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Rethinking Transitional Justice: Cambodia, Genocide, and a Victim-Centered Model

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Chapter One

The Phenomenon

“Cambodia was a satellite of imperialism, of U.S. imperialism in particular...the poor peasants were the most impoverished, the most oppressed class in Cambodian society, and it was this class that was the foundation of the Cambodian Party ... Revolution or people’s war in any country is the business of the masses and should be carried out primarily by their own efforts: there is no other way ... the Kampuchean Revolution must have [the option of] two forms of struggle: peaceful means; and means that are not peaceful. We will do our utmost to grasp firmly peaceful struggle ... however, [we] must be ready at all times to adopt non-peaceful means of struggle if the imperialists and feudalists ... stubbornly insist on forcing us to take that road... in the past we held our destiny in our own hands, and then we allowed others to resolve it in our place. We must never allow this historical error to be repeated ... we must always hold firmly to the stance of independence-mastery, rely on our own forces and endure difficulties and suffering.”

--Khmer Rouge Leaders Pol Pot and Khieu Samphan¹

“Twenty years of UN silence on Khmer Rouge genocide encouraged Cambodians to ignore the past.”

--Ben Kiernan, “Coming to Terms with the Past: Cambodia”

“The world, in general, now knows what had happened to Cambodia since April 17, 1975. Most notably, the world now knows about the Khmer Rouge reign of terrors and the Killing Field that followed. It was a nightmare that I would rather forget completely. Unfortunately, it was not possible for me to forget this tragic past in Cambodia’s history and my own. I am still hopeful for justice because vengeance can be very bitter, I know.”

--Survivor of the Khmer Rouge²

I. The Problem

On October 4, 2004, the Cambodian Parliament unanimously voted to ratify the Khmer Rouge tribunal to try cases of genocide and crimes against humanity committed by the Khmer Rouge between 1975 and 1979. More than 1.7 million Cambodians died from starvation, execution, and disease during that period; however, it is only now,

¹ Philip Short, *Pol Pot: the History of a Nightmare* (London: John Murray Publishers, 2004) 57-213.

² “Survivors’ Stories.” *Documentation Center of Cambodia*, 10 Aug. 2005
<http://www.dccam.org/survivors/survivors_stories.htm>.

almost three decades after the event, that the Cambodian Government and the international community have come to an agreement to bring justice to the Cambodian people against the Khmer Rouge.

Although tensions initially arose over the terms of the tribunal between the United Nations and the Cambodian Government, it has been established that the tribunal will be based on Cambodian law, “with the March Agreement³ stipulating that where there is uncertainty regarding Cambodian law, the tribunal *may* turn to international law.”⁴ The structure of the tribunal will consist of two extraordinary chambers, the Trial Chamber and the Supreme Court Chamber, where both chambers will be comprised of a majority of Cambodian judges and of a minority of international judges. Moreover, decisions will require a supermajority of judges, where at least one international judge’s vote in any majority will be needed for any decision to hold.⁵ It has also been held that the tribunal will aim at prosecuting senior Khmer Rouge leaders and those most responsible for committing crimes against humanity and of genocide between April 1975 and January 1979.⁶

Susan Cook and Ben Kiernan have interpreted these processes optimistically, arguing that “survivors of the genocide will know for the first time that their suffering has

³ The March Agreement refers to the draft agreement between the United Nations and Cambodia on the status of a court to try the Khmer Rouge. It takes into account both United States proposals on the creation of the court, as well as measures proposed by the Cambodian Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia. The law was passed by the Cambodian government on August 10, 2001, and appropriated jurisdiction to Extraordinary Chambers over human rights offenses, as well as its own definition of genocide. *See* Scott Luftglass, “Crossroads in Cambodia: the United Nation’s Responsibility to Withdraw Involvement from the Establishment of a Cambodian Tribunal to Prosecute the Khmer Rouge,” *Virginia Law Review* 90 (2004): 912-913.

⁴ *Ibid* 893-964.

⁵ *Ibid* 917.

⁶ Stephen Heder and Brian Tittmore, “Seven Candidates for Prosecution: Accountability for the Crimes of the Khmer Rouge.” *War Crimes Research Office*, American University, Jun. 2001, 15 Aug. 2005 <<http://www.wcl.american.edu/warcrimes/khmerrouge.pdf?rd=1>>.

been acknowledged and taken seriously by the world,”⁷ and that although “a legal accounting of the crimes of the Khmer Rouge era cannot restore to Cambodians their lost loved ones, [it] could give them back their history.”⁸ Some participants in the 2003 Asia Society Symposium have concurred, stating that “imperfect justice is better than no justice at all. The Khmer Rouge leaders are getting older and any further delay in establishing a tribunal may result in the chief perpetrators not living long enough to be held legally responsible.”⁹

Others, on the other hand, have pointed out a corrupt judicial system that might impede an effective transitional justice for Cambodians. Scott Luftglass states to this effect that the United Nations should withdraw from any involvement in the adjudication of the Khmer Rouge crimes, because to fail to do so “would compromise the best interests of the international community, the development and enforcement of international law, and the stability and rehabilitation of Cambodia.”¹⁰ The danger for Cambodia, many also say, is that of bringing out old wounds among the victims and their families without having a clear idea of how the Khmer Rouge tribunal will enable these individuals to heal and move forward, as well as enable Cambodia, as a country, to deal with its past of mass atrocities without disintegrating its social, judicial, economic, and political orders. For Cambodia, the lack of exploration of other transitional justice approaches, such as truth and reconciliation commissions and public hearings, or of using lessons learned from comparative transitional justice procedures in countries like South Africa, Rwanda, East Timor, and Sierra Leone, also entails significant drawbacks for

⁷ Susan Cook, “Prosecuting Genocide in Cambodia: the Winding Path Towards Justice.” Magazine: the Tribunals, May 2001, 5 Aug. 2005 <http://www.crimesofwar.org/tribun-mag/mag_cambodia.html>.

⁸ Ben Kiernan, “Coming to Terms with the Past: Cambodia,” History Today 54.9 (2004): 16.

⁹ Kelli Muddell, “Transitional Justice in Cambodia: Challenges and Opportunities.” Symposium Report, Asia Society, 9 Sept. 2003, 5 Aug. 2005 <http://www.asiasource.org/asip/Cambodia_report.pdf>.

¹⁰ Luftglass (2004): 896.

effective transitional justice to take place for the millions of Cambodians affected. Craig Etcheson warns against the tribunal for only extending to the very top leaders of the Khmer Rouge and has stressed the importance of looking at other techniques of reconciliation and justice to take into account that “all across the country, Cambodians live side-by-side with local Khmer Rouge leaders who were responsible for the execution of their loved ones during the Khmer Rouge regime.”¹¹

Although current literature on Cambodia and transitional justice has criticized or praised the proceedings of the tribunal with regard to reconciliation, corruption, judicial effectiveness, and international standards of justice, *I find missing an examination of how current processes that aim to create the Khmer Rouge tribunal have become political grounds for Hun Sen’s Administration to assert its views of sovereignty, democracy, transitional justice, and self-sufficiency, and for the United Nations to regain its reputation as a guarantor of human rights in the context of Cambodia.* For Hun Sen and his Government, the tribunal has been seen as an opportunity to assert Cambodia’s status in the world order as an independent, sovereign country, whereas for the United Nations, the tribunal has been a means to bring about the justice it failed to give Cambodians post-1979.

In addition, what is less clear within current research of transitional justice in Cambodia is examination that is inclusive of the different factors that created conditions for the Khmer Rouge to gain power in 1975 and that continue to play a role today as the Cambodian government and international community are working together to find justice for Cambodia. Mainly, as I will show, these factors are the political disagreements over formation and identity in post-colonial Cambodia, the role of foreign influences in

¹¹ Craig Etcheson, “Faith Traditions and Reconciliation in Cambodia,” Harvard University, “Settling Accounts? Truth, Justice, and Redress in Post-conflict Societies” Conference, 1-3 Nov. 2004: 40.

domestic politics and social life, the struggle for Cambodia to find its place in the global world order as a developing country, and the nature of public support for democracy. Whereas historical and biographical accounts have been written by Elizabeth Becker, Philip Short, Ben Kiernan, and David Chandler to describe Cambodia during colonization, post-colonization, and after the Khmer Rouge rule, current literature does not provide an understanding of how these dilemmas and factors have shaped Cambodia during those periods and continue to affect Cambodia in 2005. As a result, the absence of such analyses might weaken the pursuit of transitional justice.

Moreover, I contend that current literature, with the exception of Craig Etcheson's essay entitled "Faith Traditions and Reconciliation in Cambodia," has failed to contextualize the issue of transitional justice around its most important audience: the victims. Although Etcheson has proposed a model in which reconciliation can be achieved through the leadership of Buddhist monks and other culturally accepted rituals, he does not address specifically how this model could be applied in conjunction with other transitional justice mechanisms, mainly tribunals and truth commissions. As a result, the lack of victim-centralized approach to transitional justice may not have the intended consequences of uncovering the truth about the past, reaching reconciliation between victims and perpetrators, and achieving healing.

In addition, what remains absent is the comparative observation of other transitional justice procedures that have taken place in South Africa, Rwanda, East Timor, and Sierra Leone, which may be important for Cambodia. As David Crocker asserts, "more generally, few empirical studies compare the effects in different countries of the various types and forms of tools—including amnesties, truth commissions,

museums, and trials—for reckoning with past wrongs.”¹² As a result, I view it as important to use lessons from similar situations of countries trying to deal with their past of mass human rights violations in order to ensure justice, reconciliation, and healing.

I am of the opinion, therefore, that the issue of transitional justice for Cambodia has become politicized grounds for the Cambodian Government and the United Nations to assert their reputation and image in the world order.

II. Significance of Research

The writing of this thesis is driven by two pursuits: one personal and one intellectual. As the daughter of Cambodian refugees, I engage in this thesis with the personal intent of finding out a part of my roots and history that has often been left out of stories told to me by my parents and other Cambodian folks. Indeed, I seek to find out the historical and social factors that contributed to the genocide of over 1.7 million Cambodians and to ensure that the “sickness” that existed within Cambodian society then never gets repeated again. Additionally, this thesis is driven by my personal motivations for social justice and outrage at the persistent impunity pervading in Cambodia regarding the Khmer Rouge. In effect, the current trend of the tribunal processes having become political grounds for both the Hun Sen Government and the United Nations provide the urgency for the writing of this thesis.

Intellectually, I see this thesis as a culmination of my intellectual growth, where I see the opportunity of putting into application the many qualitative, quantitative, analytical, and research-skills that I have acquired in my four years of study. Moreover, the research of this thesis gives me the chance to intellectually engage in a topic that has been close to my heart for over twenty years and to be able to suggest specific policy

¹² David Crocker, “Punishment, Reconciliation, and Democratic Deliberation,” Buffalo Criminal Law Review 5 (2002): 533.

recommendations to the Cambodian Government and the United Nations as to what the direction of transitional justice should look like. As I show in the next chapters, this project also entails the revisiting of and interrogations of my own personal beliefs regarding justice, human rights, truth, history, and democracy. In effect, as I have engaged with the subjects of transitional justice, acknowledgment, truth, history, and democracy, I have realized that justice is not a fixed notion based on the rule of law but instead one that is subject to particular circumstances, societal needs, and empowerment.

III. Research Question and Modes of Inquiry

This project sets out to cautiously examine and assess the processes of transitional justice that have been taking place in Cambodia, especially as they purport to the creation of a Khmer Rouge tribunal. Somewhat more specifically, this study will address the following overarching question: **how can mechanisms of transitional justice best be implemented to enable Cambodia's survivors to find justice and healing?** I want to make clear, however, that this project is not about laying out a complete solution to Cambodia's dilemma of transitional justice. Rather, this study aims at pointing out the issues that need to be dealt with in order to enhance the potentials of effective transitional justice taking place for the country and its people.

To address the main question, I must look at other supplementary issues, which include: 1) why is transitional justice necessary for Cambodia; 2) who should decide and how are the voices of the victims and survivors to be included, if at all; and 3) how should Cambodia deal with its evil past while ensuring that its society does not disintegrate politically, socially, and economically?

IV. Research Methodology and Sources

Methodologically, this study employs a combination of normative and explanatory approaches, such as historical narrative, process tracing, and case studies. Moreover, I approach this project from a Foucaultian understanding of knowledge as an area prone for interpretation and questioning in order to reach a higher truth. As he writes, “to know must therefore be to interpret: to find a way from the visible mark to that which is being said by it and which, without that mark, would lie like unspoken speech, dormant within things.”¹³ In the footsteps of Foucault, I am of the opinion that interpretation is informed by actual experiences, and that the contextualization of these experiences is important in order to bring to the surface new information and new knowledge unique to specific societies. Foucault asserts that knowledge is built upon “a historical investigation into the events that have led us to constitute ourselves and to recognize ourselves as subjects of what we are doing, thinking, saying.”¹⁴ In the context of Cambodia and transitional justice, therefore, the framework of my research is informed in one part by this understanding that knowledge must be informed, questioned, and revisited in order to make sense of the society that we are investigating. Rather than proceed with this project by describing solely the limited situation of transitional justice in Cambodia, I seek to evaluate and analyze transitional justice by contextualizing it in the larger framework of historical and socio-political processes in Cambodia.

In light of this understanding of knowledge, this study is also inspired by critical theory. Brian Fay defines critical theory as explaining “a social order in such a way that it becomes itself the catalyst which leads to the transformation of the social order... it is a

¹³ Michel Foucault, The Order of Things: an Archaeology of the Human Sciences (New York: Pantheon Books, 1970) 32.

¹⁴ See Paul Rainbow, Ethics: Subjectivity and Truth (New York: The New Press, 1994) 315.

critique of [the society itself that aims at provoking] a change in the [society's] consciousness and subsequently to the transformation of [the] society itself."¹⁵

In order to achieve the purposes of this project, which is that of seeking a more victim-centralized approach to transitional justice in Cambodia, I complement my critical theory approach with a comparative analysis of case studies in transitional justice mechanisms. Whereas Janet Schofield refers to this comparative process as “comparability,” other scholars, such as E.G. Guba and Y.S. Lincoln, have named it “fittingness”; however, both concepts refer to a similar approach. Schofield explains comparability as “the degree to which components of a study—including the units of analysis, concepts generated, population characteristics, and settings—are sufficiently well described and defined that other researchers can use the results of the study as a basis for comparison.”¹⁶ Concurrently, Guba and Lincoln define fittingness through “its emphasis on analyzing the degree to which the situation studied matches other situations in which one is interested, [and] provides a more realistic and workable way of thinking about the generalizability of research results than do more classical approaches.”¹⁷ In this project, then, I look at comparative case examples of transitional justice in South Africa, Rwanda, East Timor, and Sierra Leone, in order to derive lessons from these experiences and inform the victim-centralized model that I propose for Cambodia.

Along with the approaches of critical theory and comparative analysis, I interpret my role as a researcher in terms of Rodolfo Stavenhagen's explanation that the role of the social scientist researcher has ceased to be one isolated in academic fixture and contribution. To this effect, he contends that social scientific knowledge has become an

¹⁵ Brian Fay, “The Elements of Critical Social Science,” Social Research: Philosophy, Politics and Practice, ed. Martyn Hammersley (London: Sage Publications Limited, 1993) 33.

¹⁶ Janet Schofield, “Increasing the Generalizability of Qualitative Research,” Social Research: Philosophy, Politics and Practice, ed. Martyn Hammersley (London: Sage Publications Limited, 1993) 207.

¹⁷ *Ibid* 206.

element of power, economically, socially, and politically. As a result, the social scientist has three options:

[First], he can simply continue producing information—like an assembly line worker produces spare parts—without regard to its ultimate use ... or [second], he can produce knowledge suited to prevailing and established interpretations of society, accepting and using in his work the premises upon which are predicated the continuity and stability of existing social systems ... [or] third, he can attempt to offer alternative explanations; explore new theoretical avenues; and exercise his intellectual critique of established or accepted ‘truths.’¹⁸

As should be obvious by now, the option that this project follows is that of option three, where as a researcher, I understand the significance of my work in evaluating and assessing current practices of transitional justice in Cambodia in order to arrive at a model that can better encompass the goals of justice for the Cambodian people.

In addition, I want to bring up a final element that David Crocker calls the insider-outsider hybrid. This term refers to the role of the researcher as an agent who provides alternative explanations and new theoretical approaches to a particular social dilemma, while maintaining an understanding of the social contexts that surround the particular society that he is investigating. As Crocker writes, the insider-outsider hybrid is the combination of insider’s and outsider’s advantages, where the researcher can “immerse himself in [a given group], grasp some of what is going on, and be accepted as a dialogue partner, [while] at the same time [retaining] and [taking] advantage of his outsider status in order to reflect an ‘alien’ culture back to its insiders ... bring new ideas ... and speak the truth.”¹⁹ With regards to this research, therefore, I follow an approach similar to this insider-outsider hybrid, as I am myself an individual connected to the larger Cambodian

¹⁸ Rodolfo Stavenhagen, “Decolonizing Applied Social Sciences,” Social Research: Philosophy, Politics and Practice, ed. Martyn Hammersley (London: Sage Publications Limited, 1993) 60-61.

¹⁹ David Crocker, “Cross-Cultural Criticism and Development Ethics,” Philosophy and Public Policy Quarterly 24.3 (2004): 6.

community, yet also a scholar who will attempt to shed light on the situation of transitional justice in Cambodia.

To assist me in this study, I draw on secondary sources as well as a few primary sources that have been written on Cambodia and on the issue of transitional justice. The secondary sources consist of historical analyses, newspaper articles on transitional justice, country studies, biographies, conference papers, and comparative case studies. In addition, the primary sources constitute of interviews conducted with Cambodian survivors of the Khmer Rouge era, as well as with individuals, such as academics and civil society members, that have participated in the current proceedings of transitional justice in Cambodia.

Overall, I find my use of primary and secondary sources to be realistic, given the length of time allowed to complete this project and the breadth of recent research that has been completed on Cambodia by other scholars. Although it was originally my intent to conduct field research in Cambodia as it pertains to transitional justice and discuss the processes with survivors, it became clear that such comprehensive work would not be able to take place, given the limited resources at my disposition. Other limitations involved in this study include the lack of elaborate information on comparative case examples of transitional justice. In many instances, only partial information was available from newspaper articles, articles in academic journals, and the Internet, which made it difficult to draw elaborate comparisons and apply them to the situation of Cambodia. Despite these limitations, however, I feel that this study has the promise to provide information and a model for transitional in Cambodia.

V. Organization

This project is significant for a number of practical and humanistic reasons, which include 1) the need for Cambodians, both in Cambodia and abroad, to understand and find justice for the events that took place during the Khmer Rouge era; 2) issues of accountability; 3) the larger issue of respect for human rights; and 4) the possible effects that effective and successful transitional justice in Cambodia can have on other societies with pasts of mass atrocities that have yet to be dealt with. Targeted to the public policy world, this study aims at providing assessments and recommendations as to what measures of transitional justice are and are not working for Cambodia, and what should be implemented.

To accomplish these tasks, this study is constituted of four additional chapters. Chapter two reviews the relevant literature surrounding the commanding concepts of this research: post-colonization, genocide, transitional justice, and emerging democracy. First, post- needs to be analyzed in order to understand how the Khmer Rouge gained power in Cambodia between 1975 and 1979. Hence, emphasis will be placed on the political, historical, and social contexts of post-colonization and the era of the Vietnam War. Second, ‘genocide’ is another concept that I examine because of the legal and political implications that surround the term, and how the definition of ‘genocide’ complicates the situation of transitional justice for Cambodia’s survivors. Third, I look at transitional justice, its definition, and the different mechanisms by which such justice can be achieved for societies dealing with their pasts of mass atrocities. Finally, I analyze the issue of society and emerging democracy as it pertains to the challenges and reasons for why societies with histories of gross human rights violations find democracy to be an important means by which to rebuild public support and national sentiments for the country.

Chapter three consists of a contextualized background overview of Cambodia, where I examine the historical, social, and political events that have shaped Cambodia into the country that it is today. Rather than start off with the premise that the Khmer Rouge are guilty of human rights violations, I briefly examine instead the factors, such as Cambodia's invasion by its neighboring countries, colonization by the French, forced involvement during the Vietnam War, corruption, poverty, and political instability that contributed to the rise of the Khmer Rouge. In doing so, this chapter provides a compact analysis of the Khmer Rouge, their ideology, and their paranoia that ultimately led to the destruction of Cambodia and its people. In this section, I also recognize the importance of understanding the Khmer Rouge, their aspirations and policies, and their reasons for undertaking the path they did. Without such an approach, I would be guilty of bias and predisposed position that would undermine the credibility of this study. I follow by looking at the post-Khmer Rouge era and the lack of transitional justice processes that took place under the Cambodian Government or the international community. I demonstrate how leaders, both domestically and internationally, were more interested in finding political stability and reconciliation rather than addressing the violations of human rights that had occurred within Cambodia. Finally, I finish by explaining the processes of transitional justice that have taken place since 1997 with regards to setting up a Khmer Rouge tribunal.

Chapter four delves into the issue of transitional justice by first applying the definition of transitional justice that I provided in chapter two to the current tribunal proceedings taking place in Cambodia. In doing so, I evaluate the proceedings against the issues of truth, dignity, memory, history, and recovery that are inherent within transitional justice, and I demonstrate why a more victim-centralized approach is needed.

From this analysis, I then move to looking at comparative case studies, such as Rwanda, South Africa, East Timor, and Sierra Leone, in order to draw lessons from these case examples as to what worked in ensuring transitional justice for the victims and within what contexts. I then provide a victim-centralized model that can be adopted for Cambodia in order to ensure that the purposes of transitional justice are indeed achieved. In doing so, I propose the elements of public deliberation, alternative mechanisms that incorporate cultural and religious practices, truth commissions, and nationwide discussions as other means by which the tribunal can be enhanced in order to ensure that justice is found for Cambodia's survivors.

Finally, chapter five, the conclusion, provides a few policy recommendations for the Cambodian Government and the United Nations as to how and why both entities should adopt the victim-centralized model that I propose. Although I highlight the political, social, and economic challenges and limitations that the Cambodian Government and the United Nations might face in the implementation of these recommendations, I point out the benefits that both parties can receive from ensuring that the goals of transitional justice are realized. I end by suggesting avenues for further research.

Chapter Two

Literature Review

“Even if the word justice is defined in different ways, from human rights groups to the government, for the victims... I think the issue is how do we move on. The tribunal, to me, is the last solution to Cambodia’s genocide.”

--Youk Chhang, Head of Cambodian Non-Government Organization²⁰

“The truth is Hun Sen has no intention of allowing any meaningful tribunal to judge the Khmer Rouge crimes of excess.”

--Bangkok Post, 2005²¹

²⁰ See Samantha Brown, “Khmer Rouge Tribunal: a Race Against Time as Debates Rage,” Agence France Press, Global Policy Forum, 14 Apr. 2005, 20 Aug. 2005
<<http://www.globalpolicy.org/intljustice/tribunals/cambodia/2005/0414farcical.htm>>.

“Silence poses its own dangers, however. If we do not seek to analyze genocide, then it becomes a floating signifier of evil, appropriated at will for moral condemnation or contained in ways that make us feel more comfortable... to reflect on genocide, then, is not just to explore evil but also to gain greater insight into ourselves and the society in which we live. Furthermore, if we do not attempt to understand the etiology of genocide, we will be unable to prevent its recurrence.”

--Alexander Hinton²²

I. Introduction

In order to make progress in the research question that leads this project, it is imperative that I first define the commanding concepts that are at the heart of this research. These concepts are those of post-colonization, genocide, transitional justice, and emerging democracy. The purpose of exploring these concepts and contextualizing them in the situation of Cambodia is to lay out a common understanding of these issues between the reader and the researcher by pointing out the social, political, and developmental challenges that underlie the field of transitional justice in Cambodia. I want to make clear, however, that the working definitions that I provide are important for the crucial element of the phenomenon under consideration. But I hasten to add that I will not enter into the complex and extensive debates that surround each concept. In this chapter, then, I only provide a working definition of the concepts and explain their importance to this study. I conclude by recapitulating the concepts and their application to Cambodia today.

II. Post-Colonization

A. Working definition

²¹ “Khmer Tribunal Stalled Again,” Global Policy Forum, Aug. 22, 2005, 5 Sept. 2005 <<http://www.globalpolicy.org/intljustice/tribunals/cambodia/2005/0822stall.htm>>.

²² Why Did They Kill?: Cambodia in the Shadow of Genocide (Berkeley: University of California Press, 2005) 4-5.

The aftermath of colonization has raised many questions in the fields of state-building, international politics, and social and economic development, especially as it pertains to the emergence of the state after colonization. Here, one confronts such questions as: what are the factors that contribute to state-building? What institutions are implemented and for what purposes? What are the key actors partaking in the state formation, how does the country maintain or discontinue its relationship with the colonizer, and how is legitimacy, if at all, obtained from the people? In the context of Cambodia and its current challenge of transitional justice, I hold that it is important to look back at the factors that contributed to the rise of the state of Cambodia when it gained its independence in 1954, the choices that were made with regards to state formation, and the challenges of sovereignty and state-building that affected Cambodia then and that continue to this day.

Although there exist different interpretations of the notion of the state,²³ the following features have been held as central to the modern state today:

First, the state is identified with and claims proprietary jurisdiction over a specific territorial area... second, the state enjoys sovereignty: it possesses a single source of ultimate legal authority from which all other institutions derive their legal authority ... third, the state is not a community of communities but an association of socially abstracted individuals who constitute its ultimate ontological limits and are the sole bearers of rights and obligations ... fourth, the structure and institutions of the state are based on a single set of principles, enshrined in its constitution and imparting to the state its singular, unambiguous, definitive and non-negotiable identity... fifth, all its citizens enjoy equal rights ... sixth, to be a citizen is to be a socially transcendent being directly and identically related to the state ... seventh, the state has a single and uniform system of laws in the twofold sense that the same laws apply throughout its territory and that all its citizens are subject to the same laws... eighth, members of the state form a single and homogeneous people, and qua people they are sovereign.²⁴

²³ Martin Van Creveld, The Rise and Decline of the State (Cambridge: Cambridge University Press, 1999) 1.

²⁴ Martin Doornbos and Sudipta Kaviraj, Dynamics of State Formation: India and Europe Compared (London: Sage Publications, 1997) 191-192.

Before I embrace these general characterizations of the state along the notions of territory, legitimacy, order, justice, and social cohesion, I must first mention how such theories of the state have been associated with European state formation experiences. Indeed, when one examines the works of scholars like Opello, Rosow, Doornbos, Kaviraj, Schulze, and Fisk, one can see that a major portion of current academic research has been modeled on the understandings of the state based on European state formations. However, given that the emergence of the state in post-colonization era followed these same models or was based on these same assumptions of what the state should be, I also want to consider the concept of state formation with its relation to post-colonization. Whereas European states emerged between the 16th and 18th centuries, “pioneering a political organization based on a new understanding of sovereignty,”²⁵ the concept of the state in Asia was adapted historically late. As Doornbos and Kaviraj explain, Asia “contained some of the most ancient, most hierarchical, and most powerful empires of all time, where both Asia and Africa displayed a bewildering variety of political systems ranging all the way from the loosest tribes without rulers to strongly governed, relatively stable chiefdoms, emirates, and sultanates.”²⁶ Colonization meant the conquest and control of a people’s land and the destruction of pre- or non-capitalist forms of social organization, with the imposition of one country’s ways of life on another and the use of another country’s resources and peoples for one’s own benefits.²⁷ As a result, post-colonization signified the breaking away from that imperialist relationship and the assertion by the colonized people of their destiny and self-determination. However, as Patrick Williams and Laura Chrisman depict, the era of post-colonization dealt with

²⁵ Walter Opello and Stephen J. Rosow, The Nation-State and Global Order: a Historical Introduction to Contemporary Politics (Boulder: Lynne Rienner Publishers, 1999) 87.

²⁶ Ibid 315.

²⁷ Patrick Williams and Laura Chrisman, Colonial Discourse and Post-Colonial Theory: a Reader (New York: Columbia University Press, 1994) 2.

issues of power relations, economic disintegration, and social tensions bequeathed by colonial powers.

The end of colonial rule created high hopes for the newly independent countries and for the inauguration of a properly post-colonial era, but such optimism was relatively short-lived, as the extent to which the West had not relinquished control became clear. This continuing Western influence, located in flexible combinations of the economic, the political, the military, and the ideological ... was named neo-colonialism by Marxists, though the term was quickly taken up by leaders of newly or soon to be independent countries.²⁸

Hence, the concept of post-colonization refers to an understanding of the state as a territorial entity characterized by sovereignty, institutions, civil society, and social cohesion, and complemented by a history of colonial imperialism and the challenges of reasserting its identity and position in the greater world order.

B. Application to the case of Cambodia

When Cambodia gained its independence from France in 1953 after having been colonized for almost ninety years, Prince Norodom Sihanouk, then ruler of Cambodia, faced several contentious political challenges concerning how political participation, development, involvement of foreign powers, and sovereignty should look like for Cambodia. Cambodia had functioned on the premise that the king or “monarch was a semi-divine ruler with absolute secular power and the benediction of gods.”²⁹ As a result, Prince Sihanouk “saw Cambodia as his own paradise, [envisaging his role] as designating a state to protect Cambodia and keep out unwanted foreign or modern influences that might disrupt the largely rural, Buddhist life in his kingdom.”³⁰ In order to implement his project of state formation, Prince Sihanouk abdicated the throne in 1955 to his father and

²⁸ Ibid 3.

²⁹ Elizabeth Becker, *When the War Was Over* (New York: Simon and Schuster, 1986) 23.

³⁰ Ibid 23.

formed his own party, the *Sangkum Reastr Niyum*, or Popular Socialist Community.³¹

While the Sangkum earned popular support, Sihanouk was adamant on suppressing political opposition, especially when it came to the communist party.

For Sihanouk, the task at hand with Cambodia was the gaining of legitimacy and sovereignty, both domestically and internationally. Programs were implemented at reforming the educational system, especially as the French had neglected Cambodian educational access throughout its colonial rule. Although by 1967 there were over one million educated youth in Cambodia, or 20 percent of the Khmer population, the lack of economic development accompanying these educational advancements created a sense of destabilization. As Elizabeth Becker notes:

The inability of most educated youth, partly because of the undeveloped economy, to find qualified employment, together with their detachment from traditional culture, proved an explosive combination. ‘This education tended to create a larger and larger core of ‘detribalized’ young people, who no longer identified with their cultural context, their hierarchy and their political symbolism. This led therefore to a rupture between the State and the youth.’³²

In addition to this disenfranchisement, Sihanouk’s vision of the state as an entity to be separated from the modern and international forces created tensions with the countryside. With no economic reforms pertaining to land ownership and indebtedness,

most consumer goods were not usually within the reach of peasants, nor was modern farming equipment. Obviously, there was a potential for many peasant to welcome serious reforms, such as the abolition of usury and the establishment of marketing cooperatives, as well as a more equitable redistribution of land.³³

As corruption emerged and pervaded throughout Sihanouk’s government, the state’s stability, legitimacy, and social cohesion began to be challenged. As Sophal Ear writes,

³¹ Sophal Ear, “Cambodia’s Economic Development in Historical Perspective: a Contribution to the Study of Cambodia’s Economy,” University of California, Berkeley, First Working Draft, 10 Mar. 1995: 40.

³² Becker (1986) xiv.

³³ Ibid xv.

“corruption was endemic... everyone was involved, either receiving or giving bribes. You have to pay a bribe to get a birth certificate for your child. For your driver’s license. Money talked and you could get away with almost anything as long as you have it.”³⁴ In other words, it is clear that as Cambodia underwent its processes of post-colonial state-formation, the issues of legitimacy, sovereignty, stability, social cohesion, and order were tasks that it had to deal with. For Sihanouk, reasserting Cambodia’s independence and self-determination by freeing itself from foreign influence was seen as key to upholding its sovereignty and legitimacy. But as I have suggested, such policies faced disagreements, not only from the political sphere but also from the social arena.

Having contextualized the situation of state-formation in the immediate period post-colonization, the next step is to shed light on the significance of this concept to today’s processes of transitional justice. As I have intimated in the previous chapter, the issues involved in the post-colonial era persist today with Hun Sen’s Government and its attempts at gaining legitimacy and asserting sovereignty within the international context. Hun Sen, by taking a steadfast approach in leading the processes of creating a tribunal for the Khmer Rouge, has faced criticism from the international community while also being regarded by some Cambodians as exercising the rights of Cambodia to sovereignty and self-determination. Again, the issue of freeing Cambodia from foreign powers and asserting itself emerge, as they did with state-formation post-colonization. In other words, this concept delves into the reconciliation of colonial pasts and humiliated histories with national state formation and sovereignty. On transitional justice, such a concept continues to play a role with regards to the political challenges that arise between the Hun Sen Government and the international community.

³⁴ Ear (1995): 45.

III. Genocide

A. Working definition

In the field of transitional justice, the term genocide has been used freely and at times irresponsibly, with the assumption that everyone understands what genocide is.

Indeed, this assumption of the common sense of genocide is discussed by William Rubinstein, when he writes that:

Rather surprisingly, there is no agreed definition of ‘genocide,’ and it is simply not the case that what might be termed the ‘common sense’ definition of ‘genocide’ is universally accepted. To the average person, ‘genocide’ is likely to mean the deliberate and intentional killing of all or most of a specified group of people simply because they are members of that group and for no other reason... yet almost everything in this ‘common sense’ definition of genocide has been questioned, both by scholars and international law; even—remarkably—whether genocide must necessarily entail the killing of anyone.³⁵

Today, the literature on the concept of genocide has stemmed in part from the United Nations’ definition of genocide according to its 1948 UN Convention on the Prevention and Punishment of the Crime of Genocide. In this document, genocide refers to

any of the following acts committed with intent to destroy, in whole or in part, a nation, ethnic, or religious group, such as:

- a) killing members of the group;
- b) causing serious bodily or mental harm to members of the group;
- c) deliberately inflicting on the group conditions of life designed to bring about its physical destruction in whole or in part;
- d) imposing measures intended to prevent births within the group;
- e) forcibly transferring children of the group to another group.³⁶

When this definition of genocide is used, however, several complications arise, especially as they pertain to the UN definition’s ambiguities and limitations. As Rubinstein indicates, “through Soviet pressure, the UN definition excluded political mass killings where no ethnic basis for the killings existed: it is doubtful, for instance, if Pol Pot’s mass murders could be classified as ‘genocide’ under the UN definition, or the victims of most

³⁵ “Genocide and Historical Debate,” *History Today* 54.4 (2004): 36-38.

³⁶ *Ibid* 36-38.

of Stalin's Purges."³⁷ In addition, the issue of intention is another controversy within this UN definition of genocide. If we look at instances of depopulation that some would characterize as genocide, often times the element of intent is lacking. One only needs to analyze the experiences of indigenous peoples in North and South America and the effects of virulent diseases introduced by Europeans, which were not necessarily intended to kill or exterminate a whole or part of a group, but that nevertheless resulted in mass killings of millions of indigenous peoples. In light of these shortcomings, the main criticisms of the Genocide Convention have hence been on "1) the exclusion of political and social groups from those deemed worthy of protection; 2) the exact meaning of the intentionality clause in the Convention (Article II); and 3) the absence of an international enforcement mechanism in the form of an international penal tribunal."³⁸

Despite these shortcomings, some scholars, such as Helen Fein and Leo Kuper, still believe that the UN definition is fundamentally a working one. As Kuper states, the Genocide Convention "provides a workable definitional core for interdisciplinary analysis and application, and it is the legally accepted definition that has been incorporated in a convention ratified by the great majority of the member states of the United Nations. Moreover, it provides some possibilities for preventive action."³⁹ For others, however, such as Frank Chalk and Israel Charny, the working definition created by the UN is flawed and useless given its ambiguities and exclusion of political and social groups in its definition of genocide. In response, Chalk has derived his own definition based on research of over thirty cases of genocide, where he defines genocide as "a form of one-sided mass killing in which a state or other authority intends to destroy

³⁷ Ibid 36-38.

³⁸ George Andreopoulos, Genocide: Conceptual and Historical Dimensions (Philadelphia: University of Pennsylvania Press, 1994) 2-3.

³⁹ "Theoretical Issues Relating to Genocide: Uses and Abuses," Genocide: Conceptual and Historical Dimensions, ed. George Andreopoulos (Philadelphia: University of Pennsylvania Press, 1994) 31.

a group, as that group and membership in it are defined by the perpetrator.”⁴⁰ Moreover, on the issue of intent, the debate has been over how to prove intent and to what extent intent is to be demonstrated. According to Fein, “intent can be demonstrated by showing a pattern of purposeful action,” leading to the destruction of a significant part of the targeted groups, while for scholar Michael Dobkowski, intent “is becoming increasingly difficult to locate ... because of the anonymous and amorphous structural forces that dictate the character of our world.”⁴¹

Hence, current debates on the definition of genocide point to the legal, social, and political conditions that surround the definition and that some have viewed as undermining the concept. For the field of transitional justice, these debates have significant meaning, as they purport not only to the legal technicalities surrounding the acknowledgment of historical experiences and sufferings of a people, but also to the issue of accountability that is involved within the current UN definition of genocide.

B. Application to the case of Cambodia

At implication with the examination of the debate over genocide is the question of how the debate affects processes of transitional justice for Cambodia. As I have demonstrated, the Genocide Convention restricts genocide to national, ethnic, or religious targeting, leaving out political motives. As a result, under the UN Genocide Convention, what took place under the Khmer Rouge is not legally considered genocide, except for the Khmer Rouge’s targeting of the Buddhist monkhood, Vietnamese, Chinese, and Muslim Cham, and other national minorities. As Ben Kiernan describes, “the Vietnamese community was entirely eradicated. More than half of the 400,000-strong

⁴⁰ “Redefining Genocide,” *Genocide: Conceptual and Historical Dimensions*, ed. George Andreopoulos (Philadelphia: University of Pennsylvania Press, 1994) 52.

⁴¹ See Andreopoulos (1994) 7.

community had been expelled by the U.S.-backed Lon Nol regime ... more than 100,000 others were driven out by the Pol Pot regime in the first year after its victory in 1975. The rest were simply murdered.”⁴² Hence, the question becomes: if what took place in Cambodia is not legally recognized as genocide, then how can it be characterized to encompass the social and psychological degrees of what took place? In addition, the issue also is what are the costs and problems on a societal level that arise from labeling this experience as being non-genocidal?

One caution in addressing this question is presented by Jason Abrams, when he indicates that “taxonomic debates over whether a case of mass atrocities constitutes genocide have sometimes occupied an inflated place in our response to the atrocities; thereby obscuring the more important and immediate issue of how to address them, and even providing an excuse for inaction.”⁴³ To this day, one way in which legal scholars have dealt with this question has been through the labeling of what took place between 1975 and 1979 under the Khmer Rouge as crimes against humanity. According to the legal definition of crimes against humanity, such crimes are comprised of four elements, the first of which has recently been removed by the international community through the experiences of the International Criminal Tribunal for Rwanda and the International Criminal Court. Those elements are:

- 1) that the crime has occurred during, or in the context of, either all-out war or armed conflict;
- 2) that the crime took place as part of a large-scale pattern of behavior that was either widespread or systematic and directed against civilians;
- 3) that the crime was motivated on a particular characteristic of the victim or group; and

⁴² “The Cambodian Genocide: Issues and Responses,” Genocide: Conceptual and Historical Dimensions, ed. George Andreopoulos (Philadelphia: University of Pennsylvania Press, 1994) 198.

⁴³ “The Atrocities in Cambodia and Kosovo: Observation on the Codification of Genocide,” New England Law Review 35 (2001): 303.

4) that state action, whether affirmative or negligent, contributed to the crime.⁴⁴

With this definition of crimes against humanity, therefore, the actions undertaken by the Khmer Rouge could be prosecutable on the basis of political grounds.

Given the inapplicability of the term “genocide” to political killings that took place in Cambodia under the Khmer Rouge and the use instead of crimes against humanity, one must consider then the impact that not using “genocide” can have psychologically and socially on Cambodia’s victims and their families. Although Abrams holds that the definition of an episode of mass atrocities should not be the preoccupying factor, but rather that the focus should be placed “on creating an understanding of the full range of core international crimes and a recognition that they are all serious and worthy,” he nonetheless concludes that the legal challenges involved in the present definition of genocide is inadequate and in need of expansion to encompass real-life experiences.⁴⁵ In this thesis, I agree that labeling what happened under the Khmer Rouge as genocide, even if it was auto-genocide, triggers emotions and an acknowledgment of the suffering and history of a people on a collective basis that is particular to that term. For the situation of Cambodia, therefore, this debate over the definition of genocide is very much relevant as it pertains to a victim-centered approach that acknowledges the victims’ suffering. Unlike Scott Luftglass, who mentions that “crimes against humanity seems to be the more appropriate classification of the Khmer Rouge atrocities,”⁴⁶ I am of the same opinion as Abrams, that genocide as is defined under the UN Genocide Convention needs revisiting, so that the suffering of millions of people under the Khmer Rouge can be acknowledged and justice be achieved.

⁴⁴ Scott Luftglass, “Crossroads in Cambodia: the United Nation’s Responsibility to Withdraw Involvement from the Establishment of a Cambodian Tribunal to Prosecute the Khmer Rouge,” *Virginia Law Review* 90 (2004): 922-924.

⁴⁵ Abrams (2001): 304-307.

⁴⁶ Luftglass (2004): 925.

IV. Transitional Justice

A. Working definition

For the purposes of this study, I define transitional justice as the processes of acknowledging and confronting a country's past, usually characterized by mass atrocities, by restoring an understanding of truth, reconciliation, memory, history, and humanity focused on the experiences of the victims in order for a society to move forward.

Transitional justice is made up of "processes of trials, purges, and reparations that take place after the transition from one political regime to another."⁴⁷ To this day, mechanisms that have been used to bring about transitional justice have included tribunals, truth and reconciliation commissions, museums, public forums, cultural practices, and amnesties. For some scholars, like Juan Méndez, transitional justice "is an urgent task of democratization, as it highlights the fundamental character of the new order to be established, an order based on the rule of law and on respect for the dignity and worth of each person."⁴⁸ For others, like David Crocker, transitional justice is seen as being based on a set of morally defensible goals, among which are the objectives of truth, public platform for victims, accountability and sanctions, rule of law, compensation to victims, institutional reform, democratization and economic development, and public deliberation.⁴⁹ But as with the concept of genocide, debates over how and whether transitional justice should take place are present, given the challenges over how to restore truth and justice in an effective and objective way without falling into the impulse of pursuing revenge.

⁴⁷ Jon Elster, Closing the Books: Transitional Justice in Historical Perspective (Cambridge: Cambridge University Press, 2004) 1.

⁴⁸ "In Defense of Transitional Justice," Transitional Justice and the Rule of Law in New Democracies, ed. James McAdams (Notre Dame: Notre Dame University Press, 1997) 1.

⁴⁹ "Civil Society and Transitional Justice," Civil Society, Democracy, and Civic Renewal, ed. Robert Fullinwider (New York: Rowman and Littlefield Publishers, 1999) 378-379.

The current debate on the issue of transitional justice is dominated by the views that 1) transitional justice should be about reconciliation through a forgive-and-forget policy; 2) transitional justice should take place through legal avenues and the enhancement of the rule of law; 3) transitional justice should take into account the legal, political, social, and psychological contexts in order to ensure that society does not disintegrate; and 4) transitional justice should seek to establish justice centered on the survivors and victims. One such view, the legalist perspective, holds that international law and international humanitarian and human rights law must be stressed and enforced through the creation of tribunals in order to ensure peace and justice. According to this view, tribunals and respect for the rule of law helps to prevent and deter future conflicts by placing guilt and showing to the public that such atrocities will not go unpunished.⁵⁰ Indeed, Minow argues to this effect that “trials contribute to the project of international criminal justice by helping to ‘articulate both norms and a commitment to work to realize them ... even prosecutions, and convictions can build up the materials of international human rights and the notions of individual responsibility, conscience, and human dignity that imbue them.’”⁵¹ Unlike the legalists, consequentialists and pragmatists claim that transitional justice must take into account the political, social, and economic contexts of the society. For the pragmatists and consequentialists, therefore, transitional justice is limited by circumstances, especially as they pertain to political realities. For instance, Jack Goldsmith and Stephen Krasner hold that legalists and idealists fail to take into account the factor of power and its impact on possibilities of transitional justice.⁵² In addition to these views is the emotional psychology approach, which holds that

⁵⁰ Leslie Vinjamuri and Jack Snyder, “Advocacy and Scholarship in the Study of International War Crime Tribunals and Transitional Justice,” *Annual Review of Political Science* 7 (2004): 347.

⁵¹ *Ibid* 350.

⁵² “The Limits of Idealism,” *Daedalus* 132.1 (2003): 47-63.

transitional justice should be about developing “an explanatory account of the establishment of social peace in the wake of widespread atrocities, and second, to derive policy prescriptions from that explanatory account.”⁵³ Advocates for this approach usually support truth commissions because of the cathartic truth telling potential that such a mechanism holds for the survivors and their families.

Although these debates provide important discussions as to how and why transitional justice should take place, I hold that following one approach as being the right one is ineffective. Instead, I assert that taking into account all perspectives of transitional justice are crucial for effective transitional justice, as long as the formulations of justice revolve around the needs of the victims and their families. Unlike the emotional psychology theorists, I believe that justice can be beneficial to the victims even if it is brought in the context of trials and tribunals. And like the pragmatists and consequentialists, I agree that contexts must be taken into account in order to understand the limits and possibilities of transitional justice, because transitional justice is “a series of legislative, administrative, and legal decisions.”⁵⁴ As Ruti Teitel declares, “the role of [transitional justice] in periods of political change is explored by looking at its various forms: punishment, historical inquiry, reparations, purges, and constitution making.”⁵⁵ In the end, therefore, transitional justice should be about knowledge and acknowledgment and about responding to the demand of justice for the victims.⁵⁶

B. Application to the case of Cambodia

⁵³ Vinjamuri and Snyder (2004): 357.

⁵⁴ Elster (2004) 116.

⁵⁵ Transitional Justice (Oxford: Oxford University Press, 2000) 6.

⁵⁶ *Ibid* 69.

Where Ben Kiernan and Elizabeth Becker have called for justice to take place through the implementation of a tribunal, I hold that the working definition of this study provides several areas of contention to consider before such conclusions can be reached.

On the level of political, social, and economic realities, the questions become: what are the barriers and the challenges that the Cambodian government and international community face and must address in order to establish effective mechanisms of transitional justice? For the Cambodian government, or the Hun Sen government, these political elements include political instability that might ensue from the prosecution of the Khmer Rouge, not only because of the threats made by Khmer Rouge leaders, but also because of the potential revelation of involvement of members within the Hun Sen government if transitional justice takes place. For the international community, these challenges also arise with regards to reputation and how effectively international standards of justice can be followed.

On the issue of respect for the rule of law and transition, the working definition of transitional justice calls for the assessment of the extent to which transitional justice can be achieved through the courts. As mentioned, taking the legal path to reconcile with a past of mass atrocities requires that the legal avenue is indeed objective and capable of achieving the goals of transitional justice. Ways that have been used to make this assessment have included the selection of judges, absence of corruption, protection for the victims and perpetrators, and procedures of due process.

Finally, given that the goals of transitional justice are to acknowledge, examine, and uncover truth, history, memory, dignity, and justice in order to help victims and their families heal and move forward, the task is to assess whether the mechanisms of

transitional justice that are being implemented in Cambodia will indeed fulfill these needs. And it is this task that I undertake in chapter four.

V. Emerging Democracy and the Rebuilding of Public Support

A. Working definition

The last concept that I define for the purposes of this research study is that of emerging democracy and the issue of building public support post-mass atrocities. In doing so, I first state that the definition of democracy that I use is minimalist, that is, I seek only to “focus on the smallest possible number of attributes that are still seen as producing a viable standard for democracy.”⁵⁷ Hence, emerging democracy refers to a transition of political environments in which democratic elements are voiced and put into place, such as the contested elections with full suffrage and the effective guarantees of civil liberties, such as freedom of speech, assembly, and association guaranteed under the law,⁵⁸ in order for a society to regain a sense of identity and connection with the state after events of mass atrocities or gross human rights violations. Moreover, I complement this definition with the aspects of institutionalization and legitimacy that are integral for the effective implementation and sustainability of democratic processes in such societies. As Mehran Kamrava indicates, “the political processes that [must take place in order to create a new sense of identity and connection between the state and society is one that] can in large measure be summed up as the efforts to attain institutionalization and legitimacy.”⁵⁹ The element of institutionalization in the process of emerging democracies hence refers to the creation of institutions and structures that serve as the nexus between society and the state. Institutionalization is about creating popular compliance from the

⁵⁷ David Collier and Steven Levistky, “Democracy with Adjectives: Conceptual Innovation in Comparative Research,” *World Politics* 49.3 (1997): 433.

⁵⁸ *Ibid* 434.

⁵⁹ *Politics and Society in the Third World* (London: Routledge, 1993) 1.

society to the state. Moreover, the element of legitimacy addresses the emotional and psychological link between the state and its people. Legitimacy is encompassed in the norms and practices that the state employs in order to create a sense of viability for itself through the acceptance, approval, or support from its society. According to Kamrava, there exist five broad mechanisms in which the state can gain and sustain legitimacy, which include 1) charismatic authority, or the absolute and unwavering devotion of the masses to their leader on the basis of the leader's image and/or personality; 2) patrimonialism, or the resonance of personal loyalties not only between the people and their leader but also between political incumbents and their successive echelons; 3) clientalist relations, or a patron-client relationship/loyalty; 4) the appeal to ideology or to emotionally significant historical events; and 5) politically inclusionary policies aimed at expanding a regime's popular support base, or the infusion of the state and society in order to build legitimacy through mass participation of society in political processes.⁶⁰ In other words, as developing societies transition between political environments and move toward a democracy-building process, the challenges of creating and maintaining public support is crucial for the viability of the state and its political processes and for the moving beyond a history of gross human rights violations.

B. Application to the case of Cambodia

For Cambodia today, the application of democracy and the rebuilding of public support has taken on two different meanings. On one hand, the political transition of Cambodia from an authoritarian, Lenin-like leadership to one of democracy was meant to signify the potential transition needed for Cambodia to move beyond its past of human rights violations towards one based on the rebuilding of civil society, voice, and freedom.

⁶⁰ Ibid 8.

As the work of the United Nations Transitional Authority in Cambodia (UNTAC) demonstrates, democracy through general elections was thought to be the answer to Cambodia's political transition. But as the elections took place and political struggles began to arise, as had been common in Cambodia's political history, the model of democracy envisioned by UNTAC was not realized. Following Hun Sen's coup d'état against Prince Ranariddh in 1997, the Hun Sen Government has continued to work towards the implementation and sustaining of democracy and the rebuilding of public support; however, the reasons for doing so have been to maintain political authority and legitimacy, rather than for the vision embodied by UNTAC. Hence, the second meaning of democracy today has been shaped in part by Hun Sen's political goals, which are to gain and maintain legitimacy and sovereignty in the eyes of not only Cambodia's citizens but also the international community.

As we observe with the creation of the Khmer Rouge tribunal today, Hun Sen has relied on the mechanisms of democracy-building and legitimacy-building mentioned by Kamrava, such as appeal to history and inclusionary political policies, in order to enhance his political image and sovereignty. Although it is true that Hun Sen continues to follow democratic processes, such as national elections and the use of the parliament, it is important to keep in mind the political motives that underlie these measures and the deviating meaning that democracy has taken in comparison to the original intentions of UNTAC. In other words, by raising the issue of democracy and the rebuilding of public support for countries with past of gross human rights atrocities, it is my intent to show the contradictory functions that the idea of democracy has undergone. With the emergence of transitional mechanisms of the tribunal, it is hence important to recognize the political *melée* that is inherent within the proceedings.

Chapter Three

Background Overview

“Cambodia is the last trace of a once grand Khmer Empire which spanned parts of Thailand, Laos, Vietnam and Malaysia. The home of one of the largest man-made monuments in the world, the temple-complex of Angkor Wat built in the 12th century.”

--Sopha Ear⁶¹

“Today’s society is corrupted and won over by the cult of the individual, which we must abolish at all costs. We live in a sick society since the return to peace. All brave and honest children of the fatherland must join the revolutionary party in order to move the country towards communist socialism. The capitalists who live in affluence at the expense of the working class and the masses, do not hesitate to resort to grand methods to obtain luxuries and gratify their passions. The masses live in misery, bled by them. The aim of the revolution is the liberation of the people from the capitalists and feudalists. To succeed it is necessary to resort to force.”

--Extracts from Khmer Rouge pamphlet⁶²

“On the ground, [American] invasion pushed the battlefields farther westward into the heavily populated villages and rice fields around and beyond the Mekong river. The Lon Nol government proved itself unable to defend the country, and it entered into a dependence upon foreign aid [with the United States] that would eventually choke it... By the end of 1970, the government was spending five times its revenue and earning nothing abroad. The rubber plantations in the east of the country were burned down, bombed or occupied by the Communists; thousands of hectares of paddy field had been abandoned, and those still being harvested, around the city of Battambang, were required for domestic consumption. Within a few months, the country’s economic independence was destroyed.”

--William Shawcross⁶³

⁶¹ “Cambodia’s Economic Development in Historical Perspective,” University of California, Berkeley, First Working Draft, 10 Mar. 1995: 34.

⁶² See Ben Kiernan, How Pol Pot Came to Power (New York: Verso Books, 1985) 231-232.

“In April 1975, the Khmer Rouge took Phnom Penh, after a protracted armed struggle against the rule of Prince Norodom Sihanouk and the corrupt and inept Lon Nol regime which followed it. As its core goal, the regime sought the creation of a pure Khmer nation, completely self-reliant and free from the influence of perceived foreign and class enemies.”

--Jason Abrams⁶⁴

I. Introduction

As I have argued in the introduction of this work, understanding the possibilities of transitional justice in Cambodia first requires an examination and a contextualization of the historical, social, and political factors that have shaped Cambodia into what it is today. In this chapter, I offer a synoptic background and make the following assertions: 1) Cambodia’s once greatness under the Khmer Empire contributed to more deeply felt humiliation at the hands of occupation and colonization under France, and eventually, at the foreign influence imposed by the United States on Cambodia during the Vietnam War; 2) Cambodia’s social and political decay had been an exacerbating problem beginning with Cambodia’s independence in 1954 and following Lon Nol’s rule during the early 1970s; 3) Cambodia’s political and social instability and growing sense of discontent contributed to the rise of the Khmer Rouge; 4) the Khmer Rouge, with their militant ideology of communist socialism, aimed at reviving Cambodia’s greatness, as experienced under the Khmer Empire, by going back to the ideas of a pure Khmer nation, self-reliance and self-subsistence, and detachment from foreign influence and ideas; 5) the Khmer Rouge, because of their incessant paranoia and fear of betrayal and political uprising, moved away from their political and social goals and instead led one-third of Cambodia’s population to their death and mass killings; 6)

⁶³ Sideshow: Kissinger, Nixon and the Destruction of Cambodia (New York: Simon and Schuster, 1987) 150-221.

⁶⁴ “The Atrocities in Cambodia and Kosovo: Observations on the Codification of Genocide,” New England Law Review 35 (2001): 304.

Cambodia's political instability and disagreements post-1979 enabled the international community to ignore issues of transitional justice for Cambodia; and 7) progresses of transitional justice beginning in the 1990s have been slow and politicized.

With this background overview, I move away from the too-tempting need to demonize and condemn the Khmer Rouge at the offset, as has been done too often by academic scholars. Instead, I choose to delineate the many social, political, and historical factors that set the milieu for Cambodia's political and social developments over the last century and that continue to challenge Cambodia's processes of transitional justice. In doing so, it is my hope that the background overview will shed light on the fact that Cambodia's past of political genocide was not simply an act of pure evil and a people gone mad, but rather, a reaction to the conflicting emotions of independence, nationalism, sovereignty, and self-sufficiency that were effected by colonization, humiliation, bombing, foreign dominance, corruption, and political instability. In addition, the background contextualizes the issue of transitional justice and lack thereof post-1979 not solely on Cambodia but also on the international community.

II. Cambodia: From Greatness to Tragedy

Cambodia's glorious past is a time that contributed and continues to play a crucial role in the identity and national inspirations of its people. For the Khmer Rouge, the medieval glory under the Khmer Empire inspired them to seek to transform Cambodia back to an age of self-sufficiency, prestige, and sovereignty, whereas for Cambodians today, the achievements during the Angkorian époque has been a means by which to take pride again in their country and their identity in order to move forward from a past of mass atrocities. What I do next, therefore, is briefly examine the once-

greatness associated with Cambodia that has shaped dreams and contributed to deeply felt humiliations.

As Ben Kiernan points, Cambodia's medieval glory was a "substantial corpus of inscriptions and archaeological sites like the twelfth-century Hindu temple of Angkor Wat."⁶⁵ During the Angkorian-Khmer Empire between the 9th and 15th centuries, Cambodia lived in glory and prestige as a powerful empire. Economically, the Angkorian kings had introduced a hydraulic economy with advanced irrigation systems and canals that led into the waterways of the Mekong delta and that contributed to the growth of Cambodia's economic prosperity and wealth.⁶⁶ In addition to these innovative hydraulic engineering methods, the Khmers of that period had a keen sense of ambition and attitude toward culture. With the ability to borrow ideas from other cultures and shaping them to fit their needs, early Khmers adapted Indian culture and Champan architecture to sustain their larger framework of building a true empire. As scholar Elizabeth Becker asserts, "the Khmers were among the most brilliant adapters of the new Indian culture... the Angkor era, which last six hundred years, proved so powerful that its basic institutions survived, however transformed or tattered, until the revolution of the Khmer Rouge."⁶⁷ Embodying the Hindu religion of the Brahmans, Cambodians came to encompass the ideology of *deva-raj*, or god-king. The god-king, as the most absolute ruler of all tribal lords, came to hold a venerated position among the Khmers until the rise of the Khmer Rouge regime.⁶⁸ Marked by wealth, empire, power, and the popular inspiration all-powerful god-king, medieval Cambodia was thus a land of greatness. As its power began to decline and the empire disappeared, Cambodia's once prosperity was

⁶⁵ "Coming to terms with the Past: Cambodia," *History Today* 54.9 (2004): 16.

⁶⁶ Ear (1995): 34.

⁶⁷ *When the War was Over* (New York: Simon and Schuster, 1986) 47.

⁶⁸ *Ibid* 47.

replaced by decay and humiliation at the hands of invasions from neighboring countries, and finally, colonization by the French.

III. Decay and Humiliation: Invasion and Colonization

Wracked by internal struggles for power, the Khmer empire weakened after the 15th century, marking Cambodia's degeneration and deeply felt humiliations in Asia. Although evidence and specific documents portraying this decline of power are limited, there have been nonetheless some inscriptions and recordings indicating these internal battles. Ben Kiernan writes to this effect that "civil wars wracked the country... a rare inscription carved at Angkor in 1747 celebrates the Khmer king's defeat of an unnamed rebel princess. Tracking down her forces by blocking and searching every road, the royal army drove out, pursued and scattered the rebels."⁶⁹ As royal family feuds and struggles swarmed over Cambodia, the country also became easy prey for geopolitical power gains from neighboring Thailand and Vietnam. By providing military aid to weakened Khmer princes and princesses in their attempts to oust one another, Vietnam and Thailand used these geopolitical alliances to gain rights over Cambodian territory, all the while using their military forces to openly attack embattled Khmer kingdoms. As Becker indicates, "princes... would plead for military aid from Siam (Thailand) or Vietnam to oust a rival claimant. In return, the petitioning prince or princess routinely gave up rights over Cambodian territory ... Thailand and later Vietnam [also] regularly defeated Khmer armies and annexed Khmer territory."⁷⁰ Before the colonization of Cambodia by France in the 1860s, "Cambodia was under the joint protection of Vietnam and Siam."⁷¹ As a result, many Khmers at the time questioned whether their once great land of Cambodia

⁶⁹ Ibid 16.

⁷⁰ Ibid 49.

⁷¹ Evan Gottesman, Cambodia: After the Khmer Rouge (New Haven: Yale University Press, 2003) 15.

would eventually become extinct. King Norodom, pressured to save his country, was thus convinced by the French to have Cambodia become a protectorate of France. Whereas invasions from neighboring Thailand and Vietnam had been the beginning of decline and humiliation for the Cambodian people, France's domination and eventual colonization of Cambodia further amplified Cambodia's weakened status and loss of prestige.

Partaking in the European nations' race to lay claim to the riches of the Orient, the French saw the Mekong River and its surroundings as the southern road to China and its wealth.⁷² Intending to use Cambodia as a buffer between Thailand and its more prized colony of Vietnam, the French convinced King Norodom to become a French protectorate, with the French agreeing to protect Cambodia's throne from claims by the Vietnamese or Thais.⁷³ As a result, King Norodom signed the 1863 and 1864 treaties with France and officially made Cambodia a French protectorate. Holding Cambodians as lazy and simple and noble savages with a great but lost civilization,⁷⁴ the French told King Norodom that he would be allowed to control his country, while France would have control over Cambodia's foreign policy.⁷⁵ For the French, Cambodia was therefore only a small matter, with their higher goals of reaching China via the Mekong River.⁷⁶

By 1883, it became clear to the French that the Mekong would not provide the route to China as they had intended, and thus, Cambodia's usefulness had to be realized in other ways. As the French came to play a more active role in Cambodia through the imposition of taxes on opium and alcohol and eventually Cambodia's customs service, local uprisings ensued at the loss of Cambodian control over their internal affairs and

⁷² Becker (1986) 49.

⁷³ Ibid 49-50.

⁷⁴ Gottesman (2003) 15.

⁷⁵ Becker (1986) 50.

⁷⁶ Ibid 50.

France's imposed collection of taxes.⁷⁷ Following local uprisings and the affront by King Norodom against French authorities, France "eventually took full control over [Cambodia's] administration, its financial and legal systems, and its commercial affairs."⁷⁸ Cambodia, therefore, became a source of revenue for the benefit of France and its colonial administration in Vietnam. "Cambodia would support France and Vietnam but would receive nothing in return... the French had decided that the Vietnamese were the industrious race of the future and the Khmer a lazy doomed people grown decadent on Buddhism and the rule of their opulent monarchs."⁷⁹ During its 90-year colonial rule, France neglected Khmer schools, and by 1954, Cambodia only had 144 Khmer Baccalauréats.⁸⁰

Although France benefited greatly from its colonization of Cambodia, it nonetheless provided some benefits for Cambodia. As Becker states:

they protected the country from invasions by neighbors... but perhaps the most profound fruit of the French presence in Cambodia was the seemingly arcane pursuit by a handful of French scholars to uncover the history of Cambodia. The results of their scholarship were nothing less than the recovery of Khmer pride in their country's heritage and the ideological foundation of the modern drive for an expression of an independent Khmer nation.⁸¹

Hence, France's revival of Cambodia's past achievements under the Khmer Empire provided the basis for Cambodians to take pride again in their heritage; however, it also provided the foundations for national movements to spring up and demands for independence to engender. Communist revolutionary groups, comprised of Khmer and Vietnamese forces, played an important role in fighting French colonialists. One 1949 document states, "Khmer and Vietnamese revolutionary organizations 'must live side by

⁷⁷ Ibid 50-51.

⁷⁸ Gottesman (2003) 15.

⁷⁹ Becker (1986) 52-53.

⁸⁰ Kiernan (2004): 16.

⁸¹ Ibid 53.

side to help one another, to exchange initiatives and lessons drawn from experience... to conclude on the basis of equality an alliance in the struggle against the ...French colonialists, invaders of Cambodia and of Vietnam.’’⁸² By 1953, after a few decades of rebellions and attempts by groups like the Khmer Krom, United Issarak Front, and communist groups under Keo Meas and Son Ngoc Minh to liberate Cambodia, Cambodia was awarded independence. Although I do not provide a critical examination of the movements, groups, and events that contributed to Cambodia’s independence, it is nonetheless clear that the deeply felt humiliation and antagonism of being subjected to the domination of France and the renewed national pride were important factors that emerged from France’s colonization of Cambodia between 1863 and 1953 and that led the country to gain its independence on November 9, 1953.

IV. Rise of the Khmer Rouge: Corruption, Poverty, and Political Instability

As I mentioned earlier, in order to comprehend why a group like the Khmer Rouge could rise to power in Cambodia, the political, social, and economic conditions of the society must be examined. In this section, I investigate the period following independence, which was marked by events like Prince Norodom Sihanouk’s abdication of the throne for political life, the ongoing conflict between his political party, the *Sangkum Reastr Niyum* (People’s Socialist Community), and the communists, the rise of corruption and decadence in Khmer political, social, and economic life, and finally, the involuntary involvement of Cambodia in the US-Vietnam War. As I demonstrate, all these events created in one way or another the conditions necessary for the Khmer Rouge to rise to power.

⁸² Kiernan (1985) 65.

By 1953, the Khmer Issarak Association, spearheaded by its communist backbone organization, the Khmer People's Revolutionary Party, had built up a strong communist movement from its anti-colonial activities. As Kiernan indicates to this effect, the movement "had an army of five thousand Cambodian fighters from the two largest sectors of Cambodian life: the peasantry and the monkhood. Out of this nationalist struggle, the first precondition for Pol Pot's Democratic Kampuchea had been realized: a viable communist party had emerged on the Cambodian political scene."⁸³ However, when Cambodia ceased to be a French protectorate in 1953, King Norodom Sihanouk saw the advantages of partaking in political life and thus abdicated the throne to his father in 1955. As a result of his political involvement and pronouncement of being the father of Cambodian independence, Sihanouk attracted broad popular support and led those Issaraks who had been motivated by the struggle and not the communist ideology of the group to return to civilian life.⁸⁴ For the rest of the political groups working towards opposition to his group, the King launched a series of military operations against the Communist rebels, all the while seeking to absorb and dissolve all other political parties.⁸⁵ For Sihanouk, therefore, his role was to become the leader and champion of Cambodia, helping the country move towards "modernization, socialism, neutrality, and independence."⁸⁶

The first free elections were promised to be held in 1955. With his own political party, the Sangkum, Sihanouk used his charm and promises of patronage to convince "most of the rightists and centrists to abolish their small parties and join the Sangkum. Only the leftists and the rightists supporters of Son Ngoc Thanh remained to compete

⁸³ The Pol Pot Regime: race, power, and genocide in Cambodia under the Khmer Rouge, 1975-79 (New Haven: Yale University Press, 1996) 13.

⁸⁴ Gottesman (2003) 17.

⁸⁵ Ibid 18.

⁸⁶ Becker (1986) 96.

with the prince.”⁸⁷ During the elections campaign, members of the left-leaning party, the Pracheachun, were arrested and jailed. In addition, the Democratic Party was targeted, with one candidate jailed and one leader fired upon by Sihanouk’s police.⁸⁸ In the end, through intimidation, violence, and relentless propaganda, but also with the help of his own personal popularity among Cambodian peasants, Sihanouk won the elections.⁸⁹ As Becker states, “Sihanouk’s Sangkum captured every seat.”⁹⁰

To preserve his power and ensure absolute loyalty from his members, Sihanouk continued his strong hold in the Cambodian political arena. According to Becker, “Sihanouk was not gracious in victory. He struck back at the communists fiercely, unwilling to allow them any role in his country. He did so not only to preserve his total control but also out of fear that they were subservient to the Vietnamese communists and, therefore, a foothold for future Vietnamese expansion.”⁹¹ Although Sihanouk managed to destroy nearly 90 percent of the rural cadre within the communist group, where some had been murdered, others quit in fears of their lives, and others escaped to Vietnam, Sihanouk’s forces in the end gave rise to a new leadership within the communist group, among which was Pol Pot. As Kiernan states, Sihanouk’s “erratic repression of the left played into the hands of the younger party group. Sihanouk’s secret police suppressed the orthodox grassroots KPRP veterans, partly because of their historical affinity with Hanoi, while sparing younger, educated militants with more privileged backgrounds.”⁹² Eventually, the leadership of urban educated students grew in importance, and in early

⁸⁷ Ibid 96.

⁸⁸ Ibid 96.

⁸⁹ Gottesman (2003) 18.

⁹⁰ (1986) 97.

⁹¹ Ibid 97.

⁹² (1996) 13.

1963, the Pol Pot leadership took over leadership of the communist party.⁹³ In the end, therefore, Sihanouk's efforts contributed to the rise of a more militant, French-educated, and anti-Vietnamese leadership within the communist party, rather than worked towards destroying the communist party entirely.

Despite Sihanouk's covert political activities to destroy the communist party, Sihanouk's rule and diplomatic abilities between the late 1950s and early 1960s has still been remembered by many Cambodians as Cambodia's golden moment. As Gottesman depicts,

the country enjoyed neutrality and relative peace while maintaining a functioning, if inequitable, economy. Cambodia exported rice, rubber, and pepper and received foreign aid from France, the United States, and the Sino-Soviet bloc. This assistance not only helped build hospitals, schools, and a transportation infrastructure but also ensured that, despite corruption and inefficiency, enough money trickled down to ward off hunger and discontent. Phnom Penh buzzed with cultural glories, all of which owed their patronage to Sihanouk... on one level, the affable, accessible Sihanouk was extremely popular, especially in the countryside, where Cambodian peasants adored him, not just as royalty but as the embodiment of Cambodia itself. In the capital and in the larger towns, however, many Cambodians blamed him for condoning corruption and political intimidation.⁹⁴

As corruption became widespread throughout Cambodian society, however, Sihanouk's golden moment came to be replaced by discontent, opposition, and political instability in the 1960s onward, worsening when Cambodia entered the Vietnam War and Sihanouk was deposed. As Sophal Ear describes, "corruption was everywhere. Corruption was endemic, even at the universities... [and] was observable at nearly all levels of government."⁹⁵ By 1963, protests and instability began to rise in Cambodia, undermining Sihanouk's rule and legitimacy.

⁹³ Ibid 13.

⁹⁴ (2003) 19.

⁹⁵ (1995): 45.

One such protest occurred in early 1963, when student riots broke out in the northwestern Cambodian city of Siem Reap. Sparked by local grievances, allegations of police brutality and corruption, the protest grew into a direct attack on Sihanouk himself.⁹⁶ Caught unaware, Sihanouk blamed the communists for instigating the protest. In response, Sihanouk compiled a list of thirty-four names of leftists, for the supposed purposes of forming a separate leftist cabinet. As individuals began to disappear, however, Pol Pot and Ieng Sary, whose names had been included in the list, escaped to the jungle to form a maquis and initiate the struggle to survive and prevail in Cambodia.⁹⁷ Rather than dissipate the conditions of corruption, economic instability, and public discontent that were to blame for the protest, therefore, Sihanouk had driven away the communist leadership instead. And as the Vietnam War escalated in the mid-1960s and began to destabilize Sihanouk's neutral stance in the war, these social and political conditions exacerbated, and in the end, provided the opportunity for the Khmer Rouge to rise to power.

By 1966, Sihanouk's power significantly decreased when Sihanouk refused American aid to stave off U.S. intervention in Cambodia.⁹⁸ By forfeiting a large portion of the money that had balanced his budget for years, Sihanouk had to reduce his military budget. As the elections approached, Sihanouk decided against an open confrontation and "declared he would not select the Sangkum Party's official slate of candidates."⁹⁹ As a result, the 1966 new assembly comprised of Lon Nol in power as prime minister, who had previously served under Sihanouk as his police chief and security leader, and of

⁹⁶ Becker (1986) 113.

⁹⁷ Ibid 114.

⁹⁸ Ibid 116.

⁹⁹ Ibid 116.

Sihanouk's royal rival, Prince Sirik Matak.¹⁰⁰ Sihanouk continued to hold his position as head of state. For Lon Nol, he saw that it had become time to put an end to communist opposition. Hence, with or without Sihanouk's backing, Lon Nol was intent on beginning his clean-up activities of the communist. As one communist of that period writes, "In 1966, I was arrested by Lon Nol agents and imprisoned... for three months. We were struggling against exploitation, for rights and freedoms, struggling over produce and land, and especially against the district chief of Peam Chor, who had embezzled state funds designed for the people."¹⁰¹ Rather than alleviate the political instability and opposition, however, Lon Nol's efforts encouraged the communists and their leaders to commence their social revolution. And thus, the first civil began in Cambodia in 1967.

"The rebellion that first broke out in Battambang [was] a nationally-organized CPK [Communist Party of Kampuchea]-led rebellion, in part provoked by the government... repression was fierce, but so was urban unrest."¹⁰² By 1968, Sihanouk declared that Cambodia was engulfed in a total war, where civil war had extended to other areas throughout the country.¹⁰³ In response, Lon Nol reinforced his security strategies. According to the internal documents of a 1974 CPK Party History, it was described that "beginning in 1967, the enemy, led by Lon Nol, started to destroy, kill, make arrests and put people in chains on a large scale, both in the towns and in the countryside."¹⁰⁴ For the Khmer Rouge, such government repression provided the propaganda needed to receive the support from villagers. As Kiernan indicates, the Khmer Rouge began to use the 1967-1968 repression to portray the tax problem, declining standards of living, and Lon Nol's and Sihanouk's roles as murderers of

¹⁰⁰ Ibid 117.

¹⁰¹ See Kiernan (1985) 231.

¹⁰² Ibid 249.

¹⁰³ Becker (1986) 125.

¹⁰⁴ Kiernan (1985) 251.

patriots.¹⁰⁵ By 1969, the political conditions and instabilities in the country worsened as the US Air Forces began their secret bombing of Cambodia, on the grounds that Vietnamese had sanctuaries along the Eastern coast of Cambodia. For Sihanouk, the maintenance of political neutrality in the Vietnam War became challenged, not only by the United States and Vietnam, but also internally by his own administration.

The U.S. secretive bombardment of Cambodia began in 1969. For Sihanouk, it became clear that his stance of neutrality needed to be re-examined. Although Sihanouk understood that he had no alternative, Sihanouk did not approve of the indiscriminate US bombings of Cambodian territories. As Shawcross writes, “American violations of Cambodian neutrality were as impossible to prevent as Vietnamese. Each had to be tolerated in the hope that the war could at least be contained a full-scale invasion by the United States... could be prevented.”¹⁰⁶ According to Kiernan, over the fourteen-month period between 1969 and 1970, over 3,600 B-52 raids were conducted against targets in Cambodia. Peasants were killed and Cambodian casualties were very heavy.¹⁰⁷

In all the midst of these social disruptions and instabilities that continued to undermine Cambodian economy, society, and political life, Lon Nol began to form political alliances to overthrow Sihanouk. In 1970, a coup d'état was launched by Lon Nol against Sihanouk, deposing the king who had ruled Cambodia from the inception of its independence. As Lon Nol collaborated with the United States and received economic support, conditions of corruption, economic instability, and social decline exacerbated, setting the final stage for the Khmer Rouge to rise. Gottesman portrays:

Social and economic life in Phnom Penh deteriorated as a result of the war and the sudden influx of U.S. military assistance. This aid, which by the beginning of

¹⁰⁵ Ibid 273.

¹⁰⁶ Shawcross (1987) 94.

¹⁰⁷ Kiernan (1985) 285.

1971 had reached \$180 million, found its way to corrupt generals and to officials in control of fuel, medicine, and other elements of the economy connected to the war effort... before the U.S. Congress put an end to it, in August 1973, U.S. planes had dropped three times as much tonnage of bombs on Cambodia as they had on Japan in World War II. The bombing, the resulting lack of available farmland, and the insurgency drove more than 750,000 rural Cambodians into the cities, hundreds of thousands coming to Phnom Penh alone. Refugee camps were infected with disease; the desperate begged on the streets; social services ceased to function; and all elements of the administration rotted with corruption.¹⁰⁸

As students joined the Khmer Rouge in response to the degradation of Cambodian social, economic, and political life, the Khmer Rouge, now detached from its Vietnamese counterpart, raised in power. On April 17, 1975, the Khmer Rouge defeated Lon Nol's forces, marking the beginning of the Khmer Rouge's "Year Zero."

V. The Khmer Rouge Era: Ideology, Paranoia, and Genocide

Today, scholars have had several interpretations of the Khmer Rouge era between 1975 and 1979. David Chandler has asserted that the CPK was "the purest and most thoroughgoing Marxist-Leninist movement in an era of revolutions... no other regime tried to go so quickly or so far... no other inflicted as many casualties on the country's population."¹⁰⁹ Others, like Kiernan, have concurred that although the CPK accumulated unprecedented power during that time period, the regime's horror and failure resulted "from the goals of true reactionaries: their attempts to turn back the clock" and to confront the human and material forces of history by seeking to destroy existing social groups.¹¹⁰ As Becker writes, "the Khmer Rouge considered themselves ultramodernists. They planned to accomplish in a few years the changes Western societies underwent during the centuries of their industrial revolutions: secularization, rationalization of

¹⁰⁸ (2003) 23-24.

¹⁰⁹ Brother Number One: a Political Biography of Pol Pot (Boulder: Westview Press, 1999) 3.

¹¹⁰ (1996) 27.

production, transformation of a feudal, rural population...and finally, industrialization.”¹¹¹

Overall, however, what is clear is that the Khmer Rouge, who initially based their ideology on the basic notions of Marxism-Leninism revolution and the inspirations of self-reliance, independence, racial homogeneity, and mastery, failed to achieve their revolution and instead led to the genocide of over 1.7 million Cambodians. As I express in this section, the Khmer Rouge leadership not only followed its campaign of rectifying historical injustice through its assertion of self-sufficiency and racial and national exceptionalism, but it was also instilled with fear and paranoia of conspiracy and of the enemy, which resulted in the evacuation and purging of millions of Cambodians, ethnic Vietnamese, and other minorities, and in the end, in the purging of its own leadership and own destabilization.¹¹²

When the Khmer Rouge soldiers, dressed in black or green pajamas and heavily armed, entered Phnom Penh on April 17, 1975, “the new occupiers of the capital were, like so many of the Khmer Rouge, thoroughly indoctrinated, utterly obedient to the revolution, and filled with contempt for whichever enemies were placed before them.”¹¹³ For the people of Phnom Penh, relief washed over, as “life in the city had grown worse; the economic crises, the corruption, the refugees, and the violence had led even the most anticommunist among them to hope for improvements.”¹¹⁴ However, as the people of Phnom Penh and other cities were to experience, the Khmer Rouge were soon to implement the eight-point policy advocated for by Pol Pot, starting with the evacuation of

¹¹¹ (1986) 197.

¹¹² Kanika Mak, “Genocide and Irredentism under Democratic Kampuchea (1975-1979),” Yale Center for International and Area Studies, Genocide Studies Program, Working Paper 23, 2004: 17.

¹¹³ Gottesman (2003) 24.

¹¹⁴ Ibid 24-25.

the people from all towns.¹¹⁵ As Kiernan states, “the evacuation of Phnom Penh and other urban centers was not just an ideological or economic measure but also part of a strategy of continuing warfare. From now on, the Vietnamese were not to be tempted to react by ‘swallowing’ Kampuchea in a strike against a vulnerable populated capital.” In addition, he writes that:

[the evacuation] was also a sea change in Cambodia’s political demography, facilitating both ethnic cleansing and the acquisition of totalitarian power. Not only were the cities effectively Khmerized when their ethnic Chinese and Vietnamese majorities were dispersed; without towns, too, citizens became far more easy to control. From now on, there would be no assembled constituency to whom dissident or underground political activists could appeal or among whom they could quietly work... and no change for an orthodox Marxist or other dissident faction to develop a base among a proletariat.¹¹⁶

As Khmer Rouge soldiers pointed their guns at the people of Phnom Penh and instructed them to pack lightly to move out, using the pretext of an imminent American bombing and the necessity of evacuation, “hundreds of thousands of Cambodians paraded out of the city and into the countryside. Deprived of medicine, food, and water, the old and the sick died along the way. Khmer Rouge soldiers shot many who complained.”¹¹⁷ In addition, military officers of the old Lon Nol regime were ordered to identify themselves, many assuming that doing so could save their lives. Others, like police officers, civil servants, teachers, engineers, and doctors were also systematically executed, often as a result of their association with the Western world, corrupted views, and enmity.¹¹⁸ According to Scott Luftglass, “the Khmer Rouge subscribed to the

¹¹⁵ Pol Pot had made eight points for the revolution to be successful: 1) evacuate people from all towns; 2) abolish all markets; 3) abolish Lon Nol regime currency and withhold the revolutionary currency that had been printed; 4) defrock all Buddhist monks and put them to work growing rice; 5) execute all leaders of the Lon Nol regime beginning with the top leaders; 6) establish high-level cooperatives throughout the country, with a communal eating; 7) expel the entire Vietnamese minority population; 8) dispatch troops to the borders, particularly the Vietnamese border. See Kiernan (1996) 55.

¹¹⁶ Ibid 64.

¹¹⁷ Gottesman (2003) 25.

¹¹⁸ Ibid 25.

reasoning that ‘a person who has been spoiled by a corrupt regime cannot be reformed, he must be physically eliminated.’¹¹⁹ Submerged in their nationalistic views of racial superiority, the Khmer Rouge also targeted ethnic Vietnamese and other minorities in Cambodia in order to ensure that Democratic Kampuchea would be a pure Khmer nation. As Karnaka Mak states, “the ethnic Vietnamese population was completely exterminated—it is estimated that 100% of the country’s remaining ethnic Vietnamese population... died between 1975-1979... [in addition], 40% of ethnic Lao, Thai, and Cham populations died.”¹²⁰ For the Khmer Rouge, therefore, the purging of potential enemies had begun and was to continue in order to ensure the survival of the regime. As Gottesman describes, “by May 1975, [Cambodia’s urban residents] had been dubbed ‘new people’ or ‘April 17 people’ and had been escorted to the rural cooperatives that now controlled the whole of the Cambodian population.”¹²¹

For the millions of Cambodians under the Khmer Rouge, life in the cooperatives was depicted as a continuation of the war and struggle of the revolution. As one Khmer Rouge informed the people, “we have won the revolution but the war still goes on...we warn you that it will not be easy. We must maintain a mentality of struggling against all obstacles. If Angka¹²² says to break rocks, break rocks. If Angka says to dig canals, you must dig canals... only in this way can we liberate the country and liberate the people!”¹²³ To fulfill the Khmer Rouge idea of a communist model for the country, the Khmer Rouge

¹¹⁹ “Crossroads in Cambodia: the United Nation’s Responsibility to Withdraw Involvement from the Establishment of a Cambodian Tribunal to Prosecute the Khmer Rouge,” *Virginia Law Review* 90 (2004) 900-901.

¹²⁰ (2004): 4.

¹²¹ (2003) 25.

¹²² “Angka” refers to “organization.”

¹²³ *Ibid* 26.

abolished family life, individual life, and instituted a system of labor camp life.¹²⁴ As

Gottesman illustrates:

Cambodians, with the exceptions of Khmer Rouge cadres and soldiers, worked in the fields through the daylight hours and, in parts of the country, much longer. Cooperatives ate together. Evenings, spent in the communal dining halls, were taken up with political education, self-criticism, and criticism of others. Life was structured and regulated down to the smallest detail... the Khmer Rouge frequently separated men from women and organized mass forced marriages for single people as well as for the ever-increasing number of widows and widowers. Children often lived separately [from] their parents.¹²⁵

In other words, the labor camps became a place where work and home were fused together. According to official decree, the citizens of the new country of Democratic Kampuchea were “either peasants, workers, or soldiers... where the citizens were promised one right—the right to work.”¹²⁶ Charged with the responsibilities to build the country’s economic and social self-sufficiency and self-reliance, peasants and workers were thus to build up an industrial base and expand the agricultural production.¹²⁷ With economic plans like the Four Year Plan, the Khmer Rouge therefore sought to increase rice exports and move towards economic independence and prosperity. For instance, in the northwest region of Cambodia, plans were to have “over 140,000 hectares of uncultivated or unproductive land ... be brought under cultivation. All in all, the northwest was scheduled to provide 60 percent of Cambodia’s rice exports between 1977 and 1980.”¹²⁸ As I show later, however, these economic plans often failed to achieve their goals, resulting in the increased paranoia of the Khmer Rouge that party enemies were working to undermine the Angka. In the end, such paranoia and failed policies led to the purging of leaders within the Khmer Rouge.

¹²⁴ Becker (1986) 16.

¹²⁵ (2003) 27.

¹²⁶ Ibid 181.

¹²⁷ Ibid 181.

¹²⁸ Chandler (1999) 116-117.

At the beginning of its regime, the Communist Party of Kampuchea leadership hid itself behind the ubiquitous name “Angka,” or “Organization,” in order to protect itself from party enemies and maintain secrecy.¹²⁹ Enemies, indeed, had become synonymous with “either unnamed spies working for foreign agents, or those with enemy traits that would undermine the revolution—such as lust for private property, family virtues, or personal gain. These were class enemies.”¹³⁰ As Gottesman depicts, “the Khmer Rouge leadership remained invisible. At a congress held on April 25, 1975, Sihanouk, who was still in China, was referred to as ... head of state. There was no mention of the Party or its ideology... the new rulers were identified only as *angka*.”¹³¹ By October 1975, however, the leadership emerged, assigned to eleven men and two women. Chandler writes:

the ‘comrade secretary,’ Saloth Sar [Pol Pot], took charge of the economy and defense; the ‘comrade deputy secretary,’ Nuon Chea, was responsible for party organizational work and education; and Ieng Sary was to handle foreign affairs for the state and the party. Khieu Samphan remained as liaison officer with the National Front—that is, with Sihanouk. He was also given the tasks of ‘the accountancy and pricing aspects of commerce’... Koy Thuon took charge of domestic and foreign trade, while Son Sen was in command of security and the military General Staff. Others ... included Vorn Vet, in charge of industry, railways, and fisheries; Soeu Va Si, in charge of the Central Committee’s political office; Non Suon, in charge of the agriculture portfolio; and Chhim Samauk, in charge of the prime minister’s office... Ieng Sary’s wife, Khieu Thirith, received the social welfare portfolio; and Son Sen’s wife, Yun Yat, was in charge of culture, education, and propaganda.¹³²

By 1977, the precautions that the leadership had taken to ensure its own security and secrecy failed to save Democratic Kampuchea from its self-inflicted downfall. As the Khmer Rouge and their new Democratic Kampuchea failed to meet their unrealistic Four Year Plan and thus did not achieve the economic and social prosperity the Khmer Rouge

¹²⁹ Becker (1986) 179.

¹³⁰ Ibid 195.

¹³¹ (2003) 25.

¹³² (1999) 108.

envisioned, the leadership began to take dramatic steps by purging its own leadership. As Chandler writes, between 1976 and 1978, Pol Pot “saw to it that close to a third of his cabinet were executed over the next three years... some of those killed, like Chhim Samauk and Vorn Vet, had been his intimate associated for many years.”¹³³ With the help of its S-21 interrogation center and indiscriminate targeting of over 14,000 men, women, and children “enemies,” Pol Pot therefore continued to uphold his idea that Democratic Kampuchea needed to be built and defended by eliminating its enemies. In Pol Pot’s words, “enemies attack and torment us. From the east and from the west, they persist in pounding us and worrying us. If we are slow and weak, they will mistreat us.”¹³⁴ As Chandler indicates, “perhaps as many as 100,000 people—a large proportion of them cadre, soldiers, and their families—were gathered up and put to death.”¹³⁵ In the end, Pol Pot’s obsession with purifying the party and combating incessant enemies weakened his party, causing the Khmer Rouge to be unable to fight the Vietnamese in their first attack against Cambodia in 1977 and then finally with Vietnam’s invasion of Cambodia in 1979.

In other words, Pol Pot’s Democratic Kampuchea, based on the goals of recapturing past glories experienced during Angkor times through racial homogeneity, collectivization, self-sufficiency, and independence from foreign nations, did not achieve its revolution but instead caused the genocide of over one fourth of Cambodia’s population. Paranoid with the view that the party had to defend itself against its enemies, the Khmer Rouge tortured, killed, and destroyed Cambodia, its culture, its social

¹³³ Ibid 108.

¹³⁴ Ibid 114.

¹³⁵ Ibid 147.

structures, and its people. In the end, as I have shown, the Khmer Rouge were victims of their own unrealistic agenda and obsession.

VI. Post-1979, No Justice for Cambodia

When Vietnam invaded Cambodia on January 7, 1979, and overthrew the Pol Pot regime, it installed in its place the People's Republic of Kampuchea (PRK), which was "comprised in part of former Khmer Rouge cadres including Hun Sen, who had escaped internal purges by fleeing to Vietnam in 1977. The PRK immediately proclaimed itself liberator of Cambodia."¹³⁶ For some in the international community, like the United States and China, the invasion of Cambodia by Vietnam was seen as a violation of international law and thus illegitimate. For others, like the Soviet Union, the Vietnamese were not invaders, as the PRK constituted of Cambodian defectors from the Khmer Rouge. Although DK forces numbering over 30,000 men and women and 100,000 villagers had retreated through the forests into northwestern Cambodia, the DK forces, with the assistance of foreign patronage and personal security, were able to rebuild their military strength and create an opposition to the PRK.¹³⁷ Indeed, as a resolution passed by the United Nations in the 1980s shows, "Democratic Kampuchea, [under the Khmer Rouge], retained Cambodia's seat in the United Nations... even as word of its atrocities became known internationally. This sad development resulted from an effective anti-Vietnam coalition led by China and ASEAN, and supported by the United States... as well as many Third World nations."¹³⁸ As I illustrate in the rest of this section, the period post-1979 was marked mainly by political instability and conflict, where the agenda for the Cambodian political parties and the international community became occupied with

¹³⁶ George Chigas, "The politics of defining justice after the Cambodian genocide," Journal of Genocide Research 2.2 (2000): 247.

¹³⁷ Chandler(1999) 157-159.

¹³⁸ Steven Ratner and Jason Abrams, Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy (Oxford: Oxford University Press, 1997) 239.

political ideology, power, and stability, rather than with seeking to establish transitional justice for Cambodia's survivors.¹³⁹

In the early 1980s, information concerning Pol Pot and his regime emerged, creating worldwide revulsion and non-communist Cambodian impatience with Vietnam's prolonged occupation of Cambodia. As a result of these pressures, the United States and its allies decided to "sponsor the formation of an anti-Vietnamese coalition government that could replace the Red Khmer delegation at the United Nations and provide a noncommunist coloring to the anti-Vietnamese resistance."¹⁴⁰ Again, the political agenda of both the international community and Cambodian parties in minimizing communist control of Cambodia by the Vietnamese and consolidating political power superseded the needs of acknowledging Cambodian survivors' suffering and trauma during the Pol Pot era. As Chandler describes, "the coalition government was formed in the middle of 1982. It was dominated by DK officials because of Democratic Kampuchea's patrons and military prowess; the other two factions were led by Prince Sihanouk... and by a pre-Revolutionary prime minister, Son Sann, who had lived for many years in France."¹⁴¹ As fighting between the DK-led coalition government and the Vietnamese forces took place, "most Cambodians over twenty were terrified that Pol Pot would return to power."¹⁴² Indeed, when the Vietnamese forces withdrew from Cambodia in 1989, the Khmer Rouge

¹³⁹ Although I show later in this chapter that the PRK conducted trials against the Khmer Rouge leadership in 1979, the trials were selectively done in absentia and with no respect for international law. As Gottesman demonstrates, the PRK "had succeeded in formulating a verdict that was part historical truth and part political strategy. The Pol Pot-Ieng Sary clique was characterized as genocidal, and the crimes of Democratic Kampuchea were described as having arisen... from 'fascist methods' and 'extremely reactionary policies'... overseas, the PRK hoped to use the trial to discredit the Khmer Rouge resistance. See Gottesman (2003) 65.

¹⁴⁰ Chandler (1999) 161.

¹⁴¹ Ibid 161.

¹⁴² Ibid 164.

forces “had built up an impressive portfolio of foreign investments... valued at over \$100 million, making the faction financially independent.”¹⁴³

To diminish the power of the Khmer Rouge and seek a political balance between the four factional Cambodian political parties, the international community organized conferences between 1987 and 1990. According to Chandler, “pressures mounted on the four Cambodian factions to reach some kind of agreement... the state of Cambodia, as the regime in the Phnom Penh now called itself, had to abandon its demonization of the DK regime... and relinquish some of its national sovereignty to the United Nations.”¹⁴⁴ In 1993, the United Nations assembled the United Nations Transitional Authority in Cambodia (UNTAC) in an effort to supervise “the disarming of factions, the resettlement of refugees, and the preparations for national elections.”¹⁴⁵ Suspicious, Pol Pot and his leadership saw UNTAC and participation in the peace process as a ruse intended to incapacitate their movement. As a result, rather than participate in the elections, “the Khmer Rouge boycotted the UN-organized 1993 elections, and kept killing Cambodian troops and civilians.”¹⁴⁶ As Chandler stipulates, “perhaps the leadership hoped that these massacres would set off a wave of anti-Vietnamese violence, just as they hoped that they boycott of the UN-sponsored elections would produce massive absenteeism among Cambodian voters.”¹⁴⁷ After the May 1993 elections, a coalition government was formed by Prince Norodom Ranariddh’s FUNCINPEC party (which had won the elections) and Hun Sen’s Cambodian People’s Party (CPP) (which had governed the country since 1979).¹⁴⁸

¹⁴³ Ibid 171.

¹⁴⁴ Ibid 172.

¹⁴⁵ Ibid 173.

¹⁴⁶ Kiernan (2004): 17.

¹⁴⁷ Chandler (1999) 173.

¹⁴⁸ Chigas (2000): 250.

Gottesman describes the political situation in Cambodia after the 1993 elections as follows:

pluralism in Cambodia did not evolve into a democratic exchange of ideas [as the international community had hoped] but into a tenuous compact among competing patronage systems. Most FUNCINPEC officials were more concerned with satisfying their superiors than with changing the way the country was governed. A notable exception was Finance Minister Sam Rainsy, whose complaints about unaccountable timber deals and other forms of corruption incurred the anger of Hun Sen. Rainsy's actions also annoyed Rannariddh, who removed him from office in October 1994... the lesson was clear. Hun Sen and the CPP leadership could tolerate the multiparty system imposed on them by the international community so long as the other parties did not directly challenge their interests.¹⁴⁹

For Hun Sen, therefore, the 1993 elections had been a means by which to gain international legitimacy in order to enhance his political power. The task now was to regain his domination in the political scene, manipulating Cambodia's institutions and political alliances to his advantage.¹⁵⁰ As Chigas demonstrates, Hun Sen played his political cards by seeking to dismantle the Khmer Rouge and undermine such a threat by assimilating defecting forces into the Royal Cambodian Armed Forces (RCAF).¹⁵¹ To this effect, in 1994, the Phnom Penh authorities declared the Khmer Rouge "illegal and resumed military operations against them."¹⁵² From this point on, the Khmer Rouge movement began to come apart, lacking foreign support and legitimacy, while Hun Sen advanced his political agenda rather than pay attention to the needs of Cambodia's survivors. As Chigas attests, "by passing the 1994 law, the Hun Sen government was not concerned with making the Khmer Rouge leadership accountable for the crimes

¹⁴⁹ (2003) 353.

¹⁵⁰ Chigas (2000): 250.

¹⁵¹ Ibid 250.

¹⁵² Chandler (1999) 179.

committed between 1975 and 1979. Instead, it was using the resources at its command to bring about the final downfall of its longstanding enemy.”¹⁵³

Starting in 1994, the United States began to change its approach towards Cambodia, aiming to reassert its role as the champion of human rights and rule of law in Cambodia. Moreover, the international donor community saw a trial in Cambodia as a way to assess the effectiveness and reliability of Cambodia’s legal and economic institutions that were being administered with their aid programs.¹⁵⁴ In 1994, the U.S. Congress passed a legislation with the goal of bringing the Khmer Rouge leadership to justice. On the other hand, Hun Sen continued to pursue his goal of achieving political security, framing the issue of justice around national reconciliation, peace, and stability, rather than disruptive legal proceedings against the Khmer Rouge.¹⁵⁵ In effect, when Ieng Sary defected from his position as Khmer Rouge Deputy Prime Minister for Foreign Affairs, Hun Sen gave Sary amnesty. In July 1997, Hun Sen realized his political power as he led a coup d’état against Prince Rannaridh.

In other words, this section has enumerated the different political decisions taken by both the international community and the Cambodian political parties that demonstrate the absence of justice for Cambodia’s survivors post-1979 and the encapsulation of both entities into achieving their own political agendas. As Kiernan depicts, “twenty years of UN silence on Khmer Rouge genocide encouraged Cambodians to ignore the past.”¹⁵⁶ As the international community was engulfed in disagreements over political ideology during the Vietnamese occupation of Cambodia, the United Nations continued to recognize the Khmer Rouge. With Hun Sen, his determination of gaining political power

¹⁵³ Chigas (2000): 250.

¹⁵⁴ Ibid 251.

¹⁵⁵ Ibid 251.

¹⁵⁶ (2004): 18.

and stability led to his integration of Khmer Rouge defectors into his political party and denial of justice and acknowledgment to Cambodia's survivors. Hence, post-1979 era was marked by political preoccupation rather than justice, truth, and acknowledgment of Cambodia's survivors. And as I show in the next section, although discussions around transitional justice emerged beginning in 1994, the issue of justice for Cambodia's survivors has today again turned into political grounds for the United Nations and the Cambodian government to assert their legitimacy.

VII. Progress for Justice: The Creation of a Khmer Rouge Tribunal

Although one could argue that judicial redress against the Khmer Rouge took place under the PRK government in 1979, the method of such processes can hardly be characterized as seeking to achieve the goals of transitional justice. As I mentioned in chapter two, transitional justice is about acknowledging and confronting a country's past, usually marked by mass atrocities, by restoring an understanding of truth, reconciliation, memory, history, and humanity focused on the experiences of the victims in order for a society to move forward. Like Luftglass, therefore, I agree that trying Khmer Rouge leaders in absentia, without representation, and on the presumption of guilt rather than innocence was more a matter of political interest than justice. As I indicated in the previous section, discussions around establishing a tribunal to try the Khmer Rouge finally began to take shape in 1994 when Senator Robb and Representative Solarz worked to encourage, support, establish, and finance a tribunal to prosecute the leaders of the Khmer Rouge regime. Today, more than eleven years after this initial resolution, the Khmer Rouge tribunal is still not fully set up. As with the period post-1979, I even argue that the current processes of creating a Khmer Rouge tribunal has continued to be dominated by political agendas on the part of both the Cambodian Hun Sen Government

and the United Nations. In this section, therefore, I analyze the events and discussions that have surrounded the creation of the Khmer Rouge tribunal, all the while pointing out how victims have often been kept outside of the deliberations meant to bring them justice, dignity, acknowledgment, and memory.

In 1994, President Clinton made it a priority to bring justice to Cambodians for the crimes against humanity committed by the Khmer Rouge. In December 1994, with funding from the U.S. government, Yale University launched the Cambodian Genocide Program, whose task was to uncover secret DK documents. Overall, more than 100,000 documents were found, providing evidence of testimonies conducted at the Tuol Sleng prison, DK official meetings, reports from the CPK zones, and notebooks of senior CPK officials.¹⁵⁷ In addition, the United Nations also began to revisit the issue of accountability for CPK crimes as a result of efforts by Ambassador Thomas Hammarberg. “In April 1997, his efforts resulted in a resolution by the UN Commission on Human Rights calling upon the UN Secretary-General to ‘examine any request by Cambodia for assistance in responding to past serious violations of Cambodian and international law.’”¹⁵⁸ As Luftglass portrays, however, the role of the United Nations was limited as a result of the neglect and absence of timely intervention by the international community to prevent or punish Khmer Rouge atrocities. In other words, the active participation of the United Nations to bring about a tribunal was seen as suspicious and “motivated by collective guilt, rather than the best interests of Cambodia.”¹⁵⁹ For the establishment of a tribunal for the Khmer Rouge, therefore, the significance of such perceptions meant that the international community had lost legitimacy and right to make

¹⁵⁷ Stephen Helder and Brian Tittlemore, “Seven Candidates for Prosecution: Accountability for the Crimes of the Khmer Rouge.” War Crimes Research Office, American University, Jun. 2001, 15 Aug. 2005 <<http://www.wcl.american.edu/warcrimes/khmerrouge.pdf?rd=1>>.

¹⁵⁸ Ibid.

¹⁵⁹ (2004): 905-906.

overarching demands on the Cambodian government with regards to a tribunal, because it had failed to do so when given the opportunity post-1979.¹⁶⁰

In 1995, then-Second Prime Minister Hun Sen stated at a conference that the notion of a tribunal for the Khmer Rouge was necessary, not on the ground of politics but of justice for Cambodia's survivors.¹⁶¹ A few years later on June 21, 1997, Cambodia began to actively seek help from the international community. Then-First Prime Minister Norodom Ranariddh and then-Second Prime Minister Hun Sen submitted a request to the UN Secretary-General to assist Cambodia in "bringing to justice those persons responsible for the genocide and crimes against humanity during the rule of the Khmer Rouge from 1975 and 1979."¹⁶² Although the request seemed to imply the invitation of the international community to organize a UN-sponsored and controlled tribunal by mentioning similar assistance to be given to Cambodia as was done with Yugoslavia and Rwanda, the request did not "necessarily embody its true intentions," which were those of establishing a tribunal based on the rules and leadership of the Cambodian government.¹⁶³

Following the Cambodian request, the UN General Assembly adopted a resolution in December 1997 asking Kofi Annan to establish a commission to investigate how a tribunal could take place. In response, Kofi Annan established a Group of Experts, whose three main goals were: 1) to evaluate the existing evidence and determine the nature of the crimes committed; 2) to assess the feasibility of bringing Khmer Rouge leaders to justice; and 3) to explore options for trials before international or domestic

¹⁶⁰ Ibid 906.

¹⁶¹ Craig Etcheson, "The Politics of Genocide Justice in Cambodia," *Montreal Institute of Genocide and Human Rights Studies*, 12 Sept. 2003: 1.

¹⁶² Luftglass (2004): 906.

¹⁶³ Luftglass (2004): 906-907.

courts.¹⁶⁴ Between July 1998 and February 1999, the Group of Experts “traveled through Cambodia interviewing government officials, survivors of the Khmer Rouge regime, and current Cambodian citizens, hoping not only to obtain information regarding the atrocities, but also to assess the emotional climate of the country.”¹⁶⁵ In the end, a sixty-page report was produced, with recommendations stating that the Khmer Rouge leaders should be tried for crimes of genocide, crimes against humanity, war crimes, forced labor, torture, and crimes against internationally protected persons. Moreover, the report recommended that the prosecutions be limited to the Khmer Rouge main leaders or officials directly implicated in the most serious atrocities, and that an ad hoc UN tribunal be set up in an Asia-Pacific nation-state other than Cambodia along the same lines as the International Criminal Tribunal for the former Yugoslavia.¹⁶⁶ It is important to note also the Group of Experts’ emphasis on the tribunal taking place with an international character, in order to ensure that international standards of justice, fairness, and the process of law be met.¹⁶⁷

When the Cambodian Government under Hun Sen received notice of the report by the Group of Experts, it denounced the conclusions and rejected the recommendations.¹⁶⁸ Instead, the Cambodian Government’s position was that “the international community ought only to provide legal expertise”¹⁶⁹ and that the issues of national reconciliation and political stability should be taken into account in efforts to bring about justice. For Hun Sen, therefore, the issue of transitional justice signified an opportunity to assert his government’s sovereignty and credibility in the eyes of the Cambodian people and

¹⁶⁴ Ibid 907-908.

¹⁶⁵ Ibid 908.

¹⁶⁶ Ibid 908.

¹⁶⁷ Ibid 909.

¹⁶⁸ Ibid 910.

¹⁶⁹ Ibid 910.

international community. Rather than establish an international tribunal, Hun Sen insisted that creating a domestic trial with international participation be followed. In December 1999, Hun Sen's Government, with the assistance of the United States, "agreed on a Draft Memorandum of Understanding, with a modern definition of genocide and a domestic tribunal with 'supermajority' requirements: a majority of Cambodian judges... but requiring the assent of one international judge on all decision."¹⁷⁰ In response, many believed that such a proposal was "designed to allow Hun Sen allowed too much political leeway for Hun Sen as to who would be indicted, who would be convicted, and what crimes the defendants would be found to have committed. In particular, some held that the draft included provisions that could have facilitated substantial political influence over prosecution and judgment."¹⁷¹ Hoping for Cambodia to acknowledge the benefits of a more internationally-controlled process, the UN continued its negotiations with the Hun Sen Government.¹⁷²

To the surprise of the international community, the Cambodian Government passed legislation on August 10, 2001, establishing the "Extraordinary Chambers, which passed through the Cambodian National Assembly (86-2) and Senate (51-0)."¹⁷³ As Luftglass describes,

the Extraordinary Chambers not only represent a significant departure from the ongoing negotiations, but they also serve as a preview of the presently agreed-upon mixed tribunal, which is almost identically structure. The Chambers... would have subject matter jurisdiction over a wide range of human rights offenses. The structure of the Chambers included a trial court with three Cambodian and two foreign judges, an appeals court with four Cambodian and three foreign judges, and a supreme court with five Cambodian and four foreign judges.¹⁷⁴

¹⁷⁰ Ibid 912.

¹⁷¹ Helder and Tittlemore (2001).

¹⁷² Luftglass (2004) 912.

¹⁷³ Ibid 912.

¹⁷⁴ Ibid 912-913.

Feeling betrayed and frustrated over the unexpected processes of justice taking place in Cambodia, Kofi Annan terminated UN involvement in Cambodia in February 2002. Indeed, the deadlock proceeded until June 2002, “when Hun Sen called and twice wrote the Secretary-General requesting UN assistance.”¹⁷⁵ Although Kofi Annan could have long withdrawn UN assistance in Cambodia, as was advocated by his Office of Legal Affairs, Annan kept alive his commitment to the tribunal for he felt that he and the UN “had something to prove after the UN’s debacles in Rwanda and the Balkans. The Secretary-General has publicly commented many times about the UN’s failure to protect the people of Rwanda in 1994, and has vowed that the UN will improve its performance on issues pertaining to genocide for the remainder of his tenure.”¹⁷⁶ Hence, in November 2002, the UN resumed negotiations with Cambodia. In March 2003, the UN and Cambodian Government finally reached an agreement, known as the March Agreement. According to Luftglass:

the tribunal will be seated in Cambodia, most likely Phnom Penh, with Khmer as the official language. The Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia governs both the subject matter and personal jurisdiction of the agreed-upon tribunal. The tribunal procedures will follow Cambodian law, with the March Agreement stipulating that where there is uncertainty regarding Cambodian law, the tribunal may turn to international law. Consequently, domestic norms, rather than international precedents shall govern the procedural law followed by both Cambodian and international judges... the March Agreement does address several issues that other Cambodian proposals previously ignored. First, the March Agreement mandates that the Cambodian Government will not grant any additional amnesties or pardons to the Khmer Rouge. Second, regarding the prior pardon of Ieng Sary, the March Agreement indicates that the Extraordinary Chambers will have the exclusive authority to determine whether the scope of the pardon precludes potential prosecution. Third, the March Agreement requires adherence to the due process provisions of Articles 14 and 15 of the International Covenant on Civil and Political Rights.¹⁷⁷

¹⁷⁵ Ibid 913.

¹⁷⁶ Etcheson (2003): 15-16.

¹⁷⁷ (2004): 916-918.

The March Agreement, therefore, has come to embody the possibility of disrupting the culture of impunity that has pervaded Cambodian society since 1979. With the jurisdiction to try cases of genocide and crimes against humanity, the Extraordinary Chambers have thus been seen by scholars like Susan Cook as providing the impetus for acknowledgment, justice, truth, memory, and dignity to be achieved.¹⁷⁸ As delays and political infighting have shown, however, the issues of genocide politics and legitimacy continue to embroil the dynamics of creating the Khmer Rouge tribunal.

Today, questions and criticisms over the creation of the Khmer Rouge tribunal have arisen over: 1) the efficiency of the Cambodian judicial system given its notoriously corrupt judiciary to handle the magnitude of crimes against humanity and genocide involved during the Khmer Rouge era; 2) whether the incentives for the Hun Sen Government to pursue transitional justice are propelled by politics or genuine interest to see justice; 3) the lack of participation of victims in the tribunal processes; 4) whether a Khmer Rouge tribunal will exacerbate political tensions in Cambodia and negatively diverge needed attention to Cambodia's social and economic infrastructures; and 5) the absence of accountability towards lower-ranking Khmer Rouge leaders involved in committing serious crimes.¹⁷⁹

In 2004, political infighting within Cambodia resulted in an 11-month political stalemate that engendered pessimism and fear over Cambodia's commitment to see justice realized for Cambodia's survivors.¹⁸⁰ In addition, the Justice Initiative voiced concern over the procedural ambiguities involved in the establishment of the tribunal, stating that "the precise standards by which international and Cambodian judges,

178 See "Khmer Rouge Tribunal Approved," BBC News, 4 Oct. 2004, 20 Aug. 2005 <<http://news.bbc.co.uk/1/hi/world/asia-pacific/1452412.stm>>.

179 Susan Cook, "Prosecuting Genocide in Cambodia: the Winding Path Towards Justice." Magazine: the Tribunals, May 2001, 5 Aug. 2005 <http://www.crimesofwar.org/tribun-mag/mag_cambodia.html>.

180 See "Khmer Rouge Tribunal Approved" (2004).

prosecutors and other court staff are selected and appointed... are currently unclear ... [moreover], “no codes of ethics regulating the conduct of judges and other staff of the Extraordinary Chambers currently exist.”¹⁸¹ As post-conflict expert Nathaniel Myers also describes, the Hun Sen Government has played an active role in forestalling Khmer Rouge tribunal efforts. For instance, when the UN Secretary-General Kofi Annan announced that its “member states now covered the UN’s \$43 million share of the tribunal’s \$56.3 million budget... the Royal Government of Cambodia unexpectedly announced that it could not cover most of its own share [showing] the little progress [that had] been made in the months since.”¹⁸² Moreover, Etcheson asserts that Hun Sen has been more interested in managing political balance by seeking to satisfy everyone’s interests. As he writes:

Hun Sen has a tendency to tell everyone what they want to hear, and then he wobbles a bit to keep everyone off balance and continuing to beat a path to his door with additional inducements... Cambodia is following the “Two Victories” policy, which is to forget the past and concentrate only on the future, [while arguing] that the Cambodian people deserve justice for the crimes of the Khmer Rouge regime.¹⁸³

Finally, although the notion of justice for Cambodia has been voiced around the needs for redress for the victims, current transitional justice processes have lacked the input and participation of Cambodia’s survivors in the creation of the tribunal. Where the goals of transitional justice should be about “coexistence, trust, and empathy between individuals who are connected as victims, beneficiaries, and perpetrators... the individual victims and perpetrators are at the heart of [transitional justice] activities,”¹⁸⁴ Cambodian voices

¹⁸¹ See “Issues of Priority Concerning the Extraordinary Chambers,” Global Policy Forum, 8 Aug. 2005, 5 Sept. 2005 <<http://www.globalpolicy.org/intljustice/tribunals/cambodia/2005/0808priority.htm>>.

¹⁸² See “Khmer Rouge Tribunal Needs More than Money,” *Bangkok Post*, 19 Jul. 2005, 5 Aug. 2005 <<http://www.globalpolicy.org/intljustice/tribunals/cambodia/2005/0719more.htm>>.

¹⁸³ Etcheson (2003): 18.

¹⁸⁴ David Bloomfield, “Reconciliation: An Introduction.” International Institute for Democracy and Electoral Assistance, 2003: 22.

from civil society and the victims and survivors has been ignored in the process of setting up the tribunal. As Cambodian participants mentioned at an Asia Society conference, “the negotiations that took place between the Cambodian Government and UN since March 1999 were dominated by agendas of Cambodian officials and foreigners. Public opinion and the view of Cambodian NGOs did not figure prominently into the debate on how the tribunal should be structured.”¹⁸⁵ In other words, rather than abide by its commitment to transitional justice with a victim-centered focus, the Cambodian Government and international community have taken an impasse that has been shaped by politics and notions of legitimacy and power.

To conclude, this section has aimed at describing the background processes that have contributed to the dynamics of a Khmer Rouge tribunal today. Marked by erratic discussions shaped by political interests, both the international community under the auspices of the United Nations and the Cambodian Government finally came to an agreement in March 2003 to establish the Extraordinary Chambers for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea. Using the notions of justice for the victims and survivors advocated for by the international community and the Hun Sen Government, I hold that the task today for the Cambodian Government and the United Nations is to acknowledge the political turn that the procedures have followed, and in doing so, to display their commitment to transitional justice by adopting a more victim-centered approach. By describing the criticisms that have arisen from civil and political entities, I have also shown the limitations and flaws that need to be taken into account in order to ensure that transitional justice is indeed achieved. In the next section, I provide a model for how a more victim-centered approach of transitional justice can

¹⁸⁵ See Kelli Muddell, “Transnational Justice in Cambodia: Challenges and Opportunities.” Symposium Report, Asia Society, 9 Sept. 2003, 5 Aug. 2005 <http://www.asiasource.org/asip/Cambodia_report.pdf>.

take place in Cambodia, given the experiences and lessons that can be learned and adapted from the transitional justice procedures in South Africa, Rwanda, Sierra Leone, and East Timor.

Chapter Four

Transitional Justice

“Certainly, very few people have made any effort to consult the Cambodian people about whether this tribunal will appease their need for truth and justice in regard to the Khmer Rouge regime, or whether this is no longer a concern for them over 20 years following the demise of the Regime.”

--Chea Vannath, Center for Social Development¹⁸⁶

“Following a major breakdown of the rule of law and basic civic values, a society must reconstruct its moral underpinnings. Truth commissions can be a part, perhaps the cornerstone, of such a process of moral reconstruction.”

--José Zalaquett, University of Chile¹⁸⁷

“Criminal justice is an essential part of an integrated response to massive human rights violations, and should be pursued whenever possible. While prosecutions must necessarily focus on the accused, these efforts should also aim to restore victims’ dignity and public confidence in the rule of law.”

--International Center for Transitional Justice, 2005¹⁸⁸

I. Introduction

As I have mentioned in the previous chapters, the goal of achieving transitional

¹⁸⁶ See “Khmer Rouge and National Reconciliation,” *Peace Review* 14.3 (2002): 304.

¹⁸⁷ See Human Rights Program, *Truth Commissions: a Comparative Assessment* (Cambridge: Harvard Law School, 1997) 16-17.

¹⁸⁸ “Transitional Justice Approaches.” 2 Aug. 2005 <www.ictj.org/approaches.asp>.

justice in Cambodia has been symbolized by the visions of reclaiming the victims' dignities, acknowledging Cambodia's painful past, finally bringing justice to Cambodia's survivors and their families, and creating possibilities for reconciliation and justice so that Cambodia can move forward as an emerging democracy. By examining the current processes of creating the Khmer Rouge tribunal, however, I have demonstrated the political dimensions, both domestic and international, that have come to constrain and move Cambodia away from realizing these prospects. Indeed, evidence of delays in financing the tribunal, political infighting within Cambodia's parliament, and ambiguities in Prime Minister Hun Sen's statements concerning the tribunal, has only served to validate Cambodians' fears that current dynamics of transitional justice may in the end only be a political show.

In this chapter, therefore, I provide an analysis of how a more victim-centered approach, one aimed at providing an active role to the victims in the processes of transitional justice and at ensuring that such processes focus on acknowledging the victims' dignity, humanity, need for justice, healing, and recovery, can be re-conceptualized for Cambodia. To do this, I first move away from the premise that the means of reckoning with past human rights abuses are only possible through two possible responses—trials and punishment or forgetting the past.¹⁸⁹ Instead, I hold that if one is to look at the global situation of transitional justice, one would realize the many non-judicial mechanisms, such as truth and reconciliation commissions, amnesty programs, public deliberation avenues, and culturally based solutions, that have been employed complementary to tribunals to reckon with past wrongs. In the rest of this chapter, hence, I will 1) provide an overview of the transitional justice processes that have taken place in

¹⁸⁹ David Crocker, "Reckoning with Past Wrongs: a Normative Framework." Institute for International Public Policy, University of Maryland, Jun. 2004: 2.

South Africa, Rwanda, East Timor, and Sierra Leone, and look at how victim-based approaches were or were not implemented in these situations and what the impacts of these transitional justice procedures were; 2) look at the different suggestions that have been made by scholars and activists to bring about a more victim-based approach for Cambodia; and 3) propose the victim-centered model that I envision for Cambodia given these varying examples, proposals, and suggestions.

II. Transitional Justice in Application: Case Studies

The cases of South Africa, Rwanda, East Timor, and Sierra Leone give insights into how contemporary societies have dealt with their pasts of mass atrocities and the challenges that they have faced at ensuring the goals of justice, redress, memory, and healing. Whereas some of these countries pursued judicial, retributive avenues to redress past wrongs, others implemented non-prosecutorial mechanisms such as truth commissions or culturally based practices like the *gacaca* to reckon with their societies' past wrongs. By examining these approaches, I subscribe to David Bloomfield's understanding of transitional justice, which is that "there is no 'right answer' to the [transitional justice], and so we [should not] try to prescribe a one-size-fits-all solution. Instead, we [should] present the tools, with their strengths and weaknesses: they are to be adopted and adapted, changed or replaced, as they suit the specific context."¹⁹⁰ In other words, by looking at these four case studies, it is my aim to point out the mechanisms that have underscored the potential for victims of mass atrocities to participate in the processes of transitional justice, in order to move forward.

A. South Africa

¹⁹⁰ See David Bloomfield, "Reconciliation: An Introduction." International Institute for Democracy and Electoral Assistance, 2003: 18.

Between 1948 and 1990, South Africa followed a rigid, legalized policy of racial segregation known as apartheid. Led by the National Party, which was in large comprised of white Afrikaners, South Africa legislated specific laws and regulations to enforce such an order. John Dugard describes:

The apartheid order was a legal order. Most of the injustices perpetrated by successive apartheid governments between 1948 and 1990 were committed in the name of the law. Millions were deprived of their South African citizenship... millions were arrested and imprisoned for violating influx control laws which required Africans to produce identity documents ... and millions were forcibly relocated in order to achieve territorial and residential segregation. Thousands were detained without trial under arbitrary security laws and imprisoned for opposing apartheid... the entire population was characterized under racial lines and racial 'purity' ... those classified as 'nonwhite' were denied the franchise and given inferior education, health care, social welfare benefits, and housing.¹⁹¹

For the South African Government, moreover, anyone who resisted apartheid was considered a state enemy and was to be destroyed. Acting with the blessing of the Afrikaner authorities, officers of the apartheid regime often acted outside the law to terminate such dissension. As Dugard further writes, "in the last years of apartheid, many were killed by members of a mysterious agency known as the 'Third Force,' generally believed to have been members of the security forces charged with the task of destroying the [pro-African rights] African National Congress (ANC)."¹⁹²

After years of protests and international sanctions, South Africa's apartheid was finally brought to an end constitutionally under Act 200 of 1993.¹⁹³ Soon after, Nelson Mandela, a nearly-three-decades prisoner, was elected as the new South Africa's first president. "Parliament was established, and [Mandela] appointed (in 1995) the Truth and Reconciliation Commission, or TRC, [to be presided by Archbishop Desmond Tutu] to

¹⁹¹ "Law and the South African Model," Transitional Justice and the Rule of Law in New Democracies, ed. James McAdams (Notre Dame: University of Notre Dame Press, 1997) P?.

¹⁹² Ibid 271.

¹⁹³ Ibid 273.

discover the dark facts of apartheid, and to report them to South Africa and the world.”¹⁹⁴

For South Africa, the policy for transitional justice became one of reconciliation and understanding rather than one of revenge and punishment as had been embodied by previous transitional justice mechanisms like the Nuremberg Trials. David Crocker describes:

While recognizing that a country must reckon with its past evils rather than adopt ‘National Amnesia,’ Tutu nevertheless [rejected] what he call[ed] the ‘Nuremberg Trial paradigm’...[instead], he believe[d] that victims should not press charges against those who violated their rights and the state should not make the accused ‘run the gauntlet of the normal judicial process’ and impose punishment on those found guilty. In the spirit of *ubuntu*, the central concern [should thus be about] the healing of breaches, the redressing of imbalances, the restoration of broken relationships, a seeking to rehabilitate both the victim and the perpetrator, who should be given the opportunity to be reintegrated into the community that he has injured by his offense.¹⁹⁵

With the 1995 Promotion of National Unity and Reconciliation Act 34 of 1995, therefore, the law identified the goals of reconciliation, conditional amnesty, reparation, and the search for truth as the means for South Africa to move forward as a new democracy. In doing so, the Act provided for “the creation of a Truth and Reconciliation Commission of seventeen members, appointed by the President in consultation with the Cabinet, to establish a complete picture of the ‘gross violations of human rights’ committed between March 1960 (the time of the massacre at Sharpeville) and 1993.”¹⁹⁶

In addition, the Act considered the possibilities for granting amnesty to perpetrators in

¹⁹⁴ Robert Rotberg, Truth v. Justice: the Morality of Truth Commissions (Princeton: Princeton University Press, 2000) 5.

¹⁹⁵ See David Crocker, “Punishment, Reconciliation, and Democratic Deliberation,” Buffalo Criminal Law Review 5 (2002): 510-526.

¹⁹⁶ Dugard (1997) 277.

order to forge a successful multiracial society and encourage perpetrators to come forward and testify to uncover apartheid at its worst.¹⁹⁷ To receive amnesty, the conditions that applicants needed to satisfy were: 1) having committed an act that constitutes ‘a gross violation of human rights’; and 2) fully disclosing all relevant facts, especially ones that demonstrated that a political objective was involved in the act.¹⁹⁸ According to the Committee on Amnesty, the gross violations of human rights were confined to “the killing, abduction, torture, or severe ill-treatment of any person.”¹⁹⁹ For those who failed to apply for amnesty or failed to fully disclose the facts, amnesty could be denied and prosecution could take place in domestic courts.²⁰⁰ For South Africa, therefore, the process of the Truth and Reconciliation Commission was to be centered on the victims with the aims of reclaiming the victims’ dignity through truth, acknowledgment, public deliberation, collective understanding, and reparation. As Rotberg writes, the sense was therefore “that a society can move forward only after it comes to terms with its collective angst [and] that meant dealing with outrages committed by whites against Africans, Africans against Africans, Africans against whites, and the African National Congress (ANC) against its own members.”²⁰¹

In the end, South Africa’s TRC achieved many of its goals of recovering truth and bringing acknowledgment and closure to the victims and their families. For one, the TRC processes served the needs of a deliberative democracy by involving an array of actors and participants, and most particularly, the victims and their families. As Rotberg comments, “civil society played a large role in composing the commission and its mandate; Parliament, not a president or prime minister, authorized the TRC. Its striking

¹⁹⁷ Rotberg (2000) 7.

¹⁹⁸ Dugard (1997) 277-278.

¹⁹⁹ Ibid 278-279

²⁰⁰ Ibid 283.

²⁰¹ (2000) 6.

structure and many goals were mandated by an act of Parliament.”²⁰² In addition, André du Toit suggested that the South African model of TRC passed moral tests because it held victims’ hearings as the central focus of the procedures. Because of the TRC’s truth-telling opportunities, the processes encouraged catharsis and therapy for the victims and their families to occur.²⁰³ In South Africa, the TRC “broke the deathly silence surrounding the grotesque consequences of the apartheid system. The new nation and thousands of individuals achieved an important catharsis.”²⁰⁴ As Henry Steiner notes, the TRC in South Africa afforded the possibilities for “reconciliation among different groups... vindication of victims as their stories [were] officially and publicly heard and recorded, the satisfaction of a larger sense of justice through official acknowledgment and condemnation of what [had] occurred, forgiveness by victims of the perpetrators.”²⁰⁵

To this end, Pumla Gobodo-Madikizela depicts:

Stories of forgiveness from victims of human rights abuses, like that of Amy Biehl’s parents, Peter and Linda Biehl, are significant not only because they mark some of the most memorable moments and moral achievements in the life of the TRC hearings, but also, even more important, because they translate the forgiveness model from high-minded homily to actual practice... when perpetrators express remorse, when they finally acknowledge that they can see what they previously could not see, or did not want to, they are revalidating the victim’s pain—in a sense, giving his or her humanity back.²⁰⁶

But although these positive results took place, it is also important to point out that not all victims’ needs were addressed, and for some, South Africa’s policies of amnesty and lack of retributive justice through the courts were viewed as a major omission. By seeing the TRC as the second-best option for South Africa given the political realities of the country and the need to forge a reconciled multiracial society, South Africa was

²⁰² Ibid 13.

²⁰³ See Human Rights Program (1997) 27.

²⁰⁴ Rotberg (2000) 16.

²⁰⁵ See Human Rights Program (1997) 11.

²⁰⁶ **A Human Being Died That Night** (New York: First Mariner Books, 2003) p?

viewed as having failed to see the potential rewards that prosecutorial justice could bring to South Africa's victims. As Dugard demonstrates, "reconciliation serves the broad interests of society and state. But it is not clear that it takes adequate account of the interests of the victims of apartheid. This explains why the families of Steve Biko, Griffiths and Victoria Mxenge, and others challenged the constitutionality of amnesty... in May 1996."²⁰⁷ As José Zalaquett also attests, "in many cases of transition to democracy, holding some exemplary trials may play a useful role even if full justice is impossible. Such trials remind people of the moral values at stake."²⁰⁸

In other words, the lesson to be learned from the case of South Africa is the positive impacts that public deliberation and involvement of a wide array of participants, especially the victims and their families, can have on a society seeking to move forward and to acknowledge the dignity and humanity of its survivors. To keep in mind, however, is the importance of not discarding other mechanisms such as trials if such means can be implemented in conjunction given the political realities of the society in question.

B. Rwanda

In the spring and summer of 1994, ethnic tensions between Hutus and Tutsis that had been exacerbated by Belgian colonial interventions and that continued after Rwanda's independence in 1960 erupted in the genocidal killings of more than 800,000 people, mainly Tutsis, by the majority Hutu ethnic group.²⁰⁹ Before the 1994 genocide, power struggles between Hutus and Tutsis were common in the political scene. In the early 1990s, then-Hutu President of Rwanda, Juvénal Habyarimana, had announced the

²⁰⁷ (1997) 284.

²⁰⁸ See Human Rights Program (1997) 36.

²⁰⁹ Mark A. Drumbl, "Innovations in Transnational Adjudication of International Crimes in Rwanda," International Studies Association, 2004 Annual Meeting, 18 Mar. 2004: 1.

need to establish a sharing of power among ethnic groups and political parties.²¹⁰ When President of Rwanda, along with the leader of Burundi, died in a plane crash on April 6, 1994, however, plans for peace and power-sharing were dissolved. Instead, the Hutu government charged that Tutsi forces had shot down the plane, and as a result, ethnic violence against Tutsis ensued. Payam Akhavan illustrates the horrors of Rwanda as follows:

In Rwanda, the exceptional efficiency of violence allowed the extermination of 10 to 15 percent of the population during a three-month period, and culminated a process involving the complicated planning and expenditure of resources. The Rwanda conflict was not a spontaneous outburst of savagery. Radio-Télévision Libre des Mille Collines and other media organized the extermination of the Tutsi and Hutu moderates through the systematic incitement of the public, targeting a largely illiterate population with no access to other sources of information... only when the Rwandese people were saturated with racist hatred and fallacies, and extremists had positioned themselves in every corner of the country, did it become possible to execute the monstrous ‘final solution.’²¹¹

For three months, Rwanda’s genocidal programs freely took place with the rest of the world quietly standing by and international peacekeeping forces unable to use force to prevent the mass killings of Tutsis. As Mark Drumbl notes, “the Rwandan Patriotic Army, [or the armed forces of the Tutsi Rwandan Patriotic Front political party], was the only entity that actively sought to stop the genocide.”²¹² By July 1994, though, the Tutsi-led RPA succeeded in ousting the Hutu-led militant regime. Since then, a new regime with Tutsi-dominated RPF has remained in power in Rwanda.²¹³

Following the 1994 Rwandan genocide, the RPF government “pledged to bring to justice all those who had participated in the genocidal violence and detained large

²¹⁰ Ibid 1-2.

²¹¹ “Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?,” The American Journal of International Law 95.1 (2001): 11.

²¹² (2004): 2.

²¹³ Ibid 2.

numbers of suspects.”²¹⁴ For the international community, the policy of justice for Rwanda’s survivors was to be one focused on punishment and prevention through the application of the rule of international law. To this effect, the United Nations Security Council passed Resolution 955 on November 8, 1994, to establish the International Criminal Tribunal for Rwanda (ICTR) whose jurisdiction and prosecution were to be limited to high-ranking officers and to events that took place in 1994. As Ratner and Abrams write, the ICTR’s organization [was] identical to that of the International Criminal Tribunal for the former Yugoslavia “with separate prosecutorial, adjudicative, and administrative organs... several considerations motivated the decision to link the Rwanda Tribunal so closely to its Yugoslavia counterpart. The sharing of common institutions and rules [was] aimed at promoting consistency in the law.”²¹⁵ In accordance, the new Rwandan Government maintained that it would try all other defenders.²¹⁶ For both levels of national and international trials, the goals embodied were to punish the guilty, to deter future acts of genocide, to bring about national reconciliation, to bring justice for the victims, to condemn evil, and to maintain peace.²¹⁷ In other words, by following an accountability system through the courts, the international community and Rwandan government saw as central the needs for redress, reconciliation, and reclaiming of dignity for the victims. According to Bronwyn Leebaw, trials, as tools of prosecutorial justice, have worked with the premise that “justice and conflict resolution should be understood and pursued as mutually reinforcing goals.”²¹⁸

As Diane Orentlicher further indicates, the prosecutorial approach contributes to the

²¹⁴ Steven Ratner and Jason Abrams, Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy (Oxford: Oxford University Press) 154.

²¹⁵ *Ibid* 175.

²¹⁶ *Ibid* 154-174.

²¹⁷ Drumbl (2004): 4.

²¹⁸ “New Approaches to Transitional Justice: Combining Restorative Justice and Prosecution,” International Studies Association, 2004 Annual Meeting, 18 Mar. 2004: 7-8.

peace process, first with its very formality of prosecution that demonstrates that no sector is above the law, and second, with its unbiased and impartial aspects that put an end to impunity and contributes to the processes of reconciliation.²¹⁹

In the end though, I hold that the results of the ICTR and the Rwandan trials failed to resonate well with the initial goals of seeking justice for the victims. Certainly, the ICTR and Rwandan trials had some positive impacts that included preventing the rise of anti-Hutu vengeance killings, punishing the perpetrators, prosecuting some of the top officials involved in the genocide, and raising awareness about the Rwandan genocide in the global community. As Akhavan indicates to this effect, “the ICTR as made its obvious contributions by politically incapacitating the remnants of the Hutu extremist leadership responsible for the 1994 genocide... this is the result of the arrests as well as the stigmatization of those associated with the previous government.”²²⁰ In addition, Drumbl notes that the domestic trials in Rwanda have been effective at the deontological goal of punishing.²²¹ Nonetheless, though, the ICTR and the Rwandan trials had their fair share of drawbacks, the most important of which were the ICTR’s lack of participation and involvement of the victims and their families and the Rwandan trials’ failure to create a sense of individual responsibility among the perpetrators.

For one, the ICTR was created outside of the context of Rwanda by the international community following a model of international law that did not take into account Rwanda’s local realities. As Drumbl writes, “the end result is a one-size-fits-all response that—particularly if externally imposed on a post-conflict society by foreign judges and magistrates—may relegate to a subordinate status the specific contextual

²¹⁹ Ibid 8.

²²⁰ (2001): 23.

²²¹ (2004): 4.

characteristics or needs of that society.”²²² Second, the ICTR’s processes took place outside of Rwanda, and therefore, failed to achieve a sense of connection between the victims and the prosecutorial developments of the ICTR. Akhavan attests to this effect that “the ICTR has often been faulted for its remoteness from the Rwandanese people. Its geographical location in Arusha, Tanzania, makes it visibly distant.”²²³ Moreover, Leslie Vinjamuri and Jack Snyder concur, stating that “the international tribunal’s vision of justice has been scarcely visible within Rwanda and has made no contribution to national reconciliation.”²²⁴ On the issue of the Rwandan trials, moreover, Drumbl writes that “as a general rule, the trials, or the prospect of facing trial, have failed to produce shame, contrition, regret, or remorse among the prisoners... victims, too, are frustrated with the due process and exacting proofs.”²²⁵ In other words, rather than achieve the intended goals of empowering the victims and the reclaiming of their humanity through the processes of prosecutorial justice, trials, both in the ICTR and Rwandan national courts, have instead led the victims to feel alienated and to see justice as having failed to give them redress and acknowledgment. In light of these concerns, however, the Rwandan Government took active steps in October 2000 to reform its transitional justice approach by giving rise to local participatory justice tribunals, called *gacaca*, in order to re-contextualize justice for the victims and their local realities.

For the Rwandan Government, the use of *gacaca*, which is a practice that “dates back to pre-colonial Rwanda... and whose objective [has been] to restore harmony and social order,”²²⁶ to deal with the crimes against humanity and of genocide committed in

²²² Ibid 15.

²²³ (2001): 25.

²²⁴ “Advocacy and Scholarship in the Study of International War Crime Tribunals and Transitional Justice,” Annual Review of Political Science 7.1 (2004): 351.

²²⁵ (2004): 5.

²²⁶ Drumbl (2004): 7-8.

1994 has aimed at following a form of restorative justice centered around the needs of the victims. As Leebaw suggests, the theory of restorative justice rests on four general principles: 1) restorative justice should be responsive to the context of the crime; 2) restorative justice promotes ‘rehabilitation’ and ‘reintegration’ of perpetrators; 3) restorative justice requires a concrete response to the needs of victims; and 4) restorative justice requires and dialogue that address the elements that contributed to the rise of crime and violence in the first place.²²⁷ The *gacaca* tribunals, therefore, are composed of elders and *inyangamugayo*, or people of integrity, to preside over the local tribunals. According to Drumbl, “two-hundred-and-sixty thousand such individuals were chosen in October 2001.”²²⁸ According to the procedure framework of the legislation, the procedures of the *gacaca* tribunals take place by bringing the perpetrators of the crimes before the villages where they are said to have committed the crimes. There, the perpetrators are adjudged by a *gacaca* panel comprised of nineteen individuals from the villages through the processes of survivors telling their stories publicly and perpetrators understanding their wrongdoings and compensating the genocide survivors and the communities. Unlike national trials, therefore, the *gacaca* process has been proposed as an effective measure that reduces “transportation costs, and generally improves access [and that meets local expectations].”²²⁹

Overall, the *gacaca* approach, which has been victim-centered, has had many positive results with the restoring of balance within Rwandan communities and especially with the restitution and redress for the victims and their families. For instance, the *gacaca* initial proceedings specifically have called for the compensation of genocide

²²⁷ (2004): 6-7.

²²⁸ (2004): 7.

²²⁹ Ibid 8.

survivors as is demanded by their requests. As a result, victims' and their families' needs have been met at the very onset of the procedures. Moreover, the *gacaca* approach has been participatory and communal. As Drumbl describes, "*gacaca* opens a small, but real democratic space that creates the possibility for unforeseen, non-hegemonic discussion. These discussions could involve issues of accountability for genocide, but also could spill over into other areas unrelated to the genocide, thereby promoting ... participation."²³⁰ In many cases, therefore, such an adaptation of cultural mechanism has enabled victims to find support in their communities but also to hold their perpetrators accountable to the rest of the village. But as Drumbl also notes, though, there have been criticisms on the part of international lawyers and activists concerning *gacaca* because of its lack of conformity with Western understandings of rule of law.²³¹ To this effect, he indicates, "specific examples of such non-conformity include: defense counsel is not available; there are limited appeal rights; the decision-makers may not be impartial... the search for truth might be undertaken at the expense of justice... and other basic international standards might not be met."²³² Nonetheless, though, I hold that positive steps, like the taking place of over 760 *gacacas* as of June 2003 and positive response by and involvement of victims, have in main part led to a notion of justice and reconciliation that has been closer to the victims' needs and their communities', which has been lacked in international and national trials.

In other words, the processes of transitional justice in Rwanda provide lessons for the case of transitional justice in Cambodia by showing the situations in which national and international tribunals, if they lack a connection and involvement of the victims in

²³⁰ Ibid 8.

²³¹ Ibid 8.

²³² Ibid 8.

terms of procedures or conceptions of justice, can fail to achieve its goals of reclaiming dignity for the victims. With the *gacaca* though, the case of Rwanda demonstrates that such cultural mechanisms, even if they do not fully meet international standards, are more effective at bringing about reconciliation and acknowledgment for the victims and their families. As Drumbl concludes, “*gacaca* remains the only foreseeable alternative [for Rwanda] by encouraging local justice [that is more relevant to the victims].”²³³

C. East Timor

In 1975, after tensions arose between Timorese political parties and erupted into armed violence in August 1975, the Indonesian government, under General Suharto, claimed that the situation of East Timor posed a security risk on Indonesia. As a result, on December 7, 1975, Indonesia launched a full invasion on East Timor, and by July 1976, the Indonesian regime went on to formally annex East Timor as its 27th province.²³⁴ Occupied by Indonesia between 1975 and 1999, East Timorese resistance, known as Fretilin, and its armed forces, Falintil, began to oppose the Indonesian occupation that was alleged to have committed “perpetration of gross and widespread human rights abuses, including murder, torture, rape, arbitrary detentions and internments, and forced displacements.”²³⁵ In 1999 though, following a change of leadership in Indonesia, the new Indonesian President B.J. Habibie consented to a UN-sponsored referendum that would allow East Timorese to decide if they wanted to continue to remain a province of Indonesia.

As the ballot took place, most of the votes were cast in favor of independence. Frederick Rawski writes, “in August 1999, 78% of Timorese voted to separate from

²³³ Ibid 9-10.

²³⁴ Megan Hirst and Howard Varney. “Justice Abandoned? An Assessment of Serious Crimes Process in East Timor.” International Center for Transitional Justice, June 2005: 2.

²³⁵ Ibid 2.

Indonesia, after which the Indonesian military and pro-Jakarta militia destroyed 85% of all standing structures, killed between one and two thousand people, and forcibly deported 250,000 to the Indonesian side of the island.”²³⁶ To ensure the security of East Timor’s borders, an Australian-led multi-national force, INTERFET, entered East Timor, followed by a UN peacekeeping force.²³⁷ In October 1999, the Security Council passed Resolution 1272, establishing the United Nations Transitional Administration in East Timor (UNTAET) to help East Timor “restore order and establish new governance structures.”²³⁸

While recommendations by the UN International Commission of Inquiry on East Timor advocated for the creation of an international body to investigate and prosecute those responsible for violations of international law, three special rapporteurs for the UN Commission on Human Rights had also earlier suggested that an international tribunal be established, unless “steps [were] taken by the government of Indonesia to investigate [Indonesian military forces] involvement in the [1999] violence.”²³⁹ In response, Indonesia, now led by October 1999-elected President Abdurrahman, supported the pursuit of justice for East Timor. As Akhavan mentions, Wahid “indicated his preference for trials ‘to take place at home.’”²⁴⁰ As a result, the UN ultimately decided that to deal with East Timor’s past of human rights violations, “parallel domestic prosecutions should take place in Indonesia and East Timor. In Indonesia, this was attempted through the

²³⁶ “Truth Seeking and Local Histories in East Timor,” Asia-Pacific Journal on Human Rights and the Law 1 (2002): 82.

²³⁷ Ibid 82.

²³⁸ Ibid 82.

²³⁹ Hirst and Varney (2005): 3.

²⁴⁰ (2001): 28.

establishment of an *ad hoc* human rights court. In East Timor, the Special Panels for Serious Crimes and the Serious Crimes Unit were established.”²⁴¹

According to UNTAET, “the prosecutions in East Timor would focus on local perpetrators, while the trials in Jakarta would target Indonesian suspects.” Meanwhile though, UNTAET also gave exclusive jurisdiction to East Timor’s Dili District Court in matters of serious criminal offenses, namely, “genocide, war crimes, and crimes against humanity committed at any time, as well as murder, sexual offenses, and torture committed between January 1 and October 25, 1999.”²⁴² According to Rawski, in June 2000, special panels were created within the Dili District Court and the Court of Appeal to deal with serious crimes... the panels consisted of two international judges and one national judge... the panels were to apply the law of East Timor as well as international law.”²⁴³ Moreover, in July 2001, the Special Representative of the Secretary-General in East Timor called for the establishment of a UN truth commission for East Timor with Regulation 2001/10.²⁴⁴ Following a number of restorative principles, the Commission for Reception, Truth, and Reconciliation (CAVR) has held that by establishing the truth, perpetrators of non-serious crimes would be “able to take part in a community reconciliation process in which they would agree to undertake an act of reconciliation, which might include community service or making a symbolic payment after responding to victim testimony and admitting and apologizing for their crimes.”²⁴⁵ For Indonesia, therefore, the goal of creating the tribunal was to validate its position as a new democracy and to hold the military forces accountable for their atrocities and corruption. For East

²⁴¹ Hirst and Varney (2005): 4.

²⁴² Ibid 5.

²⁴³ Ibid 5.

²⁴⁴ Rawski (2002): 83

²⁴⁵ “Transitional Justice Approaches.” International Center for Transitional Justice. 2005. 8 Aug. 2005 <<http://www.ictj.org/approaches.asp>>.

Timor, the need for trials was embodied in “stressing the importance of reconciliation among the East Timorese people and demanding that those responsible for the 1999 violence be brought to justice.”²⁴⁶ With CAVR, however, the goals of transitional justice were expanded to include restoration of victims’ dignity and a catering to their views of justice and reconciliation.

As with the case of Rwanda, the tribunal processes involved in Indonesia and East Timor to address gross human rights violations failed to meet the needs of the victims because of: 1) the victims’ sense that the trials were politically motivated and/or too weak to bring about justice for the victims, especially the trials in Indonesia, and 2) the laws and rules of procedures and fairness surrounding prosecutorial justice impeded on the trials’ abilities to deal with the realities for the victims that were involved in the conflict. As Suzannah Linton states, “charges of war crimes require the prosecution to prove the existence of armed conflict in East Timor. The orthodox view is that the East Timor conflict began on December 7, 1975 ... by the armed forces of Indonesia... [but according to international law], East Timor was not then a state, [and thus, restrictions apply].”²⁴⁷ Moreover, Linton notes that the tribunals, by focusing on individual cases, [did not] “address the truth of what happened in East Timor. It only [diverted] scarce resources.”²⁴⁸ In Indonesia, also, the notion of justice was politicized from the onset because of the military’s support for the government. According to Snyder and Vinjamuri, “in 2001, following the impeachment of the erratic elected president, Abdurrahman Wahid, [President Megawati Sukarnoputri’s] government came to power with military backing... as a result, civilian leaders cannot risk a military backlash

²⁴⁶ Rawski (2002): 83.

²⁴⁷ “Cambodia, East Timor and Sierra Leone: Experiments in International Justice,” Criminal Law Forum 12 (2001): 208-209.

²⁴⁸ Ibid 219.

against an attempt to prosecute senior officers for crimes in East Timor.”²⁴⁹ In other words, as weak systems of prosecutorial justice pervaded in East Timor and Indonesia, the needs of the victims to have their suffering acknowledged failed to be embodied and to take place. As a survivor of the conflict notes:

On the issue of reconciliation, it should be noted that some international organizations show the tendency to impose upon the process rules which are merely legal, without even trying to understand the core issues, as if it was they who have suffered, and not the Timorese, and that Timorese have feelings too... the concept of reconciliation ought to be well understood from its political and all-encompassing character, and I mean all-encompassing because they are wounds to be healed into scars, in the mothers and fathers, widows and orphans and relatives, tagged before as traitors.²⁵⁰

But unlike the tribunals and their lack of resonance with the victims, CAVR had better victim-centered results.

For one, Rawski asserts that the truth-telling process involved in CAVR has enlisted familiarity with the victims and the Timorese given their tradition of narrative history-telling. As he indicates, “Timorese may not view the ‘truth-seeking’ function of the Commission for Reception, Truth, and Reconciliation as a particularly foreign concept.”²⁵¹ By taking an approach that was culturally sensitive, CAVR has also held reconciliation ceremonies. For instance, in one case, “former militia leaders stood up and publicly apologized to the community.”²⁵² Overall, CAVR facilitated hundreds of hearings across East Timor and took thousands of statements from victims. As a result, victims were able to share their stories, while the processes were centered on their needs and the importance of community awareness and reconciliation.²⁵³

²⁴⁹ (2004): 29.

²⁵⁰ See Rawski (2002): 77.

²⁵¹ Ibid 94.

²⁵² Ibid 88.

²⁵³ “Transitional Justice Approaches,” 2005.

In other words, unlike the tribunal processes, which failed to enlist victims' support and participation, the truth commission in East Timor has aimed at better representing the needs for justice for the survivors. By not focusing on issues of due process and international legal standards but instead community reconciliation and acknowledgment, the truth commission worked with the communities and the victims to re-establish their dignities and their humanity.

D. Sierra Leone

For almost ten years, between 1991 and 1999, Sierra Leone experienced a vicious civil war between its government and the rebel Revolutionary United Front (RUF) that caused the deaths of over 75,000 people. According to Sierra Leone's Truth and Reconciliation Commission Report, "while there were many factors, both internal and external, that explain the cause of the civil war...it was years of bad governance, endemic corruption and the denial of basic human rights that created the deplorable conditions that made conflict inevitable."²⁵⁴ During the civil war, an overwhelming majority of the crimes was committed by Sierra Leoneans against Sierra Leoneans. Indeed, government and rebel groups like the RUF, the Armed Forces Revolutionary Council (AFRC), the Sierra Leone Army (SLA), and the Civil Defense Forces (CDF) were responsible for having authorized or instigated human rights atrocities against civilians.²⁵⁵ As Leebaw mentions, "the war in Sierra Leone was notorious for atrocities committed against civilians, including murder, mass rape, and the amputation by machete of hands, legs, and breasts. Thousands of children were forced into combat...72% of those who fought with

²⁵⁴ "Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission." Truth and Reconciliation Commission of Sierra Leone. 2002, 5 Aug. 2005
<<http://trcsierraleone.org/drwebsite/publish/intro.shtml>>.

²⁵⁵ Ibid.

the rebel group, the RUF, claim that they were forced into combat.”²⁵⁶ While a ceasefire between the government and the rebel forces took place on May 22, 1999 with the Lomé Peace Accord, where rebel leader Foday Sankoh and his followers were granted amnesty and appointed in positions like the Vice-Presidency, the fighting nonetheless resumed within ten months and resulted in the killings of more Sierra Leoneans. As Crocker comments, the granting of amnesty had dire consequences for Sierra Leone and for the rest of Africa, among which was the signal that “atrocities can be committed—especially if they are frightening atrocities.”²⁵⁷ Finally, in 2000, British intervention helped the government to decisively defeat the rebels.

Resuming talks over peace and transitional justice soon after, the Sierra Leone government and the United Nations worked conjunctly to establish a Truth and Reconciliation Commission and a hybrid Special Court, in which the staff was to be comprised of foreign and local judges and prosecutors.²⁵⁸ Adhering to principles of combining restorative and prosecutorial justice, Sierra Leone and the United Nations established the goals of rehabilitation and restoration of justice and dignity for the victims, while also upholding the notion of the rule of law and the ending of impunity.²⁵⁹ According to Leebaw, the establishment of the TRC, which was called for by an act of parliament in February 2000, “specifies that the purpose of the commission is to establish ‘an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone... to address impunity, to respond to the needs of victims, to promote healing, and reconciliation.’”²⁶⁰ Moreover, the

²⁵⁶ (2004): 9.

²⁵⁷ (2002): 537.

²⁵⁸ Leebaw (2004): 10.

²⁵⁹ Ibid 10.

²⁶⁰ Ibid 9.

Special aimed at reforming “Sierra Leonean law by aligning it with formal international standards, while simultaneously prosecuting top leaders associated with past violence.”²⁶¹

In order to achieve the goals of establishing truth and reclaiming dignity for Sierra Leone’s victims and their families, the Truth and Reconciliation Commission has worked in compliance with the Lomé Peace Accord, which granted full amnesty to all combatants up to its signing on May 22, 1999. Unlike the South African’s TRC, Sierra Leone’s TRC does not seek to “grant amnesty in exchange for confession.”²⁶² However, the abidance of the TRC with the Lomé amnesty agreement does not mean that the Special Court will also abide by such an agreement. Instead, the two institutions, by agreeing to operate independently of each other and not to share information on cases or investigations, have made it possible for perpetrators of gross human rights violations to still be prosecuted by the Special Court. As the Sierra Leone Truth Commission writes, “on January 16, 2002, the Government of Sierra Leone reached an agreement with the United Nations for the establishment of a Special Court with jurisdiction over pre-Lomé offenses, irrespective of amnesty or pardon.”²⁶³ In addition to this commitment to truth, the TRC has also laid out an integral role for civil society, victims, and their families to play during the procedures of establishing the truth commission. For instance, in preparations for the meeting in Lomé in 1999, the Sierra Leonean government held a consultative conference in which civil society, students, and other professionals were invited to build a consensus on how to bring about peace and reconciliation for Sierra Leone. Moreover, the TRC has integrated the mandate of helping to restore the victims’ human dignity and reconciliation in its mission, therefore demonstrating the central role of victim-centered transitional

²⁶¹ Ibid 10-11.

²⁶² Ibid 9.

²⁶³ “Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission,” 2002.

justice upheld by the TRC. Community leaders and local traditional leaders have also been invited to attend and take part in the proceedings. Other procedures embodied by the TRC have included public statement-takings of the victims—as long as the victims agreed to do so, public hearings—and the opportunity for the perpetrators to apologize to their victims. As Leebaw indicates, “the commission pursued rehabilitation and reintegration of perpetrators by holding a weekly ‘reconciliation ceremony. Sometimes victims and perpetrators would appear together... those who admitted to crimes were washed off their evils through a special cleansing ceremony.’”²⁶⁴ Overall, the TRC has received more than 7,000 statements and held country-wide victim and thematic hearings that have enabled victims to reclaim their dignity and to agree that justice has taken place. In the end also, the TRC has worked with other government agencies to ensure that reconciliation did not stop at apologies but also went further to provide reparations for the victims.

Complementary to the TRC, the Special Court has worked to advance the notion of the rule of law and the end to impunity. As mentioned, the Special Court has worked independently of the TRC, therefore enabling the Special Court to prosecute individuals responsible for gross human rights violations. As Leebaw writes, the Special Court has “the power to prosecute persons ‘who bear the greatest responsibility for serious violations of humanitarian law and Sierra Leonean Law.’”²⁶⁵ Unlike the ICTR though, the Special Court has taken extra measures to ensure the involvement of the local population. In effect, “the Registry of the Special Court planned a “Court Users Committee” comprised of local civil society organizations to give feedback to the Court. The Office of the Prosecutor [also] planned to contribute a series of lectures at the

²⁶⁴ (2004): 10.

²⁶⁵ Ibid 10.

university on accountability and human rights.”²⁶⁶ As a result, the Special Court has ensured that its commitment to the rule of law and prosecutorial justice resonates with the need of victims and their communities to feel empowered and included in the processes. As Linton writes, “the Special Court... has been carefully calibrated to fit the circumstances of Sierra Leone.”²⁶⁷ Nonetheless though, criticisms over the Special Court have also arisen over the time frame that the Court covers. As Linton mentions, the United Nations and the Sierra Leonean government have agreed that the Court’s temporal jurisdiction “will cover crimes committed since 30 November 1996, the signing of the Abidjan Accords, the first comprehensive peace agreement between the Sierra Leone government and the RUF. As the conflict is ongoing, there is no cut-off date.”²⁶⁸ For the victims and their communities, such a time frame has failed to take into account the need for justice for the victims of atrocities that were committed between 1991 and 1996. Overall, between 2002 and 2003, Marieke Wierda reports that the Special Court has issued its first indictments and has to date indicted twelve individuals, including a current head of state and leaders of all the factions in the civil war.²⁶⁹ As a result, despite some of the drawbacks of the Special Court, the Court has nonetheless begun to function in combination with the Truth and Reconciliation Commission, ensuring that where prosecutorial justice cannot fulfill the needs of the victims, the TRC can still do so through public hearings and acknowledgment.

In other words, by looking at the case of Sierra Leone, I hold that the country’s new tools of combining different ideals of justice, such as restorative, traditional, and prosecutorial, have led to the reinforcement of justice and reconciliation for the victims,

²⁶⁶ Ibid 11.

²⁶⁷ (2001): 238.

²⁶⁸ Ibid 232-233.

²⁶⁹ “Procedural Developments in International Criminal Courts,” The Law and Practice of International Courts and Tribunals 2.2 (2003): 362.

their perpetrators, and their communities. Taking into account the needs for the realization of justice for the victims as central, the approaches of the Special Court and the TRC have led many Sierra Leoneans to participate in the processes and to view these approaches as valid for their realities.

E. Summary of cases

After having examined contemporary cases of transitional justice in South Africa, Rwanda, East Timor, and Sierra Leone, I hold that the need to center transitional justice mechanisms around the victims and their realities is crucial to ensure that the goals of achieving acknowledgment, recovering history and truth, and enabling victims to regain their dignity and humanity can occur. Overall, the cases of Rwanda and East Timor indicate how prosecutorial justice embodied in tribunals can have adverse effects on transitional justice and fail to achieve goals of moving forward for the country if victims feel alienated from the processes. South Africa and East Timor also demonstrated the potentials of truth commissions in uncovering history and bringing about acknowledgment and national reconciliation. However, South Africa's TRC also indicated the drawbacks of granting amnesty to perpetrators in exchange for their testimonies, especially when the victims and their families themselves may not agree with such policies. Sierra Leone, moreover, pointed out the potential balance that can be reached between prosecutorial, restorative, and traditional justice in which tribunals, truth commissions, and cultural mechanisms can be employed to help victims regain their dignity and humanity, all the while also pursuing the goals of establishing a rule of law and better accountability system for the emerging democracy. To conclude this section, therefore, I summarize the mechanisms and their effects/potentials at achieving/having achieved transitional justice for the victims. In doing so, I use this table as a point of

reference and comparative analysis to support the need for how a more victim-centered model of transitional justice can take place for Cambodia.

Table 1: Were Elements of Victim-Centered Justice Consciousness Included in Contemporary Transitional Justice Situations?

Transitional Justice Mechanisms and Whether or Not They Are Victim-Centered	South Africa	Rwanda	East Timor	Sierra Leone
Truth Commissions	Yes	N/A	Yes	Yes
Amnesties	No	N/A	N/A	Yes
International Criminal Tribunals	N/A	No	N/A	N/A
National Tribunals	No	No	No	N/A
Mixed Tribunals	N/A	N/A	N/A	Yes
Cultural Mechanisms	Yes	Yes	Yes	Yes

III. Cambodia and the State of Victim-Centered Justice

In this section, I explore examples of suggestions that have been proposed to bring about a more victim-centered transitional justice in Cambodia. In doing so, I look at the works of Craig Etcheson and his writings on faith traditions in Cambodia, Steven Ratner and Jason Abrams and their insights on how different mechanisms of transitional justice can be engaged for Cambodia, and reports from conferences and symposiums in which Cambodian civil society representatives discuss the why’s and how’s of taking into account justice for survivors approaches. At the end of this chapter, I intend to use these suggestions to craft a more victim-centered model of transitional justice for Cambodia.

First, Craig Etcheson’s work on faith traditions and reconciliation in Cambodia examines meaningful ways in which Cambodia’s faith traditions can be utilized as enabling factors and repository mechanisms to bring about reconciliation and justice that can be culturally meaningful for Cambodia’s survivors.²⁷⁰ By focusing on the uses of rituals within the Buddhist religion, in which the core values of compassion, kindness,

²⁷⁰ “Faith Traditions and Reconciliation in Cambodia,” Harvard University, “Settling Accounts? Truth, Justice, and Redress in Post-Conflict Societies” Conference, 1-3 Nov. 2004: 2.

joy, equity, and justice are embodied, Etcheson indicates the role that such rituals can play in bringing about reconciliation and healing for survivors in the aftermath of gross human rights violations or genocide.²⁷¹ Among the rituals that Etcheson highlights, he demonstrates the role of reintegration of perpetrators and forgiveness and healing that can take place for the victims. As he writes:

The *teuch mun* ritual, which involves monks sprinkling blessed water on persons or objects, is performed to ward off evil spirits and bad luck, and has also been used to help ensure successful reintegration when former Khmer Rouge return to their non-Khmer Rouge home villages. The *rab bat* ritual involves the faithful giving food or other gifts to monks, a process which is said to relieve feelings of anger in those giving the gifts. The *Sangha tier* ritual is a ceremony performed by monks either for dead or living people, and victims and perpetrators have been known to jointly engage in this rite, helping to heal the chasm between them and bringing them together... another ritual, more traditional than spiritual, is known as the *salaboun*, and is so named for a place in the community where people gather to discuss problems and conflicts in encounters that are usually mediated by village elders.²⁷²

Culturally and religiously meaningful to the victims, therefore, these processes of reconciliation and justice can serve as potential answers to how Cambodia can deal with its past of gross human rights violations. More so also, Etcheson highlights the importance that such local rituals can have on resolving tensions that have pervaded Cambodian localities today, where “Cambodians live side-by-side with local Khmer Rouge leaders who were responsible for the execution of their loved ones during the Khmer Rouge regime.”²⁷³ In other words, as rituals have become important cultural mechanisms that have served to reintegrate perpetrators as well as bring closure or healing to the victims, Etcheson’s analysis of faith and cultural traditions are crucial elements that can contribute to a renewed sense of victim-centered transitional justice for Cambodia.

²⁷¹ Ibid 10-15.

²⁷² Ibid 19-20.

²⁷³ Ibid 40.

In addition to Etcheson, Ratner and Abrams have also written on the issue of other mechanisms that Cambodia can employ to achieve more victim-centered approaches of transitional justice. Rather than examine culture-specific mechanisms, though, Ratner and Abrams discuss the potential benefits of incorporating investigatory commissions and civil suit measures to enhance processes of justice for the survivors. On the issue of investigatory commission, Ratner and Abrams highlight the important interests of acknowledgment, healing, and spiritual reparation that can be achieved for the victims, as well as the greater impacts on Cambodia's emerging democracy and enhancement of governmental credibility that can take place if proper mandates, structures, and regulations are implemented for the investigatory commission. Moreover, Ratner and Abrams highlight the possibility of victims and their families relying on the route of civil action against Khmer Rouge leaders under laws such as the U.S. Alien Tort Claims Act or their foreign equivalents. In such a way, victims can feel empowered to legally hold their perpetrators accountable, although the level to which punishment can take place is limited to monetary and psychological compensation. Overall, therefore, Ratner and Abrams' exploration of different mechanisms besides the Khmer Rouge tribunal serves to show the complementary roles that investigatory commissions and civil suits can play to ensure that victims' needs are met.

Finally, Cambodian civil society has also been active at voicing recommendations concerning how transitional justice can be better victim-centered in their country. Unlike Etcheson, Ratner, and Abrams, however, most civil society representatives have sought to rectify the imbalance of voices that are inherent in current processes of the Khmer Rouge tribunal rather than examine alternative mechanisms that can be pursued to achieve victim-based justice. In this regard, civil society members have criticized their

lack of input and voice in the process of setting up the tribunal. As one conference participant mentioned, “the negotiations that took place between the Cambodian government and UN since March 1999 were dominated by the agendas of Cambodian officials and foreigners. Public opinion and the view of Cambodian NGOs did not figure prominently into the debate on how the tribunal should be structured.”²⁷⁴ As a result, civil society members have put forward a range of objectives that the tribunal should seek to achieve, among which are the creation of justice for victims by holding the perpetrators accountable, the provision of explanations for why the Khmer Rouge undertook to kill their own people, the catalyst to enable Cambodian society to heal, and the serving as a model to reform Cambodia’s legal system.²⁷⁵ In addition, civil society representatives have also pointed out the need for more international participation in the tribunal process, especially given the corruption and lack of credibility that Cambodia’s current court systems hold. For many of the conference participants, to allow the Cambodian government to direct the course of the tribunal at its whim is dangerous and may prove to result in a political show rather than accountability of the perpetrators and justice for the victims. Hence, by calling for greater participation of civil society and more inclusion, civil society members have also made important suggestions as to how the goals of achieving justice for the victims can still be incorporated within current structures of transitional justice in Cambodia.

With these suggestions and recommendations in mind, as well as the lessons from comparative case studies, I now move to describe my vision of how an effective victim-centered model of transitional justice can take place for Cambodia.

²⁷⁴ See Kelli Muddell, “Transitional Justice in Cambodia: Challenges and Opportunities.” Symposium Report, Asia Society, 9 Sept. 2003, 5 Aug. 2005 <http://www.asiasource.org/asip/Cambodia_report.pdf>.

²⁷⁵ Ibid.

IV. A Victim-Centered Model of Transitional Justice for Cambodia

With the comparative analysis of the transitional justice cases in South Africa, Rwanda, East Timor, and Sierra Leone, I have demonstrated the importance of having victims and their families participate or be in accord with the mechanism(s) of transitional justice in order for successful justice to take place. Indeed, the International Center for Transitional Justice resonates with this approach, writing that “while prosecutions must necessarily focus on the accused, these efforts should also aim to restore victims’ dignity and public confidence in the rule of law [and the new government].”²⁷⁶ For Cambodia, therefore, successful transitional justice mechanisms signify that the needs of the victims must be taken into account, encompassing a victim-centered approach. However, it also means that in this victim-centered approach, victims are not re-victimized but rather empowered as agents to find positive solutions to the processes of transitional justice, democracy-building, and moving forward as a society.

Where 75-85 percent of Cambodian respondents stated in a questionnaire administered by the Center for Social Development in Cambodia that they favor a tribunal for the Khmer Rouge leadership, it is clear that the tribunal currently underway must be included in the victim-centered model. However, as current proceedings have been led by the Cambodian Government with little say from the international community and have been deemed by most Cambodians as being suspicious because of the corrupt Cambodian legal system, such processes must be re-evaluated. As one participant at the Asia Society Symposium noted, there exists “a systemic lack of trust among the [Cambodian] public in their democratic institutions... impunity is rampant, as crimes such as the expropriation of people’s land, torture, and killings frequently go

²⁷⁶ See “Transitional Justice Approaches,” 2005.

unpunished.”²⁷⁷ In effect, a more victim-centered model calls for the tribunal to give the United Nations a greater role, especially with regards to the selection of judges, both international and national. Moreover, victims, their families, and civil society must be included in the procedures, where activities such as public outreach about the tribunal, public platforms where victims can have inputs on what they would like to see from the tribunal, and involvement of NGOs in the tribunal procedures can be implemented. According to Etcheson, “public outreach programs that will work not only in Phnom Penh, but also in the provinces,” are beginning to take place in Cambodia but are far from being realized yet.²⁷⁸ Hence, by giving victims a leadership role in the processes of transitional justice, victims will have the opportunities to feel self-empowered and to take leadership of their lives.

Given that the tribunal is limited in its prosecutorial scope, other important mechanisms such as a truth and reconciliation commission and the culturally based mechanisms of *teuch mun*, *Sangha tien*, and *Srang Preah* proposed by Craig Etcheson can be used to further enhance the victim-centered model that I envision for Cambodia. As David Crocker has made it clear, “victims or their families should be provided with a platform to tell their stories and have their testimony publicly acknowledged [and that such procedures are] essential to empower citizens.”²⁷⁹ As a result, I see a truth and reconciliation commission as providing the avenue for the victims and their families to hear answers to the persistent questions that continue today in Cambodia, which are “why?”, “why did Pol Pot do it?”, “why did we have to suffer so much?”, and “why was

²⁷⁷ See Kelli Muddell, 2003.

²⁷⁸ Craig Etcheson. “Re: Honor’s Paper.” Email to the author. 21 Feb. 2006.

²⁷⁹ (2004): 11.

our country destroyed by its own children?”²⁸⁰ By following a similar approach to Sierra Leone, where amnesty is not granted to the perpetrators and where the commission works as a separate entity from the prosecutorial mechanism, a truth and reconciliation commission can be an effective way for the victims and their families to tell their stories, face their perpetrators, have their suffering acknowledged publicly, and perhaps, forgive their perpetrators. For such a commission to be successful, though, victim and civil society participation in the procedures is important. For example, this means that public platforms must be held to inform Cambodians of the commission, the commission must be located in accessible locations, village leaders must be consulted, and NGOs must be involved to give oversight to the commission. On the other hand, such access to victims also require victims and their families to play an active role in the procedures, especially in coming forward to tell their stories and to actively find solutions as to how, as a society, they can move forward living with their perpetrators.

To ensure that the processes of transitional justice are relevant to the victims and their families, culturally based mechanisms such as the faith-based traditions proposed by Etcheson can also be put in place to complement the tribunal and truth and reconciliation commission. As shown with the case of Rwanda, culturally based mechanisms are important to ensure that the victims and their perpetrators can reconcile, especially if they have to live in close proximity of one another. By using religious values of forgiveness, tolerance, and acknowledgment, mechanisms like *teuch mun*, *Sangha tieqand* *Srang Preah*, which are performed by Buddhist monks, can thus be a way to have perpetrators acknowledge their wrongdoing and for victims and their families to be recognized by their community for the wrong done to them. To confirm that these processes are victim-

²⁸⁰ (2003): 8.

centered though, the culturally based mechanisms should similarly involve the victims, their families, and their communities in the consultation and implementation procedures.

Finally, other elements that promote the victim-centered model that I envision include the evidence-gathering activities that have been undertaken by DC-CAM, memorial museums in dedication of the victims that have died during the Khmer Rouge era, and death rituals where possible in memory of the victims. All of these factors would enhance the needs of the victims and their families to know the truth about the events that took place under the Khmer Rouge, to have their suffering acknowledged and recognized, and to provide the proper rituals for the dead so that they can now live in peace. As Etcheson attests, “during the Khmer Rouge regime, huge numbers of people were killed or otherwise expired without the benefit of proper death ceremonies. As a result, many Cambodians believe that there are millions of restless spirits wandering the country.”²⁸¹ In addition, in a letter addressed to King Sihanouk, a group of Cambodians overseas wrote that “the souls of those people cannot go on to their new life... in the name of the parents and children still alive we ask the government to gather the bones to bury or cremate them according to our beliefs.”²⁸²

In other words, the victim-centered mechanisms that I have just proposed are but a few examples of ways in which victim-based transitional justice can be implemented in Cambodia in order to ensure that the victims, their families, and their communities can indeed experience justice for the wrongs done to them more than three decades earlier by the Khmer Rouge. Where the notion of a tribunal has been supported by the victims and their families, it is clear that doing away with the tribunal is not a feasible idea. As a

²⁸¹ (2004): 24.

²⁸² See “Despite Buddhist Belief, Cambodia won’t burn evidence of genocide,” *Agence France Presse*, 29 Mar. 2001.

result, to take into account the needs of the victims, the tribunal must undergo changes by providing a greater role for the UN and more civil society participation. In addition, given that the experiences of South Africa, Rwanda, East Timor, and Sierra Leone have shown the benefits that can be derived from a combination of prosecutorial and reparatory justice, the victim-centered model that I envision also includes a truth commission, museums, and culturally based mechanisms to sustain the idea of a victim-based justice. In conclusion, the victim-centered model that I propose for Cambodia is one that is based on the elements of truth, memory, history, acknowledgment, and accountability that have been voiced by victims and their families as important to their idea of justice. As I have discussed though, the criteria in all these different mechanisms is to ensure that victims take leadership in the processes and that these individuals work towards self-empowerment and finding solutions to make democracy work in their country. Indeed, without such outlook towards the future, transitional justice cannot take place and reconciliation and the aspects of moving forward will continue to remain stagnant. To end this chapter, hence, I summarize how the proposed mechanisms under the proposed victim-centered model are more congruent with the commitments to justice for the victims than the tribunal-only mechanism that is being put in place today.²⁸³

Table 2: Comparing Today’s Khmer Rouge Tribunal with the Proposed Victim-Centered Model

	Today’s Tribunal Processes	Proposed Victim Centered Model
Victims’ Participation/Civil Society Input		X
Implementation of Culturally Based		X

²⁸³ Like Craig Etcheson personally mentioned to me, though, I recognize that these efforts may only be a way to bring back the humanity and dignity that were taken away from the victims and their families by the Khmer Rouge and that these efforts may never make these individuals fully “whole” again. See Craig Etcheson, “Re: Honor’s Paper,” email to the author. 21 Feb. 2006.

Mechanisms		
Resonance with Victims' Views of Justice	X	X
Public Platform for Victims and their Families to Tell their Stories		X
Platform for Acknowledgment, Reconciliation, and/or Forgiveness between Victims and Perpetrators		X
Accountability for Top Leaders of Khmer Rouge	X	X
Accountability for Non-Top Leaders of Khmer Rouge		X

Chapter Five

Conclusion

“There must be no compromise on due process or judicial impartiality and integrity. Clearly, United Nations involvement will legitimize any ventures providing tainted justice and it must therefore reject options that are not feasible and must not support any enterprises that are unlikely to meet the minimal standards of justice... with its own reputation and that of the principles it represents at stake, the United Nations cannot afford to be involved in failed experiments in international justice.”

--Suzannah Linton²⁸⁴

“The crimes committed under the Khmer Rouge were of a character and scale that it was still almost impossible to comprehend... the victims of those horrific crimes had waited too long for justice... the international community will do its part to ensure that, however late, and however imperfect, impunity will not remain unchallenged, and a measure of justice will be done. That will be a precious and important gift to Cambodia.”

--Secretary-General Kofi Annan²⁸⁵

²⁸⁴ “Cambodia, East Timor and Sierra Leone: Experiments in International Justice,” Criminal Law Forum 12 (2001): 242.

²⁸⁵ See UN Press Release, “Governments pledge \$38.48 million for Khmer Rouge trials.” Global Policy Forum, United Nations, 28 Mar. 2005, 11 Oct. 2005
<<http://www.globalpolicy.org/intljustice/tribunals/cambodia/2005/0328pledge.htm>>.

“This [the tribunal for the Khmer Rouge] is not about politics, this is about justice.”

--Hun Sen²⁸⁶

I. Introduction

In this final chapter, I look at the political and social incentives for why the Cambodian Government and the United Nations should follow the victim-centered model of transitional justice that I have proposed. In doing so, I analyze statements made and actions taken by the Cambodian government and the United Nations that commit these parties to ensuring that the victims’ needs for truth, history, and acknowledgment are met. Where all public policy recommendations inevitably include costs and drawbacks, I also mention the economic, social, and/or political challenges that the Cambodian government and the UN may face in adopting the victim-centered model. To overcome these limits, however, I address ways in which these obstacles can be dealt with and how the results derived from a more victim-centered model can enhance the political, social, and economic priorities faced by the Cambodian government and the UN.

Moreover, I write about additional research that can be done on the issue of transitional justice in Cambodia and the avenues that have been opened as a result of this research. As the victim centered model that I have proposed should be thought as a starting point to think about ways in which prosecutorial and restorative justice can be combined to meet the needs of the victims and their families, I want to make sure to allow flexibility for the addition of other mechanisms of transitional justice that focus on the victims.

²⁸⁶ See Craig Etcheson, “The Politics of Genocide Justice in Cambodia,” Montreal Institute of Genocide and Human Rights Studies, Sept. 2003: 1.

Finally, as mentioned in the introductory chapter, this concluding chapter is also an opportunity for me to discuss the significance of writing this thesis as the daughter of Cambodian refugees. While the importance of academic research is based on impartiality and objectivity, I mention the difficulty nonetheless that I faced in ensuring that the viewpoint provided in this project did not pre-judge or condemn the Khmer Rouge as violators of human rights without looking first at the conditions that contributed to the rise of the Khmer Rouge.

II. Making the Case to the Cambodian Government

As I have illustrated in the previous chapters, the Cambodian Government's behavior throughout the processes of establishing the Khmer Rouge tribunal has faced both criticism and praise by Cambodian society and the international community. As Etcheson indicates, "the struggle for genocide justice in Cambodia has been ongoing for more than a quarter century... the interests of both Cambodian domestic actors as well as actors in the many other nations that have chosen to involve themselves in Cambodia's affairs over the last three decades have intersected to create a terrible political tangle."²⁸⁷ At issue for the Cambodian Government, to summarize, have been several considerations and dilemmas, which include: living up to its statements of finding justice for Cambodia's victims; responding effectively to international pressures without damaging relationships with countries like China, the US, and Japan; balancing domestic political pressures without losing political advantage; and ensuring that the conditions for democracy-building are present to gain political and economic legitimacy domestically and internationally.

²⁸⁷ Ibid 1.

In light of these conditions, therefore, I note that the Cambodian Government will only adopt a more victim-centered model as proposed in the previous chapter if the economic, social, and political factors mentioned are addressed and dealt with. In my view, adopting a more victim-centered approach as outlined will necessitate the government to: 1) be less ambiguous; 2) allow the United Nations to play a greater role in the tribunal proceedings; 3) risk creating tensions within the domestic and international political arenas; 4) provide more participation for civil society, victims, and their families; and 5) invest more time and money in the processes of transitional justice. In doing so, I am of the position that the benefits derived from a more victim-centered model will not only resonate with the priorities held by the Cambodian Government but will also result in successes and rewards that will be politically, economically, and socially beneficial for the government and Cambodia.

For one, taking a less ambiguous stance will increase the Cambodian Government's credibility in the eyes of Cambodian society and the international community and will result in more legitimacy and sovereignty. As participants in the Asia Society Symposium have complained, the continually changing contexts of the tribunal have undermined the faith of Cambodians in their government and in the efforts to deal with the country's legacy of human rights abuses.²⁸⁸ By actively following a more victim-centered model, the Cambodian Government will take the steps to demonstrate to its constituents and the international community that it is being held accountable to its people and to the values of truth and justice. As the case of South Africa has shown us, a government's commitment to justice and community empowerment are key to the building of democracy, public involvement, and stability in the country.

²⁸⁸ See Kelli Muddell, "Transitional Justice in Cambodia: Challenges and Opportunities." Symposium Report, Asia Society, 9 Sept. 2003, 5 Aug. 2005 <http://www.asiasource.org/asip/Cambodia_report.pdf>.

In addition, allowing the United Nations to play a greater role in the transitional justice processes should not be seen by the Cambodian Government as an interference to its sovereignty but as a means to ensuring that Cambodia can take effective steps towards democracy-building, social stability, and acknowledgment of a hurtful past. In effect, the Cambodian Government's current lack of cooperation with the UN, as seen with tensions in funding the tribunal and agreeing to the terms of procedures of the tribunal²⁸⁹, should be re-evaluated. By giving the UN a more defined role, the Cambodian Government can give more legitimacy to its commitment to transitional justice, especially given the authority that the UN holds in the international community today and with regards to post-conflict resolution tribunals. As Prince Norodom Ranariddh and Hun Sen themselves mentioned in a letter to Secretary-General Kofi Annan in 1997, "we are aware of similar [transitional justice] efforts to respond to the genocide and crimes against humanity in Rwanda and the former Yugoslavia, and ask that similar assistance be given to Cambodia."²⁹⁰

Finally, if the Cambodian Government is to follow the victim-centered model that I have proposed, it should be ready to give more participation to civil society, both domestic and international. With mechanisms of truth and reconciliation commissions and community dialogues that I included in my model, it is evident that the Cambodian Government must be willing to be more open and inclusive of civil society, especially with regards to NGOs and the involvement of victims and their families. As members of NGOs have already stated, the current processes of transitional justice in Cambodia have lacked inputs from civil society and have kept victims and their families in the dark. To

²⁸⁹ See Bangkok Post, "Khmer Tribunal Stalled Again," Global Policy Forum, Aug. 22, 2005, 5 Sept. 2005 <<http://www.globalpolicy.org/intljustice/tribunals/cambodia/2005/0822stall.htm>>.

²⁹⁰ See Susan E. Cook, "Prosecuting Genocide in Cambodia: the Winding Path Towards Justice," The Tribunals, May 2001, 10 Aug. 2005 <http://www.crimesofwar.org/tribun-mag/cambodia_print.html>.

rectify this situation, a much more holistic approach, such as the victim-centered model, is necessary to recover truth and history and move towards reconciliation.²⁹¹ For the Cambodian Government, such change of approach can have political, economic, and social benefits that include increased legitimacy, social empowerment of the Cambodian people, increased credibility in the eyes of donor countries, and more efficiency for the transitional justice processes.

Overall, therefore, the Cambodian Government has much to gain from following the more victim-centered approach that I have suggested in this research. Although it is certain that the Hun Sen Government might face opposition within its party and from international partners like China that do not support the prosecution of the Khmer Rouge but rather advocate a forget-the-past approach, the potential benefits that can be derived from the victim-centered models nonetheless resonate with the priorities set by the Cambodian Government. As indicated, potential successes include the building of legitimacy, sovereignty, credibility, political and economic support, and democracy in a country whose past of human rights atrocities continue to impede upon its state-building growth. In other words, it is time that the Cambodian Government take actions to change the view held by so many that the “practice of Cambodia’s democracy is corrupt and easily manipulated,²⁹²” into one where Cambodia’s constituents and international community begin to recognize that democracy can become a reality.

III. Making the Case to the United Nations

Like the Cambodian Government, the UN also has much to gain from following the more victim-centered model that I analyze in this research. At issue for the UN, however, are different concerns that involve maintaining its legitimacy and authority in

²⁹¹ See Kelli Muddell, 2003.

²⁹² Ibid.

the international community, maintaining world order, holding accountable perpetrators of gross human rights violations, and ensuring that Cambodia's victims and their families are acknowledged for their suffering. According to Craig Etcheson, the role of the UN in Cambodia "seems to be that Annan [feels] that he and the UN have something to prove after the UN's debacles in Rwanda and the Balkans. The Secretary-General has publicly commented many times about the UN's failure to protect the people of Rwanda in 1994, and has vowed that the UN will improve its performance on issues pertaining to genocide."²⁹³ So far, though, much discontent has arisen from the international community and Cambodian civil society concerning the UN's role in the proceedings of transitional justice in Cambodia. Scott Luftglass, for instance, has written that "the UN should either demand the establishment of an ad hoc international tribunal for Cambodia (with goals and structures similar to existing tribunals created for the former Yugoslavia and Rwanda), or completely withdraw from any involvement with the adjudication of the Khmer Rouge crimes. Any alternative would compromise the best interests of the international community, the development and enforcement of international law, and the stability and rehabilitation of Cambodia."²⁹⁴ By taking a more victim-centered approach of transitional justice, I assert that the UN could address many of the current objections that have been voiced concerning the tribunal, all the while ensuring that the victims' needs for justice and acknowledgment are met.

By following the victim-centered model, the UN will inevitably have to deal with several issues that include: 1) upholding the needs of the victims and their families above a strict interpretation of international law; that is, the UN must be willing to support

²⁹³ (2003): 15.

²⁹⁴ "Crossroads in Cambodia: the United Nation's Responsibility to Withdraw Involvement from the Establishment of a Cambodian Tribunal to Prosecute the Khmer Rouge," *Virginia Law Review* 90 (2004): 896.

efforts like truth and reconciliation commissions and community-based dialogues; 2) being ready to demand more participation in the processes of transitional justice in Cambodia, especially as it purports to the selection of judges for the tribunal and the creation of codes of ethics and procedures; and 3) continuing to advocate for the prosecution of gross human rights violators. Where it is clear that strict interpretations of international law based on prosecutorial justice have not been effective in cases like Rwanda, Sierra Leone, and East Timor, the UN must recognize and support transitional justice mechanisms that will incorporate a balance of prosecutorial and restorative justice for the sake of Cambodia's victims and their families. In doing so, the UN could help to revive the notions of justice and faith in the Cambodian Government and international community among Cambodian survivors and their families. As already discussed, the tribunal has come to be viewed today by many as a political show meant to please international donors rather than fulfill the ideals of justice and acknowledgement. It is thus time for the UN to ask for an examination of the transitional justice processes in Cambodia and to become more accountable to Cambodia's victims and their families.

In order to overcome objections from the Cambodian Government and other countries that might resist greater involvement of the UN in transitional justice planning and implementation, the UN should refer to its authority in the international community and experiences with transitional justice in the cases of Rwanda, Sierra Leone, and East Timor. In so doing, the UN can point out the legitimacy that UN involvement provided in these circumstances for the survivors and their families. Moreover, given that the UN is playing a key role in financing the tribunal (more than half of the assessed \$50 million

needed)²⁹⁵, the UN can also use this leverage to assert that transitional justice procedures meet standards of international justice.

In other words, the UN's political and social priorities of seeing the Khmer Rouge brought to justice and ensuring that impunity no longer dominates the human rights arena will be met if the UN enforces a victim-centered approach to transitional justice in Cambodia. Although resistance and objections are likely to arise over the definitions of justice, international law, and the role of sovereignty, the UN must nonetheless be willing to play a more active role in Cambodia by using the political, social, and economic leverages that it holds in the international community. In my view, failure to do so will undermine the possibilities for truth and acknowledgment for the victims and their families.

IV. Possibilities for Additional Research

As I end this chapter, I want to note the avenues for additional research that can be explored on the subjects of Cambodia, transitional justice, and democracy. As already indicated, the victim-centered model proposed in this research should not be seen as a fixed and non-malleable model. Instead, this project should be seen as an opportunity to start thinking about how the ideas of acknowledgment, history, truth, justice, and moving forward around the needs of the victims and their families can be incorporated to ensure positive results for nations trying to deal with their pasts of human rights violations. Given that the tribunal processes in Cambodia have yet to fully take off (funding is still to be secured, judges to be selected, and procedures to be written), it is certain that more concerns will arise and mechanisms identified to ensure the involvement of victims and civil society. For example, Etcheson recently mentioned to me that there is presently

²⁹⁵ "Khmer Rouge tribunal approved." *BBC News*, 10 Aug. 2005
<<http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/1/hi/world/asia-pacific/3>>.

ideas circulating about how to encourage victims to partake in testimony-giving during the trial procedures and that efforts are being undertaken to involve civil society.

In my view, examples of additional research questions/issues to investigate are 1) the interconnection between Cambodia's political situation during King Sihanouk after independence and today's political activities with the Hun Sen government; 2) the effectiveness of restorative justice over prosecutorial justice through a more comprehensive analysis of cases like the Nuremberg trials, the former Yugoslavia, and Rwanda; and 3) the social, moral, political, and economical implications for why nations with pasts of gross human rights violations need to deal with those wrongs through acknowledgment in order to reinstate stability, truth, democracy, and trust in their new societies.

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Appendix

Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006).

LAW ON THE ESTABLISHMENT OF EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA FOR THE PROSECUTION OF CRIMES COMMITTED DURING THE PERIOD OF DEMOCRATIC KAMPUCHEA

CHAPTER I GENERAL PROVISIONS

Article 1:

The purpose of this law is to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.

CHAPTER II COMPETENCE

Article 2 new

Extraordinary Chambers shall be established in the existing court structure, namely the trial court and the supreme court to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian laws related to crimes, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.

Senior leaders of Democratic Kampuchea and those who were most responsible for the above acts are hereinafter designated as "Suspects".

Article 3 new

The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed any of these crimes set forth in the 1956 Penal Code, and which were committed during the period from 17 April 1975 to 6 January 1979:

- Homicide (Article 501, 503, 504, 505, 506, 507 and 508)
- Torture (Article 500)

- Religious Persecution (Articles 209 and 210)

The statute of limitations set forth in the 1956 Penal Code shall be extended for an additional 30 years for the crimes enumerated above, which are within the jurisdiction of the Extraordinary Chambers.

The penalty under Articles 209, 500, 506 and 507 of the 1956 Penal Code shall be limited to a maximum of life imprisonment, in accordance with Article 32 of the Constitution of the Kingdom of Cambodia, and as further stipulated in Articles 38 and 39 of this Law.

Article 4

The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed the crimes of genocide as defined in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, and which were committed during the period from 17 April 1975 to 6 January 1979.

The acts of genocide, which have no statute of limitations, mean any acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as:

- killing members of the group;
- causing serious bodily or mental harm to members of the group;
- deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- imposing measures intended to prevent births within the group;
- forcibly transferring children from one group to another group.

The following acts shall be punishable under this Article:

- attempts to commit acts of genocide;
- conspiracy to commit acts of genocide;
- participation in acts of genocide.

Article 5

The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed crimes against humanity during the period 17 April 1975 to 6 January 1979. Crimes against humanity, which have no statute of limitations, are any acts committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds, such as:

- murder;

- extermination;
- enslavement;
- deportation;
- imprisonment;
- torture;
- rape;
- persecutions on political, racial, and religious grounds;
- other inhumane acts.

Article 6

The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed or ordered the commission of grave breaches of the Geneva Conventions of 12 August 1949, such as the following acts against persons or property protected under provisions of these Conventions, and which were committed during the period 17 April 1975 to 6 January 1979:

- wilful killing;
- torture or inhumane treatment;
- wilfully causing great suffering or serious injury to body or health;
- destruction and serious damage to property, not justified by military necessity and carried out unlawfully and wantonly;
- compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
- wilfully depriving a prisoner of war or civilian the rights of fair and regular trial;
- unlawful deportation or transfer or unlawful confinement of a civilian;
- taking civilians as hostages.

Article 7

The Extraordinary Chambers shall have the power to bring to trial all Suspects most responsible for the destruction of cultural property during armed conflict pursuant to the 1954 Hague Convention for Protection of Cultural Property in the Event of Armed Conflict, and which were committed during the period from 17 April 1975 to 6 January 1979.

Article 8

The Extraordinary Chambers shall have the power to bring to trial all Suspects most responsible for crimes against internationally protected persons pursuant to the Vienna Convention of 1961 on Diplomatic Relations, and which were committed during the period from 17 April 1975 to 6 January 1979.

CHAPTER III COMPOSITION OF THE EXTRAORDINARY CHAMBERS

Article 9 new

The Trial Chamber shall be an Extraordinary Chamber composed of five professional judges, of whom three are Cambodian judges with one as president, and two foreign judges; and before which the Co-Prosecutors shall present their cases. The president shall appoint one or more clerks of the court to participate.

The Supreme Court Chamber, which shall serve as both appellate chamber and final instance, shall be an Extraordinary Chamber composed of seven judges, of whom four are Cambodian judges with one as president, and three foreign judges; and before which the Co-Prosecutors shall present their cases. The president shall appoint one or more clerks of the court to participate.

**CHAPTER IV
APPOINTMENT OF JUDGES**

Article 10 new

The judges of the Extraordinary Chambers shall be appointed from among the currently practising judges or are additionally appointed in accordance with the existing procedures for appointment of judges; all of whom shall have high moral character, a spirit of impartiality and integrity, and experience, particularly in criminal law or international law, including international humanitarian law and human rights law.

Judges shall be independent in the performance of their functions, and shall not accept or seek any instructions from any government or any other source.

Article 11 new

The Supreme Council of the Magistracy shall appoint at least seven Cambodian judges to act as judges of the Extraordinary Chambers, and shall appoint reserve judges as needed, and shall also appoint the President of each of the Extraordinary Chambers from the above Cambodian judges so appointed, in accordance with the existing procedures for appointment of judges.

The reserve Cambodian judges shall replace the appointed Cambodian judges in case of their absence. These reserve judges may continue to perform their regular duties in their respective courts.

The Supreme Council of the Magistracy shall appoint at least five individuals of foreign nationality to act as foreign judges of the Extraordinary Chambers upon nomination by the Secretary-General of the United Nations.

The Secretary-General of the United Nations shall submit a list of not less than seven candidates for foreign judges to the Royal Government of Cambodia, from which the Supreme Council of the Magistracy shall appoint five sitting judges and at least two reserve judges. In addition to the foreign judges sitting in the Extraordinary Chambers and present at every stage of the proceedings, the President of each Chamber may, on a case-by-case basis, designate one or more reserve foreign judges already appointed by the Supreme Council of the Magistracy to be present at each stage of the trial, and to replace a foreign judge if that judge is unable to continue sitting.

Article 12

All judges under this law shall enjoy equal status and conditions of service according to each level of the Extraordinary Chambers.

Each judge under this law shall be appointed for the period of these proceedings.

Article 13

Judges shall be assisted by Cambodian and international staff as needed in their offices.

In choosing staff to serve as assistants and law clerks, the Director of the Office of Administration shall interview if necessary and, with the approval of the Cambodian judges by majority vote, hire staff who shall be appointed by the Royal Government of Cambodia. The Deputy Director of the Office of Administration shall be responsible for the recruitment and administration of all international staff. The number of assistants and law clerks shall be chosen in proportion to the Cambodian judges and foreign judges.

Cambodian staff shall be selected from Cambodian civil servants or other qualified nationals of Cambodia, if necessary.

**CHAPTER V
DECISIONS OF THE EXTRAORDINARY CHAMBERS**

Article 14 new

1. The judges shall attempt to achieve unanimity in their decisions. If this is not possible, the following shall apply:

- a. a decision by the Extraordinary Chamber of the trial court shall require the affirmative vote of at least four judges;
- b. a decision by the Extraordinary Chamber of the Supreme Court shall require the affirmative vote of at least five judges.

2. When there is no unanimity, the decision of the Extraordinary Chambers shall contain the opinions of the majority and the minority.

Article 15

The Presidents shall convene the appointed judges at the appropriate time to proceed with the work of the Extraordinary Chambers.

**CHAPTER VI
CO-PROSECUTORS**

Article 16

All indictments in the Extraordinary Chambers shall be the responsibility of two prosecutors, one Cambodian and another foreign, hereinafter referred to as Co-Prosecutors, who shall work together to prepare indictments against the Suspects in the Extraordinary Chambers.

Article 17 new

The Co-Prosecutors in the Trial Chamber shall have the right to appeal the verdict of the Extraordinary Chamber of the trial court.

Article 18 new

The Supreme Council of the Magistracy shall appoint Cambodian prosecutors and Cambodian reserve prosecutors as necessary from among the Cambodian professional judges.

The reserve prosecutors shall replace the appointed prosecutors in case of their absence. These reserve prosecutors may continue to perform their regular duties in their respective courts.

One foreign prosecutor with the competence to appear in both Extraordinary Chambers shall be appointed by the Supreme Council of the Magistracy upon nomination by the Secretary-General of the United Nations.

The Secretary-General of the United Nations shall submit a list of at least two candidates for foreign Co-Prosecutor to the Royal Government of Cambodia, from which the Supreme Council of the Magistracy shall appoint one prosecutor and one reserve prosecutor.

Article 19

The Co-Prosecutors shall be appointed from among those individuals who are appointed in accordance with the existing procedures for selection of prosecutors who have high moral character and integrity and who are experienced in the conduct of investigations and prosecutions of criminal cases.

The Co-Prosecutors shall be independent in the performance of their functions and shall not accept or seek instructions from any government or any other source.

Article 20 new

The Co-Prosecutors shall prosecute in accordance with existing procedures in force. If these existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standards, the Co-Prosecutors may seek guidance in procedural rules established at the international level.

In the event of disagreement between the Co-Prosecutors the following shall apply:

The prosecution shall proceed unless the Co-Prosecutors or one of them requests within thirty days that the difference shall be settled in accordance with the following provisions;

The Co-Prosecutors shall submit written statements of facts and the reasons for their different positions to the Director of the Office of Administration. The difference shall be settled forthwith by a Pre-Trial Chamber of five judges, three Cambodian judges appointed by the Supreme Council of the Magistracy, one of whom shall be President, and two foreign judges appointed by the Supreme Council of the Magistracy upon nomination by the Secretary-General of the United Nations. The appointment of the above judges shall follow the provisions of Article 10 of this Law.

Upon receipt of the statements referred to in the third paragraph, the Director of the Office of Administration shall immediately convene the Pre-Trial Chamber and communicate the statements to its members.

A decision of the Pre-Trial Chamber, against which there is no appeal, requires the affirmative vote of at least four judges. The decision shall be communicated to the Director of the Office of Administration, who shall publish it and communicate it to the Co-Prosecutors. They shall immediately proceed in accordance with the decision of the Chamber. If there is no majority as required for a decision, the prosecution shall proceed.

In carrying out the prosecution, the Co-Prosecutors may seek the assistance of the Royal Government of Cambodia if such assistance would be useful to the prosecution, and such assistance shall be provided.

Article 21 new

The Co-Prosecutors under this law shall enjoy equal status and conditions of service according to each level of the Extraordinary Chambers.

Each Co-Prosecutor shall be appointed for the period of these proceedings. In the event of the absence of the foreign Co-Prosecutor, he or she shall be replaced by the reserve foreign Co-Prosecutor.

Article 22 new

Each Co-Prosecutor shall have the right to choose one or more deputy prosecutors to assist him or her with prosecution before the chambers. Deputy foreign prosecutors shall be appointed by the foreign Co-Prosecutor from a list provided by the Secretary-General.

The Co-prosecutors shall be assisted by Cambodian and international staff as needed in their offices. In choosing staff to serve as assistants, the Director of the Office of Administration shall interview, if necessary, and with the approval of the Cambodian Co-Prosecutor, hire staff who shall be appointed by the Royal Government of Cambodia. The Deputy Director of the Office of Administration shall be responsible for the recruitment and administration of all foreign staff. The number of assistants shall be chosen in proportion to the Cambodian prosecutors and foreign prosecutors.

Cambodian staff shall be selected from Cambodian civil servants and, if necessary, other qualified nationals of Cambodia.

**CHAPTER VII
INVESTIGATIONS**

Article 23 new

All investigations shall be the joint responsibility of two investigating judges, one Cambodian and another foreign, hereinafter referred to as Co-Investigating Judges, and shall follow existing procedures in force. If these existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standards, the Co-Investigating Judges may seek guidance in procedural rules established at the international level.

In the event of disagreement between the Co-Investigating Judges the following shall apply:

The investigation shall proceed unless the Co-Investigating Judges or one of them requests within thirty days that the difference shall be settled in accordance with the following provisions.

The Co-Investigating Judges shall submit written statements of facts and the reasons for their different positions to the Director of the Office of Administration.

The difference shall be settled forthwith by the Pre-Trial Chamber referred to in Article 20.

Upon receipt of the statements referred to in the third paragraph, the Director of the Office of Administration shall immediately convene the Pre-Trial Chamber and communicate the statements to its members.

A decision of the Pre-Trial Chamber, against which there is no appeal, requires the affirmative vote of at least four judges. The decision shall be communicated to the Director of the Office of Administration, who shall publish it and communicate it to the Co-Investigating Judges. They shall immediately proceed in accordance with the decision of the Pre-Trial Chamber. If there is no majority as required for a decision, the investigation shall proceed.

The Co-Investigating Judges shall conduct investigations on the basis of information obtained from any institution, including the Government, United Nations organs, or non-governmental organizations.

The Co-Investigating Judges shall have the power to question suspects and victims, to hear witnesses, and to collect evidence, in accordance with existing procedures in force. In the event the Co-Investigating Judges consider it necessary to do so, they may issue an order requesting the Co-Prosecutors also to interrogate the witnesses.

In carrying out the investigations, the Co-Investigating Judges may seek the assistance of the Royal Government of Cambodia, if such assistance would be useful to the investigation, and such assistance shall be provided.

Article 24 new

During the investigation, Suspects shall be unconditionally entitled to assistance of counsel of their own choosing, and to have legal assistance assigned to them free of charge if they cannot afford it, as well as the right to interpretation, as necessary, into and from a language they speak and understand.

Article 25

The Co-Investigating Judges shall be appointed from among the currently practising judges or are additionally appointed in accordance with the existing procedures for appointment of judges; all of whom shall have high moral character, a spirit of impartiality and integrity, and experience. They shall be independent in the performance of their functions and shall not accept or seek instructions from any government or any other source.

Article 26

The Cambodian Co-Investigating Judge and the reserve Investigating Judges shall be appointed by the Supreme Council of the Magistracy from among the Cambodian professional judges.

The reserve Investigating Judges shall replace the appointed Investigating Judges in case of their absence. The reserve Investigating Judges may continue to perform their regular duties in their respective courts.

The Supreme Council of the Magistracy shall appoint the foreign Co-Investigating Judge for the period of the investigation, upon nomination by the Secretary-General of the United Nations.

The Secretary-General of the United Nations shall submit a list of at least two candidates for foreign Co-Investigating Judge to the Royal Government of Cambodia, from which the Supreme Council of the Magistracy shall appoint one Investigating Judge and one reserve Investigating Judge.

Article 27 new

All Investigating Judges under this law shall enjoy equal status and conditions of service.

Each Investigating Judge shall be appointed for the period of the investigation. In the event of the absence of the foreign Co-Investigating Judge, he or she shall be replaced by the reserve foreign Co-Investigating Judge.

Article 28

The Co-Investigating Judges shall be assisted by Cambodian and international staff as needed in their offices.

In choosing staff to serve as assistants, the Co-Investigating Judges shall comply with the spirit of the provisions set forth in Article 13 of this law.

**CHAPTER VIII
INDIVIDUAL RESPONSIBILITY**

Article 29

Any Suspect who planned, instigated, ordered, aided and abetted, or committed the crimes referred to in article 3 new, 4, 5, 6, 7 and 8 of this law shall be individually responsible for the crime.

The position or rank of any Suspect shall not relieve such person of criminal responsibility or mitigate punishment.

The fact that any of the acts referred to in Articles 3 new, 4, 5, 6, 7 and 8 of this law were committed by a subordinate does not relieve the superior of personal criminal responsibility if the superior had effective command and control or authority and control over the subordinate, and the superior knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.

The fact that a Suspect acted pursuant to an order of the Government of Democratic Kampuchea or of a superior shall not relieve the Suspect of individual criminal responsibility.

CHAPTER IX OFFICE OF ADMINISTRATION

Article 30

The staff of the judges, the investigating judges and prosecutors of the Extraordinary Chambers shall be supervised by an Office of Administration.

This Office shall have a Cambodian Director, a foreign Deputy Director and such other staff as necessary.

Article 31 new

The Director of the Office of Administration shall be appointed by the Royal Government of Cambodia for a two-year term and shall be eligible for reappointment.

The Director of the Office of Administration shall be responsible for the overall management of the Office of Administration, except in matters that are subject to United Nations rules and procedures.

The Director of the Office of Administration shall be appointed from among those with significant experience in court administration and fluency in one of the foreign languages used in the Extraordinary Chambers, and shall be a person of high moral character and integrity.

The foreign Deputy Director shall be appointed by the Secretary-General of the United Nations and assigned by the Royal Government of Cambodia, and shall be responsible for the recruitment and administration of all international staff, as required by the foreign components of the Extraordinary Chambers, the Co-Investigating Judges, the Co-Prosecutors' Office, and the Office of Administration. The Deputy Director shall administer the resources provided through the United Nations Trust Fund.

The Office of Administration shall be assisted by Cambodian and international staff as necessary. All Cambodian staff of the Office of Administration shall be appointed by the Royal Government of Cambodia at the request of the Director. Foreign staff shall be appointed by the Deputy Director.

Cambodian staff shall be selected from Cambodian civil servants and, if necessary, other qualified nationals of Cambodia.

Article 32

All staff assigned to the judges, Co-Investigating Judges, Co-Prosecutors, and Office of Administration shall enjoy the same working conditions according to each level of the Extraordinary Chambers.

**CHAPTER X
TRIAL PROCEEDINGS OF THE EXTRAORDINARY CHAMBERS**

Article 33 new

The Extraordinary Chambers of the trial court shall ensure that trials are fair and expeditious and are conducted in accordance with existing procedures in force, with full respect for the rights of the accused and for the protection of victims and witnesses. If these existing procedure do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standard, guidance may be sought in procedural rules established at the international level.

The Extraordinary Chambers of the trial court shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights.

Suspects who have been indicted and arrested shall be brought to the Trial Chamber according to existing procedures in force. The Royal Government of Cambodia shall guarantee the security of the Suspects who appear before the court, and is responsible for taking measures for the arrest of the Suspects prosecuted under this law. Justice police shall be assisted by other law

enforcement elements of the Royal Government of Cambodia, including the armed forces, in order to ensure that accused persons are brought into custody immediately.

Conditions for the arrest and the custody of the accused shall conform to existing law in force.

The Court shall provide for the protection of victims and witnesses. Such protection measures shall include, but not be limited to, the conduct of *in camera* proceedings and the protection of the victim's identity.

Article 34 new

Trials shall be public and open to representatives of foreign States, of the Secretary-General of the United Nations, of the media and of national and international non-government organizations unless in exceptional circumstances the Extraordinary Chambers decide to close the proceedings for good cause in accordance with existing procedures in force where publicity would prejudice the interests of justice.

Article 35 new

The accused shall be presumed innocent as long as the court has not given its definitive judgment.

In determining charges against the accused, the accused shall be equally entitled to the following minimum guarantees, in accordance with Article 14 of the International Covenant on Civil and Political Rights.

- a. to be informed promptly and in detail in a language that they understand of the nature and cause of the charge against them;
- b. to have adequate time and facilities for the preparation of their defense and to communicate with counsel of their own choosing;
- c. to be tried without delay;
- d. to be tried in their own presence and to defend themselves in person or with the assistance of counsel of their own choosing, to be informed of this right and to have legal assistance assigned to them free of charge if they do not have sufficient means to pay for it ;
- e. to examine evidence against them and obtain the presentation and examination of evidence on their behalf under the same conditions as evidence against them;
- f. to have the free assistance of an interpreter if the accused cannot understand or does not speak the language used in the court;
- g. not to be compelled to testify against themselves or to confess guilt.

Article 36 new

The Extraordinary Chamber of the Supreme Court shall decide appeals made by the accused, the victims, or the Co-Prosecutors against the decision of the Extraordinary Chamber of the trial court. In this case, the Supreme Court Chamber shall make final decisions on both issues of law and fact, and shall not return the case to the Extraordinary Chamber of the trial court.

Article 37 new

The provision of Article 33, 34 and 35 shall apply *mutatis mutandis* in respect of proceedings before the Extraordinary Chambers of the Supreme Court.

**CHAPTER XI
PENALTIES**

Article 38

All penalties shall be limited to imprisonment.

Article 39

Those who have committed any crime as provided in Articles 3 new, 4, 5, 6, 7 and 8 shall be sentenced to a prison term from five years to life imprisonment.

In addition to imprisonment, the Extraordinary Chamber of the trial court may order the confiscation of personal property, money, and real property acquired unlawfully or by criminal conduct.

The confiscated property shall be returned to the State.

**CHAPTER XII
AMNESTY AND PARDONS**

Article 40 new

The Royal Government of Cambodia shall not request an amnesty or pardon for any persons who may be investigated for or convicted of crimes referred to in Articles 3, 4, 5, 6, 7 and 8 of this law. The scope of any amnesty or pardon that may have been granted prior to the enactment of this Law is a matter to be decided by the Extraordinary Chambers.

**CHAPTER XIII
STATUS, RIGHTS, PRIVILEGES AND IMMUNITIES**

Article 41

The foreign judges, the foreign Co-Investigating Judge, the foreign Co-Prosecutor and the Deputy Director of the Office of Administration, together with their families forming part of their household, shall enjoy all of the privileges and

immunities, exemptions and facilities accorded to diplomatic agents in accordance with the 1961 Vienna Convention on Diplomatic Relations. Such officials shall enjoy exemption from taxation in Cambodia on their salaries, emoluments and allowances.

Article 42 new

1. Cambodian judges, the Co-Investigating Judge, the Co-Prosecutor, the Director of the Office of Administration and personnel shall be accorded immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity. Such immunity shall continue to be accorded after termination of employment with the Extraordinary Chambers, the Pre-Trial Chamber and the Office of Administration.

2. International personnel shall be accorded in addition:

- a. immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity. Such immunity shall continue to be accorded after termination of employment with the co-investigating judges, the co-prosecutors, the Extraordinary Chambers, the Pre-Trial Chamber and the Office of Administration;
- b. immunity from taxation on salaries, allowances and emoluments paid to them by the United Nations;
- c. immunity from immigration restriction;
- d. the right to import free of duties and taxes, except for payment for services, their furniture and effects at the time of first taking up their official duties in Cambodia.

3. The counsel of a suspect or an accused who has been admitted as such by the Extraordinary Chambers shall not be subjected by the Government to any measure that may affect the free and independent exercise of his or her functions under the Law on the Establishment of the Extraordinary Chambers.

In particular, the counsel shall be accorded:

- a. immunity from personal arrest or detention and from seizure of personal baggage relating to his or her functions in the proceedings;
- b. inviolability of all documents relating to the exercise of his or her functions as a counsel of a suspect or accused;
- c. immunity from criminal or civil jurisdiction in respect of words spoken or written and acts performed in his or her capacity as counsel. Such immunity shall continue to be accorded after termination of their function as counsel of a suspect or accused.

4. The archives of the co-investigating judges, the co-prosecutors, the Extraordinary Chambers, the Pre-Trial Chamber and the Office of Administration and in general all documents and materials made available to, belonging to, or used by them, wherever located in the Kingdom of Cambodia and by whomsoever held, shall be inviolable for the duration of the proceedings.

CHAPTER XIV LOCATION OF THE EXTRAORDINARY CHAMBERS

Article 43 new

The Extraordinary Chambers established in the trial court and the Supreme Court Chamber shall be located in Phnom Penh.

CHAPTER XV EXPENSES

Article 44 new

The expenses and salaries of the Extraordinary Chambers shall be as follows:

1. The expenses and salaries of the Cambodian administrative officials and staff, the Cambodian judges and reserve judges, investigating judges and reserve investigating judges, and prosecutors and reserve prosecutors shall be borne by the Cambodian national budget;
2. The expenses of the foreign administrative officials and staff, the foreign judges, Co-investigating judge and Co-prosecutor sent by the Secretary-General of the United Nations shall be borne by the United Nations;
3. The defense counsel may receive fees for mounting the defense;
4. The Extraordinary Chambers may receive additional assistance for their expenses from other voluntary funds contributed by foreign governments, international institutions, non-governmental organizations, and other persons wishing to assist the proceedings.

CHAPTER XVI WORKING LANGUAGES

Article 45 new

The official working languages of the Extraordinary Chambers shall be Khmer, English and French.

CHAPTER XVII ABSENCE OF FOREIGN JUDGES, INVESTIGATING JUDGES OR PROSECUTORS

Article 46 new

In order to ensure timely and smooth implementation of this law, in the event any foreign judges or foreign investigating judges or foreign prosecutors fail or refuse to participate in the Extraordinary Chambers, the Supreme Council of the Magistracy shall appoint other judges or investigating judges or prosecutors to fill any vacancies from the lists of foreign candidates provided for in Article 11, Article 18, and Article 26. In the event those lists are exhausted, and the Secretary-General of the United Nations does not supplement the lists with new candidates, or in the event that the United Nations withdraws its support from the Extraordinary Chambers, any such vacancies shall be filled by the Supreme Council of the Magistracy from candidates recommended by the Governments of Member States of the United Nations or from among other foreign legal personalities.

If, following such procedures, there are still no foreign judges or foreign investigating judges or foreign prosecutors participating in the work of the Extraordinary Chambers and no foreign candidates have been identified to occupy the vacant positions, then the Supreme Council of the Magistracy may choose replacement Cambodian judges, investigating judges or prosecutors.

CHAPTER XVIII EXISTENCE OF THE COURT

Article 47

The Extraordinary Chambers in the courts of Cambodia shall automatically dissolve following the definitive conclusion of these proceedings.

CHAPTER XIX AGREEMENT BETWEEN THE UNITED NATIONS AND CAMBODIA

Article 47 bis new

Following its ratification in accordance with the relevant provisions of the law of Kingdom of Cambodia regarding competence to conclude treaties, the Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crime Committed during the period of Democratic Kampuchea, done at Phnom Penh on 6 June 2003, shall apply as law within the Kingdom of Cambodia.

FINAL PROVISION

Article 48

This law shall be proclaimed as urgent.

*Unofficial translation by the Council of Jurists and the Secretariat of the Task Force.
Revised 29 Sept 2005.*