

especially those related to the application of rules of general international law to these issues.¹⁷ This notwithstanding, the book offers a thought-provoking contribution to the literature on international investment law. It provides a rich, novel and interesting study of how investor misconduct ought to factor into the analysis of state responsibility in investor–state arbitration claims. Jarrett offers rules that could conceivably form a basis for future debate and reforms, underpinned by a detailed discussion that grapples with the structure, content and implications of such rules for investment claims. The wide-ranging discussion will appeal to those engaged with investment law, but also more broadly to international lawyers grappling with issues of causation in other contexts. Jarrett adds depth to existing analyses of investor misconduct and delivers on his intention of removing the guesswork associated with apportioning responsibility in cases of investor misconduct, to transform ‘the concepts of contributory fault and investor misconduct from a state of primitivism to one of development’ (at 164).

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Maria Elander. ***Figuring Victims in International Criminal Justice: The Case of the Khmer Rouge Tribunal***. Abingdon: Routledge, 2018. Pp. 195. £31.19. ISBN: 9781138242302

1 Introduction

Showcased at Choeung Ek – the so-called ‘killing fields’ outside of Cambodia’s capital Phnom Penh – are rows upon rows of human skulls. The skulls are quite literally showcased: enclosed in glass cases, thousands of mottled, milky-white to brown-coloured bone pieces are displayed before the visitors to this key site of the Cambodian genocide. The tooth fragments of one skull rest on a cranium beneath. Equally distressing are the photographs of prisoners, most of them tortured and executed, hanging on the walls of the famous S-21 Prison in Cambodia’s capital Phnom Penh. The mug shots of over a hundred former prisoners, taken when they were first brought into the complex, can be viewed in what is now the Tuol Sleng Genocide Museum. These sites of victimhood are major tourist destinations. Choeung Ek and Tuol Sleng rank globally at number five on a ‘dark tourism’ website, where destinations

¹⁷ Especially, for example, on the role of investors as treaty parties or third-party beneficiaries/obligees under the law of treaties (at 112–113); on the distinction between the concepts of ‘liability’ and ‘responsibility’; and on the distinction between principles of attribution for internationally wrongful conduct, as opposed to those applicable to the attribution or imputation of knowledge and conduct in other circumstances (e.g. at 103, 132, 147).

are ordered by the ‘degree of darkness/significance’.¹ Tourism Cambodia, seemingly embracing the spectacle of horror, describes the Khmer Rouge regime as ‘devouring its own children’.² On TripAdvisor, an online travel platform, tourists can book a tour of both destinations, starting from £19.73 for two adults with ‘a professional English speaking tour guide’ who collects them from their hotel.³

Maria Elander’s book *Figuring Victims in International Criminal Justice: The Case of the Khmer Rouge Tribunal* is a far more sensitive, less brutish, less voyeuristic account of victimhood. It delicately and lyrically sets out the way in which the victim-subject is brought into being. With the increased reliance on victims’ stories to provide legitimacy for the field of international criminal law, and a larger ‘turn to victims’ in neighbouring fields of transitional justice, peacebuilding and criminology, this book is a welcome addition to a growing literature concerning the divide between ‘real’ victims and ‘constructed’ victims. Broadly speaking, this literature addresses questions around how victimhood is legally, politically, culturally and aesthetically configured, depending on the social context. Elander’s book not only adds to this literature, reminding us that the legal platform is a platform – rather than a *superior* platform – for victims to recount their stories (at 24),⁴ it also pushes the discussion into important new directions. The more brutal depictions of victimhood, however, acutely remind us that images of victimhood often stand *in competition* with one another, and that some victim images are deemed to be more competitive than others. Elander’s book gestures towards this competition (at 71);⁵ however, it could have gone further in explaining the context in which one victim figure is prioritized over another. A critique of political economy that foregrounds competition is essential to coming to grips with a central aspect, rather neglected in the book, namely the racialized depictions of victimhood. The relevance of analytically centring race in discussions of victimhood has become particularly topical during the coronavirus pandemic. Elander’s book, of course, predates the outbreak of the epidemic, but the ‘figuring’ of victims around racialized notions of ‘deserving’ victims demonstrates the continued urgency of critical engagement with the constructions of victimhood.

2 Focus on Cambodia

As much of the focus of international criminal law remains on the International Criminal Court (ICC) in The Hague, it is important to keep in mind the perspectives of other tribunals and geographic regions. Elander’s focus on the Extraordinary

¹ ‘Top 10 Dark Tourism Sites by Degree of Darkness/Significance’, *Dark-Tourism*, available at <https://bit.ly/37TTQCS> (last visited 26 March 2020).

² ‘Tuol Sleng Museum S21’, *Tourism Cambodia*, available at <https://bit.ly/33qnlm5> (last visited 26 March 2020).

³ ‘The Killing Field and Tuol Sleng Genocide Museum (S21) Tour’, *TripAdvisor*, available at <https://bit.ly/3o4FXzV> (last visited 26 March 2020).

⁴ Here, Elander relies on Dembour and Haslam, ‘Silencing Witnesses? Victim Witnesses at War Crimes Trials’, 15 *European Journal of International Law* (2004) 151, 153.

⁵ With reference to Martti Koskeniemi’s structural bias of law in *From Apology to Utopia: The Structure of International Argument* (2005).

Chambers in the Courts of Cambodia (ECCC) – or the Khmer Rouge Tribunal – exposes important tensions and complexities in instances where the ICC’s observers might be tempted into simplifications. The ECCC was established as a compromise between the United Nations and the government of Cambodia. The ‘hybrid’ nature of the ECCC is a result of a combination of the relevant laws and procedures, and is reflected in staffing decisions. Keen to prove to the Cambodian population that the Khmer Rouge regime had been overcome, President Hun Sen was in favour of establishing a tribunal, but wanted to retain control over who would be subject to legal scrutiny and who would be in charge of it (not least because several suspects had since defected to his government). Meanwhile, the United Nations had little appetite for drawing attention to its own politically messy, and over a decade-long, recognition of the Khmer Rouge as the Cambodian representatives to the General Assembly. Meanwhile, the United States, which supported the establishment of the ECCC, and was instrumental in gathering the documentation of the genocide, had no desire to delve too closely into the abominable US bombing of Cambodia during the Vietnam War.⁶ As a hybrid tribunal headquartered in Cambodia rather than in The Hague, the ECCC had to negotiate *in situ* the struggle between the political and the legal, the ‘local’ and the ‘global’, the national and the international, the colonial and the anti-colonial.

A simplified, comfortable narrative written from the perspective of liberal internationalism would say that the tribunal’s struggle was one of law attempting to overcome politics. Law would be the neutral force to conquer the partisanship of politicized societies in transition. This narrative was bolstered by the international co-investigating Judge Kasper-Ansermet (a Swiss national) dramatically resigning from the bench in 2012, claiming he could no longer ‘properly and freely perform his duties’.⁷ Similarly, the victims could be described as requiring law as a means to find a voice and a forum outside of the distortions of local or national politics. Elander, however, is not tempted into these simplifications. In its refusal to submit to the comforting language of heroic legal internationalism, her work corresponds to a growing critical tradition within international criminal law and transitional justice. The tradition highlights, among other issues, the gendered language of masculine interventionism;⁸ the orientalizing faculties of distinguishing between the local and the global;⁹ and the protection of market interests through the institutions and discipline of international criminal law.¹⁰ Elander’s distinct contribution consists in complicating the figure of the victim,

⁶ According to C. Hitchens, *The Trial of Henry Kissinger* (2001), the United States dropped a higher tonnage of bombs onto Cambodia than the total of all allied bombs used in the Second World War.

⁷ ECCC, International Reserve Co-Investigating Judge, Press Release (19 March 2012), available at <https://bit.ly/3mkkCC6> (discussed in Elander at 36–37).

⁸ See, e.g., Otomo, ‘Of Mimicry and Madness: Speculations on the State’, 28 *Australian Feminist Law Journal* (2008) 53; Campbell, ‘Gender Justice Beyond the Tribunals: From Criminal Accountability to Transformative Justice’, 110 *American Journal International Law Unbound* (2016) 227.

⁹ See, e.g., Nesiha, ‘Local Ownership of Global Governance’, 14 *Journal of International Criminal Justice (JICJ)* (2016) 985; Burgis-Kasthala, ‘Scholarship as Dialogue? TWAIL and the Politics of Methodology’, 14 *JICJ* (2016) 921.

¹⁰ Krever, ‘International Criminal Law: An Ideology Critique’, 26 *Leiden Journal of International Law* (2013) 701; C. Schwöbel-Patel, *Marketing Global Justice: The Political Economy of International Criminal Law* (2021).

departing from the crude description of victims as ‘victims of culture’. Her interest lies in how victims are discursively constructed by all participants through laws, courtroom practices and in the academic commentary.

3 The Changeability of Victim Images?

Figuring Victims foregrounds the discursive practices of the construction of victims – what Elander calls ‘victiming’ (at 11).¹¹ Subjectivity is, according to Elander, ‘inaugurated through language’ through the act of naming (at 9). Crucial to Elander’s methodology is that she does not qualify individuals as victims, but rather studies invocations of victimhood. She studies the modes through which a discursive narrowing takes place, generating exclusions that are ‘by no means accidental’ (at 54).¹² Law and its practices distinguish between those recognized *under law* as victims, and those who are ‘*a*-legal, or non-lawful, for the purposes of that particular institution’ (at 39). Although Elander is also interested in photographs of victims – specifically, those exhibited at the Tuol Sleng Genocide Museum – this is mostly in relation to victim invocations at the ECCC. The construction of victimhood that Elander observes is necessarily unstable: victim figures are changeable and often conflicting. ‘While victims appear centre stage, there is nothing self-evident about the particular ways in which they do so’ (at 185). Victimhood is therefore not *pre*-figured; ‘victiming’ is relational. In Elander’s words: ‘[T]hese figurations of the victim never settle down but are constitutively plural’ (at 185). In chapter 3, Elander uses forced marriage under the Khmer regime to exemplify the ‘relational’ framing of victimhood. Specifically, she looks at how forced marriages were ‘translated’ into crime (at 78–79). She displays ‘manifold victim representations’ that emerge from the translation of the marriages into international criminal law. ‘[T]he victim’, Elander restates her central point, ‘is constitutively multiple and multifaceted’ (at 101). At the same time, the multifaceted suffering is constrained through the demand of international criminal justice for easily recognizable harms – in this case, sexual violence (at 100). To be registered by the law, Elander notes, statements of suffering must also be *spoken* (at 141). Perhaps this is why Elander is largely agnostic, or at least ambivalent, about the accumulation of imagery of mass atrocity, and of its exhibition and consumption – so long as the authenticity of the images is not attributed to Western sources (at 169). Photographs provoke: they are part of an ‘affective encounter’ (at 182) with a ‘potential for opening up a space for connections between viewers’ (at 173).

Elander is correct in focusing on the relational functions of invocations of victimhood. Multiple individuals, groups and organizations construct victimhood. When we speak of multiple victims, victimhood becomes increasingly abstract. This is not only

¹¹ Building on Judith Butler’s ‘girling’ as the corporeally enacted femininity which comes with the naming of the ‘girl’ in *Bodies That Matter: On the Discursive Limits of Sex* (1993), at 7.

¹² Building on Kendall and Nouwen’s important work, ‘Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood’, 76 *Law and Contemporary Problems* (2014) 235.

true of mass atrocities, but can also be seen in the global pandemic caused by the coronavirus (COVID-19). As fatality numbers rise, a shift from individual victims to masses of victims takes place. This includes not only those suffering from the virus; but it also includes those who have lost their jobs due to the abrupt halting of entire industries, those who have other health conditions but cannot be treated and those who are vulnerable in their own homes. Multiple victim configurations emerge and shift. But, with this analogy, we also see something about 'victimizing' that is, in contrast to Elander's theorization of instability, particularly *stable*, even predictable. Although the virus does not discriminate (any-body can become infected), the structures within which it targets its victims decidedly do. Healthcare systems, like criminal justice systems, are sites of inequality. In the neoliberal order, profit takes priority over public health, creating greater inequalities in access to healthcare, and thus to health. This is a divide between the Global North and the Global South— as much a geographic marker as it is as a social marker. Across the neoliberal order, where race has been socially constructed as a dividing line between who is deserving of wealth and health, racialized women and men are far more vulnerable to becoming victims. And yet, as with mass atrocity crimes, the figuring of victimhood differs between white and non-white victims. The recurring patterns of victimhood imply a structural prioritization of victims – and therefore a discursive and visual prioritization – that supports the heroism of white interventionism. Whether in relation to mass atrocity crimes or a pandemic, underlying exploitative chains of (racial) capitalism are hidden from victim narratives.

The dominant narrative of the coronavirus is that the Chinese are victims of their own making, or simply perpetrators spreading the disease; meanwhile, Western victims are the 'innocent' victims. The most extreme version of this is the idea of a 'foreign virus' which has caught the innocent West off guard.¹³ In the context of the Cambodian genocide, the dominant narrative is that Cambodians were victims of their own making (i.e. victims of their own 'backwardness'). This invisibilizes victimhood created through the structural inequalities of colonialism; through the treatment of Cambodian lives as disposable during the Vietnam war; through structural adjustment programmes; and through contemporary land grabs. Relying on a seminal work by Anne Orford, Elander correctly observes that the international is generally absent from scenes of violence.¹⁴ The 'international' is the site of heroism, rather than a site of structural inequality. So, the question that needs to be most urgently attended to is not the question of the unsettled nature of victimhood, or its plurality, but rather the question of what forms of *predictability* and *stability* absence construes for victimhood. Which patterns do victim stories tend to follow? Whose voices tend to be elevated? Although Elander discusses the 'a-historicizing' of events as framing victimhood (at 59), a political economy perspective could have pushed the enquiry further.

¹³ LeBlanc, "Trump Calls Coronavirus a "Foreign Virus" in Oval Office Address", CNN (12 March 2020), available at <https://cnn.it/3fMfgNu>.

¹⁴ A. Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (2003), ch. 3.

One possible way in which the analysis of figurations of victimhood could have been productively extended through a political economy critique is in regard to US funding of internationalized criminal justice in Cambodia. As Elander notes, US Congress passed the so-called Cambodian Genocide Justice Act in 1994, which funded the Documentation Centre of Cambodia (hereinafter ‘DC Cam’) through Yale University (at 41).¹⁵ Although DC Cam remained independent of the ECCC, it became the principal body to provide evidence for the tribunal. What bearing, one might ask, do these patterns – and expectations – of funding have on the constructions of victimhood? This question should not only be posed in relation to the discursive perspective of ‘who is speaking?’, but also in relation to the structural perspective of ‘who is heard?’. The ‘who is heard?’ question allows us to see more clearly who benefits from the framing of victimhood in a particular way.

Elander is right to point out that the figuring of victims is about more than inclusion and exclusion; it is also about the very discipline of international criminal justice. Where I depart from Elander is in her statement that this is reflective of international criminal justice as a ‘citational network’ (at 14). International criminal justice is a discipline of material relations that determine whose representational voices are amplified and whose voices are marginalized or silenced. Thus, despite the changeability of the figure of the victim, there are also elements of the victim that are *predictable* and largely immutable. This includes the construction of non-white victims as victims of ‘their own culture’ and white victims as victims of ‘another culture’; of non-white victims as unable to fully grasp the extent of their suffering, requiring white agents to explain it to them; the voyeurism of non-white bodies and greater sensitivity towards privacy of white victims; and the construction of non-white victims as dependent and white victims as resilient.

4 Conclusion: The Agency of Victims

The key contribution of *Figuring Victims* resides most immediately in drawing attention to ‘[t]he significance of language’ in the construction of the figure of victim (at 33). Elander reminds us of the power and manipulability of words. Linguistic-legal processes of ‘victiming’ must be parsed and foregrounded for exclusions of victimhood to become visible. Moreover, *Figuring Victims* provides a tentative but distinct message of hope: ‘[T]he victim, brought into being through language, also has a capacity to challenge the discursive practices that constitute it as a subject and thereby to alter the practices of ICJ [international criminal justice]’ (at 7). In combination with an awareness of the stabilizing structural biases of speech and listening (drawn from a critique of political economy), one might imagine the amplification of victim voices that challenge the discursive practices. Such amplification could provide a powerful tactic for a *re*-figuring of victimhood. As constructions of victimhood continue to

¹⁵ Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, 108 Stat. 486, Public Law 103–236 (30 April 1994); 22 USC 2656, §§ 571–574.

determine the distribution of resources – whether in regard to mass atrocity crimes or pandemics – recognizing the agency of victims is key for those under-represented on account of their race, class or gender. The sensitivity with which Elander’s excellent book approaches the topic of victimhood – in stark opposition to the voyeurism of competing victimhoods – carries a potential for significant political power.

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1 Introduction

The International Criminal Court (ICC) has famously encountered sustained push-back over the past several years from governments, in particular from African states. This has been accompanied by a growing literature seeking to make sense of these developments, often within the context of a (so-called) backlash against international tribunals and institutions more generally.¹ Set against this backdrop, Kamari Maxine Clarke’s new volume provides a rich and thought-provoking perspective on the African tribulations of the ICC.

¹ See, e.g., Alter, Gathii and Helfer, ‘Backlash against International Courts in West, East and Southern Africa: Causes and Consequences’, 27 *European Journal of International Law (EJIL)* (2016) 293; Caron and Shirlow, ‘Dissecting Backlash: The Unarticulated Causes of Backlash and Its Unintended Consequences’, in A. Follesdal and G. Ulfstein (eds), *The Judicialization of International Law: A Mixed Blessing?* (2018) 159; Contesse, ‘Judicial Backlash in Inter-American Human Rights Law?’, *I-CONnect* (blog) (2 March 2017), available at <https://bit.ly/3gsPzBU>; Helfer and Showalter, ‘Opposing International Justice: Kenya’s Integrated Backlash Strategy against the ICC’, 17 *International Criminal Law Review* (2017) 1; Krisch, ‘The Backlash against International Courts’, *Verfassungsblog* (16 December 2014), available at <https://bit.ly/3oFr3QK>; Lovat, ‘International Criminal Tribunal Backlash’, in K. J. Heller et al. (eds), *Oxford Handbook of International Criminal Law* (2020) 601; Rask Madsen, Cebulak and Wiebusch, ‘Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts’, 14 *International Journal of Law in Context (Int’l J. L. in Context)* (2018) 197; Sandholtz, Bei and Caldwell, ‘Backlash and International Human Rights Courts’, in A. Brysk and M. Stohl (eds), *Contracting Human Rights* (2018) 159; Soley and Steininger, ‘Parting Ways or Lashing Back? Withdrawals, Backlash and the Inter-American Court of Human Rights’, 14 *Int’l J. L. in Context* (2018) 237; Voeten, ‘Populism and Backlashes against International Courts’, *Perspectives on Politics* (2019) 1; Vinjamuri, ‘Human Rights Backlash’, in S. Hopgood, J. Snyder and L. Vinjamuri (eds), *Human Rights Futures* (2017) 114.