Barton & Cheang Sokha, *Jarai villagers fight finance minister’s sister for land*, PHNOM PENH POST, Jan. 26, 2007, *available at* <http://www.phnompenhpost.com/national/jarai-villagers-fight-finance-ministers-sister-land> (last accessed Aug. 15, 2020).

Villagers were made to thumbprint documents while under the influence of alcohol distributed by Mrs. Keat Kolney’s party. *Id.*

113. *Id.*

obtain the former's assistance in facilitating the land transfer.¹¹⁴ Moreover, local judges were too scared to get involved in the cases while the lawyers helping the villagers faced intimidation, harassment, and threats of disbarment.¹¹⁵

In other parts of Cambodia, there were well documented cases of battery and violence resulting to injuries, arson, theft, damage, eviction, and even murder perpetrated by the Cambodian police and army at the direction of the Ruling Elite and members of their inner circle.¹¹⁶ The evictions resulted in food insecurity, loss of land and livelihood, and interruption of education among the villagers and their children.¹¹⁷ To date, no action has been taken by the government on the complaints filed by the non-governmental organizations (NGOs) on behalf of victims.

The United Nations described the situation in Cambodia as a "frenzy" of powerful individuals leaving people, a number of whom are indigenous, homeless and locked in a cycle of poverty.¹¹⁸ The Cambodian League for the Promotion and Defense of Human Rights (LICADHO) reports that more than 22% of Cambodia's land mass was granted to private firms for concessions which affected at least 400,000 people who were forced into becoming landless with no means of self-sustenance.¹¹⁹ This number only covers half of Cambodia's provinces where the NGO actually operates.¹²⁰

In the Communication filed by British lawyer Richard Rogers before the ICC, it was alleged that an estimate of 770,000 people have been affected

114. *Id.*

115. *Id.*

116. Particulars of Claim, Mar. 28, 2013, ¶ 13 (on file with the High Court of Justice Admiralty and Commercial Court), *in* Song Mao and Others v. Tate & Lyle Industries Ltd. & T & L Sugars Limited, (High Court of Justice Admiralty and Commercial Court 2013) (Eng.) (unreported).

117. *See* Particulars of Claim, *supra* note 116, ¶¶ 14 & 27.

118. *See* LICADHO, Human Rights in Cambodia: The facade of stability (A Report Published by LICADHO on May 2006) at 3, *available at* <https://www.licadho-cambodia.org/reports/files/8682LICADHOFacadeDemocracyReport2005-06.pdf> (last accessed Aug. 15, 2020) (citing Guy De Launey, Cambodia 'suffering land crisis', *available at* <http://news.bbc.co.uk/2/hi/asia-pacific/4207138.stm> (last accessed Aug. 15, 2020)).

119. LICADHO, 2012 in Review: Land Grabbing, the Roots of Strife, *available at* <http://www.licadho-cambodia.org/articles/20130212/133/index.html> (last accessed Aug. 15, 2020).

120. *Id.*

by land grabbing by the Ruling Elite in Cambodia since the year 2000, which has led to the forcible transfer and displacement of at least six percent of Cambodia's population.¹²¹ Of this number, around 190,000 people were part of the indigenous minorities, evidencing persecution on the basis of ethnic grounds.¹²² The forcible transfer was attended with burning of entire villages, evictions, threats, and intimidation.¹²³ Instances of murder, illegal imprisonment, and other inhumane acts were likewise committed.¹²⁴ It was in fact argued by several NGOs that these mass atrocities should be considered crimes against humanity as they form part of a widespread and systematic attack against the civilian population, pursuant to the policy formulated by the Ruling Elite.¹²⁵

The State apparatus (i.e., military, police, and judiciary) committed direct harms in furtherance of the Ruling Elites' objective of self-enrichment and maintenance of power.¹²⁶ There is evidence showing that the use of the military and judiciary in these atrocities was actually planned by PM Hun Sen and his cohorts.¹²⁷ For example, in order to ensure unlimited use of police and armed forces as private armies, the PM formulated a policy encouraging businesses to donate to particular units of the Royal Cambodian Army in the guise of "supporting the welfare of the troops."¹²⁸ Likewise, control over the judges, their appointment and promotion, ensured that government officials, senior military figures, and their business associates will

121. Global Diligence, *Communication Under Article 15 of the Rome Statute of the International Criminal Court: The Commission of Crimes Against Humanity in Cambodia July 2002 to Present* at *4, available at https://www.fidh.org/IMG/pdf/executive_summary-2.pdf (last accessed Aug. 15, 2020).

122. *Id.* at *5.

123. *Id.* at *6.

124. *Id.* at *11.

125. *Id.*

126. *Id.* at *3.

127. Hannah Ellis-Petersen, *Cambodian PM now 'fully fledged military dictator', says report*, GUARDIAN, June 28, 2018, available at <https://www.theguardian.com/world/2018/jun/28/cambodian-pm-hun-sen-fully-fledged-military-dictator-says-report> (last accessed Aug. 15, 2020).

128. Brendan Brady, *The Cambodian Army: Open for Corporate Sponsors*, available at <http://content.time.com/time/world/article/0,8599,1995298,00.html> (last accessed Aug. 15, 2020).

not fear being checked by a politically controlled judiciary.¹²⁹ As such, the judiciary was heavily relied upon in order to invent charges against those opposing the Ruling Elite.¹³⁰

D. Preliminary Findings

From the discussion above, the following can be concluded. *First*, the notion that SV only leads to structural or indirect violence is not entirely true. It can permeate into direct violence and harms, such as, but not limited to, murder, illegal detention, and forced evictions. *Second*, the type of human rights violations breached is not dependent on the type of violence utilized such that direct violence does not only breach CPR, it likewise breaches ESCR. The same can be said with SV which breaches both CPR (right to life, liberty, etc.) and ESCR (right to housing, food, etc.). *Third*, an analysis of the Cambodian situation does not end in the fact that the patronage system produces or permeates into direct harms. Rather, these direct harms proliferate and ensure that the SV will continue thus creating a cycle that reflects Sheper-Hughes' comment that violence further breeds violence. The experience of Cambodia showed that when the people lost their lands due to land grabbing, there was an increase in food insecurity.¹³¹ Children were pulled out of schools to help their struggling families; some people were forced to work in plantations which barely pay them regular wages; and those who witnessed how protesters were treated became more fearful of their security.¹³² In other words, the patronage system which leads to direct violence likewise ensured greater inequality and poverty, thus sustaining SV.

There is a need to understand the relationship between the types of violations, their interrelation with each other, and the human rights breached. The relationship/s can be summarized in the following diagram:¹³³

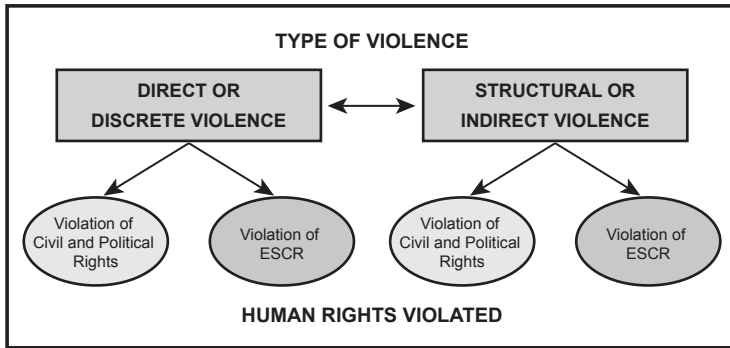
129. Global Witness, *Country for Sale: How Cambodia's elite has captured the country's extractive industries* at 12, available at https://cdn.globalwitness.org/archive/files/import/country_for_sale_high_res_english.pdf (last accessed Aug. 15, 2020).

130. *Id.*

131. APRODEV, *Stolen Land Stolen Future* (A Paper Published on December 2011) at 4, available at https://actalliance.eu/wp-content/uploads/2016/04/landgrab_aprodev.pdf (last accessed Aug. 15, 2020).

132. *Id.* at 16.

133. Verga, *supra* note 33, at 36.



To summarize, the patronage system in Cambodia, which is an SV, “can permeate into direct violence and vice versa.”¹³⁴ SV and direct violence can both lead to a violation of CPR and ESCR.¹³⁵ Thus, the mainstream notion that SV can only lead to breach of ESCR is not impregnable. At most, such notion merely creates a “hierarchy of harms and hierarchy of rights” which do not reflect reality.¹³⁶ In dealing with SV, the assumptions employed must be questioned; otherwise, the remedies that can be utilized when addressing this type of violence will be limited.

IV. COLLECTIVE CRIMINAL RESPONSIBILITY AND PATRONAGE SYSTEM IN CAMBODIA

Having established the nature of SV, particularly, the case of the patronage system in Cambodia, the next question would be whether criminal responsibility can arise in such a context. Part II of this Article discussed what kind of violations are addressed when we talk about the mainstream notion of criminal responsibility. It was established that it is generally limited to direct violations and violations of CPR. Following this notion, it is then assumed that no criminal responsibility can arise in a patronage system which is structural and assumed to only lead to indirect harms. This simple analysis does not reflect the true nature of SV.

A. Patronage System as a System Criminality

As discussed above, SV permeates into direct violence. It breaches both ESCR and CPR. Hence, if the assumption that criminal responsibility covers direct harms (e.g., the murders, illegal detention, forced eviction, etc.)

¹³⁴. *Id.*

¹³⁵. *Id.*

¹³⁶. *Id.*

permeating from patronage system will be accepted, they should likewise involve some form of criminal responsibility. However, if the mainstream notion of criminal responsibility is to be followed, the tendency would be to focus only on the direct harms without considering that these acts arose from an SV which, as seen in the case of Cambodia, was a factor of why the crimes committed were widespread and systematic. In other words, the patronage system provided the collective element which made the commission of mass atrocities plausible.

If the individualistic approach to criminal responsibility is to be applied, only the small fry will be caught, but not the big fish. In the case of murder in the Pheapimex case, for example, only the direct perpetrator would be held accountable, but not Mr. Lao Meng Khin, his wife Yeay Phu, nor PM Hun Sen. Hence, there is a need to understand violence from the context in which it unfolds. By doing so, those who orchestrate the SV — the patron and their followers — would be held liable as well. This, however, would counter the mainstream notion of criminal responsibility which only blames selected individuals involved in the commission of the direct violence, but not those who sustain or contribute to the functioning of the system which made possible the perpetuation of the crime. This shows the inherent weakness and gap in the individualistic approach to criminal responsibility.

In the case of the patronage system in Cambodia, the wide-scale mass atrocity committed was more than just a crime of individuals as it was a product of a group or collective entity. The approach of pinning the blame only to the most guilty or most responsible for the direct violence, as practiced in international tribunals, would hardly serve the purpose of bringing justice to the victims. It would have no effect on the patronage system that will remain in place, even if an individual author of a criminal act is removed.¹³⁷ In fact, such a system would “[only continue its] widespread authorization of [actions] of violence[.]”¹³⁸

There is indeed a strong argument in the claim that the acts committed by virtue of the patronage system in Cambodia may be considered crimes against humanity as they consist of a widespread and/or systematic attack on the civilian population. However, what is more important to highlight for the purpose of our current discourse is the fact that the individual behavior of the Cambodian perpetrators can be better understood in reference to the patronage system which breeds criminality. In order to address this situation,

137. See Nollkaemper, *supra* note 49, at 319.

138. *Id.*

mere application of the individualistic approach to criminal responsibility will be insufficient, thus opening doors for the possible application of CCR.

B. Issues in the Application of Collective Criminal Responsibility

Unfortunately, the concept of CCR and even collective responsibility, the more general term, is still considered by some scholars as primitive.¹³⁹ In fact, it is argued that it is unacceptable and would be a “step back to the primitive state from which the international order has just liberated itself.”¹⁴⁰ These comments fail to take into consideration that in practice, collective responsibility continues to be relevant, albeit not within a criminal law setting. For example, the Security Council imposed economic sanctions on Iraq, a measure in the form of exalting collective responsibility.¹⁴¹ Domestic laws, such as the Alien Torts Claims Act in the United States, permit the imposition of damages for tort violations committed by collective actors such as corporations.¹⁴² Outside the realm of litigation, collective responsibility finds significance in other forms of justice such as memorialization, commemoration, and reparation.¹⁴³ Moreover, in some instances, collective responsibility may be the only justified redress as when a substantial part of the group has been involved collectively in the commission of the criminal act, such as the case of Rwanda during the genocide.¹⁴⁴ At most, shying away from the concept of CCR or collective responsibility in general only serves to shield States whose collective structure has become instruments of criminal terror from being held responsible for crimes and mass atrocities committed.¹⁴⁵

The main criticism of CCR lies on the fact that its proponents fail to describe the nature of this term with sufficient clarity. At this juncture, two points will be highlighted. *First*, some scholars would equate CCR with collective guilt which makes a person criminally liable merely because of his membership in a collectivity — for example, making all Germans, even those born after the Second World War, guilty for the holocaust. CCR is

139. See Nollkaemper, *supra* note 49, at 321.

140. *Id.* at 323.

141. Drumbl, *Accountability for System Criminality*, *supra* note 43, at 381.

142. *Id.* at 376 (citing Alien Tort Statute, 28 U.S.C. § 1350 (2004) (U.S.)).

143. Drumbl, *Accountability for System Criminality*, *supra* note 43, at 377.

144. Nollkaemper, *supra* note 49, at 324.

145. Laurel Fletcher, *A Wolf in Sheep's Clothing? Transitional Justice and the Effacement of State Accountability for International Crimes*, 39 *FORDHAM INT'L L.J.* 447, 451 (2016).

not, as Drumbl argues, “tantamount to collective punishment or collective guilt[.]”¹⁴⁶ *Second*, CCR is often seen as an alternative to individual criminal responsibility (ICR), which it is not. As commented by Vogel, CCR is not an alternative but, rather, an addition to individual responsibility.¹⁴⁷ In fact, there is no single system in the world which excludes punishing an individual when collective responsibility is applied.¹⁴⁸ If these points are taken into consideration when discussing CCR, the fundamentalist criticisms to this concept may no longer be as potent as they seem to be. In any case, criticisms on the concept of CCR do not object to the recognition under ICL that mass atrocities can be committed by a group or collective entity.

C. Reconciling Collective Criminal Responsibility and International Criminal Responsibility in the Cambodian Patronage System

Given that CCR and ICR do not necessarily cancel each other out, the next question would be: how can these two concepts be reconciled? Vogel and Marxen’s theories may shed some light. According to Vogel, CCR “is triggered *ratione materiae* by acting on behalf or in [favor] of the collective entity.”¹⁴⁹ On the other hand, Klaus Marxen, who argued for a systemic model as a legal response to systemic injustice, theorized that there exists “a structure of imputation that consists of three elements and two connecting links[.]”¹⁵⁰ The first element consists of a specific behavior or “concrete conduct” of a person within a system.¹⁵¹ The second element consists of the system itself or the “supra-individual criminal context” — the criminal group, structure, or organization — which links the first and the third elements.¹⁵² The third element consists of an offense that was committed in the system or the “criminal result[.]”¹⁵³ Marxen’s theory makes “a person who knowingly and willingly contributes to the functioning of the system ... responsible for the offense even if he or she does not [] participate in the

146. Drumbl, *Accountability for System Criminality*, *supra* note 43, at 381.

147. Vogel, *supra* note 42, at 165.

148. *Id.*

149. *Id.* at 166.

150. KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW: VOLUME I: FOUNDATIONS AND GENERAL PART 85 (2013) (citing Klaus Marxen, Beteiligung, in AUFGEKLÄRTE KRIMINALPOLITIK ODER KAMPF GEGEN DAS BÖSE?, *supra* note 46, at 231–32).

151. AMBOS, *supra* note 150, at 85.

152. *Id.*

153. *Id.*

commission of the [crime, as long as such] [offense] can be foreseen in the framework of the system.”¹⁵⁴ In other words, while there still exists criminal responsibility, Marxen’s theory does away with the individualistic causation requirement and, instead, highlights the collective context.¹⁵⁵

Under Marxen’s theory, it can be observed that the patronage system in Cambodia satisfies all the elements: *first*, there exists a behavior of patrons who view self-enrichment and maintenance of power as justified; *second*, there exists the system itself, wherein patrons, in order to amass wealth and maintain power, solicit the support of followers through promises of positions and protection; and *third*, the offense — murder, forced eviction, illegal detention, and other harms — are committed in the system in order to maintain it. With these elements present, any person, including the patron and the clients, who “knowingly and willingly contributes to the functioning of the system”¹⁵⁶ should be held criminally responsible for the offense even if he or she does not participate in the commission of the crime since the act “can be foreseen in the framework of the system.”¹⁵⁷ In addition, the fear that any person shall be made criminally liable by mere membership to the collective entity is abated. Under Marxen’s theory, such persons can be held criminally responsible for a crime only if they willingly or knowingly contributed to the functioning of the system. Hence, a mere bystander is not covered.

D. Collective Criminal Responsibility in the Practice of International Tribunals

While scholars would insist that CCR is contrary to the notion of ICR (and, therefore, pointing to an assumption that international criminal tribunals have not utilized the previous term), some jurisprudence and practices would prove otherwise.

As mentioned above, the Nuremberg Tribunal highlighted the individual approach to criminal responsibility. Yet, in the jurisprudence of the Tribunal, the prosecution charged six German organizations on the basis of their structure, policies, and role in planning and carrying out the crimes stated in the indictment.¹⁵⁸ In view of the declaration that these

154. Vogel, *supra* note 42, at 158.

155. *Id.*

156. *Id.*

157. *Id.*

158. IMT, Nuremberg Trial Proceedings Vol. 1, Indictment: Appendix B, *available at* <http://avalon.law.yale.edu/imt/countb.asp> (last accessed Aug. 15, 2020).

organizations were criminal, at least 24 individuals were likewise indicted on the basis of their roles in the organization at the time the crimes were committed.¹⁵⁹ In other words, the prosecution relied on the existence of a CCR on the part of the organization indicted in order to establish ICR. However, the term CCR was not utilized. Instead, the Tribunal made use of terms such as “common plan or conspiracy” to create a basis for liability.¹⁶⁰ It is likewise worthwhile to note that under Article 9 of the Nuremberg Charter, the Tribunal may declare a group or organization as a criminal organization, giving basis to bring an individual who is a member of such entity to trial.¹⁶¹ This Article resembles Marxen’s theory where those who had a hand in sustaining or functioning of a criminal enterprise shall be held criminally responsible.

Under the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR), the Prosecutors made use of the principle of command responsibility and joint criminal enterprise (JCE). In *The Prosecutor v. Duško Tadić*,¹⁶² the ICTY Appeals Chamber described JCE by stating that ICR in fact “embraces actions perpetrated by [a] collectivity of persons in furtherance of a common [] design.”¹⁶³ A study conducted by Jenia Turner, a Professor of Criminal Law, showed that 64% of indictments in the ICTY relied on JCE, proving its centrality in the Court’s jurisprudence.¹⁶⁴ The notion of JCE reflects the idea that in case of collective criminality of several persons, all persons in the common plan may be held criminally liable for the perpetration of the criminal act, without the need for materially participating in said crime.¹⁶⁵ What is important to note at this juncture is the fact that JCE goes beyond

159. *Id.*

160. Charter of the International Military Tribunal art. 6, *adopted* Aug. 8, 1945, 82 U.N.T.S 279.

161. *Id.* art. 9.

162. *Prosecutor v. Dusko Tadić*, Case No. ICTY-IT-94-1-A, Judgment (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999).

163. *Id.* ¶ 193.

164. Jenia Iontcheva Turner, *Defense Perspectives on Law and Politics in International Criminal Trials*, 48 VIRGINIA J. INT’L L. 529, 561 (2008) (citing Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 107-08 (2005)).

165. Antonio Cassese, *The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise*, 5 J. INT’L. CRIM. JUST. 109, 111 (2007).

ICR and banks on the existence of collectivities as basis for prosecuting an individual.¹⁶⁶

V. FINDINGS AND CONCLUSION

This Article sought to contribute to the discourse on criminal responsibility vis-à-vis SV in the context of the patronage system in Cambodia. It started with the premise that the main notion of criminal responsibility is individualistic and addresses only direct harms. Considering these notions, the concept of criminal responsibility may seem inapplicable to SV, which is assumed to lead only to indirect harms and usually lacks an individual perpetrator.

In the case study of the patronage system in Cambodia, it was shown that SV can, in fact, permeate into direct harms and, as such, should be addressed within the concept of criminal responsibility. However, applying the individualistic approach on criminal responsibility would only impose liability on certain individuals, who are usually those who perpetrate the direct violence, but not those who perpetuate or contribute to the functioning of the system that made the commission of such crimes possible.

Taking into account how the patronage system works, it can be considered as a classic example of a system criminality wherein the collective entity orders crimes to be committed, encourages the commitment, or tolerates the commission of such crime.¹⁶⁷ As such, the individualistic approach alone may not be the best course in ensuring that justice is served. As suggested by Nollkaemper, the CCR may provide a suitable redress to system criminality, and, in this case, to the patronage system.

Unfortunately, due to fears that this concept would overly expand the net of criminal prosecution (as it is often associated with collective guilt and collective sanctions), scholars often shy away from CCR in the criminal law discourse. However, CCR is not an alternative to ICR but, rather, a supplement in case the latter cannot be established.¹⁶⁸ Likewise, while the concept of CCR has not been implicitly applied by international tribunals, jurisprudence and statutes would show the reliance on Collective Criminality of entities as a basis for prosecuting certain individuals who are members of such groups.

166. Nollkaemper, *supra* note 49, at 329.

167. Rölöing, *supra* note 47, at 138.

168. Vogel, *supra* note 42, at 165.

While CCR may be applied in the case of structural violence in the context of the patronage system, there still lie questions on how it can be enforced or triggered. Vogel and Marxen's theories shed some light on the possibility of reconciling the concept of ICR and CCR. Applying Marxen's theory, three elements in the context of Cambodia are identified: the existence of a behavior of patrons, the patronage system itself, and the crime or offense committed in furtherance of the system. The existence of system criminality in this case (the patronage system), which links elements one and three, may give rise to criminal responsibility of those individuals who contribute willingly and knowingly in the functioning of such a system. Clearly, both CCR and ICR can be applied hand in hand in attributing criminal responsibility.

This Article aimed to answer the question on whether criminal responsibility can, in certain instances, arise in the context of SV. As shown above, this is at least true in the context of a patronage system (which permeates into direct harms, and where criminal responsibility can actually arise). This criminal responsibility goes beyond the current notion in ICL which uses the individualistic approach. However, as shown above, CCR and ICR should be seen as complementing each other, rather than being opposing alternatives. This flexible notion of criminal responsibility allows the prosecution of persons who are part of collective entities which order or tolerate the commission of crimes.

This Article does not conclude that CCR is always applicable to SV. Neither is it argued that all SV should be unconditionally addressed by criminal prosecution. At the same time, this Article does not argue that ICR should be abandoned in favor of CCR. Rather, ICR and CCR should be utilized hand in hand in order to avoid impunity.

That being said, this Article does not exhaust everything that needs to be said about CCR or ICR vis-à-vis structural violence. It merely provides a road map. Neither is it assumed that Marxen and Vogel's theories are impregnable. But, at the very least, they provide a guide on how CCR and ICR can be reconciled. Moreover, it is not argued that imposing criminal responsibility is the best and only means for addressing the legacy of structural violence. Rather, this Article provides a single path out of numerous and different roads that can be taken.

Finally, more than an intellectual exercise, this Article aimed to contribute in the prevention of the application of a hierarchy of harms and double standards which necessarily prevents us from developing mechanisms that ensure justice, not only for the direct violations but also for the indirect violations that prompted the atrocities. When dealing with violence and the

question of who should be responsible for such, researchers and practitioners should be vigilant and examine the assumptions that they employ, as these notions have a great impact on how we develop intervention measures that attempt to address the legacy of past atrocities.