

OUT OF TIME? EXAMINING THE LOW NUMBER OF PROSECUTIONS AFTER  
THE CAMBODIAN GENOCIDE

by

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ABSTRACT OF THE DISSERTATION  
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Genocide is the most horrific crime in human existence. While there have been attempts to bring those who have committed genocide to justice, they have not always been successful. While this crime occurred over fifty years ago in Cambodia, only a few perpetrators were ever tried in a court of law, and of those only three were convicted. This thesis hypothesizes that there are multiple factors that played into this, including the geopolitics of the Cold War, the legal definitions of genocide, and Cambodia's own political system. This thesis explores these factors through a historical lens, concluding that while there are several reasons for the low number of prosecutions, none of them can be viewed in a vacuum. The factors intersect with one another and must be viewed as a complex whole. By showing the complexities of topics such as the Cambodian genocide, it is hoped that future trials will not be met with the same lack of appropriate prosecutions, and that the crime of genocide will no longer be able to occur.

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## 1. Introduction:

With the rise and fall of civilizations, genocide remains a constant throughout history. Although the terminology is recent, its occurrence is not. One of the first recorded instances in which genocide occurred was in 146 BCE during the Third Punic War by the Roman Republic against its enemy, Carthage. Over 150,000 Carthaginians were killed. Genocide is not a single act, but a calculated series of events that lead to the extermination of a group through varying means. Perpetrators are not limited to a nation's higher-most officials, as genocide can also turn neighbor against neighbor, transforming everyday citizens into perpetrators.

Although genocide is one of the most horrific crimes imaginable, there exist few ways to address it. The 1948 Convention on the Prevention and Punishment of Genocide provided a narrow legal definition of genocide, allowing many other types of genocide to be left to the wayside. Even if harmed groups were to fall under the legal definition of genocide, there is still the arduous task of proving that the perpetrators were aware of what they were doing, something that can be difficult due to the perpetrator's propensity to attempt to destroy evidence of their crimes. If the perpetrators are brought to trial, there is still the issue that the tribunal may fail to encourage reconciliation in the country, or allow the perpetrators to go free. The case of Cambodia is particularly interesting in that when compared to other genocides of the 20<sup>th</sup> century (East Timor, Rwanda, Yugoslavia, etc.) there are so few trials, let alone prosecutions.

In 1975, the Khmer Rouge regime rose to power in Cambodia, attempting to remodel the country in their own ideology based on Marxist beliefs. When the country

was liberated by Vietnam in 1979, 20% of Cambodia's population (1.5-2 million people) were killed by the Khmer Rouge through a variety of means, among them, mass starvation, forced labor, and torture & execution centers. Despite these figures, the majority of those within the Khmer Rouge have eluded prosecution; only three have been prosecuted to this day. During the proceedings, two officials died due to old age. When looking at Cambodia, it must be reiterated that with the most heinous of crimes committed, more than forty years later, only three have been convicted of committing a crime. When viewed alongside other genocides, the variance between prosecutions is even more clear. The Rwandan and Yugoslav genocides near the end of the 20th century saw 61 and 83 convictions respectively. Why have the Khmer Rouge perpetrators not been brought to justice? The issue surrounding this is two-fold, the first is the amount of time lapsed between the genocide and the tribunal, and the second is that more recent genocides have achieved a higher rate of justice for their victims than those of the Cambodian genocide. To this end, it remains to be asked why so few prosecutions have occurred in the time that has passed.

The term genocide has been debated since it was coined by Raphael Lemkin in 1944. Due to other country's own crimes, certain groups, such as political opponents, were deemed to not fall under the definition of genocide. Even so, a key issue in trying others for genocide is that there must be a way to prove that the perpetrators were aware of the crime they were committing. In the case of Cambodia, political opponents could not be considered as part of the genocide given the limited definition of the term. Despite senior-most members of the Khmer Rouge being tried for crimes against humanity, there exists a stark difference between those convicted following the Holocaust, and those

following the Cambodian Genocide. The lack of action following less stringent guidelines may be seen as indicative of the second reason for such a small number of prosecutions—inaction by the international community.

During the Khmer Rouge's time in power, it received assistance from the People's Republic of China. Following the Khmer Rouge's ousting, it then received further aid from the United States and other western countries, all of whom condemned Vietnam's invasion of Cambodia. Isolating Vietnam as well as the newly installed government in Cambodia, dialogue regarding the genocide was quashed in favor of condemnation; the international community preferred to condemn Vietnam's invasion of Cambodia, rather than acknowledge the atrocities that had taken place within Cambodia. Even when a trial was attempted by Vietnam (in absence of Pol Pot and Ieng Sary, the two senior-most officials in the Khmer Rouge) it was viewed as a farce by the rest of the world. During this time, the international community, save for the Soviet Union and other Eastern bloc countries, attempted to stifle both international aid as well as assistance via non-governmental organizations. This would continue primarily backed by the United States and China into the 1990s after which the actions in Cambodia were declared genocide and the Khmer Rouge's seat subsequently revoked from the United Nations. Even following such actions however, action by the United Nations was slow. Rather than conduct a tribunal system similar to that of Rwanda and Yugoslavia which saw success, the United Nations attempted a hybrid one to placate and appease the Cambodian government. Since Vietnam's invasion, the Cambodian government retained many former lower and mid-level members of the Khmer Rouge. Finally, the current

Cambodian administration's policy of stalling current trials and avoiding future ones allows most of the perpetrators to still be deprived of justice.

Cambodia is currently lead by Prime Minister Hun Sen, in power since 1985. In 1993, Sen served alongside a second prime minister, Norodom Ranariddh, who was ousted in 1997 leaving Sen as the sole leader of Cambodia. Throughout his time in power, Sen has been reluctant to pursue further trials, instead declaring that a civil war would occur, and that the Cambodian people would rather forget what transpired. Even when his claims were dismissed, Sen and other Cambodian officials have refused to carry out warrants for the arrest of those accused, and outright refused to cooperate with United Nations officials.

The question that this thesis sets out to answer is why were so few prosecuted after the Cambodian genocide? To answer this question, it will be argued that one cannot look at a single factor to explain why the Cambodian genocide had so few prosecutions. Rather, there is an intersectionality to all these aspects, none of them exist in a vacuum. For example, Cambodia cannot be examined on its own when so much of its past has been shaped by colonial powers, and then by others in the global community. Throughout this thesis, I will elaborate on this in four components. In the third chapter, I will discuss the history of Cambodia and how it allowed the Khmer Rouge to come to power. Historical context is important in understanding not only Cambodia's colonial past, but also how Cambodia's future was shaped as a result of it. Following this, in the fourth chapter I will discuss the term "genocide," both how it was coined, as well as how its societal definition differs from its legal definition. The nuances of this term will be examined alongside the tribunal models used to try genocide and how both were utilized



in the case of Cambodia. It is important to understand not only how the term is legally used, but also how tribunals may differ in their goals/methods. The fifth chapter will examine the international community and its interactions with Cambodia. Widening the global scope, countries from the United States of America, to the Soviet Union, to the People's Republic of China will be examined. Each country has interacted differently with Cambodia, during its time under the Khmer Rouge, as well as after, sometimes with changing motives. These changing objectives prevented Cambodia from understanding what had transpired, as well as prevented it from going forward. Lastly, the sixth chapter examines present day Cambodia and its domestic politics. Both the government and the Cambodian tribunal will be examined, allowing the range of domestic corruption, and difficulties plaguing the court system to be fully understood.

## 2. Relevant Literature and Methodology:

Several debates surround the Cambodian Genocide. The first debate is about the definition of genocide and whether its narrow wording has prevented perpetrators from being prosecuted. Genocide is defined as the destruction of a group based on racial, ethical, national, or religious grounds. Following this, the second debate will be examined. This debate consists of the tribunal model and whether certain models can encourage reconciliation and further justice than others. Subsequently, the third debate is about Cold War geopolitics and what actors are responsible, if at all, for the Khmer Rouge ascending to power and maintaining it thereafter. Lastly, the fourth debate is about the domestic politics Cambodia and the actions of the Sen administration and if they stymied further progress on the tribunal.

First and foremost, the debate surrounding the definition of genocide is imperative to understanding not only the crime committed in Cambodia, but also how it pertains to the tribunal model conducted in the country. The legal definition of genocide has been criticized, in that certain instances are unable to be prosecuted due to the legal term being too narrow. One author has posited that the Cambodian populace targeted would constitute a national group, as per the legal definition of genocide. This is noted in the Khmer Rouge's calls for only a single people to exist within Cambodia during their rule, those that are Khmer.<sup>1</sup> Authors have also posited that those that commit genocide may target groups that are the same nationality as them, in that there is no requirement that states they must be different. Others have disagreed, stating that that crime would not be

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<sup>1</sup> Hurst Hannum, "International Law and Cambodian Genocide: The Sounds of Silence," *Human Rights Quarterly* 11, no. 1 (1989): 86.

able to be tried as genocide given the legal definition.<sup>2</sup> There may be a social definition, yes, but a social definition cannot be applied to a legal one and to do so would be wishful thinking.<sup>3</sup> Scholars have also appealed to the notion of *jus cogens*, in that a moral standard must be present in the international community. To defy a moral standard is to go against other states. The appeal to a norm is indicative of an overall understanding of genocide from the moral sense, not necessarily a legal one.<sup>4</sup> This thesis intends to state that while the genocide occurs outside of the current definition of genocide (labeled by some as autogenocide), that there exists no way to try those currently as perpetrators of genocide. Despite this, this thesis intends to indicate the difficulties in prosecuting those, and tentatively indicate how the definition may be changed for future instances of said crime occurring. To prosecute such crimes in the future, the definition of genocide must be expanded upon.

The second debate consists of which tribunal model is effective for prosecuting genocide and other atrocities. There exist two primary tribunal models. The human rights model pursues justice, and the social model pursues understanding and reconciliation. The Cambodian tribunal is a hybrid model, attempting to involve both domestic judges in addition to international ones. As with the social tribunal model, it attempted to allow the Cambodian population to understand what had happened. Certain scholars posit that the human rights model is more effective at ensuring convictions, whereas others decry the process as being too removed from the domestic politics of the country in which the

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<sup>2</sup> Seeta Scully, "Judging The Successes And Failures Of The Extraordinary Chambers Of The Courts Of Cambodia," *Asia-Pacific Law & Policy Journal* 13, no. 1 (2011): 304.

<sup>3</sup> Ibid., 304.

<sup>4</sup> Beth van Schaack, "The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot," *The Yale Law Journal* 106, no. 7, (1997): 2259, accessed May 20, 2017, [www.jstor.org/stable/797169](http://www.jstor.org/stable/797169).

atrocities took place. Proponents of the social tribunal model insist that for a country to move forward, it is important to involve the population affected, and that their testimony be allowed. This may be viewed in the trial of Kang Kek Iew, also known as “Comrade Duch.” Following the trial, the populace generally felt as though justice had been delivered, particularly given the crimes committed at S-21, one of Cambodia's more infamous prison sites. Despite the populace's initial hopefulness at Duch's conviction however, general amnesty afforded to low and mid-level Khmer Rouge officials negatively impacted the way the tribunal process was viewed. What is more, it is difficult to ascertain if reconciliation has been achieved given the rhetoric from the Sen administration. Whereas the populace has felt as though the tribunal has not progressed adequately, the Sen administration maintains that it has, all the while stating that the populace does not wish the tribunal to continue its work and that they are willing to let the past remain the past.<sup>5</sup>

Other scholars have posited that blanket amnesty offered to both low and mid-level Khmer Rouge has not only stalled the tribunal, but also lessened hope in the general populace in reconciling. In offering blanket amnesty (and that former mid and low-level Khmer Rouge remain amongst the society as well as the current administration) there is an inability for the populace to understand what has transpired, particularly when the administration controls the rhetoric and tribunal process. However, as the Sen administration states that reconciliation has occurred and that the tribunal has achieved its objectives, scholars have stated that the issue itself is seen in that particular light.<sup>6</sup> Other

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<sup>5</sup> Ken Gee-kin, “Fulfilling The Mandate Of National Reconciliation In The Extraordinary Chambers In The Courts Of Cambodia (ECCC) - An Evaluation Through The Prism Of Victims' Rights,” *International Criminal Law Review* 13 (2013): 872.

<sup>6</sup> *Ibid.*, 874.

scholars have put forth the argument that not only has reconciliation occurred, but that with the populace confused as to the events that transpired as well as the international community's response at the time of the genocide, there exists an inability to understand both the issue at the domestic as well as the international level.<sup>7</sup> There may be no way to state in which reconciliation has occurred as a whole, but it may still be stated that there exists discontent amongst the populace in how the tribunal process has thus occurred. To this, it may be stated that while the hybrid model does have its flaws in addressing even a low number of convictions, there still exists a way in which to share a common history and evolve from what has transpired during the rule of the Khmer Rouge. In this regard, while the hybrid model has its faults, it nonetheless allows that future trials may take place so that the populace is able to address the events that have occurred.<sup>8</sup> In furthering the tribunal process, not only is there an attempt at ensuring that the populace is content with action taken against those accused, but also that any further opportunities to try those are not lost to time. Certain scholars however, have posited that the Cambodian tribunal must be commended for what it has achieved in lieu of action by the Sen administration. The issue is multiple, one may commend the ECCC for number of prosecutions it has achieved despite issues in its implementation, yet it will then be compared to those in Yugoslavia and Rwanda.<sup>9</sup>

Next, the third debate of Cold War geopolitics will be examined. There exists several state actors, each of whom shift the blame of the Cambodian genocide to a state

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<sup>7</sup> Tom Fawthrop and Helen Jarvis, *Getting Away with Genocide?: Elusive Justice and the Khmer Rouge Tribunal* (Sydney: UNSW, 2005), 8.

<sup>8</sup> Seeta Scully, "Judging The Successes And Failures Of The Extraordinary Chambers Of The Courts Of Cambodia," *Asia-Pacific Law & Policy Journal* 13, no. 1 (2011): 306.

<sup>9</sup> Seth Mydans, "11 Years, \$300 Million and 3 Convictions. Was the Khmer Rouge Tribunal Worth It?," *The New York Times*, accessed April 10, 2017, <https://www.nytimes.com/2017/04/10/world/asia/cambodia-khmer-rouge-united-nations-tribunal.html>.

other than themselves. Although countries such as the United States of America and the People's Republic of China have condemned Vietnam's invasion and called the trials a farce, other scholars have said that Vietnam was acting to the best of its ability, providing aid and attempting to allow the populace to reconcile with what had occurred.<sup>10</sup> Others have condemned the actions of countries such as the United States, and how they allowed the Khmer Rouge to maintain their legitimacy following Vietnam's invasion.<sup>11</sup> It is important to understand this debate as each state actor maintains that only their actions were legitimate.

The fourth and final debate is of the Sen administration and the Cambodian government and if they have stymied progress in the tribunal. As already mentioned, the Sen administration has stated that reconciliation has occurred and that the tribunal completed its objectives, even after only trying several senior-most officials.<sup>12</sup> Furthermore, the administration maintains that if the trials were to continue, a civil war would ensue. Despite these claims, certain scholars have posited that tribunal must be commended for what it set out to achieve, particularly given Cambodia's history, both under colonial rule, and then under the Khmer Rouge.<sup>13</sup> While this thesis does commend the trials for prosecuting several senior-most officials, there still exist numerous issues in the Cambodian tribunal.

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<sup>10</sup> Tom Fawthrop and Helen Jarvis, *Getting Away with Genocide?: Elusive Justice and the Khmer Rouge Tribunal* (Sydney: UNSW, 2005), 15.

<sup>11</sup> Steven J. Hood, "Beijing's Cambodia Gamble and the Prospects for Peace in Indochina: The Khmer Rouge or Sihanouk?" *Asia Survey* 30, no. 10 (1990): 978, accessed April 15, 2017, [www.jstor.org/stable/2644784](http://www.jstor.org/stable/2644784).

<sup>12</sup> Ken Gee-kin, "Fulfilling The Mandate Of National Reconciliation In The Extraordinary Chambers In The Courts Of Cambodia (ECCC) - An Evaluation Through The Prism Of Victims' Rights," *International Criminal Law Review* 13 (2013): 872.

<sup>13</sup> Seth Mydans, "11 Years, \$300 Million and 3 Convictions. Was the Khmer Rouge Tribunal Worth It?," *The New York Times*, accessed April 10, 2017, <https://www.nytimes.com/2017/04/10/world/asia/cambodia-khmer-rouge-united-nations-tribunal.html>.

The aim of this thesis is to state that reconciliation has not occurred, and that attempts by the Sen administration to state that it has runs contrary to the goals of the ECCC as well as understanding what has transpired for the populace. Furthermore, the tribunal should allow future generations of Cambodians to understand why the genocide occurred as well as what the international community has done, both in their inaction during the genocide as well as their action following it.

These debates are integral to understanding that Cambodia cannot be viewed by itself, nor the international community's actions. Rather, they all mesh with one another. This thesis' methodology intends to examine the Cambodian genocide from two approaches, historical and comparative. The historical approach will consist of examining Cambodia's history, from its time as a colony—to its time under the Khmer Rouge—and finally, under the Sen administration. While each period had of its own leaders who different on how to rule the country, the policies implemented would ultimately build upon previous ones. This may be understood in Cambodia's civil law following the ousting of the Khmer Rouge, certain portions of French civil law still remained, thus hindering the tribunal. Even more-so, anti-Vietnamese rhetoric espoused after the Khmer Rouge's rule found its roots decades, if not centuries before due to difficult relations between Vietnam and Cambodia.

The comparative approach will be used in examining the definition of genocide as put forth by the United Nations, as well as the various tribunal models. The definition of genocide differs substantially from its conception by Raphael Lemkin. While the term may be used more loosely in a sociological sense, its legal definition remains much more stringent. There is a pattern of larger states acting in accordance with their own interests

rather than fulfilling a more even definition of international law that applies to all. Furthermore, the tribunal model of the Extraordinary Chambers in the Courts of Cambodia is among a select few, differing vastly from other tribunal models. The hybrid model cannot be examined on its own. Rather, the human rights and social model must be analyzed, not only in their intent, but also how other tribunals have succeeded. To understand how the Cambodian tribunal has so few prosecutions, it must in turn be compared to other tribunals. Other tribunals have used either the human rights or social model and succeeded, whereas other cases that have used a hybrid model have failed to ensure justice.

The non-linear approach to this thesis is integral to understanding the Cambodian tribunal. By first examining the history of Cambodia up-to the 1990s, it will be understood as to how colonialism shaped Cambodia, as well as the Khmer Rouge. Following this, the concept of genocide must be examined. By doing so, it will be gleaned as to how the term emerged, how it was defined legally, and how it is applicable to Cambodia. Subsequently, the tribunal process will also be analyzed, comparing the various models and how Cambodia differs from the two traditional models. This will allow subsequent chapters on the tribunal to be further understood, as well as the difficulties as they arise.

After both the history of Cambodia as well as the conception of the term genocide, attention will be paid to the international community. Cambodia's genocide did not occur in a vacuum. Just as attention was paid to Cambodia's time as a colony, so will attention be paid to the rest of the international community as the genocide occurred. It



will also be noted as to how the international community reacted following the genocide, both with their views of the Khmer Rouge, as well as stymying of aid to Cambodia.

Finally, the Cambodian tribunal will be examined. In this, it will be understood as to how the tribunal model differs from previous ones, as well as how domestic politics have impacted the tribunal process. Successful and non-successful convictions will be compared, and how under certain cases evidence was allowed, whereas in others it was not.

Each component is essential to understanding not only the Cambodian genocide, but also my thesis statement in why so few have been prosecuted. The history of Cambodia allows context in understanding how colonial powers shaped Cambodia's future as well as how Cambodia's neighboring countries would go on to interact with it. Furthermore, the definition of genocide, as well as subsequent Cold War geopolitics would go on to play a significant role in how the Khmer Rouge were able to retain international legitimacy long after their ousting, allowing the domestic corruption in Cambodia to continue. The next chapter will highlight Cambodia's history, both its time as a colonial power, as well as under the Khmer Rouge.

### 3. Cambodia's History:

Since the creation of the Extraordinary Chambers of the Courts of Cambodia in 2003, five members of the Khmer Rouge have been brought to trial. Three have been successfully convicted, and two have since died. Be its time as a French colony, or the aftermath of the Cambodian Genocide, Cambodia's history shows that its rulers put the needs of the citizens second to their own. To understand the effectiveness (or lack thereof) of the ECCC, as well as inaction on behalf of the current administration, the country's history must be examined.

As will be discussed in subsequent chapters, Cambodia has found itself in the midst of other country's geopolitical goals. Prior to its time as a French protectorate, Cambodia was subjugated by both Siam (modern day Thailand) and Annam (modern day Vietnam). In 1863, King Leggio Norodom attempted to regain sovereignty and appealed to France to establish a protectorate over Cambodia. The appeal was successful, and in 1887 Cambodia found itself integrated into French Indochina, consisting of Annam, Cochinchina, and Tonkin (all part of Vietnam today). Laos became part of the region in 1893, as did the Chinese territory of Guangzhouwan followed in 1898.<sup>1</sup> Following a series of revolts against Norodom for placing Cambodia under French control in the 1860's and 1870's, France was able to successfully quell both albeit with great difficulty. It was after this that France would further its control over both Vietnam and Cambodia.<sup>2</sup> Among reforms enacted by France was the abolition of slavery, and institutionalizing the

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<sup>1</sup> R. Stanley Thomson, "The Establishment of the French Protectorate Over Cambodia," *The Far Eastern Quarterly* 4, no. 4 (1945): 325, accessed February 10, 2017, [www.jstor.org/stable/2049693](http://www.jstor.org/stable/2049693).

<sup>2</sup> David Chandler, *A History of Cambodia* (Westview Press, 2008), 175.

ownership of land.<sup>3</sup> These reforms would upset the Cambodian elite—coupled with many viewing Norodom as a puppet of the French, civil unrest occurred in 1885. Suspecting Norodom of assisting the opposition, France began to consolidate power via Norodom's family member, Sisowath.<sup>4</sup> As they resolved their standing with Norodom, France proclaimed that if the rebels ceased their role in the conflict, there would be a further attempt on behalf of France to respect Cambodian customs.<sup>5</sup> Though reforms were promised, they would not be put into place until twenty years later.<sup>6</sup>

Following the death of Norodom in 1904, France further gained control over Cambodia in that they ensured that monarchs were unable to select their own advisors.<sup>7</sup> Furthermore, France would act on Vietnamese-Cambodia relations, installing Vietnamese in Cambodia's government, furthering tensions between the already strained countries.<sup>8</sup> In 1936, Cambodian newspapers would begin publishing anti-Vietnamese rhetoric. This would ensure that such views would be carried over in 1979 when Vietnam liberated Cambodia from the Khmer Rouge.<sup>9</sup> As the French loosened their control during the second World War, nationalist thinking began to emerge.<sup>10</sup> It would be this thinking, coupled with the communist movements that would solidify a desire for independence from France.

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<sup>3</sup> Ibid., 176.

<sup>4</sup> Ibid., 177.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid., 178.

<sup>7</sup> Ibid., 181.

<sup>8</sup> Ibid., 185.

<sup>9</sup> Ibid., 200.

<sup>10</sup> Ibid., 201.

In 1930, Ho Chi Minh founded the Indochinese Communist Party (ICP),<sup>11</sup> intended to bring communist movements together from Laos, Cambodia, and Vietnam. Throughout the years, the movement would be restructured into smaller branches to ensure that each branch was pertinent to the location it sought to assist-the Laos Issara movement for Laos, the Viet Minh and Vietnam Workers' Party for Vietnam, and the Kampuchean People's Revolutionary Party (KPRP) for Cambodia. Despite such restructuring, Vietnamese groups would continue to supervise both the Laos and Cambodian movements.<sup>12</sup>

Attempts were made to legitimize the KPRP through elections in 1955 and 1958. Ultimately, the movement was forced into exile into northern Vietnam.<sup>13</sup> At the same time, Cambodian students in Paris who believed in the cause returned to Cambodia. Among these students were Pol Pot and Ieng Sary. The KPRP would go on to rename itself again in 1960 to the Workers' Party of Kampuchea, solidifying their own independent group from their Vietnamese allies.<sup>14</sup> From 1965 onward, the Workers' Party of Cambodia received aid from the People's Republic of China. It would then go on to rename itself once again to the Communist Party of Kampuchea (CPK). Though initially in 1967, the CPK fought against Prince Sihanouk and the government of Cambodia,<sup>15</sup> the two became allies following the 1970 coup in which Lon Nol was installed by the United States. Prince Sihanouk was ousted and would retreat to China in

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<sup>11</sup> John Ronald Bruce, *Revolution, Reform and Regionalism in Southeast Asia: Cambodia, Laos and Vietnam* (Routledge, 2008), 6.

<sup>12</sup> Justus M. Van Der Kroef, "New Patterns of Strategic Conflict in Southeast Asia," *Journal of the US Army War College* 10, no. 2, (1980): 61.

<sup>13</sup> David Chandler, *A History of Cambodia* (Westview Press, 2008), 228.

<sup>14</sup> John Ronald Bruce, *Revolution, Reform and Regionalism in Southeast Asia: Cambodia, Laos and Vietnam* (Routledge, 2008), 60.

<sup>15</sup> David Chandler, *A History of Cambodia* (Westview Press, 2008), 247.

exile. From there, he was declared the head of the CPK, who promised to reinstate him when they retook the country. Sihanouk's Kingdom of Cambodia would go on to be named the Khmer Republic.

Lon Nol was sympathetic to the goals of the United States in Vietnam. However, Lon Nol was also corrupt. Samantha Power notes that he did not interact with the Cambodian populace and was not viewed kindly by Cambodians. Furthermore, Lon Nol limited human rights within Cambodia, dissolving the parliament and outright stating that it was time to "end the sterile game of outmoded liberal democracy."<sup>16</sup> His desire for power culminated in 1972 in which he stated that he was to be not only the president and prime minister of Cambodia, but also the defense minister and head of the armed forces. The United States would invest almost two billion dollars in Lon Nol's regime.<sup>17</sup> Lon Nol's forces were largely for show. In 1972, Lon Nol went about blessing military aircraft to defeat Communist foes, all the while claiming that their military strength was greater than it actually was. Furthermore, aid from the United States was put into their own bank accounts, rather than pay Cambodian troops.<sup>18</sup>

During Lon Nol's rule, Cambodia would continue to be bombed by the United States in order to weaken Vietnamese forces.<sup>19</sup> The issue is two-fold, in one regard, Cambodia was dependent upon United States aid (both financially and militarily), yet those same actions would spur Cambodians to join the Khmer Rouge. David Chandler explains that Cambodian citizens themselves were not targets of US bombings,<sup>20</sup> yet the

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<sup>16</sup> Samantha Power, *A Problem From Hell* (Basic Books, 2002), 83.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> David Chandler, *A History of Cambodia* (Westview Press, 2008), 228.

<sup>20</sup> Ibid., 252.

high casualties of these actions would spur many to join the Khmer Rouge in an effort to retake the country. In contrast to this, the peasantry that joined the Khmer Rouge did not do so due to believing in the Khmer Rouge's ideology, but rather they wished to see Prince Sihanouk restored to the throne. Just as Cambodians did not believe in Lon Nol or his policies, so too did they not truly believe in the Khmer Rouge. Chandler states that they simply wished for the conflict to end and their previous ruler restored. Fighting alongside Vietnamese forces, the Khmer Rouge would retake the country in 1975.

From 1975 onward, the Khmer Rouge would begin to enact a series of acts that would drastically change the country. To understand the actions carried out by the Khmer Rouge is further made difficult in the initial secrecy of the party. Alexander Hinton explains that for the first two years following the ousting of Lon Nol, the Khmer Rouge simply referred to themselves as “Angkar,” their reasoning being that they were fearful of external enemies that would work against them. Civilians were not told who oversaw Cambodia, only given the same term—“Angkar.”<sup>21</sup> All laws, places of education, money, hospitals, were abolished. Those that lived in urban areas were relocated to the countryside under the guise of a temporary evacuation to avoid enemy forces. It was through this process that language was changed with regards to how the populace thought of themselves.<sup>22</sup>

Under the Khmer Rouge, language that pertained to hierarchy was largely disposed of, citizens were encouraged to refer to one another as “comrade” followed by their given name.<sup>23</sup> Though the concept of a mother and father remained, such familial

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<sup>21</sup> Alexander Laban Hinton, *Why Did They Kill?: Cambodia in the Shadow of Genocide* (University of California Press, 2005), 238.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid., 130.

bonds were undermined. Children were encouraged to report on a family member if they acted contrary to the views put forth by the Khmer Rouge. Doing so encouraged loyalty to the state, as well as ensuring the younger generation were theirs to mold.<sup>24</sup> The changing of language would go on further in that those in the city were viewed as “new people,” whereas those in the countryside were thought of as “old people.”<sup>25</sup> “New people” were thought to have ties to capitalism, materialism, and other notions viewed unfavorably by the Khmer Rouge. In contrast, those called “old people” would be viewed more favorably in that they did not have the ties to capitalist notions or education that those in the urban areas did.<sup>26</sup>

However, the changing of language was not simply limited to how the populace regarded one another, it also was indicative of the manner that Khmer Rouge officials viewed society should be. Within Khmer Rouge ideology, the concept of “Year Zero” was a prevalent one, in that following a revolution, all concepts from before must be disposed of, education, culture, etc., in order to build a completely new society.<sup>27</sup> In this sense, the closing of banks, the burning of books, the evacuation of cities was not simply to acclimate the citizenry to their way of thinking, but it was also to dispose of all previous ways of life. Hinton explains that the concept of “new” and “old” people would go along with this, in that “new people” were viewed as expendable and would ultimately have no place in the Khmer Rouge’s Cambodia. Such was the view of the Khmer Rouge that they would frequently tell those that were “new people”, “to keep you is no benefit,

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<sup>24</sup> Ibid., 131.

<sup>25</sup> Ibid., 9.

<sup>26</sup> Ibid.

<sup>27</sup> Beth van Schaack, “The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot,” *The Yale Law Journal* 106, no. 7, (1997): 2269, accessed May 20, 2017, [www.jstor.org/stable/797169](http://www.jstor.org/stable/797169).

to destroy you is no loss.”<sup>28</sup> Within the “new people” those targeted and killed with haste were those who had higher education. The Khmer Rouge were so suspicious of those with education that they would even execute those who wore glasses, to them a sign that one read.<sup>29</sup>

Those that lived in urban areas were subject to not just greater suspicion, but also execution if they did not act as dictated by Khmer Rouge officials. Citizens would torture and kill one another to avoid suspicion. This is indicative of how cultural notions may coincide with the difficulty in understanding not only how many committed crimes at the behest of the Khmer Rouge, but also why they may not come forward. In this instance, the notion of “losing face” must be addressed. Hinton explains that within Cambodian society, it is expected that a person will internalize negative emotions as well as negative acts that they have done. He goes on to state that to dishonor oneself and admit to a wrong is to “lose face” and have lost social power.<sup>30</sup> What is more, upon one admitting to a wrong may cause the victim to build up resentment until they deem it is time to act in the name of vengeance. Hinton notes the case of one Khmer Rouge, named Lohr, where it was stated in one interview that he had admitted to killing over four-hundred civilians for the Khmer Rouge. However, upon being interviewed later and with a desire to “save face” he admitted to killing only one or two, both to show that he had committed a wrong, but also to try to avoid consequences for his actions.<sup>31</sup>

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<sup>28</sup> Alexander Laban Hinton, *Why Did They Kill?: Cambodia in the Shadow of Genocide* (University of California Press, 2005), 19.

<sup>29</sup> *Ibid.*, 221.

<sup>30</sup> *Ibid.*, 256.

<sup>31</sup> Alexander Laban Hinton, “Why Did You Kill?: The Cambodian Genocide and the Dark Side of Face and Honor,” *The Journal of Asian Studies* 57, no. 1 (1998): 94, accessed June 10, 2017, [www.jstor.org/stable/2659025](http://www.jstor.org/stable/2659025).



Furthermore, other Khmer Rouge officials may not come forward, or also downplay their actions not only to save face, but also to avoid punishment. The issue in this occurs that even should crimes be admitted, only high-level perpetrators are able to be tried via the ECCC. Those deemed lower and mid-level Khmer Rouge members are able to escape justice.<sup>32</sup> It is through incidents such as these that make what occurred in Cambodia even more difficult to understand and act on. Those that have committed atrocities have either been able to avoid consequences for their actions, or have since died.

Those who were executed, intellectual or not, were taken outside of the immediate farming area into the forests. Known as the “killing fields” here citizens would be executed, often with just clubs and hammers.<sup>33</sup> The citizens were never told that they were being sent to their execution, rather vague terms were utilized, such as that they were “needed for work.” Other times citizens were informed that they were being sent away for “re-education.” Citizens would confess to fabricated crimes in the hopeful attempt that they would be given another chance and freed, yet this too would end in execution. These confessions were not limited to the Killing Fields as a desperate attempt to save one's life, but also at the now infamous Security-21 prison (now known as the Tuol Sleng Genocide Museum). Formerly a high school, the building was converted into an interrogation, torture, and execution center which saw over 14,000 killed.<sup>34</sup>

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<sup>32</sup> Ibid., 94.

<sup>33</sup> Wilfred Graham Burchett, *The China - Cambodia - Vietnam Triangle* (London: Zed. Press, 1981), 128.

<sup>34</sup> David Chandler, *A History of Cambodia* (Westview Press, 2008), 265.

Within S-21, prisoners were shackled to the floor and forbidden from speaking to one another.<sup>35</sup> Upon being interrogated, prisoners were tortured with a variety of means, such as electrocution, hot iron instruments, suffocation, etc.<sup>36</sup> A special medical unit was present to perform experiments on prisoners, sometimes by bleeding them out or performing live vivisections without anesthetic.

At first, victims were from Lon Nol's former government. As time went on, doctors, students, teachers would each pass through the building. As prisoners were interrogated and tortured, they would falsely confess to their crimes, often that they were a member of the CIA, KGB, or some other organization, implicating other family member and friends to make the torture stop.<sup>37</sup> As the reign of the Khmer Rouge continued, so would their paranoia increase. Guards of the prison were not exempt from being singled out and imprisoned themselves. Members of the Khmer Rouge suspected of working against the party would be sent to S-21. Typically held longer than the usual two to three months of the average prisoner before execution, their false confessions would again implicate other members from within the Khmer Rouge. Those implicated would then be brought to the facility and the process repeated. Those not killed at S-21 would be brought to the most infamous Killing Field, Choeung Ek at which almost 9,000 bodies have been found to-date.<sup>38</sup> What must be noted with S-21 is that the Khmer Rouge kept extensive records of the confessions given by prisoners. Photos were taken of prisoners, both upon their arrival to the facility as well as upon their death. It is through this

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<sup>35</sup> Alexander Laban Hinton, *Why Did They Kill?: Cambodia in the Shadow of Genocide* (University of California Press, 2005), 176.

<sup>36</sup> *Ibid.*, 178.

<sup>37</sup> *Ibid.*

<sup>38</sup> Sebastian Strangio, *Hun Sen's Cambodia* (Yale University Press, 2014), 239.

documentation that the actions of the Khmer Rouge become clearer, despite attempts to dismiss them.

In 1977, Khmer Rouge forces began initiating combat with Vietnamese forces along the border between the two countries despite previous alliance between the two.<sup>39</sup> The rationale for Khmer Rouge officials was that Vietnam wished to usurp their rule and become the most powerful state in the region. Though China attempted to intervene on behalf of the two countries, it was viewed as ensuring the Khmer Rouge stayed in power so that it (China) would be the most dominant political power in the region following the United States' mishap in Vietnam. The Khmer Rouge would finally be ousted by Vietnam in 1979, after which Vietnam would install their own government, the People's Republic of Kampuchea (PRK).<sup>40</sup> Further detail on the PRK as well as their handling of the Cambodian genocide will be discussed in subsequent chapters.

Following invasion by Vietnamese forces, the Khmer Rouge called an emergency meeting at the United Nations. Though at this moment Prince Sihanouk attempted to distance himself from the regime, he nonetheless attempted to defend the Khmer Rouge's right to rule Cambodia. A ceasefire agreement was drafted by China, France, the United States, the United Kingdom, among other countries. Vietnam's invasion of Cambodia was deemed legitimate by the Soviet Union due to the actions of the Khmer Rouge against its own people. The PRK would go on to sign a treaty with Vietnam, legitimizing the invasion as per Vietnam's view. Tensions continued to rise at the United Nations as the PRK and Khmer Rouge each attempted to claim the seat. Though knowledge of the

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<sup>39</sup> John Ronald Bruce, *Revolution, Reform and Regionalism in Southeast Asia: Cambodia, Laos and Vietnam* (Routledge, 2008), 29.

<sup>40</sup> *Ibid.*, 60.

Khmer Rouge's violent actions was apparent, the UN nonetheless voted to ensure that they kept their seat.<sup>41</sup> Condemnation continued against the PRK from Western countries.<sup>42</sup> Prince Sihanouk would go on to leave the Khmer Rouge, finding asylum in North Korea. From there he would decry both the Khmer Rouge's abuses as well as the Vietnamese occupation of Cambodia.

Following the legitimization of the PRK by Vietnam, multiple resistance groups emerged alongside the ousted Khmer Rouge government. The first, the Khmer People's National Liberation Front (KPNLF) consisted largely of refugees from Cambodia. The second was formed by Prince Sihanouk, titled the National United Front for an Independent, Peaceful, Neutral, and Cooperative Cambodia (FUNCINPEC). Sihanouk and FUNCINPEC would go on to ask the UN to leave Cambodia's seat on the UN vacant from both the Khmer Rouge and PRK.<sup>43</sup>

Each of the resistance groups faced charges of corruption and wrongdoing. FUNCINPEC, though initially enjoying support from the populace given that it was headed by Prince Sihanouk, would eventually find its favorability declining due to its work with the ousted Khmer Rouge government.<sup>44</sup> The group featured another drastic decline in popularity following the 1997 coup-de-etat in which multiple parties accused the other of utilizing Khmer Rouge members to fight for them. Throughout the next several years however, FUNCINPEC would join the KPNLF and Khmer Rouge in a coalition called the Coalition Government of Democratic Kampuchea (CGDK). Throughout the

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<sup>41</sup> Ibid., 65.

<sup>42</sup> Ibid.

<sup>43</sup> Steven J. Hood, "Beijing's Cambodia Gamble and the Prospects for Peace in Indochina: The Khmer Rouge or Sihanouk?" *Asia Survey* 30, no. 10 (1990): 978, accessed April 15, 2017, [www.jstor.org/stable/2644784](http://www.jstor.org/stable/2644784).

<sup>44</sup> Craig Etcheson, *After the Killing Fields: Lessons from the Cambodian Genocide*. (S.L.: Texas Tech University, 2006).

remainder of the decade the Khmer Rouge would retain their seat at the United Nations while the CGDK would continue to fight against Vietnamese forces, the largest military force within them, the Khmer Rouge. In 1985, Hun Sen became Prime Minister of the PRK. A former Khmer Rouge member that defected in 1977 amidst the purges enacted at the time, Sen has remained in power to the present day.

The history of Cambodia is integral to this thesis. It is important to understand how colonial powers shaped Cambodia's history, as well as the country's relationship with its neighbors. Though there was a period in which communist Vietnamese and Cambodian forces were allies, they would again sour, pitting the two against one another. The propaganda that was used against Vietnamese during French rule would continue to be used after Cambodia's liberation by Vietnam, and even play a role in how the international community viewed Vietnam.

The next chapter will discuss the legal definition of genocide as well as the different tribunal models. It is important to understand the narrow definition of genocide as it shows what can be prosecuted under it, and what cannot. Even when other alternative charges are pursued, there remain issues as to what can be proven, and even if certain tribunal models are sufficient to address the crime. The tribunal models will be examined in their entirety, providing several cases in which to understand how the tribunals can succeed when utilized correctly. By providing this foundation, the later chapter about Cambodia's own issues with its tribunal will be more evident.

#### 4. How Is Genocide Defined?:

While the previous chapter showed Cambodia's history as a colonial power as well as its time under the rule of the Khmer Rouge, this chapter will show the history of the term genocide and how its original definition has been narrowed down to the current legal one. The intent is to show that there are narrow parameters in which to try someone of committing genocide, and then even if such a trial were to take place, there are different models in which to use, each with varying degrees of success.

The concept of genocide has become increasingly limited in its scope as it has been defined by the international community. Beginning in 1948 at the Convention on the Prevention and Punishment of the Crime of Genocide, the convention's goal was not only to define the concept of genocide, but also theorize on how to ensure that those who committed such crimes were punished. However, due to the actions of those within the international community, several aspects of genocide were reconsidered and eventually dropped due to the realization that those countries would also have committed genocide by that notion. Accountability for those that commit genocide has become increasingly difficult to ensure, in that the stipulations that would initially have ensured those that commit it would have been found guilty without a doubt, are now non-existent. Though in certain cases there can be no denying that the social aspect of genocide has occurred, pursuing justice through legal means has become increasingly difficult. The goal of this section is to examine the 1948 Convention on Genocide and subsequent difficulties in the definition of genocide since its inception. Doing so will ensure not only that Cambodia's tribunals are seen in a more nuanced view of what has occurred, but also to understand

the difficulty that has occurred in defining the term as ‘genocide’. Furthermore, it will show how that has impacted the tribunal process.

The definition of genocide adopted by the United Nations at the Convention on the Prevention and Punishment of the Crime of Genocide was not the one proposed by Raphael Lemkin. Lemkin was of Polish descent and fled the Nazis in 1941. He would go on to lose over 49 relatives in the Holocaust. It became his personal passion to publicly define the term genocide and for it to be recognized by the international community. Lemkin's definition of genocide covered a myriad of groups not present in the now legal definition.<sup>1</sup> Furthermore, Lemkin posited that genocide consisted in two forms, “the destruction of a national pattern of an oppressed group, and imposing of the pattern by the oppressor.”<sup>2</sup> In this, there is the act carried out by the perpetrator in order to destroy a group, but also the actions that follow it. In having two components, a pattern may be examined in order to understand in future circumstances if a genocide is to be carried out. These included political entities such as the citizenry, as well as political parties. In addition to this, social genocide was considered.<sup>3</sup> In this, the social structure of a country would be undermined so as to further the perpetrator’s vision of what a country would entail. Furthermore, cultural genocide was to be considered. In this, a culture would be weakened and eventually eradicated. This may be done through a language being forbidden from being spoken or a particular people forced to attend schools that further the state’s goals. Economic genocide may also be considered.<sup>4</sup> In this, a national group’s ability to function and be part of society may be weakened by having their property and

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<sup>1</sup> Jens Meierhenrich, *Genocide: A Reader* (Oxford University Press, 2014), 56.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid., 59.

<sup>4</sup> Ibid., 60.

finances confiscated. The goal of this is to ensure the group lives on a day to day basis for survival, limiting their ability to participate in the structure of the state. Biological genocide was to be considered.<sup>5</sup> In this, those deemed to not be part of the state's "chosen people" would be forbidden from having children whereas the chosen group would be encouraged to do so. Physical genocide may also occur.<sup>6</sup> In this, groups may be discriminated against by limiting food intake, allowing their health to deteriorate, and ensuring they are the victims of mass killings. Just so, genocide may be carried out on the basis of religion, in that certain groups may be targeted by their belief system. Finally, moral genocide may occur.<sup>7</sup> In this, a group is forced to focus on their base needs, all the while inhibiting a desire to engage in discourse of the state. The base needs to be focused on are not that of day to day living, but rather the introduction of sexual material or substances to be abused.<sup>8</sup>

In Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide the groups defined must belong to a "national, ethnical, racial, or religious group."<sup>9</sup> However, both political entities and cultural entities were excluded from this list. Though both were considered in the initial drafting for the convention by the United Nations, they were later reconsidered. Frank Chalk and Kurt Jonassohn note that the Soviet Union and Eastern bloc disagreed with this definition, stating that political groups were incapable of being distinguished from other groups.<sup>10</sup> A contemporary issue in the

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<sup>5</sup> Ibid., 60.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Hurst Hannum, "International Law and Cambodian Genocide: The Sounds of Silence," *Human Rights Quarterly* 11, no. 1 (1989): 86.

<sup>10</sup> Frank Chalk and Kurt Jonassohn, *The History and Sociology of Genocide: Analyses and Case Studies* (Yale University Press, 1990), 10.



definition of genocide, this highlights how perpetrators may muddle the term to fit their perspective. Perpetrators are aware that there exist such loopholes, and may attempt to redefine their victims as belonging to political groups so as to avoid punishment.<sup>11</sup> Even more-so, those deemed political groups are only done so explicitly by perpetrators, rather than others in the international community. To the outside world, it may be difficult to distinguish political groups from other ones that may fall under the definition of genocide. This makes the matter of prosecuting those who committed the Cambodian Genocide more difficult, in that while there is a sociological understanding of the term genocide as understood by the international community, there are no legal grounds that one may be prosecuted for genocide against a political group.

The reason for political groups remaining outside the definition of genocide can be linked to the victors of the second World War. Chalk and Jonassohn note that as the prevailing actors, states such as the Soviet Union wished to be free of repercussions that they accused others such as Nazi Germany of, such as the mass killings of those deemed an enemy of the state. By specifically curtailing the definition of genocide, Western powers could set up a scenario in which they would be immune from prosecution, all the while enabling future atrocities such as that in Cambodia and East Timor as being able to be overlooked in the name of their own political interests.<sup>12</sup> This furthers the question of who is beholden to international law, and who is not. A hierarchy is ensured, certain states are able to commit acts without repercussion, or even reprisal, whereas others will face consequences for their actions. This not only further complicates the issue of

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<sup>11</sup> Ibid., 10.

<sup>12</sup> Ibid., 12.

genocide and crimes against humanity in that some must adhere to the law and others not, but also in that the precedent it sets for future cases to be tried.

It was not until the early 1990s that the difficulty with prosecuting genocide began to change. Beth van Schaack notes that during efforts to try crimes committed during the Yugoslav, Rwandan, and Cambodian genocides, there was acknowledgement that the definition of genocide agreed upon almost fifty years ago was insufficient.<sup>13</sup> In the instance that states pursued mass killings against those deemed political entities, there was little that the international community could do. States would be able to defend the killings as falling under their sovereignty. It is explained by van Schaack that to allow a definition of a political group would undermine a state's sovereignty in dealing with what is perceived to be a threat to its existence.<sup>14</sup> Under this notion, to do away with protections for political groups, it may be thought that the 1948 convention did little to prevent future instances of genocide from being prosecuted, as well as not acknowledging that the manner in which genocide occurs may change as time goes on. It is again explained by van Schaack that this not only allows the targeting of political groups without cause for concern, but it also allows justification of other atrocities under the guise of being politically based. Given that the state is able to deal with what is perceived as a threat internally, so it can take further action against other groups—those that would not fall under the definition of genocide in order to restore what it perceives to be a threat to its authority. This loophole of political entities within the definition of genocide furthers not only the ability for states to utilize power against its own citizenry

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<sup>13</sup> Beth van Schaack, "The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot," *The Yale Law Journal* 106, no. 7, (1997): 2261, accessed May 20, 2017, [www.jstor.org/stable/797169](http://www.jstor.org/stable/797169).

<sup>14</sup> *Ibid.*, 2267.

to secure their hold, but also furthers the condoning of such acts by the international community due to their being unable to act.

An additional under-addressed issue is that of being complicit in committing acts of genocide. Both the tribunals for Rwanda and Yugoslavia have not tried complicity in genocide as a crime as dictated by the Genocide Convention of 1948, but rather as a matter leading to the prosecution of genocide as a whole. Daniel Greenfield notes that in the original Genocide Convention of 1948, complicity was listed as “all acts of assistance or encouragement that have substantially contributed to, or have had a detrimental effect on, the completion of a crime.”<sup>15</sup> Complicity of genocide is to be different from the crime of aiding and abetting genocide. Greenfield goes on to state that to aid and abet genocide is to have a “heightened *mens rea* of the *genocidaire*”<sup>16</sup> or the knowledge of one's wrongdoing. By ensuring that both remain separate crimes, two categories of perpetrators may be tried, those that planned the genocide from positions of power, and those who committed it. For the latter, Greenfield makes the argument that a lesser *mens rea* should be allowed, in that the perpetrators for that crime may be less aware of the implications of their actions on a larger scale, yet should be tried for their actions nonetheless.<sup>17</sup> However, with the complicity of genocide now being disregarded as a crime by itself, there exists the possibility that those who committed genocide in complicity may have sanctuary from prosecution.<sup>18</sup> To this, there exist both issues out of the original 1948 Genocide Convention but also of modern day attempts to prosecute genocide.

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<sup>15</sup> Daniel M. Greenfield, “The Crime of Complicity in Genocide: How the International Criminal Tribunals for Rwanda and Yugoslavia Got It Wrong, and Why It Matters,” *The Journal of Criminal Law and Criminology* (1973-) 98, no. 3, (2008): 926.

<sup>16</sup> *Ibid.*, 924.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*, 925.

Both the act of being complicit in genocide as well as aiding and abetting require the same amount of *mens rea*.<sup>19</sup> The evidence required to prosecute one of genocide is exceptionally high. This burden of proof coupled with the need to show that one was aware of their actions allows that those who committed acts of genocide will be acquitted. Coupled with the already narrower definition of genocide sans political entities and culture, to prosecute one of genocide becomes increasingly difficult. Greenfield notes that the difficulty is furthered when differentiating between genocide and crimes against humanity. For genocide, the “destruction of a group on national, ethical, racial, or religious grounds” must be done because they are precisely that.<sup>20</sup> Greenfield states that the end goal must be the destruction of that group, rather than the destruction of said group occurring along a series of decisions toward a different end goal. For such an action, the crime would be a crime against humanity, not simply genocide. Though the distinction is slight, this does affect how the crime of senior Khmer Rouge officials is viewed. It becomes increasingly difficult to discern whether the killing of the Cambodian populace was meant as a means to an end, or an end itself. Though the difficulty in discerning this, as well as the status of the Cambodian populace pertaining to the definition of genocide may impact how senior officials of Khmer Rouge are tried in the tribunal process, there is nonetheless an avenue of justice that may be pursued in either case. Both crimes against humanity and genocide are abuses that are triable under international law, with this in mind, it becomes all the more disconcerting that to date only three officials have been tried in the decades long process. William Schabas notes

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<sup>19</sup> Ibid., 929.

<sup>20</sup> Ibid., 933.

that for one to be tried on genocide, a mental acknowledgement of genocide is not sufficient. Rather, there must also be an *actus reus*, or a physical element.<sup>21</sup>

As the notion of how to try those who commit genocide changes over time, so must attention be paid to the tribunal model and how it may affect the trying process. Seeta Scully notes that there are initially two models, the human rights model, and the social model. On their own accord, tribunals attempt to accomplish a multitude of objectives, often times unable to satisfy all of them.<sup>22</sup> The former model attempts to give a fair trial to those accused of genocide and other crimes whereas the latter attempts to tell the story of what has occurred in the event and how the region may heal going forward. Though each model has a particular goal in mind, that is not to say that the model's goal is its only one being pursued at the time of the tribunal. In the cases of Rwanda and Yugoslavia, the primary focus was that of the human rights model, yet it still attempted to enact social model policies to a lesser extent. Ken Gee-kin adds on to this, stating that in both tribunals, the rationale was that by failing to prosecute those who committed genocide, such actions may occur in the future.<sup>23</sup> Unfortunately, the same atrocities continue to occur time and time again.

The human rights model views the trying of abuses of human rights as the first and foremost objective. By failing to identify human rights abuses as they occur, Scully posits that some may have the belief that the tribunals themselves may be violating

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<sup>21</sup> William A. Schabas, *Genocide in International Law: The Crime of Crimes* (Cambridge University Press, 2009), 12.

<sup>22</sup> Seeta Scully, "Judging The Successes And Failures Of The Extraordinary Chambers Of The Courts Of Cambodia," *Asia-Pacific Law & Policy Journal* 13, no. 1 (2011): 303.

<sup>23</sup> Ken Gee-kin, "Fulfilling The Mandate Of National Reconciliation In The Extraordinary Chambers In The Courts Of Cambodia (ECCC) - An Evaluation Through The Prism Of Victims' Rights," *International Criminal Law Review* 13 (2013): 876.

international law.<sup>24</sup> Scully goes on to state that the United Nations is “synonymous” with human rights, and that a failure to address violations damages the United Nations' reputation.<sup>25</sup> It is also important to understand the background of how the human rights model was applied in Rwanda and Yugoslavia.

Both Rwanda (ICTR) and Yugoslavia (ICTY), were tried using the human rights model. Both were created by the United Nations Security Council and acted of their own accord, not beholden to either state. Scully explains that the notion driving these tribunals was that they would be free from domestic politics or corruption. Initially they were hailed as successes, particularly with their number of convictions. An issue that occurred in both Yugoslavia and Rwanda was that in either, the local populace may not have been aware that they occurred at all. The question then also emerges if a human rights model tribunal can have a lasting impact amongst the populace.<sup>26</sup>

Each of the tribunal models may be examined through instances in which they have been applied. In this, the case of East Timor will be examined. Both, in addition to the ECCC, are indicative of the hybrid type of tribunal that has occurred following the human rights and social models. In examining these two instances, it may be gleaned whether it is a fault of the hybrid model itself, or rather a factor specific to the Cambodia tribunal.

Upon examining the nature of the tribunal model itself, it may be questioned whether the hybrid model, while working with the government of a country, may instead hinder progress. In 2000, the United Nations Transitional Administration in East Timor

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<sup>24</sup> Seeta Scully, “Judging The Successes And Failures Of The Extraordinary Chambers Of The Courts Of Cambodia,” *Asia-Pacific Law & Policy Journal* 13, no. 1 (2011): 307.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

(UNTAET) created the Special Panels of the Dili District Court, a hybrid model with the intent of trying those who had participated in the violence in East Timor in 1999. In the conflict, East Timor attempted to proclaim independence only to face violence in turn. As conflict escalated, over 1,400 civilians would be killed. In 2000, the Special Panels for Serious Crimes was created. They would address crimes committed in the region. The trials consisted of two international judges, and one from East Timor. In this, there was an attempt as with the ECCC, to create both a tribunal that had components of the international community as well as those within the country where the crimes occurred. The tribunal was plagued by poor management, and trials had little oversight to ensure their efficiency.<sup>27</sup> Despite attempts to try perpetrators, only those in lower and mid-level would be tried, the opposite of the ECCC. Indonesia would refuse to extradite high-ranking officials who strategized and carried out the attacks. Even when Indonesia would establish a commission with East Timor, they would state that there had been wrongdoing on their part, but nothing would be said about attempts to bring perpetrators to justice, or any other action.<sup>28</sup>

In this case, the violence took place largely in a neighboring country, yet there were still attempts by a domestic government to ensure that certain perpetrators were not brought to justice. In this scenario the hybrid tribunal model may be said to not have achieved its goal, yet while part of the blame may lie on mismanagement, other still lies on allowing a sovereign government to state who can and cannot be extradited to stand trial. Indeed, it may even be posited that if other high-level, or even mid-level officials

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<sup>27</sup> David Cohen, "Indifference and Accountability: The United Nations and the Politics of International Justice in East Timor," *East-West Center* 9 (2006): 307.

<sup>28</sup> "Justice Call On East Timor Massacre Anniversary," *East Timor Action Network*, April 6, 2005, <https://www.globalpolicy.org/component/content/article/163/29201.html>.

were tried in Cambodia, there would be a larger reconciliation process. The hybrid tribunal model offers hope and the ability to construct a shared history, something that the human rights model was unable to achieve. Yet, it still highlights that work must be done to ensure justice and understanding emerge whole.

The intent of the social model is to do more than try those accused of crimes and immediately leaving the country after the tribunal has finished. Rather, the tribunal should create a sense of justice going forward that the country may utilize.<sup>29</sup> Victims of genocide and other crimes are encouraged to participate in the court proceedings so that not only are their stories told, but also so that they themselves receive a sense of closure.<sup>30</sup> The social model attempts to be as open as possible with the public, rather than a closed court that few are aware is occurring. Despite this however, both models are capable of failing to address the issue that they set out to do.

The tribunal models themselves are important for several reasons. Both the human rights and social models allow others to see how those tried under crimes of genocide and otherwise were viewed-either as the foremost concern, or next to that of reconciling the populace of the nation. However, both tribunal models also allow one to understand the difficulty in creating the hybrid model. The hybrid model attempts to pursue both goals, in allowing reconciliation and prosecuting perpetrators. Furthermore, the hybrid model attempts to utilize international norms with that of domestic law. To the aspect of the human rights model, it can be questioned if success is measured by the amount of convictions. In the case of Rwanda, over 20 years, 61 were sentenced for crimes

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<sup>29</sup> Ibid., 306.

<sup>30</sup> Ibid.



committed. In Yugoslavia, over 23 years, more than 83 were sentenced.<sup>31</sup> In Cambodia, over the course of 10 years, only 3 were convicted of crimes.<sup>32</sup> Both tribunals focused more on prosecuting the perpetrators, though it does bring into question whether it is better to focus on international law, than adhere to a country's. As the hybrid model attempts to blend the two together, the question remains (as in the case of the ECCC) if it was able to bring reconciliation as well as justice. With the notion of nation reconciliation, one may look at Cambodia and question whether the nation itself as moved on from the atrocities committed there. To this, I say that not only has the nation not reconciled from actions by the Khmer Rouge, but also that the reason is more than the hybrid nature of the tribunal. Further chapters will delve into the corrupt nature of the ECCC and how that has stalled prosecution of those tried for genocide.

While the definition of genocide was initially broad in scope, it soon became much more limited in its legal definition. The narrow legal definition occurred due to certain powers wishing to remain safe from being prosecuted themselves. When the Yugoslav, Rwandan, East Timor, and Cambodian genocides were tried, they were done using a different tribunal model. Certain models resulted in a higher number of convictions, but at the cost of the population being involved. Other tribunal models involved the population, allowing them to testify before the tribunal, and to submit evidence that the atrocity had occurred. In the case of the East Timor genocide, Indonesia refused to extradite high-level officials to stand trial, showing the difficulties that may emerge when intertwining domestic and international systems.

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<sup>31</sup> Seth Mydans, "11 Years, \$300 Million and 3 Convictions. Was the Khmer Rouge Tribunal Worth It?," *The New York Times*, accessed April 10, 2017, <https://www.nytimes.com/2017/04/10/world/asia/cambodia-khmer-rouge-united-nations-tribunal.html>.

<sup>32</sup> Ibid.

It is important to understand how the legal definition of genocide is more contained than how it is used in everyday language. Furthermore, there is a large burden of proof in trying it, particularly when perpetrators attempt to destroy evidence or use propaganda to dissuade others from believing what occurred. Even if all these factors are met, the tribunal model may still impact the process, as well as how the domestic government cooperates (or doesn't) with the rest of the international community. The legal definition of genocide only allows certain categories to be seen as the victims of genocide. Even if the perpetrators were unable to be tried under the crime of genocide, they still should be able to be tried under crimes against humanity. It is here that my thesis statement resurfaces again, that the history of Cambodia, the current administration of Cambodia, and the actions of the international community converge with one another. Cambodia was influenced by other countries during its history, and the current administration has prevented perpetrators from even being tried at all, even of the "lesser crime" of crimes against humanity.

## 5. Global Community, Local Problems:

Though there are several factors that have allowed senior officials of the Khmer Rouge to elude justice today, attention must be paid to the actions of the international community following the ousting of the Khmer Rouge. This is integral to this thesis in understanding how the international community affected Cambodia. It must be reiterated that the atrocities in Cambodia did not occur in a vacuum. Other members of the international community had an interest in ensuring that the Democratic Kampuchea remained as the recognized state for Cambodia. As a result of this, an atmosphere of acceptance, even complacency was fostered. Similarly, attempts by the Vietnamese-created People's Republic of Kampuchea (PRK) at rebuilding Cambodian society and economy, was met with blockage from others opposed to its very existence. Even when the PRK conducted trials for Khmer Rouge officials *in absentia*, among them Pol Pot, the proceedings were decried as show trials. To understand the difficulty in prosecuting Khmer Rouge senior officials in the modern day, each state actor's motives during the Cold War must be understood, particularly how they ensured that not only was there an atmosphere of complacency, but also that any prosecution attempts by those viewed as illegitimate would afterward be disregarded.

In 1979, the PRK was faced with the task of completely rebuilding Cambodian society, from its economy, to various social aspects. With the populace moved to the countryside, the cities were abandoned. Among the first policies enacted was to allow the populace the freedom of movement. Doing so would allow those that had been displaced from urban areas to not only attempt to reconnect with loved ones—should they even

still be alive—but also to rebuild society. Despite attempts by the PRK to rebuild society, there still existed the issue of intellectuals having been particularly targeted during the Khmer Rouge era. Between 1975-79, 43 remained of the previous 450 doctors, and 7 out of nearly 700 lawyers remained. Even more staggering however, were those having an education or art background. Over 18,000 teachers, 10,550 students, 191 journalists, and 1,120 artists had all been killed.<sup>1</sup> Regardless of these numbers, following the Vietnamese liberation of the country, surviving Cambodian students would attempt to work with the Vietnamese-backed government in rebuilding their country.<sup>2</sup> One instance saw student Sum Mean organize with other students in petitioning the PRK to allow them to work with them in addressing primary concerns of the Cambodian populace. Though the students were initially spurned, PRK officials would come to acknowledge both the student's pleas as well as that of the populace.<sup>3</sup> This occurred however, amongst decades old rivalry between Cambodia and Vietnam. There still existed a disbelief amongst the Cambodian populace that the Vietnamese would wish to assist them, much less liberate them. This mentality was furthered by Khmer Rouge propaganda during their time in power.<sup>4</sup> These attempts by the Khmer Rouge were not only an attempt to further consolidate power as they lost their grasp on it, but would be utilized by countries such as the U.S. and China as the PRK's attempts to restructure society would be condemned.

The political nature of southeast Asia is complex, particularly during the Cold War. Following the Sino-Soviet split in which China viewed the Soviet Union as having

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<sup>1</sup> Tom Fawthrop and Helen Jarvis, *Getting Away with Genocide?: Elusive Justice and the Khmer Rouge Tribunal* (Sydney: UNSW, 2005), 15.

<sup>2</sup> Ibid., 14.

<sup>3</sup> Ibid., 16.

<sup>4</sup> Ibid., 10.

deviated from Marxist ideology following the death of Joseph Stalin, both countries would go on to influence other countries in transitioning to their own variant of communism.<sup>5</sup> In the case of the Soviet Union, this was seen with their aid for the National Liberation Front during the Vietnam War.<sup>6</sup> For China, this would be seen in their support for the Khmer Rouge.

Following the Sino-Soviet split, the Soviet Union attempted to further its interests through backing fledgling communist states in the developing world. The closest and most prominent one, was that of the National Liberation Front attempting to combat south Vietnamese forces. Though Vietnam was initially in communication with both the Soviet Union and China,<sup>7</sup> it eventually began to gravitate to the Soviet Union, particularly given that it was the chief supplier of its weaponry and a more ardent supporter of the National Liberation Front's goal of combating south Vietnamese forces. In this regard, the Soviet Union's support of north Vietnamese forces was both a means to further their influence as well to oppose China's.<sup>8</sup> Given success by north Vietnamese forces as well as those in Cambodia, the Soviet Union's view of itself as a strong power in the region was solidified, thus furthering not only its support for north Vietnamese forces, but also in ensuring that communist movements in the region succeeded.

China, having the same interest as the Soviet Union in achieving a foothold in the region, backed the Khmer Rouge. Following Lon Nol's ousting of Prince Sihanouk, the deposed monarch would find refuge in China. Just as the Soviet Union assisted north

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<sup>5</sup> Dennis Merrill and Thomas G. Paterson, *Major Problems in American Foreign Relations: Documents and Essays Vol. 2* (Boston: Wadsworth Cengage Learning, 2010), 429.

<sup>6</sup> Ibid., 430.

<sup>7</sup> Ibid., 417.

<sup>8</sup> Muthiah Alagappa, "Soviet Policy in Southeast Asia: Towards Constructive Engagement," *Pacific Affairs*, 63, no. 3, (1990): 323, accessed May 29, 2018, [www.jstor.org/stable/2759522](http://www.jstor.org/stable/2759522).

Vietnamese forces, so would China assist the Khmer Rouge. China supplied more than 15,000 military advisors, as well as various tanks and other such weaponry.<sup>9</sup> It would go on to assist the Khmer Rouge on the international stage.<sup>10</sup> To this end, China would work with other countries in southeast Asia, citing not only the Soviet Union as a threat to stability in the region, but also that by ensuring cooperation with them (China) the region itself would improve as a whole.<sup>11</sup> Assisting China in condemning the PRK, was the U.S. Not only did the U.S. have an interest in working against the PRK given its association with Vietnam and the U.S.'s difficulty in the region, but doing so would also further already thawing relations with China. By furthering their actions against the PRK, the U.S. and China was also able to shape the region in its interests despite military difficulties. It was these actions however, that would foster a wariness of the international community for Cambodians.

Throughout the 1980s as the PRK found itself isolated on the international stage, it would only enjoy relations with the Soviet Union as well as countries in the Eastern Bloc. Despite this isolation, the PRK would go on to attempt to bring those who committed the atrocities in Cambodia, to justice. S-21 was converted to the Tuol Sleng Genocide Museum. As well as this, authorities attempted to preserve the mass graves found throughout the country.<sup>12</sup> This was further complicated by the actions of Buddhist

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<sup>9</sup> Tom Fawthrop and Helen Jarvis, *Getting Away with Genocide?: Elusive Justice and the Khmer Rouge Tribunal* (Sydney: UNSW, 2005), 48.

<sup>10</sup> Emily Wight, "The China Connection: New Book Reveals Khmer Rouge Relationship," *Phnom Penh Post*, February 14, 2014, <https://www.phnompenhpost.com/7days/china-connection-new-book-reveals-khmer-rouge-relationship>.

<sup>11</sup> Robert S. Ross, "China and Post-Cambodia Southeast Asia: Coping with Success," *The Annals of the American Academy of Political and Social Science* 519, (1992): 53, accessed September 29, 2018, <http://www.jstor.org/stable/1046753>.

<sup>12</sup> Tom Fawthrop and Helen Jarvis, *Getting Away with Genocide?: Elusive Justice and the Khmer Rouge Tribunal* (Sydney: UNSW, 2005), 9.

monks throughout the nation. Prior to the Khmer Rouge's time in power there existed 50,000 monks, after their ousting, there were less than 1,000.<sup>13</sup> Given the relatively small monkhood that remained and the number killed, efforts were made to gather the dead-or what remained, and give them cremations. Though this is telling of the nation's attempts to recover from what it went through, the cremation destroyed what evidence that could be utilized in trials against senior Khmer Rouge officials. The destruction of evidence would continue to be a pressing issue during the ECCC; this is further discussed in the following chapter.

Other issues would plague the PRK's trial, also similar to that of the present day. The then-tribunal faced the issue of lacking experts to conduct the trial, including lawyers, judges, and other experts. Those who had survived the actions of the Khmer Rouge were interviewed and their experiences were documented for the tribunal. However, the PRK would enact the same policy as that of the present day, to try senior-most officials of genocide.<sup>14</sup> Though also having former Khmer Rouge within its government, the PRK's goal of trying senior-most officials was also due to hoping to induce defections from other Khmer Rouge officials.<sup>15</sup> Such was the case of the chief prosecutor, Mat Ly, a former member of the Khmer Rouge that had defected prior to the Vietnamese invasion of Cambodia.<sup>16</sup> In this regard, other members of the Khmer Rouge had begun to become intertwined in the new administration. Though the PRK had not fostered an atmosphere of complacency regarding the trying of those who committed genocide, its retaining of members would prove for difficulties later on during the ECCC.

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<sup>13</sup> Ibid., 15.

<sup>14</sup> Ibid., 41.

<sup>15</sup> Ibid., 42.

<sup>16</sup> Ibid., 43.

Former Khmer Rouge members would disrupt future trials out of fear of themselves being tried. The tribunal itself used domestic law to reach its verdict, yet made particular reference to the Genocide Convention of 1948, stating that the Khmer Rouge did commit genocide.<sup>17</sup> However, the verdict regarding Pol Pot and Ieng Sary was decided before the trial. With the two tried *in absentia*, their defense made no attempts to dispute their crimes, nor were any witnesses cross-examined.<sup>18</sup> Even so, the PRK's trial was also fraught with historical inaccuracies. Steven Hood notes that it was claimed that China had directly assisted the Khmer Rouge in committing genocide against the Cambodian populace. In this regard, Vietnam's antagonism towards China is evident, yet makes it clear that even trials before the ECCC contained their own set of bias. Attention paid by the international community save for the PRK's immediate allies was brief. The trial itself was dismissed as illegitimate, and calls were maintained for Vietnamese forces to withdraw from Cambodia.<sup>19</sup> The trial during the PRK's time in power was a missed opportunity by the international community. Unlike the present day, in which many of the senior-most officials have been recused or have died, there existed the possibility of trying those in the Khmer Rouge, even absently. This lack of action would prove difficult for future Cambodians to reconcile given the international community's previous reaction to atrocities such as the Holocaust.

Providing legitimacy for both China and the U.S's actions amidst this, was Prince Sihanouk. For a time, the CGDK and the KPNLF would fight alongside each other

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<sup>17</sup> Ibid., 44.

<sup>18</sup> Ibid., 48.

<sup>19</sup> Steven J. Hood, "Beijing's Cambodia Gamble and the Prospects for Peace in Indochina: The Khmer Rouge or Sihanouk?" *Asia Survey* 30, no. 10 (1990): 978, accessed April 15, 2017, [www.jstor.org/stable/2644784](http://www.jstor.org/stable/2644784).



despite their ideological differences, the rationale being that it was the pragmatic choice to wage war against the PRK via a united front. Hood notes that Sihanouk's agreement to side with the CGDK only furthered international condemnation against the PRK.<sup>20</sup> It was only following Sihanouk's leaving the CGDK that China began to reconsider its support for the Khmer Rouge, more so out of the understanding that without Sihanouk's support, China's legitimacy in the matter was threatened.<sup>21</sup> Furthermore, Sihanouk made it known that he believed China and Thailand had more power to stop the Khmer Rouge than he, in that they supplied them with weaponry. In this regard, China's continued support of the Khmer Rouge following their ousting not only hampered international understanding of what had taken place in Cambodia, but also hindered any future momentum of it occurring.<sup>22</sup> The issue would be further complicated among the negotiation process as Sihanouk would again join CGDK despite his disapproval of the Khmer Rouge in order to hasten a Vietnamese withdrawal.

Negotiations between Sihanouk, China, and the U.S. would continue throughout the 1980's as to the status of Cambodia's seat at the United Nations. While the seat was still kept by the Khmer Rouge, attempts were made by both ASEAN and China to continue to prevent the seat from being given to the PRK, thus furthering a condoning of the Khmer Rouge.<sup>23</sup> In 1990, the U.S. withdrew recognition for the Khmer Rouge at the international level. Though faced with disapproval from China, Sihanouk, and other

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<sup>20</sup> Ibid., 981.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid., 982.

<sup>23</sup> Ibid., 983.

countries in ASEAN, its act did show a change in tone for how the international community viewed the deposed regime.<sup>24</sup>

In 1991, the Paris Peace Accords were signed, putting an end to the war between Cambodia and Vietnam. Under this, the United Nations was put in control of the country until elections were conducted. The United Nations created the United Nations Transitional Authority on Cambodia (UNTAC). UNTAC had numerous objectives, among them to secure free and fair elections, to disarm any groups still engaging in combat, to withdraw any foreign parties, and to assist Cambodian refugees all the while reenabling human rights.<sup>25</sup> Following the end of the Cold War, the United States ceased to support the CGDK. The rest of the United Nations Security Council would follow several months later. Despite the country's agreements to do so, the United States and China attempted to ensure that the Khmer Rouge would remain part of the process.<sup>26</sup> Sebastian Strangio states that these attempts to include the Khmer Rouge would include all references of genocide to be removed from the treaty and instead referenced as the “policies and practices of the recent past.” Strangio goes on to explain that U.S. officials would echo China's sentiment, stating that “it was as much as could be done at the time.”<sup>27</sup>

The issue of involving the Khmer Rouge persisted with Khmer leaders still at the Thai border. Pol Pot and other senior leaders remained intent on retaking power despite these negotiations.<sup>28</sup> The Khmer Rouge was faced with uncertainty how they were to

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<sup>24</sup> Ibid., 989.

<sup>25</sup> Benny Widyono, *Dancing in Shadows: Sihanouk, the Khmer Rouge, and the United Nations in Cambodia* (Rowman & Littlefield Publishers Inc, 2007), 5.

<sup>26</sup> Sebastian Strangio, *Hun Sen's Cambodia* (Yale University Press, 2014), 39.

<sup>27</sup> Ibid., 44.

<sup>28</sup> Ibid.

approach the situation. Should they participate in the United Nations elections and win, they would be returned to power, all the while legitimate in the eyes of the international community. However, should they participate in the process, they could also dilute their rhetoric and further consolidate power once the United Nations withdrew from the region.<sup>29</sup> Prince Sihanouk just as easily questioned the electoral process, instead viewing it as past events that had placed him on the throne. Despite this, he still intended to ensure the country remained out of the reach of the Khmer Rouge.<sup>30</sup>

Prior to the United Nation's arrival however, steps were taken to further consolidate power. Sen's administration renamed itself the Cambodian People's Party (CPP). Over 2,000 political prisoners were released, and the administration declared it would respect human rights and all political parties. Sen would state in private that it was a simple "rebranding."<sup>31</sup> Any claims made for land or possessions before 1975 were disregarded, instead reassuring those that possessed them they would retain them if former owners returned. Furthermore, other forms of land and businesses were sold to officials in the CPP. These officials would in turn sell them to other investors. They largely consisted of others from Thailand or Singapore yet was also of international organizations attempting to assist in the region.<sup>32</sup> All of this was to ensure that anything taken over by the United Nations was instead inconsequential and thus free of their influence.<sup>33</sup>

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<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid., 50.

<sup>32</sup> Ibid., 51.

<sup>33</sup> Ibid.

UNTAC also attempted to disengage countries that had previously attempted to influence Cambodia's future. In doing so, Vietnam was able to engage with the United States again, whereas China could still attempt to influence the region, albeit with other parties involved. Even countries that had not been involved in the region would go on to do so through UNTAC, such as Japan. Japan would go on to be a significant backer of UNTAC as well as during the ECCC.<sup>34</sup> Though the countries previously involved in Cambodia felt that the country's stability should finally be prioritized, Sen refused to concede power because the "international community demanded it."<sup>35</sup>

In 1992, UNTAC arrived in Phnom Penh. Over 20,600 military, police, and civilian forces were deployed from over one hundred countries. These forces would replace the Vietnamese and Soviet personnel that had assisted Cambodia since Vietnam's intervention. Initially UNTAC personnel found it difficult to converse with Cambodian civilians. Strangio explains that UNTAC lacked knowledge of the language and the customs of Cambodia, and tended to act in a "condescending" manner towards Cambodians.<sup>36</sup> Hope was widespread following the United Nation's arrival. However, this quickly turned to anger. Though money was put into the economy at a large rate, it created inflation, with the U.S. dollar informally replacing the native riel. Strangio notes that food and other supplies quickly rose in price, and HIV/AIDS became rampant due to a "flourishing brothel industry."<sup>37</sup> An international presence had once again created problems all the while attempting to alleviate them.<sup>38</sup>

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<sup>34</sup> Ibid., 43.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid., 52.

<sup>37</sup> Ibid.

<sup>38</sup> Ibid.

As the peace process continued, the Khmer Rouge would go on to obstruct plans by UNTAC. Other senior officials who wished to participate, such as Ieng Sary, were demoted. The Khmer Rouge would go on to obstruct UNTAC forces from touring any part under their control, and outright refused to disarm or demobilize in any sense. To this, UNTAC issued statements in which they were concerned the peace process was being endangered. Despite this, they could not force the Khmer Rouge to adhere to the peace process. Any embargoes forced upon the Khmer Rouge through their export of raw resources to surrounding countries was met with derision and little effect.<sup>39</sup> Strangio notes an incident in May 1992.<sup>40</sup> On a mission to enter Khmer Rouge territory, a simple bamboo pole had been laid across the path where vehicles would have passed through. On both sides of the pole stood several Khmer Rouge soldiers. Rather than force their way over the bamboo pole, UNTAC vehicles retreated. Though it was stated that United Nations lacked the capacity to act against the Khmer Rouge, even peacefully, it was a signal to the Khmer Rouge that their actions would be met without opposition.<sup>41</sup> Even more-so, it further lowered morale amongst ordinary Cambodians, who had initially seen UNTAC and the United Nations as finally routing the Khmer Rouge from their country.<sup>42</sup> Due to the Khmer Rouge refusing to cooperate with UNTAC, it also signaled to Sen's administration that would be able to do the same. Sen's army was over 126,000, and capable of opposing the Khmer Rouge. Despite this, the Sen administration reduced it by a third.<sup>43</sup>

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<sup>39</sup> Ibid., 54.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

In December 1992, the Khmer Rouge began to kidnap United Nations peacekeepers. UNTAC was forced to relocate closer to the Khmer Rouge. The following year in April, the Khmer Rouge formally withdrew from the electoral process, stating that they were a means to ensure that Cambodia remained under Vietnamese control. This announcement would be followed by a series of attacks against Cambodian police officers and United Nations peacekeepers.<sup>44</sup> Sen's administration also felt strengthened by UNTAC's inability to act. They would go on to threaten FUNCINPEC and other opposition parties through the Ministry of National Security. Over time they would escalate their actions with threats of violence, and even assassination attempts. As UNTAC already relied on the Sen administration as the glue holding society together, they were unable to act against them. They would go on to document intimidation and killings performed by the administration but could do nothing beyond that.<sup>45</sup>

In 1993, UNTAC hosted elections in Cambodia. Multiple parties participated, save for the Khmer Rouge who decried the process and refused to. During the elections however, the country continued to be managed by Sen. Ultimately, it was not Sen's administration that won the majority vote, but Sihanouk's FUNCINPEC party. Sen refused to relinquish power, and instead decided to share power with his political rivals. The repercussions of this will be discussed in the following chapter.<sup>46</sup>

Each state's actions during the time of the PRK has not only hindered the notion that the perpetrators of the genocide must be tried, but have also shown the manner in which the international community prioritizes matters. Both China and the U.S's actions,

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<sup>44</sup> Ibid., 55.

<sup>45</sup> Ibid., 56.

<sup>46</sup> L Shelton Woods, "The Myth of Cambodia's Recovery," *Contemporary Southeast Asia* 18, no. 4, (1997): 420, accessed August 10, 2017, <http://www.jstor.org/stable/25798356>.

while aiming to preserve their hold on the region, also show an inability (more-so in the case of the U.S.) to pursue actions against Vietnam given the outcome of the Vietnam War, rather what may actually be beneficial for the region. In the case of the U.S., it is particularly ironic given its condoning of one communist country's actions, all the while decrying those of others. Even following Vietnam's withdrawal from Cambodia, those within the PRK would nonetheless find positions within the succeeding government. In this regard, the atmosphere of only trying senior-most officials of the PRK (and the fear of their own safety) would continue on to the present day.

Just as the legal definition of genocide was decided by powerful states following the end of the second World War, so too was Cambodia's fate. Whether it was the People's Republic of China (and eventually the United States) backing the Khmer Rouge, or the Soviet Union backing the Vietnamese invasion of Cambodia, other states have attempted to decide the fate of Cambodia. Furthermore, the atrocities committed by the Khmer Rouge were ignored (and the initial trial decried as a sham) up-to the 1990s. As this condemnation continued, the Khmer Rouge's seat in the United Nations was preserved; they were still viewed as the legitimate rulers of Cambodia despite their actions clearly violating international humanitarian law.

Throughout this thesis, it has been continuously asked why there were so few prosecutions after the Cambodian genocide. This chapter reinforces my thesis statement that there is an intersectionality between Cambodia and the rest of the global community, even more-so when viewed alongside the narrow definition of genocide. The international community backed certain groups to further their own interests, in turn allowing those groups to have legitimacy. Vietnam is not guiltless, in that it also installed

low and mid-level Khmer Rouge, many of whom are still in the Cambodian government to this day. No state actor is blameless in Cambodia's history. The next chapter will address my final point, the Sen administration, and its policies regarding the Cambodian tribunal. The chapter will build off what was noted in chapter four regarding genocide and the tribunal models utilized by the United Nations. It will be shown how the hybrid model in the case of Cambodia failed to try the perpetrators, and how the Sen administration has stymied further trials to protect their own interests rather than allow the populace to reconcile with what transpired over forty years ago.



## 6. Local Problems, Global Solutions?:

Each chapter thus far has built upon the previous one, ever widening the scope while examining Cambodia. From Cambodia's history as a colonial power, to under the Khmer Rouge, the foundation was created to understand how genocide and the tribunal model (both which emerged well before Cambodia's own atrocity) would go on to affect the country later on. Even so, attention must still be paid to the international community, understanding how each of the nation's actions influenced Cambodia as it tried to move forward from what it experienced.

It is in this chapter that the scope begins to again narrow in on the Sen administration as well as the Cambodian tribunal. Each of these factors, time under colonial rule, the narrow legal definition of genocide and the lack of enforcement, other countries attempting to further their own interests in Cambodia, have led to this moment in which domestic politics meet the international, where a lack of foresight decades earlier allows only three people to be prosecuted, and two to die awaiting trial due to old age.

The Extraordinary Chambers in the Courts of Cambodia (ECCC) came into being in 2003 following seven years of negotiations. Despite this, the tribunal was unable to begin proceedings until 2006. Since its creation, the ECCC has prosecuted 3 of the most senior members of the Khmer Rouge. In contrast to this, the tribunals for Rwanda and Yugoslavia have prosecuted 61 and 83 people respectively. Numerous issues have plagued the ECCC, among them, allegations of corruption, neglect by the United Nations, and the hybrid tribunal model itself. In examining these factors of the ECCC, not only

has it resulted in a low number of prosecutions, but the international community and definition of genocide remain culpable to the issue as a whole.

Prior to its creation, the ECCC faced several issues, the most prominent being, who would be tried. As has been noted in previous chapters, the majority of both the People's Republic of Kampuchea (PRK) and the present day Sen administration are comprised of former lower and mid-level members of the Khmer Rouge. Given that the atrocities committed during the Cambodian genocide are not limited to the senior-most officials, if the ECCC was allowed a broad scope to try those accused, the majority of the Cambodian government would find itself tried.<sup>1</sup> An attempt was made by Prince Sihanouk in 1996 to pardon those prosecuted in the 1979 trials conducted by the PRK in an attempt to encourage national reconciliation,<sup>2</sup> yet with the emergence of the ECCC, the question emerged as to how address those offered amnesty. The same year, both Prime Ministers Hun Sen and Norodom Ranariddh wrote to the United Nations requesting assistance in creating a tribunal and addressing the difficulties presented to them.<sup>3</sup>

Following Ranariddh's request, there was debate amongst members of the international community as to how to assist Cambodia. The first concern was to ensure how not only would the international community work with Cambodia into ensuring a transparent and successful tribunal, but also that the events of the 1979 PRK trials were not repeated. Though the PRK did attempt to ensure that the international community

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<sup>1</sup> John D. Ciorciari and Anne Heindel, *Experiments in International Criminal Justice: Lessons from the Khmer Rouge Tribunal* (Michigan Journal of International Law, 2014), 128.

<sup>2</sup> Seeta Scully, "Judging The Successes And Failures Of The Extraordinary Chambers Of The Courts Of Cambodia," *Asia-Pacific Law & Policy Journal* 13, no. 1 (2011): 311.

<sup>3</sup> Joel Brinkley, "Justice Squandered: Cambodia's Khmer Rouge Tribunal," *World Affairs* 176, no. 3, (2013): 41, accessed March 9, 2017, <http://www.jstor.org/stable/43555408>.

understood the actions of the Pol Pot regime, the verdict of the trial was largely pre-decided—the defense was not allowed to participate, and lines were scripted. After deliberation, the United Nations Human Rights Commission passed a resolution that a war crimes tribunal be created. This would not only ensure that Cambodia received international assistance, but that more rigorous guidelines would be placed on Cambodia. Doing so ensured that the tribunal would adhere to the standard set by the international community and that Cambodia itself work with them.<sup>4</sup>

In 1998, Ranariddh was ousted in a coup staged by Sen, leaving Sen the sole prime minister of Cambodia. Sen quickly rescinded support for the tribunal, citing concerns that the requirements set by the United Nations were too broad. He instead requested that only a certain number of former Khmer Rouge from 1975 to 1979 be tried and stated that the “past is better left forgotten.”<sup>5</sup> Sen's rationale was that the majority of the Cambodian government would be targeted under the broad guidelines set by the United Nations. Scully notes that Sen stated he feared a second civil war could occur if the tribunal went forward with the guidelines set by the United Nations.<sup>6</sup> This claim would be utilized time and time again as the tribunal proceeded.

Following Sen rescinding support for a tribunal, his administration began a series of attempts to reduce the role of the United Nations in the tribunal process. Over the next seven years, among the requests made to the United Nations was that the tribunal be comprised entirely of Cambodian judges and that it operate under Cambodian law. There were multiple problems with these requests. In requesting that the tribunal adhere to

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<sup>4</sup> Seeta Scully, “Judging The Successes And Failures Of The Extraordinary Chambers Of The Courts Of Cambodia,” *Asia-Pacific Law & Policy Journal* 13, no. 1 (2011): 312.

<sup>5</sup> *Ibid.*, 316.

<sup>6</sup> *Ibid.*, 315.

Cambodian law, it demonstrated a hesitation to adhere to the guidelines set forth by the international community for the tribunal. Furthermore, by having the tribunal consist entirely of Cambodian judges, there existed a lack of presence from the international community. Even if both of these requests were granted, there existed the issue that the Cambodian legal system performed under the standards set by the international community, and that trained professionals, be they lawyers, judges, or other intellectuals, were lacking due to purges under the Pol Pot regime.<sup>7</sup> To request this of the United Nations and to make these concessions signifies a dissonance with the reality of the situation in Cambodia at the time. Whether this is the result of previous attempts to influence Cambodia be it colonialism, the fear of an emerging Vietnam, remains to be seen. Regardless, attempts to further their requests by signifying a desire for Cambodian sovereignty furthered the question as to how Cambodian sovereignty may be preserved all the while applying international guidelines to the tribunal.

Negotiations continued with the United Nations putting forth the idea that the tribunal be modeled after the ones in Rwanda and Yugoslavia, both having succeeded. Finding the United Nation's suggestion to not be feasible, Sen abandoned the negotiation process between Cambodia and the United Nations, stating that so long as the United Nations failed to accept a minor role, the two could not discuss the matter. In 2001, Sen would go so far as to sign a law that would allow the tribunal to proceed under Cambodian appointed judges and courts. Following this, the United Nations withdrew from discussion on the matter and talks remained suspended for several more years.<sup>8</sup> It was not until the United States made a suggestion on behalf of the United Nations that

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<sup>7</sup> Ibid., 316.

<sup>8</sup> Ibid., 317.

talks resumed, among these suggestions were that two out of the five judges for the trial be appointed by the United Nations and the remaining three be Cambodian. By giving a Cambodian majority but ensuring that four out of the five judges agree to reach a verdict, not only would Sen's desire for Cambodian sovereignty be satisfied, but so would the international community play a pivotal role in reaching a verdict. In 2003, both the United Nations and Cambodia agreed to these guidelines.

Even so, issues would persist following the creation of the ECCC. One such issue was how to base its legal standing. Prior to the Khmer Rouge disbanding all laws, Cambodia operated under a form of French civil law retained from its time as a French colony.<sup>9</sup> It was this model that was used to form the basis for the ECCC, yet it was modified in an attempt to function for international matters. Under this modification, each of the roles for the tribunal is divided so that there is both a Cambodian and international component. Furthermore, Scully explains that if a matter is not covered by French civil law, international law may be looked to provide further “guidance.”<sup>10</sup>

The prosecution, consisting of both a Cambodian prosecutor and a United Nations prosecutor, must submit a request for investigation to two investigating judges, also divided accordingly. Under the French civil system, investigating judges will attempt to find evidence, rather than law enforcement. When the investigating judges conclude their investigation, they must issue an order whether the case is to be tried or dismissed. From there, the trial continues through three different chambers, that of the Pre-Trial, Trial, and Supreme Chamber. In the Pre-Trial chamber, the need for a trial may be appealed. If it is

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<sup>9</sup> John D. Ciorciari and Anne Heindel, *Experiments in International Criminal Justice: Lessons from the Khmer Rouge Tribunal* (Michigan Journal of International Law, 2014), 104.

<sup>10</sup> Seeta Scully, “Judging The Successes And Failures Of The Extraordinary Chambers Of The Courts Of Cambodia,” *Asia-Pacific Law & Policy Journal* 13, no. 1 (2011): 318.

not, the case continues to the Trial Chamber, divided between three Cambodian and two United Nations appointed judges.<sup>11</sup> In both the Pre-Trial and Trial chambers, four out of five judges must agree on a ruling. Should the Trial Chamber's ruling be appealed, the case is taken to the last chamber, that of the Supreme Chamber. In the Supreme Court Chamber, the decision is final. Presided over by four Cambodian and three international judges, a "supermajority" of five out of seven judges must be in agreement to reach a verdict.<sup>12</sup>

Upon establishing the ECCC, an issue debated was what charges would be brought against the accused. While there was no question that the Cham and Vietnamese minorities killed under the Pol Pot regime constituted a national group that would fall under the definition of genocide,<sup>13</sup> the question remained as to how to define those killed that were Cambodian. Given that the Khmer Rouge insisted that Cambodians killed were a political group, it could not be tried under genocide, but instead would constitute a crime against humanity.

Even so, the notion that Cambodians killed were only a political group has been contested. Given that all areas of Cambodian society were targeted, such as education or entire regions of the country, it is difficult to attribute this to a single political entity. Hurst Hannum explains this through the notion that the populace was killed not because of being traitors or dangerous, but that they were considered part of that group because they were to be killed.<sup>14</sup> Using the definition of genocide allowed the Khmer Rouge to

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<sup>11</sup> John D. Ciorciari and Anne Heindel, *Experiments in International Criminal Justice: Lessons from the Khmer Rouge Tribunal* (Michigan Journal of International Law, 2014), 104.

<sup>12</sup> Ibid.

<sup>13</sup> Seeta Scully, "Judging The Successes And Failures Of The Extraordinary Chambers Of The Courts Of Cambodia," *Asia-Pacific Law & Policy Journal* 13, no. 1 (2011): 320.

<sup>14</sup> Hurst Hannum, "International Law and Cambodian Genocide: The Sounds of Silence," *Human Rights Quarterly* 11, no. 1 (1989): 89.

dismiss their actions as not genocide, though this would not make them exempt from international law regarding their actions.

It has been posited by Hannum that under the Khmer Rouge, there was only a Khmer nationality in Cambodia. Those that were killed would fall under a national group rather than being a political entity. Hannum's points are furthered by the claim that in the definition of genocide, there is no claim that those killed must be of a minority group.<sup>15</sup> Even if the Cambodian populace were declared as falling under the definition of genocide, there still exists the issue of whether Khmer Rouge officials were aware of the effects of their actions. The evidence presented during the ECCC shows not only that Khmer Rouge officials were aware of their actions, but the lengths to which they went to dehumanize those tortured and killed. Documents from the Tuol Sleng Genocide Museum (S-21 under the Khmer Rouge) include over 20,000 forced and documented confessions from prisoners as well as over 200,000 general files. Within the documents include annotations, indicating that they were passed between officials, documenting their thoughts at the time of the events unfolding.<sup>16</sup>

Given that the ECCC labelled the deaths of Cambodians as a crime against humanity, the requirement that the motivations be proven as in the case of genocide, is no more. At a first glance, this would appear to make the verdict that much more easier to achieve, yet this is not the case. Instead, other factors remain as to why there have been a limited number of prosecutions.

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<sup>15</sup> Ibid., 105.

<sup>16</sup> Tom Fawthrop and Helen Jarvis, *Getting Away with Genocide?: Elusive Justice and the Khmer Rouge Tribunal* (Sydney: UNSW, 2005), 212.

A question that has persisted during the ECCC was who is able to be brought before the tribunal. Given the Sen administration's hesitation to include anyone beyond senior officials and those most responsible during the 1975 to 1979 period, the scope for those able to be tried is limited. The issue is further compounded by amnesty granted in 1996 by Prince Sihanouk. In the case of Ieng Sary, who was declared guilty while tried *in absentia* by the PRK in 1979, the question of whether he would stand trial was debated by the ECCC. The issue remained in whether amnesty provided by the domestic government would supersede international law. If amnesty was to remain, the international community's ability to intervene regarding domestic cases would be undermined, and its legitimacy be in question. The Trial Chamber concluded with this sentiment, ruling that given Cambodia's obligation under the international law as per the 1954 Geneva Convention in which they were a signatory participant, they must try Ieng Sary.<sup>17</sup> However, debate continued following the Trial Chamber's declaration and Ieng Sary died in 2013 while awaiting trial.

Aside from Cases 001 and 002 of the ECCC, the rest have been contested by the Sen administration. In 2015, United Nations investigating judge Mark Harmon charged two former Khmer Rouge officials, Im Chem and Meas Muth, with crimes against humanity as well as war crimes. Given that both acted within the 1975 to 1979 period and were senior officials, they would fall under the agreed classifications. Nonetheless they were opposed by the Sen administration on the grounds that doing so would lead to a

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<sup>17</sup> John D. Ciorciari and Anne Heindel, *Experiments in International Criminal Justice: Lessons from the Khmer Rouge Tribunal* (Michigan Journal of International Law, 2014), 119.



civil war in which 200,000 to 300,000 would be killed<sup>18</sup>—a civil war that would be started by an upset populace. The grounds for this claim were baseless. During Case 001 in which the head of the S-21 prison, Kang Kek Iew, also known as “Comrade Duch,” was tried, there were no cases of civil unrest of any kind.<sup>19</sup> Sen’s claim of civil war may instead be linked to that of former Khmer Rouge members such as Yim Phanna when interviewed, agreed with his sentiment.<sup>20</sup> To this, any further cases viewed by the ECCC have the possibility of sparking unease for former Khmer Rouge members, in that they are unsure if they may be tried next. The cases have continued to be investigated since 2010 without civil unrest occurring, yet Sen has maintained his position. Even when Harmon issued warrants for the arrests of Muth and Chem (the Cambodian investigating judges refused to cooperate), Cambodian police officials were instructed to ignore the warrant for their arrest.<sup>21</sup> Both cases have continued with clear refusal on behalf of the Cambodian government and judges.

A leftover from colonialism, the role of the investigating judge has further impacted the ECCC and its ability to operate. Though the role was utilized by the French civil system in the past, its ability to perform efficiency in the event of mass killings has been questioned. Furthermore, the role has been reduced in France's own legal system.<sup>22</sup>

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<sup>18</sup> Kuch Naren, “Hun Sen Warns of Civil War If ECCC Goes Beyond ‘Limit’,” *The Cambodia Daily*, February 27, 2015, <https://english.cambodiadaily.com/news/hun-sen-warns-of-civil-war-if-eccc-goes-beyond-limit-78757/>.

<sup>19</sup> Joel Brinkley, “Justice Squandered: Cambodia’s Khmer Rouge Tribunal,” *World Affairs* 176, no. 3, (2013): 45, accessed March 9, 2017, <http://www.jstor.org/stable/43555408>.

<sup>20</sup> Kuch Naren, “Hun Sen Warns of Civil War If ECCC Goes Beyond ‘Limit’,” *The Cambodia Daily*, February 27, 2015, <https://english.cambodiadaily.com/news/hun-sen-warns-of-civil-war-if-eccc-goes-beyond-limit-78757/>.

<sup>21</sup> “Cambodia: Stop Blocking Justice for Khmer Rouge Crimes,” *Human Rights Watch*, March 22 2015, <https://www.hrw.org/news/2015/03/22/cambodia-stop-blocking-justice-khmer-rouge-crimes>.

<sup>22</sup> John D. Ciorciari and Anne Heindel, *Experiments in International Criminal Justice: Lessons from the Khmer Rouge Tribunal* (Michigan Journal of International Law, 2014), 120.

Given that the foundation for the ECCC was a mixture of adhering to the French civil system left behind as well as the United Nation's own attempt at maintaining an international presence, the role has found itself the reason for stalling current cases as well as future ones.

Previous United Nations investigating judge Marcel Lemonade was quoted by John Ciorciari as stating that "every decision is like negotiating a treaty. In France or elsewhere, taking a decision takes a half hour, here we need 8 days."<sup>23</sup> Ciorciari goes on to state that in Case 001 in which Duch was tried, investigating judges spent two years finding evidence when "the accused admitted to most of the allegations against him."<sup>24</sup> When Duch was found to have been under confinement without a trial and due process, United Nations investigating judges attempted to reduce his sentence for time served, yet this was overturned by the Cambodian investigating judges due to fear of public outcry. This concern for bias was not only in Duch's case, but in others.

When attempts were made by United Nations investigating judges to proceed with additional trials, the Cambodian judges dissented and voted against their decision.<sup>25</sup> When cases 003 and 004 were dismissed in 2010 by the Cambodian judges, Judge Lemonade resigned. His successor, Judge Blunk resigned shortly after. Blunk's successor, Judge Kasper-Ansernet, was hindered from taking his post. Despite the United Nations having the ability to appoint its own judges, they nonetheless had to be confirmed and granted the ability to investigate by the Cambodian Supreme Council of the Magistracy. Initially refusing to meet with Judge Kasper-Ansernet, and when finally having met with

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<sup>23</sup> Ibid., 107.

<sup>24</sup> Ibid., 108.

<sup>25</sup> Ibid., 129.

him, refused to confirm him on the basis that the judge had previously posted negatively on social media about the success of the ECCC. Kasper-Ansernet's orders were prevented from going on file regarding cases 003 and 004, and orders to be granted access to the case files were ignored. Kasper-Ansernet resigned in 2012.

In May 2017, the Cambodian government voiced concerns that it would be unable to continue with the ECCC due to having failed to secure funding. This was deemed an excuse, in that the majority of ECCC funding comes from others in the international community, among them, Japan, the U.S. and Australia. Given a lack of action on cases 003 and 004, the excuse that there is a lack of funding is all the more dubious, particularly given claims in the past that Cambodian staffers were forced to give their payrolls to the Sen administration so that they could continue their position. Even after an independent office was established to combat corruption, concerns still arose if such was taking place.<sup>26</sup> Despite insistence of members of the international community that funding would continue for the ECCC, the Cambodian government has insisted that the cases close.<sup>27</sup> Ciorciari notes that the Cambodian government went so far as to declare a document that dictated as to why the tribunal would close be labeled “confidential,” there was no transparency to other countries looking into the matter.<sup>28</sup>

The tribunal would continue trying senior-most members throughout 2017. In June of that year, Khieu Samphan was tried along with Nuon Chea. Both continued to deny that genocide occurred within Cambodia, instead maintaining the stance that it was

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<sup>26</sup> Ibid., 142.

<sup>27</sup> Andrew Nachemson and Erin Handley, “Donors Still Backing Khmer Rouge Tribunal,” *Phnom Penh Post*, accessed May 15, 2017, <https://www.phnompenhpost.com/national/donors-still-backing-khmer-rouge-tribunal>.

<sup>28</sup> John D. Ciorciari and Anne Heindel, *Experiments in International Criminal Justice: Lessons from the Khmer Rouge Tribunal* (Michigan Journal of International Law, 2014), 149.

Vietnamese propaganda. Khieu Samphan would go on to state “the term ‘murder,’ I categorically reject it, the Communist People of Kampuchea leaders did not exterminate our people, what was the interest in doing so?”<sup>29</sup> The two were initially convicted in 2014 of crimes against humanity with the evacuation of Phnom Penh and use of labor and execution sites,<sup>30</sup> receiving life sentences, yet the trial continued for the crime of genocide against the Vietnamese and Cham minorities.<sup>31</sup> The use of labor camps was justified in that it was intended to solve hunger, and that it was not criminal. Nuon Chea's lawyer, Victor Koppe, spoke out against the proceedings, stating that the ECCC was a show trial for the United States and Vietnam. In this, the defense of Khmer Rouge senior officials mimics the stance of the international community following Pol Pot's trial *in absentia*.

On November 16, 2018, both Nuon Chea and Khieu Samphan were found guilty of genocide against Vietnamese in Cambodia. Khieu Samphan however, was found not guilty of genocide against the Cham due to a lack of evidence. Hailed as a victory, it nonetheless highlights the difficulties of the ECCC, as well as the limitations between genocide and crimes against humanity. Both found their life sentences doubled.<sup>32</sup>

There are difficulties regarding the ECCC, yet they may be viewed in conjunction with both the actions of the international community as well as the definition of genocide.

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<sup>29</sup> Prak Chan Thul, “Khmer Rouge leader denies mass murder, blames Vietnam,” *Reuters*, June 23, 2017, <https://www.reuters.com/article/us-cambodia-rouge/khmer-rouge-leader-denies-mass-murder-blames-vietnam-idUSKBN19E0UO>.

<sup>30</sup> “Top Khmer Rouge Leader Khieu Samphan Denies Cambodia Genocide at Close of UN-backed Trial,” *The Straits Times*, June 23, 2017, <https://www.straitstimes.com/asia/se-asia/top-khmer-rouge-leader-khieu-samphan-denies-cambodia-genocide-at-close-of-un-backed>.

<sup>31</sup> Prak Chan Thul, “Khmer Rouge leader denies mass murder, blames Vietnam,” *Reuters*, June 23, 2017, <https://www.reuters.com/article/us-cambodia-rouge/khmer-rouge-leader-denies-mass-murder-blames-vietnam-idUSKBN19E0UO>.

<sup>32</sup> Eli Meixler, “Cambodian Court Convicts Former Khmer Rouge Leaders of Genocide in Historic Ruling,” *Time*, November 16, 2018, <http://time.com/5456749/cambodia-khmer-rouge-genocide-verdict/>.

The definition's failure to address political groups runs contrary to the message put forth to the international community at the 1954 Geneva Convention that the world is against genocide, in that allowing such a limited definition only allows other ways in which answering for the crime to be realized. Even so, the shifting stance of the international community, while commendable, may be seen as legitimizing the Sen administration to do the same in discontinuing trials at the ECCC. The issue is further compounded in that as survivors of the genocide continue to die, or those that were perpetrators, so is history lost. Evidence-testimonies, one's memory, all are aspects that are lost as the ECCC continues to be able to try those who have committed the crimes that they have. Furthermore, it is not simply history or evidence that is lost, but also any ground for future trials of genocide. A precedent, no matter how unintended, will have been created from the inaction on behalf of the Cambodian government. This may be viewed in a favorable light for future perpetrators of genocide in that they may believe that they are able to commit the crimes they do and receive no punishment due to political maneuvers. As the tribunal faced the possibility for closing, not only is the populace denied an opportunity for justice, but so are the perpetrators able to escape it.

The Cambodian tribunal continues to be fraught with corruption and an inability to address what has occurred in Cambodia. As mentioned in previous chapters, the history is Cambodia allowed a cycle of self-serving rulers to put their needs above the rest of the populace. Other states, have also acted in their own interests, attempting to either back rulers that would aid them in the overall conflict in Vietnam, or aid the Khmer Rouge. Even after the international community acknowledged that the perpetrators of the Cambodian genocide must be held accountable, there still existed

difficulties in bringing them to justice. The Sen administration, while initially open to trying perpetrators, only wished to try the senior-most officials. After a long and drawn out process in which the United Nations attempted to ensure fair elections, a coup lead by Sen would further entrench his power. The tribunal would begin, albeit reluctantly, and be met with opposition at every turn. When other senior officials were declared to be tried (as per the Sen administration's own acceptance), it was decried as going outside of the boundaries set forth by the tribunal.

The issues present in this chapter are indicative of the intersectional problems with Cambodia. The Sen administration attempted to reduce the role of the international community while unwilling to prosecute beyond a few cases themselves. Parallel to this, the international community and United Nations was not able to act within their wishes, hindered by the narrow legal definition of genocide and continued attempted legitimacy of the Khmer Rouge. The hybrid model, while based on the successes of Rwanda and Yugoslavia, was able to act in accordance with the wishes of the Sen administration, rather than what was needed for Cambodia's populace. Even when attempts were made to enforce certain rulings, colonial laws were referenced as a starting point, laws that have since been amended by the former colonial powers in their own countries, due to their ineffectiveness. Ultimately, the placement of low and mid-level Khmer Rouge within Cambodia's government, along with domestic corruption as well as the difficulties of the tribunal model, allowed many to escape justice.

By now understanding the intersectionality of the issues present in Cambodia and what allowed so few to be prosecuted, it may be wondered what this means for the future, if the issues present in the ECCC can happen again after another genocide, or if the

international community will again focus on their interests rather than humanitarian matters.

## 7. What Does This Mean For The Future?:

The low number of perpetrators prosecuted after the Cambodian genocide lies at the crossroads of colonialism, Cold War geopolitics, and domestic corruption.

Cambodia's time under colonial rule provided a foundation in which it was subjugated by Vietnam, and unable to provide for its populace. During the Cold War, its ruler would be usurped by more powerful state actors, and then its rulers (the Khmer Rouge) who committed atrocities, would have their seat at the United Nations maintained in the name of other state's interests. Finally, the current administration has maintained its power, and stymied additional cases in order to preserve themselves. While all of the previous chapters have showed the intersectional aspects of what allowed so few to be prosecuted following the Cambodian genocide, it may now be posited what will happen in the future. This chapter will again examine these factors and then attempt to find a solution so that the issues present in Cambodia are not repeated.

Multiple factors have resulted in the low number of prosecutions for genocide by the ECCC. The tribunal had two aspects to it, corruption from within the Sen administration, as well as an inability to act on suggestions put forth by the United Nations. Geopolitics, even prior to Cambodia's independence lead to a scenario in which countries would continue to vie for control of the state. Even more-so, actions by those in the international community would not only allow the Khmer Rouge to rise to power, but to maintain their hold on the country for several years. Even the intervening force from Vietnam would consist of those that had previously consisted of the Khmer Rouge. Although the sincerity of Vietnam's actions may be doubted, attempts were made to try



Pol Pot *in absentia*, all the while the international community continued to back the Khmer Rouge on the world stage. It was only when the proxy conflict ended that the international community would become involved, yet this would be met with a mixture of hope but trepidation. Given the nature of the country's liberation, only the senior-most officials were able to be tried, any even any others who faced insurmountable evidence, would be denied a trial.

Even so, the legal definition of genocide, all the while running contrary to the one put forth by Lemkin, denied senior-most perpetrators of being tried of it against the Cambodian populace. Instead, crimes against humanity was used, and genocide instead utilized for Vietnamese and Cham. This is indicative of not only the difficulty of prosecuting genocide, but also the geopolitics that surround how the term came to legally be. International affairs cannot continue with such a stringent definition, and instead must expand upon it, even at the possibility of countries being tried for their actions in the past. If a tribunal has lasted for several decades and contained a limited scope for who to be tried is unable to convict mass killings of its populace as genocide, the question for the future remains as to who will be able to succeed in such an act.

If the tribunal is to be commended for its prosecution of senior-most officials, then it must still be criticized for the process through which this occurred. As the tribunal concluded, all senior leaders were either tried and convicted of crimes against humanity and genocide against the Cham and Vietnamese or died during the process. The question then remains if the ECCC was successful in what it sought to achieve. From the notion of trying senior-most leaders of the Khmer Rouge, it succeeded, although it must also be noted that in the case of Pol Pot and Ieng Sary, it failed. Geopolitics from the Cold War

impeded upon an international tribunal and allowed several perpetrators to escape justice. If examined from the notion of trying other members of the Khmer Rouge, the tribunal may be said to have failed. However, it is important to note that mid and lower-level members are still present in the Cambodian government and involved in preventing any further cases are tried.

Each of these components allowed only a select few to be tried for genocide, and even then, instead crimes against humanity. A question may be then asked about the future of genocide studies, and the possibility of trying others in the future. It must be asked which model is more likely to be used with success—while United Nations led tribunals have had more success, but the question still emerges if reconciliation has occurred. Even with the interwoven model of the ECCC, it is questionable whether it has occurred amongst the Cambodian populace. Even so, a lack of such could also be said to have occurred due to Cambodia's previous interactions with the international community.

Though there exists no solution to enabling further trials at the ECCC, it must be commended for creating a common history for the Cambodian populace and allowing them to understand what has happened. For future tribunals, emphasis must be placed on preventing the state from intervening too heavily yet ensuring that the tribunal is able to convict those accused. Furthermore, it is imperative that the tribunal take place within the country of which it occurred so as to allow the populace to participate as opposed to being distanced from it in the case of Rwanda and Yugoslavia. The ECCC, while low in prosecutions, allows us to understand the ways in which geopolitics impacts the pursuit of justice, and that is important to pursue justice the moment it becomes available.

It can be easy to regard the Cambodian tribunal with bleak resignation. The stringent legal definition of genocide, states backing certain factions to fulfill their own geopolitical goals, and domestic politics, all affected how the tribunal would be addressed decades after the genocide occurred. There exists no immediate solution. States will not alter the legal definition of genocide due to their own fears for being accused of committing atrocities. Nor will states agree to cease intervening in the affairs of others. What remains hopeful however, is the apparatus in which the United Nations allows states to come together and pursue justice, however narrow the scope. As states continue to rethink their role in international affairs, hopefully the United Nations may provide the means to which matters such as the definition of genocide, or the hybrid tribunal model, can be amended. Cambodia simply must be the first place from which these attempts are made.

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