

**NOTE****CROSSROADS IN CAMBODIA:****THE UNITED NATION'S RESPONSIBILITY TO  
WITHDRAW INVOLVEMENT FROM THE  
ESTABLISHMENT OF A CAMBODIAN TRIBUNAL TO  
PROSECUTE THE KHMER ROUGE***Scott Luftglass\**

“During the Khmer Rouge period between April 1975 to January 1979, nearly a quarter of Cambodia’s population died as a result of extrajudicial executions, starvation and disease. In addition, tens of thousands of people were cruelly abused, enslaved, systematically tortured and killed. In this dark time, there was a generation of professional torturers. To date, not one of them has been brought to account for the suffering they caused.”

– Amnesty International<sup>1</sup>

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<sup>1</sup> Amnesty Int’l, International Justice Now! Time for an Effective International Criminal Court, AI Index IOR 40/15/98 (May 1, 1998), at <http://web.amnesty.org/library/index/engior400151998> (on file with the Virginia Law Review Association).

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## INTRODUCTION

FOR almost twenty-five years, the former leaders of the Khmer Rouge, responsible for the deaths of over 1.7 million of their fellow Cambodians,<sup>2</sup> have enjoyed freedom absent domestic and international accountability for their actions.<sup>3</sup> During this period, a combination of domestic instability and international apathy rendered the country paralyzed by the memory of a once-promising government that turned into a killing machine.

Since 1997, the United Nations (“U.N.”) and Cambodia have engaged in contentious negotiations for the establishment of a criminal tribunal to try the former leaders of the Khmer Rouge. The negotiations culminated in March 2003, with both sides agreeing on an internationally supported, yet Cambodian-controlled, tribunal to prosecute the former members of the Khmer Rouge for genocide and crimes against humanity that occurred between 1975 to 1979. The U.N. General Assembly ratified this agreement in May 2003 and is awaiting its expected ratification by the Cambodian National Assembly. While these developments appear to signal a shift toward international justice and domestic reconciliation, the presence of widely asymmetrical goals and intentions between the U.N. and the Cambodian government poses unfortunate risks both to the Cambodian people and to the international community.

This Note will argue that the agreed upon proposal will both fail to meet international standards of justice and prove to be a greater

<sup>2</sup> Mann Bunyanunda, Note, *The Khmer Rouge on Trial: Whither the Defense?*, 74 S. Cal. L. Rev. 1581, 1582 (2001).

<sup>3</sup> *Id.* at 1611.

risk than complete withdrawal of international involvement. To this end, this Note will argue that the U.N. should either demand the establishment of an ad hoc international tribunal for Cambodia (with goals and structure similar to existing tribunals created for the former Yugoslavia and Rwanda), or completely withdraw from any involvement in 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.

Part I of this Note will document the Khmer Rouge regime, focusing both on the Khmer Rouge atrocities during 1975–79 as well as the international community's limited involvement in the events following the overthrow of the regime. This Part will aim not only to provide a background of the underlying events subject to international prosecution, but also to establish a framework within which to discern the relative intentions of the international community and the Cambodian government.

Part II will survey the history of the negotiations and exchanges between Cambodia and the U.N. regarding the establishment of a tribunal. This Part will attempt to identify the true intentions of each actor, as well as carefully track the increasing Cambodian demands for Cambodian control, and corresponding decrease in U.N. influence. Part II will conclude by reviewing the details of the agreed upon Cambodian tribunal.

Part III will shift focus to distilling both the "international standards of justice" against which any tribunal will be judged and the substantive international laws and norms allegedly violated by the Khmer Rouge. This Part will begin by outlining the normative principles underlying "international standards of justice," and then will parse the elements of crimes against humanity and genocide. Part III will conclude with a review of the current international tribunals in the former Yugoslavia, Rwanda, Sierra Leone, and East Timor. Derivative lessons from these tribunals will be used as baseline comparisons to assess the risks of the presently proposed Cambodian tribunal.

Part IV will address the specific failures and risks inherent in the present plan, and will call upon the lessons of the existing tribunals in the former Yugoslavia and Rwanda to approach the proposal from the perspectives of the international community and the

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Cambodian people. Specifically, this Part will focus on the lack of competent and qualified Cambodian judges, the lack of respect for the culture of law in Cambodia, the inappropriate influence of the government on the judiciary, and the risks of either an overly lenient or an overly harsh tribunal.

Part V will address the alternatives to either an international or domestic tribunal and will demonstrate the lack of feasibility or efficacy of the various plans. The focus will be on the oft-proposed alternative to the tribunals—some variation of a truth commission. By demonstrating the risks inherent in the use of the domestic tribunal and the relative lack of alternatives, this Note will conclude in support of the hard-line position of either establishing an ad hoc international tribunal or completely withdrawing U.N. involvement.

## I. BACKGROUND OF THE KHMER ROUGE REGIME

### *A. Events Preceding the Khmer Rouge Regime*

Cambodia, which gained its independence from France in 1954, was ruled by King Norodom Sihanouk until 1970.<sup>4</sup> On March 18, 1970, General Lon Nol, supported by the United States, engineered a military coup to seize power.<sup>5</sup> The United States supported General Nol in order to obtain a geopolitical ally who both adamantly opposed communism and would lend support in the Vietnamese conflict.<sup>6</sup> Between 1970 and 1975 multiple rebel groups battled against one another and Nol's government in an attempt to seize political control of Cambodia. The most prominent group was the Khmer Rouge, which vehemently opposed Cambodia's support of the United States in the Vietnam conflict.<sup>7</sup> Finally, in April 1975,

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<sup>4</sup> Steven R. Ratner, *The Cambodia Settlement Agreements*, 87 *Am. J. Int'l L.* 1, 2 (1993). For a summary of the emergence of the Khmer Rouge in Cambodia, see *id.*

<sup>5</sup> Jamie Frederic Metzler, *Western Responses to Human Rights Abuses in Cambodia, 1975–80*, at 2–3 (1996).

<sup>6</sup> *Id.* at 3.

<sup>7</sup> *Id.* at 6–7; see also Howard Ball, *Prosecuting War Crimes and Genocide: The Twentieth-Century Experience* 99–100 (1999) (describing the rise to power of the Khmer Rouge).

the Khmer Rouge gained complete control over the capital city of Phnom Penh.<sup>8</sup>

The Khmer Rouge regime was heavily supported by North Vietnam and communist powers, while the United States and South Vietnam supported General Nol and the prior regime.<sup>9</sup> From 1969 until 1973, the United States and South Vietnam engaged in controversial carpet bombing in Cambodia, hoping to push back communist threats, such as the Khmer Rouge.<sup>10</sup> The carpet bombing has an overarching implication for the establishment and validity of a tribunal. Cambodia has challenged the international community's focus on the actions of the Khmer Rouge as deeply hypocritical, given the simultaneous neglect of the actions of the United States and South Vietnam.

This alleged hypocrisy is particularly important given the Cambodian government's frequent appeals to the international community seeking redress for the carpet bombing. From July 30, 1968, to March 9, 1970, Cambodia filed over 100 protests with the U.N. without positive response.<sup>11</sup> Cambodia now relies on both the sins of commission (by the United States and South Vietnam), and the sins of omission (by the U.N.) as justifications for its reluctance to depend on international involvement in a potential tribunal.

### *B. The Khmer Rouge Regime: Revolutionizing an Entire Society*

On April 17, 1975, the Khmer Rouge marched on Phnom Penh and ousted General Lon Nol, promising to "turn Cambodia back to the 'Year Zero.'"<sup>12</sup> In the years leading up to the Khmer Rouge's

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<sup>8</sup> Ball, *supra* note 7, at 100.

<sup>9</sup> Metzl, *supra* note 5, at 5–6.

<sup>10</sup> See Nicole Barrett, Note, Holding Individual Leaders Responsible for Violations of Customary International Law: The U.S. Bombardment of Cambodia and Laos, 32 Colum. Hum. Rts. L. Rev. 429, 433–37 (2001). The extent of the casualties associated with these bombings is one of the most understated statistics of American involvement in international affairs. The Finnish Kampuchea Inquiry Commission estimates that, out of a total population of over seven million, 600,000 Cambodians died and over two million more became refugees as a direct result of the "carpet bombing." *Id.* at 437. For a general discussion of the bombings, see Seymour M. Hersh, *The Price of Power: Kissinger in the Nixon White House* 54–65 (1983); William Shawcross, *Side-show: Kissinger, Nixon and the Destruction of Cambodia* 19–35 (1987).

<sup>11</sup> See Barrett, *supra* note 10, at 439.

<sup>12</sup> Bunyanunda, *supra* note 2, at 1581. For a more detailed discussion of the Khmer Rouge rule and the accompanying atrocities, see generally Elizabeth Becker, *When*

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overthrow of General Lon Nol, the Khmer Rouge worked closely with the peasants and became well-known supporters of the down-trodden.<sup>13</sup> Pol Pot, as the leader of the new regime, was thus warmly welcomed at first. Indeed, many of his future victims believed that the Khmer Rouge would protect them from potential American attacks.<sup>14</sup> Pol Pot followed the teachings of Mao Zedong and immediately evacuated Phnom Penh, aiming to convert Cambodia into an agrarian society of communists.<sup>15</sup> Pol Pot immediately severed Cambodia's communication with the outside world: He exiled all journalists and reporters, ended international telephone, telegram, cable, and mail connections, terminated all commercial flights, and sealed the borders—actions all taken in order to insulate Cambodia from outside influences.<sup>16</sup> The fundamental principle underlying Pol Pot's leadership was secrecy, with a corresponding distrust for outsiders. The Khmer Rouge leadership, known as Angkar Loeu, or the "Standing Committee," dealt in secrecy and did not issue official orders.<sup>17</sup>

Pol Pot's plan for the "Democratic Kampuchea"<sup>18</sup> targeted both the structure of society and the status of individuals. Pol Pot outlined an eight-point agenda for the Angkar to force on the population: (1) evacuate the people from the cities; (2) abolish all markets; (3) abolish currency; (4) defrock all monks; (5) execute leaders of Lon Nol's army and government; (6) establish coopera-

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the War Was Over: Cambodia and the Khmer Rouge Revolution (PublicAffairs 2d ed. 1998) (1986) (describing the Khmer Rouge); Cambodia 1975–1978: Rendezvous with Death (Karl D. Jackson ed., 1989) (same); Nayan Chanda, *Brother Enemy: The War After the War* (1986) (same); Ben Kiernan, *The Pol Pot Regime: Race, Power, and Genocide in Cambodia Under the Khmer Rouge, 1975–79* (2d ed. 2002) (same); François Ponchaud, *Cambodia: Year Zero* (Nancy Amphoux trans., 1978) (same); Michael Vickery, *Cambodia: 1975–1982* (1984) (same).

<sup>13</sup> Metzl, *supra* note 5, at 5.

<sup>14</sup> William A. Schabas, *Problems of International Codification – Were the Atrocities in Cambodia and Kosovo Genocide?*, 35 *New Eng. L. Rev.* 287, 287 (2001).

<sup>15</sup> See Ball, *supra* note 7, at 94–95.

<sup>16</sup> Metzl, *supra* note 5, at 17.

<sup>17</sup> Ball, *supra* note 7, at 100–01.

<sup>18</sup> For an in-depth analysis of the strategies employed by Pol Pot and the Khmer Rouge to achieve this end, see generally *Genocide in Cambodia: Documents from the Trial of Pol Pot and Ieng Sary* (Howard J. De Nike et al. eds., 2000) (containing documents describing Khmer Rouge tactics) [hereinafter 1979 Trial Documents]; Metzl, *supra* note 5 (detailing the international context and Western response to the Khmer Rouge regime).

tives across Cambodia, with communal eating; (7) expel the entire Vietnamese population; and (8) establish firm and guarded borders.<sup>19</sup>

To further this effort toward homogeneity and allegiance to the country, the Khmer Rouge engaged in population relocation and the destruction of professional classes.<sup>20</sup> According to Brian D. Tittmore, staff attorney with the Inter-American Commission on Human Rights, “[d]uring its rule over Cambodia, the Khmer Rouge, under the political and ideological leadership of Pol Pot, strove to build a socially and ethnically homogeneous society by abolishing all preexisting economic, social, and cultural institutions, and transforming the population of Cambodia into a collective workforce.”<sup>21</sup>

The most important aspect of this transformation was the systematic and deliberate torture and murder of Cambodian citizens, which, along with the disease and starvation that accompanied the regime’s policies, killed 1.7 million Cambodians,<sup>22</sup> or nearly twenty percent of the country’s 1975 population of 7.3–7.9 million.<sup>23</sup> There were three main targets for execution during the Khmer Rouge regime, each chosen to serve a strategic goal. First, in an effort to eliminate all remnants of the former government, those identified with the prior regime of General Lon Nol were executed.<sup>24</sup> Second, the Khmer Rouge committed intra-party purges geared toward purification of the Communist Party.<sup>25</sup> Third, through “assertive killings,” the Khmer Rouge executed those who might otherwise pose a threat to the regime.<sup>26</sup> The Khmer Rouge subscribed to the rea-

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<sup>19</sup> Ball, *supra* note 7, at 101.

<sup>20</sup> The Khmer Rouge began moving city-dwellers to the countryside in an effort to start an agrarian revolution. Bunyanunda, *supra* note 2, at 1582. In addition, doctors, lawyers, monks, teachers, and all professionals were stripped of their jobs. Kenneth M. Quinn, *The Pattern and Scope of Violence, in Cambodia 1975–1978: Rendezvous with Death*, *supra* note 12, at 179, 187.

<sup>21</sup> See Brian D. Tittmore, *Khmer Rouge Crimes: The Elusive Search for Justice*, 7 *Hum. Rts. Brief* 3, 3 (Fall 1999) [hereinafter Tittmore, *Khmer Rouge Crimes*].

<sup>22</sup> *Id.*

<sup>23</sup> Steven R. Ratner, *The United Nations Group of Experts for Cambodia*, 93 *Am. J. Int’l L.* 948, 948 (1999).

<sup>24</sup> Bunyanunda, *supra* note 2, at 1608.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*; see also Ponchaud, *supra* note 12, at 50–51 (“Several accounts state that in many places the officers’ wives and children were killed too: the theme that the family



soning that “a person who has been spoiled by a corrupt regime cannot be reformed, he must be physically eliminated.”<sup>27</sup> Those who were not killed were subjected to torture and interrogation.

Tuol Sleng Prison, a site of interrogation, torture, and execution, best exemplifies the lethal nature of the Khmer Rouge regime in the late 1970s.<sup>28</sup> Of the 16,000–20,000 people “treated” there, only seven survivors are known to be alive.<sup>29</sup> The Khmer Rouge guards at Tuol Sleng subjected the prisoners to various methods of torture, culminating in the forced, written confessions of over 4,000 Cambodians.<sup>30</sup> Methods of interrogation included, but were not limited to, electric shocks, severe beatings, removal of toenails and fingernails, submersion in water, cigarette burnings, needling, suffocation, suspension, and forced consumption of human waste.<sup>31</sup> Tuol Sleng became a microcosm for the Khmer Rouge atrocities, and the accurate and meticulous records maintained by its guards will undoubtedly serve as significant evidence during any criminal adjudication.

### *C. The Aftermath of the Khmer Rouge Atrocities: International and Domestic Responses*

The decades following the overthrow of the Khmer Rouge were marked by international apathy towards Cambodia, and the limited attention given was concentrated on the establishment of a non-

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line must be annihilated down to the last survivor is recurrent in such reports.”). Most of these “assertive killings,” committed by local regime leaders, were directed against certain professions and religions. See Bunyanunda, *supra* note 2, at 1607–08. There is some question, however, as to whether such actions were ordered by the top officials of the Khmer Rouge or instead unilaterally initiated by the local “low-level cadre.” See *id.* at 1606.

<sup>27</sup> Ponchaud, *supra* note 12, at 50.

<sup>28</sup> Locals in Phnom Penh referred to the prison as the “place of entering, no leaving.” David Chandler, *A History of Cambodia* 218 (2d ed. 1996).

<sup>29</sup> See Bunyanunda, *supra* note 2, at 1594; see also Alan Sipress, *For Torture Camp Survivor, Time is Scarce: Chance to Bear Witness Against Khmer Rouge Hinges on Stalled Tribunal*, *Wash. Post*, Feb. 18, 2003, at A20 (detailing the survival of one of these remaining eyewitnesses).

<sup>30</sup> See Bunyanunda, *supra* note 2, at 1594.

<sup>31</sup> *Id.* at 1593 n.45.

communist government rather than the adjudication of potential crimes.<sup>32</sup>

The Khmer Rouge's efforts to exercise complete control over the territory and population of Cambodia met severe opposition in late 1978, when Vietnamese forces invaded Cambodia and stormed Phnom Penh. The Vietnamese established complete control of the country in January 1979, forcing the Khmer Rouge into the jungles of Cambodia and nearby Thailand where they continued to fight, supported mainly by China.<sup>33</sup> A new Cambodian government was then installed by the Vietnamese. As order was restored, both the international community and the new Cambodian government began to respond to the overthrow of the Khmer Rouge. Neither response benefited the Cambodian people, however, and both have generated more difficulties in the current efforts to bring the former leaders of the Khmer Rouge to justice.

Cambodia responded in 1979 with what is widely regarded as a farcical trial of both Pol Pot and Ieng Sary, the Standing Committee Member and Deputy Prime Minister for Foreign Affairs. The two leaders were tried in absentia without a defense presented, found guilty of the commission of genocide, and sentenced to death by a domestic tribunal.<sup>34</sup>

The international community refuses to recognize these trials as legitimate for several reasons. First, the two leaders were tried in absentia, a violation of the International Covenant on Civil and Political Rights ("ICCPR").<sup>35</sup> Second, the Decree Law establishing the "People's Revolutionary Tribunal" contained language denouncing the two defendants, functionally assuming their guilt, a violation of the international norm of the "presumption of innocence."<sup>36</sup> Third, the definition of genocide used at the trial did not comport with the internationally accepted definition, and it was

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<sup>32</sup> For a comprehensive review of the international response during and following the Khmer Rouge regime, see generally Metzl, *supra* note 5.

<sup>33</sup> Bunyanunda, *supra* note 2, at 1582-83.

<sup>34</sup> See 1979 Trial Documents, *supra* note 18, at 549; Schabas, *supra* note 14, at 289.

<sup>35</sup> Gregory H. Stanton, *The Cambodian Genocide and International Law*, in *Genocide and Democracy in Cambodia: The Khmer Rouge, the United Nations and the International Community* 141, 142 (Ben Kiernan ed., 1993).

<sup>36</sup> For a definition of "presumption of innocence," see International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 14(2), 999 U.N.T.S. 171, 176 [hereinafter ICCPR].

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crafted to virtually ensure the guilt of the defendants. The definition of genocide included:

planned massacres of groups of innocent people; expulsion of inhabitants of cities and villages in order to concentrate them and force them to do hard labor in conditions leading to their physical and mental destruction; wiping out religion; [and] destroying political, cultural and social structures and family and social relations.<sup>37</sup>

On balance, the People's Revolutionary Tribunal was neither normatively fair nor in conformity with prevailing international law.

The international community was predominantly focused on ensuring Cambodian territorial sovereignty and stability, at the expense of a thorough and adequate investigation and prosecution of those responsible for the atrocities. The U.N. was involved in the settlement agreements terminating the Khmer Rouge leadership and establishing transitional Vietnamese occupation.<sup>38</sup> The U.N. Human Rights Commission's Sub-Commission on Prevention of Discrimination and Protection of Minorities considered Cambodia's human rights record in March 1979, describing the events between 1975 and 1979 as "the most serious [human rights violations] that had occurred anywhere in the world since nazism," concluding that they "constituted nothing less than autogenocide."<sup>39</sup> The Sub-Commission shared its results with the Cambodian government, which rejected its factual conclusions. The U.N. subsequently abandoned its efforts to investigate the atrocities once the Vietnamese occupied Cambodia.<sup>40</sup> Similarly, between July 13 and 17, 1981, the International Conference on Kampuchea met in New York, but focused almost entirely on the Vietnamese involvement.<sup>41</sup>

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<sup>37</sup> 1979 Trial Documents, *supra* note 18, at 45; see Schabas, *supra* note 14, at 289.

<sup>38</sup> For a detailed discussion of the U.N.'s involvement after the Vietnamese were ousted, see Ratner, *supra* note 4, at 5–30.

<sup>39</sup> U.N. ESCOR, Hum. Rts. Comm., 35th Sess., 1510th mtg. at 7, U.N. Doc. E/CN.4/SR.1510 (1979).

<sup>40</sup> See Ratner, *supra* note 4, at 4 n.11 ("At its 1979 session, however, the Commission [on Human Rights] postponed examination of the report in light of the ouster of the Khmer Rouge government and thereafter considered only the Vietnamese occupation.").

<sup>41</sup> *Id.* at 4.

During the entire period of its rule the Khmer Rouge occupied the Cambodian seat in the U.N., without even a single Western country voting against its retention.<sup>42</sup> Perhaps more alarmingly, no country has invoked the Genocide Convention on behalf of the victims, brought a claim against Cambodia before the International Court of Justice, or extradited Khmer Rouge leaders for trial via universal jurisdiction.<sup>43</sup>

Members of the international community did, however, take a prominent role in the multilateral Paris Peace Accords of 1991, which reinstated the Cambodian government's full independence from Vietnam. On October 23, 1991, the Paris Conference on Cambodia signed a complex set of settlement accords.<sup>44</sup> Perhaps prophetically, the specific 1989 mandate establishing the conference did not reference justice, human rights, or tribunals.<sup>45</sup>

Once again, the Cambodian people found an international community eager to restore Cambodian sovereignty and territorial integrity, but reluctant to address contentious human rights issues. Foreshadowing an interesting reversal of roles, the international community prioritized Cambodian sovereignty and control, but would later need to undermine that control in order to lobby for an international tribunal.

The U.N. considered proposals for an international criminal tribunal or a case before the International Court of Justice, but rejected both options.<sup>46</sup> Professor Steven R. Ratner, who represented the United States during the negotiations at the Paris Conference, stated: "Although all the participants believed that human rights should be mentioned, it was harder to reach consensus on how to . . . punish Khmer Rouge officials responsible for the atrocities

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<sup>42</sup> Eva Mysliwec, *Punishing the Poor: The International Isolation of Kampuchea* 90 (1988).

<sup>43</sup> Theresa Klosterman, Note, *The Feasibility and Propriety of a Truth Commission in Cambodia: Too Little? Too Late?*, 15 *Ariz. J. Int'l & Comp. L.* 833, 850 (1998).

<sup>44</sup> Steven R. Ratner, an Attorney-Adviser for the Office of the Legal Adviser, United States Department of State, served as a member of the U.S. delegation to the Paris Conference on Cambodia. See Ratner, *supra* note 4, at 1.

<sup>45</sup> *Id.* at 5.

<sup>46</sup> For a discussion of the proposals and their ultimate rejection, see Hurst Hannum, *International Law and Cambodian Genocide: The Sounds of Silence*, 11 *Hum. Rts. Q.* 82, 94-101 (1989); Jim Leach, *Don't Help Pol Pot. Try Him.*, *N.Y. Times*, Sept. 27, 1989, at A29.

and to prevent the repetition of these acts. As a result, the human rights obligations at times appear opaque.”<sup>47</sup>

The international community attempted to find an indirect route by addressing the human rights concerns in Article 15 of the Paris Peace Accords, emphasizing the Cambodian government’s present-time obligations to human rights treaties and standards.<sup>48</sup> Article 15 included several major human rights provisions: it stated that all Cambodians shall enjoy the rights and freedoms enumerated in the Universal Declaration of Human Rights and other international instruments;<sup>49</sup> it imposed on Cambodia an affirmative duty to protect human rights and institute preventive measures to ensure that the policies and practices of the Khmer Rouge era do not return;<sup>50</sup> in an effort to eliminate the international neglect that prevailed during the Khmer Rouge era, Article 15 imposed corresponding obligations on other signatories;<sup>51</sup> and Article 17 imposed on the U.N. Commission on Human Rights the obligation to monitor the human rights conditions in Cambodia.<sup>52</sup> Professor Ratner best characterized the provisions as “viewed as best tackl[ing the problem] by obligating Cambodia to meet its commitments under the pertinent human rights instruments, especially the Genocide Convention.”<sup>53</sup>

In summary, the international community’s neglect over the past three decades surely has affected its ability to influence the current attempts to create a tribunal.<sup>54</sup> As Cambodian scholar Brian D. Tittmore observed: “[T]he absence of timely intervention by the international community to prevent or punish Khmer Rouge atrocities significantly limited the United Nation’s present-day ability to influence the creation of a Khmer Rouge tribunal or to ensure that

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<sup>47</sup> Ratner, *supra* note 4, at 25–26.

<sup>48</sup> Final Act of the Paris Peace Conference on Cambodia, U.N. SCOR, 46th Sess., Annex, U.N. Doc. A/46/608 & S/23177 (1991), *reprinted in* 31 I.L.M. 180, 186 (1992).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Ratner, *supra* note 4, at 40.

<sup>54</sup> See, e.g., Brian D. Tittmore, *Securing Accountability for Gross Violations of Human Rights and the Implications of Non-Intervention: The Lessons of Cambodia*, 7 ILSA J. Int’l & Comp. L. 447 (2001) [hereinafter Tittmore, *Securing Accountability*] (addressing the difficulties currently encountered by the U.N. due to its prior non-intervention during the Khmer Rouge era).

any such tribunal is competent, impartial, and effective.”<sup>55</sup> Previous neglect creates looming concerns that the international community is currently motivated by collective guilt, rather than the best interests of Cambodia, that it has lost its right to make demands of the Cambodian government, and that international actions taken now would serve only to open old wounds rather than rehabilitate the country.

## II. HISTORY OF THE U.N.-CAMBODIAN EFFORTS TOWARD A TRIBUNAL

### *A. Pre-Negotiation History and Cambodia’s Initial Request for Assistance*

On June 21, 1997, then-First Prime Minister Norodom Ranariddh and then-Second Prime Minister Hun Sen submitted a request to the U.N. Secretary-General requesting international aid in “bringing to justice those persons responsible for the genocide and crimes against humanity during the rule of the Khmer Rouge from 1975 to 1979.”<sup>56</sup> On its face, the letter seemed to invite the international community to organize a U.N.-sponsored and controlled tribunal. The Cambodian government cited both the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”), asking that “similar assistance be given to Cambodia.”<sup>57</sup> Cambodia’s request, however, did not necessarily embody its true intentions.

The Cambodian letter appeared to unambiguously concede that the Khmer Rouge atrocities constituted violations of international law that warranted international remedies:

We believe that crimes of this magnitude are of concern to all persons in the world, as they greatly diminish respect for the most basic right, the right to life. We hope that the United Na-

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<sup>55</sup> Tittlemore, *Securing Accountability* supra note 54, at 451–52.

<sup>56</sup> Tittlemore, *Khmer Rouge Crimes*, supra note 21, at 3 (quoting Letter from Norodom Ranariddh, Cambodian First Prime Minister, and Hun Sen, Cambodian Second Prime Minister, to Secretary-General Annan (June 21, 1997)).

<sup>57</sup> Letter from Norodom Ranariddh, Cambodian First Prime Minister, and Hun Sen, Cambodian Second Prime Minister, to Secretary-General Annan (June 21, 1997)).

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tions and the international community can assist the Cambodian people in establishing the truth about this period and bringing those responsible to justice. Only in this way can this tragedy be brought to a full and final conclusion.<sup>58</sup>

On July 5, 1997, Hun Sen took power with a bloody military coup, killing more than forty political opponents.<sup>59</sup> Sen was deeply concerned with both asserting Cambodian sovereignty and gaining international credibility. The coup had been planned for months; it is possible that Sen foresaw a means of diverting attention from the coup by pursuing international prosecution of the Khmer Rouge.

Perhaps the greatest indicator of the double-talk is Cambodia's public comments regarding its reason for opposing U.N.-sponsored tribunals. Following the letter, the Cambodian government publicly stated that a U.N. tribunal might not be feasible because China would veto any proposal.<sup>60</sup> The Chinese government informed the U.N., however, that it would not oppose *any* tribunal supported by Cambodia, but would oppose only one imposed on Cambodia against its will.<sup>61</sup> Thus, the only impediment to a U.N. tribunal would be Cambodia.

The U.N. General Assembly adopted a December 12, 1997, resolution asking the Secretary-General to examine the Cambodian government's request and consider establishing an investigative commission.<sup>62</sup> In the spring of 1998, Secretary-General Kofi Annan established a "Group of Experts" with three main goals: "(1) to evaluate the existing evidence and determine the nature of the crimes committed; (2) to assess the feasibility of bringing

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<sup>58</sup> *Id.*

<sup>59</sup> Seth Mydans, Cambodia Purge Said to Claim 40 Victims, *N.Y. Times*, July 16, 1997, at A8.

<sup>60</sup> Ratner, *supra* note 23, at 952; see also Elizabeth Becker, Cambodia Spurns U.N. Plan for Khmer Rouge Trial, *N.Y. Times*, Mar. 14, 1999, at A4 (describing Cambodia's insistence on control over Khmer Rouge trials).

<sup>61</sup> Ratner, *supra* note 23, at 952. In 1994, China abstained from voting on Resolution 955, which created the Rwandan tribunal. Catherine Cissé, *The International Tribunals for the Former Yugoslavia and Rwanda: Some Elements of Comparison*, 7 *Transnat'l L. & Contemp. Probs.* 103, 107 (1997) (discussing U.N. SCOR, 49th Sess., 3453d mtg. at 11, U.N. Doc. S/PV.3453 (1994)).

<sup>62</sup> Situation of Human Rights in Cambodia, G.A. Res. 52/135, U.N. GAOR, 52d Sess., 70th plen. mtg., Agenda Item 112(b), ¶ 16, U.N. Doc. A/RES/52/135 (1998).

Khmer Rouge leaders to justice; and (3) to explore options for trials before international or domestic courts.”<sup>63</sup>

*B. Group of Experts Report and Subsequent Exchanges*

From July 1998 until February 1999, the U.N. Group of Experts (“the Group”) 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.<sup>64</sup> The delegation was comprised of Sir Ninian Stephen, former ICTY judge, Judge Rajsoomer Lallah, and Steven R. Ratner.<sup>65</sup> The visits produced a sixty-page report presented to both the Security Council and General Assembly on February 22, 1999.<sup>66</sup>

The Group’s preliminary conclusion found ample evidence to proceed with the prosecution of Khmer Rouge leaders for international crimes of genocide, crimes against humanity, war crimes, forced labor, torture, and crimes against internationally protected persons.<sup>67</sup> The Group recommended that prosecutions be limited, however, to “those persons most responsible for the most serious violations of human rights [in Cambodia] . . . includ[ing] senior leaders with responsibility over the abuses as well as those at lower levels who are directly implicated in the most serious atrocities.”<sup>68</sup>

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<sup>63</sup> Ratner, *supra* note 23, at 949.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* Sir Ninian Stephen was the former Governor-General of Australia and former ICTY judge, Judge Rajsoomer Lallah was a member of the U.N. Human Rights Committee and Special Rapporteur for Myanmar of the U.N. Commission on Human Rights, and Steven R. Ratner was a participant in the Cambodian settlement talks and United States Department of State consultant on Cambodia.

<sup>67</sup> Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135, U.N. GAOR, 53d Sess., Annex, Agenda Item 110(b), at 18–27, 41–42, U.N. Doc. A/53/850, S/1999/231 (1999) [hereinafter Group of Experts Report].

<sup>68</sup> *Id.* ¶ 110, at 32. Cambodian Premier Hun Sen has indicated his desire to try up to five former leaders. Bunyanunda, *supra* note 2, at 1586. Seven former officials seem likely candidates. Stephen Heder & Brian D. Tittmore, Seven Candidates for Prosecution: Accountability for the Crimes of the Khmer Rouge 5–6 (2001), [http://www.cij.org/pdf/seven\\_candidates\\_for\\_prosecution\\_Cambodia.pdf](http://www.cij.org/pdf/seven_candidates_for_prosecution_Cambodia.pdf) (on file with the Virginia Law Review Association).



The Group addressed the concern that the passage of time would impede the collection of evidence. They concluded that for some atrocities (for example, those committed at Tuol Sleng Prison) there was an abundance of documentary evidence, whereas for other crimes witness testimony would be the backbone.<sup>69</sup>

The Group then considered five different means of prosecuting the Khmer Rouge: “a tribunal established under Cambodian Law; a UN tribunal; a Cambodian tribunal under UN administration (through a bilateral agreement between the United Nations and Cambodia); an international tribunal established by multilateral treaty; and trials in states other than Cambodia.”<sup>70</sup> Based on the precarious state of the Cambodian domestic judicial system, the risk of political influence on the domestic courts, and the contentious international law issues involved, the Group recommended the establishment of an ad hoc U.N. tribunal seated in an Asia-Pacific nation-state other than Cambodia.<sup>71</sup>

The Group made two additional important statements. First, in balancing the goal of achieving retributive justice with the goal of rehabilitation of Cambodia, the Group concluded that the process would not be politically or socially destabilizing to the country.<sup>72</sup> Second, the Group adamantly recommended an independent prosecutor, even suggesting the use of the lead prosecutor from the ICTY and ICTR.<sup>73</sup> Secretary-General Annan concurred with the aforementioned conclusions, submitted the Group of Experts Report to the Security Council and General Assembly, and announced: “[I]f the international standards of justice, fairness and the process of law are to be met . . . the tribunal in question must be international in character.”<sup>74</sup>

Hun Sen’s government immediately denounced the Group of Experts’ conclusions. A senior government official later indicated that the decision to reject the recommendations was made within five days after the mission was completed and prior to the actual

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<sup>69</sup> Group of Experts Report, *supra* note 67, at 16–18.

<sup>70</sup> See *id.*; Ratner, *supra* note 23, at 951.

<sup>71</sup> See Group of Experts Report, *supra* note 67, at 16–18; Ratner, *supra* note 23, at 951.

<sup>72</sup> Group of Experts Report, *supra* note 67, at 28–30.

<sup>73</sup> Craig Etcheson, *Accountability Beckons During a Year of Worries for the Khmer Rouge Leadership*, 6 *ILSA J. Int’l & Comp. L.* 507, 508 (2000).

<sup>74</sup> Ratner, *supra* note 23, at 952.

release of the report.<sup>75</sup> On March 12, 1999, Hun Sen officially rejected both the Group of Experts' recommendations and "truth commission."<sup>76</sup> A few days after the Group of Experts Report was published, the Cambodian government arrested Khmer Rouge leader Ta Mok, and asserted that there was no longer a need for any international assistance.<sup>77</sup>

Still hopeful of the prospects for an international tribunal, the Secretariat proposed a Cambodian court with a majority of foreign personnel in August 1999, yet Cambodia rejected this plan in September 1999 based on Hun Sen's position that the international community ought only to provide legal expertise.<sup>78</sup> This development demonstrates a lack of sincerity in the 1997 Cambodian request for international involvement similar to the U.N.'s actions in Rwanda and the former Yugoslavia. It also reveals Sen's true intention of prioritizing sovereignty over international justice. In addition, this validates the Group of Experts' initial fear that the Cambodian government would try to control any tribunal.

The U.N. responded with a second proposal for a tribunal with the following distinguishing characteristics: a seat outside of Cambodia, one trial chamber and one appeals chamber, jurisdiction over crimes against humanity, and while held under Cambodian jurisdiction, a staff composed of a majority of international personnel appointed by the Secretary-General.<sup>79</sup> Secretary-General Annan proclaimed that the core challenge to the U.N. was to "forge unity behind the principle that massive and systematic violations of human rights—wherever they may take place—should not be allowed to stand."<sup>80</sup> While the U.N. indicated concerns for international law and human rights, Hun Sen indicated a greater concern for sovereignty and control:

We must also recognize that both parties remain divided on the mechanism for the functioning of the trial. In compliance

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<sup>75</sup> Etcheson, *supra* note 73, at 509–10.

<sup>76</sup> Jaya Ramji, *Reclaiming Cambodian History: The Case for a Truth Commission*, 24 *Fletcher F. World Aff.* 137, 139 (2000).

<sup>77</sup> *Id.*; Chris Seper, *Cambodia Captures Last Khmer Rouge Leader: Government Vows to Put Ta Mok on Trial*, *Wash. Post*, Mar. 7, 1999, at A22.

<sup>78</sup> Ratner, *supra* note 23, at 952.

<sup>79</sup> Etcheson, *supra* note 73, at 511.

<sup>80</sup> Tittlemore, *Securing Accountability*, *supra* note 54, at 447–48.

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with its sovereignty, Cambodia must proceed with Cambodia's existing national court and introduce additional legislation to allow foreign judges and prosecutors to take part in the trial. As for the United Nations legal experts, their intention to create a special tribunal, to implement special laws in Cambodia, which in reality is outside the umbrella of the Cambodian constitution and laws, will not be applicable.<sup>81</sup>

Hun Sen then closed his comments with a reminder that the Khmer Rouge atrocities "received no attention from anyone for more than 20 years."<sup>82</sup>

Following Cambodia's second rejection of a U.N. tribunal proposal, the United States entered the negotiations.<sup>83</sup> In October 1999, the Cambodian government endorsed a U.S. proposal for a mixed tribunal, only later to reject it and propose a domestic tribunal that would allow limited participation by foreign judges.<sup>84</sup> Hun Sen's government proposed a mixed tribunal, but one of fundamentally national character, to prosecute the Khmer Rouge leadership on charges of genocide and crimes against humanity.<sup>85</sup> The tribunal would have one trial chamber and two appeals chambers, with a majority of Cambodian personnel.<sup>86</sup> The proposal also included a new definition of genocide, which violated the international law against retroactivity and reflected the Cambodian gov-

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<sup>81</sup> Etcheson, *supra* note 73, at 512–13 (quoting aide memoire from Cambodian Prime Minister Hun Sen, to Secretary General Kofi Annan (Sept. 17, 1999) (unofficial translation)).

<sup>82</sup> *Id.* at 513 (quoting aide memoire from Cambodian Prime Minister Hun Sen, to Secretary General Kofi Annan (Sept. 17, 1999) (unofficial translation)).

<sup>83</sup> President Clinton, following the 1998 death of Pol Pot, stated, "We must not permit the death of the most notorious of the Khmer Rouge leaders to deter us from the equally important task of bringing these others to justice." Elizabeth Becker, *Pol Pot's End Won't Stop U.S. Pursuit of His Circle*, N.Y. Times, Apr. 17, 1998, at A15. President Clinton then appealed to the United Nations to create a new war crimes tribunal to prosecute former leaders of the Khmer Rouge. Colum Lynch, *U.S. Seeks Khmer Rouge Trials: Call for UN Tribunal on Cambodia Spurs Protest by China*, Boston Globe, May 1, 1998, at A10.

<sup>84</sup> Bunyanunda, *supra* note 2, at 1615; see also Barbara Crossette, *U.S. Offers Compromise for Cambodian War Crimes Trials: Washington Proposes a Judicial Tribunal Made up of Three Cambodians and Two Foreign Members*, Portland Oregonian, Oct. 20, 1999, at A12 (describing the U.S. proposal and chronicling Cambodian objections to the U.N. proposal).

<sup>85</sup> Etcheson, *supra* note 73, at 510.

<sup>86</sup> *Id.*

ernment's refusal to comply with requests by the U.N. for Cambodia to compromise on basic issues of international law.<sup>87</sup>

Recognizing the shortcomings of this proposal, the United States and Cambodia 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 (a three-two ratio on the trial level, and a four-three ratio on the appeals level), but requiring the assent of one international judge on all decisions.<sup>88</sup> Moreover, the tribunal would have co-prosecutors.<sup>89</sup> The U.N. preferred a more internationally-controlled tribunal, so it continued negotiations with Cambodia.

While it thus seemed that negotiations were progressing toward an agreement, albeit one falling short of current international standards, the talks derailed when Cambodia initiated unilateral actions in defiance of the international community. On August 10, 2001, the Cambodian government passed legislation establishing Extraordinary Chambers, which passed through the Cambodian National Assembly (86-2) and Senate (51-0).<sup>90</sup>

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 structured. The Chambers, located in Phnom Penh, would have subject matter jurisdiction over a wide range of human rights offenses.<sup>91</sup> The statute included the Cambodian definition of genocide, however, again raising the issue of retroactivity.

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<sup>87</sup> Id. at 511.

<sup>88</sup> Bunyanunda, *supra* note 2, at 1619.

<sup>89</sup> Colum Lynch, U.N. Warns Cambodia on War Crimes Tribunal, *Wash. Post*, Feb. 3, 2001, at A22.

<sup>90</sup> Bunyanunda, *supra* note 2, at 1619 n.155.

<sup>91</sup> These categories of offenses are: (1) crimes set forth in the 1956 Penal Code of Cambodia, (2) crimes against humanity, (3) grave breaches of the four 1949 Geneva Conventions, (4) destruction of cultural property in violation of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, and (5) crimes against the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents. Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (Council of Jurists trans.), at [http://www.cambodia.gov.kh/krt/pdfs/KR%20Law%20as%20promulgated%20\(Eng%20trans%206%20Sept%202001\).pdf](http://www.cambodia.gov.kh/krt/pdfs/KR%20Law%20as%20promulgated%20(Eng%20trans%206%20Sept%202001).pdf) (on file with the Virginia Law Review Association).

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The structure of the Chambers included a trial court<sup>92</sup> with three Cambodian and two foreign judges,<sup>93</sup> an appeals court with four Cambodian and three foreign judges,<sup>94</sup> and a supreme court with five Cambodian and four foreign judges.<sup>95</sup> Decisions at each level would require a supermajority, including at least one foreign judge in any verdict to convict.<sup>96</sup>

Frustrated with Cambodia's lack of cooperation and dogmatic insistence on taking unilateral action, Secretary-General Annan terminated U.N. involvement in the Cambodia negotiations on February 8, 2002.<sup>97</sup> Amnesty International summarized the subsequent international climate as follows:

The process as envisaged by the Cambodian authorities fell short of required internationally recognized standards for fair trials, and it is for the UN to ensure that the standards are maintained. Participating in trial procedures which are not fair would serve only to undermine UN human rights standards, and sell the Cambodian people short.<sup>98</sup>

The deadlock continued until June 2002, when Hun Sen called and twice wrote the Secretary-General requesting U.N. assistance.<sup>99</sup>

*C. Resumption of Negotiations*

On August 20, 2002, Secretary-General Annan replied to Hun Sen's letter, informing Hun Sen that he would not resume negotiations and expend U.N. resources without a directive from the Gen-

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<sup>92</sup> Id. art. 2, at 2.

<sup>93</sup> Id. art. 9, at 4.

<sup>94</sup> Id.

<sup>95</sup> Id. art. 9, at 5.

<sup>96</sup> Id. art. 14.1, at 6.

<sup>97</sup> Amnesty Int'l, Cambodia: Flawed Trials in No One's Best Interests, AI Index ASA 23/001/2002 (Feb. 11, 2002), at <http://web.amnesty.org/library/Index/ENGASA230012002?open&of=ENG-KHM> (on file with the Virginia Law Review Association).

<sup>98</sup> Id.

<sup>99</sup> Statement, U.N. High Comm'r for Human Rights, Secretary-General Replies to Cambodian Prime Minister's Letter on Trial of Khmer Rouge Leaders (Aug. 20, 2002), at <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/1D61F44196A25F19C1256C1C00309DED?opendocument> (on file with the Virginia Law Review Association).

eral Assembly.<sup>100</sup> Annan balanced the issues of sovereignty and justice: “As a sovereign State, Cambodia has the responsibility for the trial while the international community, through the United Nations or otherwise, can help provided that the [Cambodian] Government demonstrates its preparedness to *ensure the observance of international standards of justice*.”<sup>101</sup>

On November 5, 2002, Peter Leuprecht, the Special Representative of the Secretary-General for Human Rights in Cambodia, recommended to the General Assembly’s Third Committee that the U.N. resume negotiations.<sup>102</sup> On November 20, 2002, the Third Committee overwhelmingly passed a resolution requesting the resumption of negotiations, aimed at establishing “extraordinary chambers to try those suspected of being responsible for the atrocities committed by the Khmer Rouge.”<sup>103</sup> The United States publicly expressed regret that the Cambodian government did not co-sponsor the resolution.<sup>104</sup>

On December 18, 2002, the General Assembly passed a resolution supporting the resumption of U.N. negotiations with Cambodia, effectively endorsing a mixed tribunal with a majority of Cambodian judges.<sup>105</sup> The resolution began by recognizing “the substantial progress made by the Secretary-General and the Government of Cambodia towards the establishment of Extraordinary Chambers *within the existing court structure of Cambodia*.”<sup>106</sup> Thus, the negotiations contemplated the controversial Cambodian Extraordinary Chambers, rather than procedures established by international precedent.

The resolution made a series of recommendations to the U.N. negotiating team. First, the resolution directed that the Extraordi-

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<sup>100</sup> Id.

<sup>101</sup> Id. (emphasis added).

<sup>102</sup> Press Release, United Nations, Third Committee Debates Human Rights Situation in Iraq, Cambodia, Palestinian Occupied Territories, U.N. GAOR 3d Comm., 57th Sess., 36th mtg., U.N. Doc. GA/SHC/3715 (2002).

<sup>103</sup> Judy Aita, U.S. Dep’t of State, U.N. Committee Wants Negotiations on Khmer Rouge Trials Restarted: U.S. Regrets Phnom Penh did not Co-sponsor Resolution, Nov. 21, 2002, at <http://usinfo.state.gov/topical/pol/usandun/02112101.htm> (on file with the Virginia Law Review Association).

<sup>104</sup> Id.

<sup>105</sup> Khmer Rouge Trials, Draft Resolution 26, U.N. GAOR, U.N. Doc. A/RES/57/228 (2002).

<sup>106</sup> Id. (emphasis added).

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nary Chambers have subject matter jurisdiction consistent with the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia and personal jurisdiction over the former leaders of the Khmer Rouge.<sup>107</sup> Note that this law included the non-conforming definition of genocide. Second, the resolution called for the exercise of this jurisdiction “in accordance with international standards of justice, fairness and due process of law, as set out in articles 14 and 15 of the International Covenant on Civil and Political Rights.”<sup>108</sup> Third, the resolution called for the independence and impartiality of judges and prosecutors.<sup>109</sup> The resolution is of course paradoxical, however, because recognition of the Extraordinary Chambers frustrates the resolution’s second and third recommendations (which the U.N. has repeatedly stated can best be achieved by establishing an ad hoc international tribunal).

From January 6 to 13, 2003, U.N. and Cambodian officials resumed negotiations with a round of exploratory talks in New York City. Prime Minister Hun Sen invited the U.N. to visit Cambodia for continuing talks, and the U.N. sent a negotiating team from March 13 to 17, 2003.<sup>110</sup> United Nations legal counsel Hans Correll, after meeting with Cambodian officials in Phnom Penh on March 17, 2003, announced that they had reached a draft agreement with Cambodia on the status of a court (“March Agreement”<sup>111</sup>).<sup>112</sup> After eleven negotiation rounds in five years, Om Yentieng, an advisor to Prime Minister Hun Sen, stated, “We have agreed on a draft cooperation agreement in which the United Nations will assist Cambodia in the proceedings of a special tribunal.”<sup>113</sup>

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<sup>107</sup> Id.

<sup>108</sup> Id.

<sup>109</sup> Id.

<sup>110</sup> Daniel Kemper Donovan, Recent Developments, Joint U.N.-Cambodia Efforts to Establish a Khmer Rouge Tribunal, 44 Harv. Int’l L.J. 551, 552 (2003).

<sup>111</sup> Draft Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, U.N. GAOR 3d Comm., 57th Sess., Annex, Agenda Item 109(b) U.N. Doc. A/57/806 (2003) [hereinafter March Agreement].

<sup>112</sup> Associated Press and Reuters, Khmer Rouge Trial Deal Agreed, at <http://www.cnn.com/2003/WORLD/asiapcf/southeast/03/17/cambodia.trial/index.html> (Mar. 17, 2003) (on file with the Virginia Law Review Association).

<sup>113</sup> Id.

The March Agreement was approved by consensus of the U.N. General Assembly on May 13, 2003,<sup>114</sup> and, as of March 2004, still awaits official adoption by the Cambodian National Assembly.

*D. Structure of the Current "March Agreement"*

The March Agreement bears a striking resemblance to both the United States proposals and the Cambodian Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia,<sup>115</sup> and it contravenes most of the recommendations of the U.N. Group of Experts.<sup>116</sup> The tribunal will be seated in Cambodia, most likely Phnom Penh,<sup>117</sup> with Khmer as the official language.<sup>118</sup> 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 tribunals.<sup>119</sup>

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.<sup>120</sup> Consequently, domestic norms, rather than international precedents, shall govern the procedural law followed by both Cambodian and international judges.

Regarding the much-debated structure of the Cambodian tribunal, there will be just two extraordinary chambers.<sup>121</sup> The Trial Chamber will be comprised of three Cambodian judges and two international judges.<sup>122</sup> The Supreme Court Chamber, the sole appellate chamber, will consist of four Cambodian judges and three international judges.<sup>123</sup> Thus, the agreed-upon tribunal abandons the previously discussed nine-judge, final appeals level.<sup>124</sup> The Cambo-

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<sup>114</sup> Press Release, United Nations, General Assembly Approves Draft Agreement Between UN, Cambodia on Khmer Rouge Trials, U.N. GAOR 57th. Sess., 85th plen. mtg., U.N. Doc. GA/10135 (May 13, 2003).

<sup>115</sup> See *supra* text accompanying notes 83–96.

<sup>116</sup> See *supra* text accompanying notes 67–74.

<sup>117</sup> March Agreement, *supra* note 111, art. 14, at 9.

<sup>118</sup> *Id.* art. 26(1), at 13.

<sup>119</sup> *Id.* art. 2, at 4.

<sup>120</sup> *Id.* art. 12(1), at 8.

<sup>121</sup> *Id.* art. 3(2), at 4.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> See *supra* text accompanying note 95.



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dian Supreme Council of the Magistracy will select the international judges from a list generated by the U.N. Secretary-General.<sup>125</sup>

The March Agreement mandates that each decision include a “supermajority” of judges (four judges at the Trial Chamber level and five judges at the Supreme Court Chamber level),<sup>126</sup> thus requiring at least one international judge’s vote in any majority. This is in clear response to international concerns over Cambodian control over the tribunal, but does not represent a change over previous draft agreements.<sup>127</sup>

The investigatory function of the tribunal will be shared by one Cambodian investigator and one international investigator.<sup>128</sup> There will be an identical structure for co-prosecutors.<sup>129</sup> In each case, the Cambodian Supreme Council of the Magistracy selects the international investigator and prosecutor from a list of U.N. Secretary-General nominees.<sup>130</sup> Thus, Cambodia has notable discretion in choosing the participants.

If any disagreement should exist between the domestic and international personnel regarding whether to prosecute a case, the default rule is that the case advances.<sup>131</sup> The dissenting prosecutor may, however, appeal the decision to a Pre-Trial Chamber of five judges, who have final authority.<sup>132</sup> The Cambodian Supreme Council of the Magistracy appoints three judges directly, and chooses the remaining two judges from a list generated by the U.N. Secretary-General.<sup>133</sup> Once again, the Chamber decision requires a supermajority vote; in the absence of the required supermajority the investigation or prosecution proceeds.<sup>134</sup>

The tribunal will have subject matter jurisdiction over the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, crimes against human-

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<sup>125</sup> March Agreement, supra note 111, art. 3(1), at 4.

<sup>126</sup> Id. art. 4(1), at 5.

<sup>127</sup> See supra note 98 and accompanying text.

<sup>128</sup> March Agreement, supra note 111, art. 5(1), at 5.

<sup>129</sup> Id. art. 6(1), at 6.

<sup>130</sup> Id. arts. 5(5), 6(5), at 6.

<sup>131</sup> Id. art. 6(4), at 6.

<sup>132</sup> Id. arts. 6(4), 7, at 6–7.

<sup>133</sup> Id. art. 7(2), at 7.

<sup>134</sup> Id. art. 7(4), at 7.

ity as defined in the 1998 Rome Statute of the International Criminal Court, grave breaches of the 1949 Geneva Conventions, and additional crimes defined in Chapter II of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia.<sup>135</sup>

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.<sup>136</sup> 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.<sup>137</sup> 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.<sup>138</sup> Lastly, the maximum penalty upon conviction is life imprisonment, eliminating the possibility of the death penalty.<sup>139</sup>

### III. INTERNATIONAL STANDARDS OF JUSTICE, METHODS OF HUMAN RIGHTS PROTECTIONS, AND INTERNATIONAL TRIBUNALS

#### *A. International Standards of Justice*

The most widely posited critique of the March Agreement is that the agreed upon tribunal will not comport with “international standards of justice.” Part II outlined the lengthy negotiations preceding the March Agreement, and Part IV explores the shortcomings of the proposed tribunal structure. This Part discerns the meaning of “international standards of justice,” and parses the guarantees therein.

The international community’s first formal establishment of “international standards of justice” centered on the efforts to address the atrocities committed by the Nazis during World War II. The international community, specifically the Allied powers, considered the crimes committed by the Nazi leaders to be offenses against not

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<sup>135</sup> Id. art. 9, at 8.

<sup>136</sup> Id. art. 11(1), at 8.

<sup>137</sup> Id. art. 11(2), at 8.

<sup>138</sup> Id. arts. 12–13, at 8–9.

<sup>139</sup> Id. art. 10, at 8.

only the individual victims, but also against humanity as a whole. Consequently, it turned to an international forum in order to ensure retributive justice and deterrence.<sup>140</sup>

In August 1945 the Allied powers established the International Military Tribunal, commonly referred to as the Nuremberg Trials.<sup>141</sup> The Nuremberg Trials gave birth to far-reaching principles of international standards of justice, which were later codified by the U.N. General Assembly.<sup>142</sup> In December 1946 the international community incorporated seven principles into international law. Primarily, they stood for the tenet that there is individual responsibility for war crimes, and that there is neither a defense based on sovereign immunity nor one based on the fact that a lower-ranking individual was “just following orders” from a superior. The Nuremberg principles balanced these standards against the articulated obligations to afford the accused both a fair trial and due process.<sup>143</sup> For our purposes, the lessons of Nuremberg can be separated into two major categories: (1) overarching principles and goals of international human rights protections and (2) substantive and procedural rights afforded defendants subject to international prosecution.

The international experience at Nuremberg and the ratification of certain principles of international justice led to the articulation of three distinct crimes: crimes against the peace, war crimes, and crimes against humanity.<sup>144</sup> These crimes have emerged as the foundation of international criminal law, and the prosecution of these crimes at Nuremberg made several dramatic statements. First, victims have rights that international law and the interna-

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<sup>140</sup> See Ball, *supra* note 7, at 86–87.

<sup>141</sup> *Id.*; see also Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* 147 (2000) (considering the competing interests in the Allied powers’ decision to put alleged war criminals on trial). The Charter of the Nuremberg Trials is: Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 1546–52, 82 U.N.T.S. 279, 284–301.

<sup>142</sup> Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal: Report of the Sixth Committee, G.A. Res. 95(I), U.N. Doc. A/64/Add. 1, at 188 (1946).

<sup>143</sup> Ball, *supra* note 7, at 87.

<sup>144</sup> See *id.*

tional community can honor collectively through criminal law.<sup>145</sup> Second, the international community can deter egregious rights violations by prosecuting high-level leaders and elites responsible for the atrocities.<sup>146</sup> Third, the international community should investigate and generate a complete and accurate record of human rights violations.<sup>147</sup> According to lead prosecutor at Nuremberg and former United States Supreme Court Justice Robert H. Jackson, “Unless we write the record of this movement with clarity and precision, we cannot blame the future if in days of peace it finds incredible accusatory generalities uttered during the war. We must establish incredible events by credible evidence.”<sup>148</sup> Fourth, and most importantly here, the international community has both an affirmative and unconditional responsibility to afford due process protections to all individuals accused of violations of international law.<sup>149</sup> Thus, Nuremberg served as a foundation for the modern conception of human rights tribunals.<sup>150</sup>

While the debate over international standards of justice had its genesis at Nuremberg, most substantive standards emerged in the subsequent treaties and international documents, specifically the ICCPR.<sup>151</sup> The first set of standards applies prior to trial, and reflects the importance of ensuring a rigorous defense. This not only protects the rights of the defendant, but also generates a more accurate and authoritative record of the proceedings. Article 14(3)(b) of the ICCPR mandates that a defendant have both adequate time and facilities for the preparation of a defense.<sup>152</sup> Article 14(3)(d)

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<sup>145</sup> Winston P. Nagan, *Strengthening Humanitarian Law: Sovereignty, International Criminal Law and the Ad Hoc Tribunal for the Former Yugoslavia*, 6 *Duke Comp. & Int'l L.* 127, 151 (1995).

<sup>146</sup> See Dennis J. Hutchinson, *Tribunals of War: A History Lesson in Mass Crimes*, *Chi. Trib.*, Nov. 18, 2001, § 1, at 21.

<sup>147</sup> See *id.*

<sup>148</sup> *Id.*

<sup>149</sup> See *id.*

<sup>150</sup> It is important to distinguish the Nuremberg Trials, however, from the modern adjudication of international criminal law. For a concise, yet poignant, statement regarding the difficulties involved in relying on the Nuremberg Trials as an example, see Louise Arbour, *The Prosecution of International Crimes: Prospects and Pitfalls*, 1 *Wash. U. J.L. & Pol'y* 13, 22 (1999).

<sup>151</sup> ICCPR, *supra* note 36.

<sup>152</sup> *Id.* art. 14(3)(b), at 177.

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prohibits trials in absentia,<sup>153</sup> and Article 14(3)(e) entitles each defendant to confront the witnesses testifying against him.<sup>154</sup> Article 9 covers the period between the arrest and trial, ensuring that individuals shall neither be subject to arbitrary arrest or detention nor denied liberty without due process of law,<sup>155</sup> shall be informed promptly of the charges,<sup>156</sup> and shall receive a speedy trial.<sup>157</sup>

The second set of standards applies to the structure and establishment of the tribunal itself. Article 14(1) guarantees that each defendant has the right to a fair and public hearing before a competent, independent, and impartial tribunal.<sup>158</sup> The final set of standards addresses further due process rights. Article 14(2) guarantees that an individual charged with an offense is presumed innocent until proven guilty by the appropriate standard.<sup>159</sup> Article 15(1) applies a principle of nonretroactivity, providing that each individual has the right not to be held guilty of any act or omission that did not constitute a criminal offense under national or international law at the time it was committed.<sup>160</sup>

One final observation could rise to prominence in the present situation should the Cambodian tribunals ultimately fall short of international standards of justice. The Statutes of the International Criminal Tribunals for the former Yugoslavia (Article 10) and Rwanda (Article 9), in conformity with customary international norms, recognize that domestic trials for acts constituting serious violations of international law will not, under the double jeopardy rule, preclude subsequent international prosecutions for the same acts where those domestic trials do not meet acceptable levels of international justice.<sup>161</sup>

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<sup>153</sup> Id. art. 14(3)(d), at 177.

<sup>154</sup> Id. art. 14(3)(e), at 177.

<sup>155</sup> Id. art. 9(1), at 175.

<sup>156</sup> Id. art. 9(2), at 175.

<sup>157</sup> Id. arts. 9(3)–(4), at 175–76.

<sup>158</sup> Id. art. 14(1), at 176.

<sup>159</sup> Id. art. 14(2), at 176.

<sup>160</sup> Id. art. 15(1), at 177.

<sup>161</sup> Tittmore, *Khmer Rouge Crimes*, supra note 21, at 5.

### B. The Applicable Crimes at International Law

The March Agreement grants the Cambodian tribunal jurisdiction over both crimes against humanity and genocide,<sup>162</sup> and the following Section explores the elements of each crime.<sup>163</sup>

#### 1. Crimes Against Humanity

Four elements must be proven for a successful prosecution of crimes against humanity. First, and most heavily debated, is the requirement of a nexus to armed conflict.<sup>164</sup> The International Military Tribunal Charter arguably requires that the crime have occurred during, or in the context of, either all-out war or armed conflict.<sup>165</sup> This would be a high hurdle for the prosecutions against the Khmer Rouge because the period 1975 to 1979 would have to be classified either as “war” or “armed conflict.” Similarly, the ICTY, consistent with Nuremberg, requires proof of a nexus to armed conflict.<sup>166</sup>

The international community, however, has recently removed this requirement: Neither the ICTR<sup>167</sup> nor the International Criminal Court (“ICC”)<sup>168</sup> requires a nexus to armed conflict. The March Agreement incorporates the ICC’s definition of crimes against humanity for the Cambodian tribunal,<sup>169</sup> thus seemingly eliminating the requirement of a nexus to armed conflict. The unsettled nature

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<sup>162</sup> March Agreement, *supra* note 111, art. 9, at 8.

<sup>163</sup> For a comprehensive analysis of not only genocide and crimes against humanity, but also other potential violations of international human rights law, see Steven R. Ratner & Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (1997).

<sup>164</sup> See generally Phyliss Hwang, *Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court*, 22 *Fordham Int’l L.J.* 457 (1998) (documenting the evolving interpretation of the requirement for a nexus to armed conflict).

<sup>165</sup> Ratner & Abrams, *supra* note 163, at 49.

<sup>166</sup> Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, U.N. SCOR, 48th Sess., 3175th mtg., Annex, art. 5, at 38, U.N. Doc. S/25704 (1993) [hereinafter *ICTY Statute*].

<sup>167</sup> G.A. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., Annex, art. 3, at 4, U.N. Doc. S/RES/955 (1994) (providing for the “Statute of the International Tribunal for Rwanda”) [hereinafter *ICTR Statute*].

<sup>168</sup> Rome Statute of the International Criminal Court, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, art. 7, at 9, U.N. Doc. A/CONF.183/9 (1998) [hereinafter *Rome Statute*].

<sup>169</sup> March Agreement, *supra* note 111, art. 9, at 8.

of this requirement has two major implications for the present situation in Cambodia. First, whether the tribunal adopts a broader or narrower view of the nexus requirement could determine whether the actions of the Khmer Rouge rise to the level of crimes against humanity. If the conservative view prevails and a nexus to armed conflict is required, acts such as the tortures and executions at Tuol Sleng may be entirely excluded from the tribunal's jurisdiction.<sup>170</sup> Second, and more importantly, the established tribunal will necessarily interpret and provide precedent on this contentious issue in international law. This means that the composition of judges and prosecutors on the Khmer Rouge tribunal will be critical to the future interpretation of the elements of crimes against humanity. Cambodian judges, lacking international law expertise, could potentially shape international law precedent with their decisions during the proceedings.

The second element of a successful crime against humanity claim is that the actions taken must be part of a large scale pattern of behavior that satisfies a two-prong test.<sup>171</sup> The actions must be: (1) either widespread or systematic,<sup>172</sup> and (2) directed against civilians.<sup>173</sup> This requirement can be met in a variety of ways and take several forms. The ICTY has even held that a single act could qualify as a crime against humanity.<sup>174</sup>

The third element of the offense is motive-based, and requires that the perpetrator have acted on a particular characteristic of the victim or group.<sup>175</sup> While the Genocide Convention excludes political beliefs and economic status as relevant characteristics, the Nuremberg principle of crimes against humanity includes persecutions based on political grounds.<sup>176</sup>

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<sup>170</sup> Bunyanunda, *supra* note 2, at 1600.

<sup>171</sup> Ratner & Abrams, *supra* note 163, at 57.

<sup>172</sup> Prosecutor v. Tadic, Case No. IT-94-1-T, Trial Chamber, ICTY ¶ 646; ICTY Statute, *supra* note 166, at 13. For a discussion of the distinction between widespread and systematic, see, e.g., Simon Chesterman, An Altogether Different Order: Defining the Elements of Crimes Against Humanity, 10 *Duke J. Comp. & Int'l L.* 307 (2000).

<sup>173</sup> *Tadic*, No. IT-94-1-T, ¶ 646.

<sup>174</sup> *Id.* ¶ 649.

<sup>175</sup> Ratner & Abrams, *supra* note 163, at 60.

<sup>176</sup> Ball, *supra* note 7, at 86-87.

The fourth element of a crime against humanity, state action, has been interpreted quite differently over the past fifty years. At Nuremberg, state action was required for a successful prosecution of a crime against humanity.<sup>177</sup> This interpretation is consistent with the International Military Tribunal Charter and subsequent codification by the U.N.<sup>178</sup> Both the ICTY and ICTR, however, have interpreted state action as either the affirmative action required at Nuremberg or, alternatively, state inaction and negligence in allowing these atrocities to occur.<sup>179</sup> The new interpretation co-opts the principle of international law that crimes against humanity lie only when domestic law is either inadequate or exhausted. Professor Diane F. Orentlicher notes that the modern interpretation is fulfilled when “the state involved, owing to indifference, impotency or complicity, has been unable to or has refused to halt the crimes and punish the criminals.”<sup>180</sup> Under any interpretation, the charges against the Khmer Rouge likely would focus on the state-organized atrocities, thus fulfilling the requirement of state action.

## 2. *Genocide*

The March Agreement incorporates the 1948 Genocide Convention’s definition of genocide.<sup>181</sup> The drafters of the 1948 Genocide Convention, to which Cambodia is a party, intended to establish a crime completely distinct from the Nuremberg precedent and rejected several countries’ proposals to refer to Nuremberg and crimes against humanity.<sup>182</sup> The structure of the Genocide Convention turns on Article III’s criminalization of a set of acts that involve genocide as defined in Article II.

Acts punishable under Article III are: “(a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to

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<sup>177</sup> See Bunyanunda, *supra* note 2, at 1591.

<sup>178</sup> *Id.*

<sup>179</sup> See Chesterman, *supra* note 172, at 338 (2000).

<sup>180</sup> Diane F. Orentlicher, *International Criminal Law and the Cambodian Killing Fields*, 3 *ILSA J. Int’l & Comp. L.* 705, 706 (1997) (quoting 4 *Trial of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, at 498 (1948)).

<sup>181</sup> March Agreement, *supra* note 111, art. 9, at 8.

<sup>182</sup> Ratner & Abrams, *supra* note 163, at 27.



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commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide.”<sup>183</sup>

Article II’s definition of genocide, which is repeated almost verbatim in the Rome Statute for the ICC,<sup>184</sup> involves a two-prong test. The first requirement is that the act be committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, but not a political group.<sup>185</sup> Second, the act must be a sufficiently violent and destructive behavior.<sup>186</sup>

In one sense, genocide is broader in application than crimes against humanity because it clearly does not require a nexus to armed conflict. The Genocide Convention is much narrower, however, in that it applies to a more select set of victim groups than crimes against humanity. The definition of crimes against humanity focuses more on the intent and degree of the crime committed by the perpetrator, while the Genocide Convention focuses more on whether the victim group is covered by the definition.<sup>187</sup>

Consequently, the Genocide Convention does not include political or economic groups, nor does it include “cultural genocide.” When the definition of genocide was being devised by the U.N. General Assembly in 1948, there were proposals to include social and economic groups, but they were quickly rejected.<sup>188</sup> As a result, crimes against humanity seems to be the more appropriate classification of the Khmer Rouge atrocities.

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<sup>183</sup> Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. III, 102 Stat. 3045, 3045, 78 U.N.T.S. 277, 280 [hereinafter Genocide Convention].

<sup>184</sup> Rome Statute, supra note 168, art. 6, at 6.

<sup>185</sup> Genocide Convention, supra note 183, art. II, at 280.

<sup>186</sup> See id. The second prong requires the commission of at least one of the following:

- (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 calculated 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.

Id.

<sup>187</sup> See Ball, supra note 7, at 87–90.

<sup>188</sup> See U.N. GAOR 6th Comm., 74th mtg., U.N. Doc. A/C.6/SR.74 (1948); U.N. GAOR 6th Comm., 72nd mtg., U.N. Doc. A/C.6/SR.72 (1948); U.N. GAOR 6th Comm., 69th mtg., U.N. Doc. A/C.6/SR.69 (1948).

*C. Contentious Nature of the Charges Brought Against the Khmer Rouge*

To be credible, it is imperative that any established tribunal be impartial, independent, and comport with international standards of justice. The tribunal must provide a presumption of innocence and prevent the tribunal from becoming a rubber stamp for de facto indictments. Conceptually, and perhaps even counterintuitively, the international community must both be prepared for potential acquittals and encourage the rigorous defense of the Khmer Rouge.<sup>189</sup>

It is critical that the United States and United Nations not presume the Khmer Rouge's guilt before formal proceedings, as doing so would defeat the purpose of establishing a competent and independent tribunal. The United States, through both legislation and official statements, already has "convicted" the Khmer Rouge for both genocide and crimes against humanity. In 1994, Congress passed the Cambodian Genocide Justice Act, stating that "[c]onsistent with international law, it is the policy of the United States to support efforts to bring to justice members of the Khmer Rouge for their crimes against humanity committed in Cambodia between April 17, 1975, and January 7, 1979."<sup>190</sup> The Act, however, neither granted federal courts jurisdiction to prosecute the Khmer Rouge nor required any affirmative action by the United States.

The U.N. has made similar presumptions, as illustrated in the 1997 General Assembly resolution calling for a Group of Experts to "respond positively to assist efforts to investigate Cambodia's tragic history including responsibility for past international crimes, such as acts of genocide and crimes against humanity."<sup>191</sup> In establishing the tribunal, the international community must be more careful with its characterization of the proceedings.

A rigorous defense of the Khmer Rouge is the fundamental cornerstone of any tribunal's compliance with international standards of justice.<sup>192</sup> The most difficult elements to prove will be the nexus

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<sup>189</sup> See Ratner & Abrams, *supra* note 163, at 267–68.

<sup>190</sup> See Schabas, *supra* note 14, at 292 n.21 (quoting Cambodia Genocide Justice Act, Pub. L. No. 103–236, § 572(a), 108 Stat. 486, 486–87 (1994)).

<sup>191</sup> *Id.* at 292–93 (quoting Situation of Human Rights in Cambodia, *supra* note 62, at 2).

<sup>192</sup> *Id.*

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to armed conflict for crimes against humanity and the status of the Cambodian victims as a cognizable group for genocide purposes.<sup>193</sup> With regard to the characterization of the victims as a cognizable victim group, Professor William A. Schabas best illustrates the implications of this distinction: “[T]he debate is not about the truth of what happened . . . in Cambodia. Rather, it is about the characterization of the atrocities committed[,] . . . whether they are more properly described as crimes against humanity, rather than genocide.”<sup>194</sup> The prosecutors also will likely face a struggle in meeting the appropriate level of intent necessary to warrant a conviction for genocide.<sup>195</sup>

#### *D. Survey of Other International Tribunals*

While Part IV will explore a more detailed comparison of the Cambodian proposal with other tribunals, a survey of the other ad hoc tribunals is a useful means of illustrating both the importance of international standards of justice and the means employed to balance individual sovereignty with collective action.

All of the ad hoc tribunals share the primary goals of deterrence and retributive justice; the reconstruction and rehabilitation of society are only tangential.<sup>196</sup> The ICTY and ITCR together are considered the international benchmark for war crimes tribunals.

##### *1. The ICTY*

The Security Council created the ICTY in May 1993, with jurisdiction over crimes against humanity, genocide, and violations of Article 3 of the Geneva Conventions committed in the former Yugoslavia.<sup>197</sup>

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<sup>193</sup> Group of Experts Report, supra note 67, ¶ 65, at 20.

<sup>194</sup> Schabas, supra note 14, at 288–89.

<sup>195</sup> Ratner & Abrams, supra note 163, at 243–47.

<sup>196</sup> Diane F. Orentlicher, Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime, 100 *Yale L.J.* 2537, 2542 (1991).

<sup>197</sup> See S.C. Res. 827, U.N. SCOR, 3217th mtg. at 1, U.N. Doc. S/RES/827 (1993). See also Roman A. Kolodkin, An Ad Hoc International Tribunal for the Prosecution of Serious Violations of International Humanitarian Law in the Former Yugoslavia, in *The Prosecution of International Crimes*, 165, 165–66 (Roger S. Clark & Madeleine Sann eds., 1996) (analyzing the legal aspects of prosecution in the ICTY); Orentlicher, supra note 180, at 708 (suggesting that the Security Council intended to “broadcast a global message: Those *anywhere* who might in the future contemplate crimes against

The progression of events resulting in the establishment of the ICTY mirrors the progression of events in Cambodia and serves as the international template for the establishment of an ad hoc tribunal.<sup>198</sup> The General Assembly passed a series of resolutions including resolutions calling on states to collect and present the Security Council with information regarding the violations in the former Yugoslavia;<sup>199</sup> authorizing and deploying a commission of experts;<sup>200</sup> passing a mandate to create a tribunal;<sup>201</sup> and establishing the tribunal itself.<sup>202</sup>

Structurally, the ICTY is organized to ensure maximum independence and impartiality. There are sixteen members of the Tribunal, elected by the General Assembly, with no more than one judge from any single country. Six judges are assigned to two three-judge chambers, and five judges are assigned to an appeals chamber.<sup>203</sup> The ICTY consists of three branches: (1) the office of the prosecutor; (2) the judicial chambers; and (3) the Registry, which “administers services to the court” and protects witnesses.<sup>204</sup>

Perhaps the most critical feature of the ICTY is that the office of the prosecutor is completely independent, answering to no one (not even the Security Council), limited only by the requirement that there be “reasonable grounds for believing that a subject has committed a crime.”<sup>205</sup> The ICTY differs from the Nuremberg trials

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the human condition should think again.”); Patricia M. Wald, *The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-To-Day Dilemmas of an International Court*, 5 Wash. U. J.L. & Pol’y 87 (2001) (discussing the ICTY from a firsthand perspective).

<sup>198</sup> For a specific review of both the actions during the conflict in the former Yugoslavia and the subsequent political struggle for the establishment of a tribunal, see Ball, *supra* note 7, at 121–54.

<sup>199</sup> S.C. Res. 771, U.N. SCOR, 3106th mtg. at 1–2, U.N. Doc. S/RES/771 (1992).

<sup>200</sup> S.C. Res. 780, U.N. SCOR, 3119th mtg. at 1–2, U.N. Doc. S/RES/780 (1992). For Commission Chair M. Cherif Bassiouni’s summary of the Commission’s findings, see M. Cherif Bassiouni, *The Commission of Experts Established Pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia*, in *The Prosecution of International Crimes*, *supra* note 197, at 61, 61.

<sup>201</sup> S.C. Res. 808, U.N. SCOR, 3175th mtg. at 1–2, U.N. Doc. S/RES/808 (1993).

<sup>202</sup> S.C. Res. 827, U.N. SCOR, 3217th mtg. at 1–3, U.N. Doc. S/RES/827 (1993); see also Nagan, *supra* note 145, at 154; Orentlicher, *supra* note 180, at 709.

<sup>203</sup> ICTY Statute, *supra* note 166, art. 12, at 40.

<sup>204</sup> Wald, *supra* note 197, at 88.

<sup>205</sup> *Id.* at 100 (quoting ICTY Rule of Procedure and Evidence 47, U.N. Doc. IT/32 (1994)).

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insofar as it prohibits trials in absentia and allows defendants to choose not to testify.<sup>206</sup>

## 2. *The ICTR*

As a response to the deaths of between 500,000 and 1,000,000 Rwandans in just three months, the Security Council established the ICTR in November 1994 and charged it with jurisdiction over both crimes against humanity and genocide.<sup>207</sup> The progression of events resulting in the creation of the ICTR is even more similar to those in Cambodia.

The chain of events began with a request by the Rwandan government for international intervention.<sup>208</sup> In early 1994, the General Assembly empowered a Commission of Experts, which ultimately recommended the creation of an international tribunal. In November 1994, the U.N. adopted Resolution 955 creating the ICTR.<sup>209</sup> Resolution 955 limited the jurisdiction of the tribunals both temporally and with regard to subject matter, granting power for the prosecution of crimes of genocide, crimes against humanity, and violations of Article 3 common to the Geneva Conventions and Protocol II committed in 1994.<sup>210</sup> The major jurisdictional difference, as compared to the ICTY, is that the ICTR split jurisdiction with Rwandan national courts. The ICTR focused on high profile defendants while allowing Rwandan domestic courts to prosecute the lesser actors and offenses. In other words, while the ICTR had primacy over national courts, domestic courts maintained limited authority.<sup>211</sup>

The structure of the ICTR is almost identical to that of the ICTY, yet the ICTR judges have great flexibility in creating the

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<sup>206</sup> See *id.* at 98.

<sup>207</sup> Christina M. Carroll, *An Assessment of the Role and Effectiveness of the International Criminal Tribunal for Rwanda and the Rwandan National Justice System in Dealing with the Mass Atrocities of 1994*, 18 *B.U. Int'l L.J.* 163, 164 (2000); see also Payam Akhavan, *The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment*, 90 *Am. J. Int'l L.* 501, 501 (1996); Ball, *supra* note 7, at 155–87 (addressing the efficacy of international attempts to counter human rights violations).

<sup>208</sup> See Ball, *supra* note 7, at 171.

<sup>209</sup> S.C. Res. 955, U.N. SCOR, 3453d mtg. at 1–3, U.N. Doc. S/RES/955 (1994).

<sup>210</sup> ICTR Statute, *supra* note 167, arts. 2–4, at 3–5; Carroll, *supra* note 207, at 174.

<sup>211</sup> ICTR Statute, *supra* note 167, art. 8, at 6.

ICTR's own rules of evidence and procedure, independent of the ICTY.<sup>212</sup> Mirroring the ICTY, the ICTR has two three-judge trial chambers, an office of the prosecutor, and a Registry. Both the office of the prosecutor and the appeals chamber, however, are shared with the ICTY.<sup>213</sup> This serves two distinct purposes: (1) conservation of resources and (2) consistency in the interpretation of contentious and unsettled issues of international law. This highlights the need for qualified judges to adjudicate the prosecution of Cambodian war crimes in order to ensure conformity with international jurisprudence.

Two issues related to the establishment of the ICTR have implications for the negotiations of a Khmer Rouge tribunal: (1) the preference for an international tribunal and (2) the decreasing support of the Rwandan government for the tribunal. An international tribunal in Rwanda was initially performed for several reasons. First, the Rwandan justice system was in shambles after civil unrest and lacked the human, physical, and financial resources to deal with perpetrators.<sup>214</sup> Second, the 1994 U.N. Commission of Experts was confident that objectivity and independence required that the ICTR have primacy over high level crimes.<sup>215</sup> Third, the international community furthered the Nuremberg principle that the U.N. should address crimes that affect the international community *qua* international community.<sup>216</sup> Lastly, the ICTR, as well as the ICTY, aimed to "deter future international humanitarian law violations by sending the message" that the international community would prosecute violators to the fullest extent.<sup>217</sup>

Like Cambodia, the experience in Rwanda initially sought international aid in the tribunal and then regretted its cessation of sovereignty. The Rwandan government actually voted against the tribunal ultimately established by the U.N., citing issues with

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<sup>212</sup> *Id.* art. 14, at 9.

<sup>213</sup> *Id.* arts. 10–12, 15, at 7–9.

<sup>214</sup> Carroll, *supra* note 207, at 172; Amnesty Int'l, *Rwanda: Unfair Trials: Justice Denied*, AI Index AFR 47/08/97, at <http://www.web.amnesty.org/ai.nsf/index/AFR470081997> (Apr. 8, 1997) (on file with the Virginia Law Review Association).

<sup>215</sup> ICTR Statute, *supra* note 167, art. 8, at 6.

<sup>216</sup> See Carroll, *supra* note 207, at 173.

<sup>217</sup> *Id.*

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temporal jurisdiction, lack of control, extradition, and available penalties.<sup>218</sup>

### *3. The ICTY and ICTR's Collective Significance*

Considered together, the ICTY and ICTR represent the benchmark for the international community's approach to prosecuting both genocide and crimes against humanity.<sup>219</sup> The tribunals represent two distinct yet converging perspectives for international involvement in the domestic affairs of human rights violators: a moral perspective, emerging from collective guilt for inaction, and a legal perspective, suggesting that the most serious violations of international law should be subject to the jurisdiction of an international criminal tribunal.<sup>220</sup> Both tribunals place great importance on the international nature of not only the committed atrocities, but also the threat of future atrocities.

Both tribunals were established under Chapter VII of the U.N. Charter as necessary enforcement instruments for the exercise of the Security Council's power to maintain or restore international peace and security.<sup>221</sup> Importantly, a finding of an international threat is required in order to invoke the power to create tribunals—a possible barrier to the U.N. creation of an ad hoc tribunal for the prosecution of the Khmer Rouge. Pursuant to Article 39 of Chapter VII, the Security Council is responsible for determining the existence of any international threats to peace and security.<sup>222</sup> Therefore, while the requirement of such a finding for the establishment of a tribunal might be difficult to justify from a public relations perspective, it is not a significant legal obstacle. This is due to the fact that the Security Council controls the power to “find”

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<sup>218</sup> Id. at 175–78; Cissé, *supra* note 61, at 107–08; Susan W. Tiefenbrun, *The Paradox of International Adjudication: Developments in the International Criminal Tribunals for the Former Yugoslavia and Rwanda, the World Court, and the International Criminal Court*, 25 N.C. J. Int'l L. & Com. Reg. 551, 566–69 (2000).

<sup>219</sup> For an argument that the two ad hoc tribunals are failures, however, see David S. Bloch & Elon Weinstein, *Velvet Glove and Iron Fist: A New Paradigm for the Permanent War Crimes Court*, 22 *Hastings Int'l & Comp. L. Rev.* 1 (1998).

<sup>220</sup> Cissé, *supra* note 61, at 105. For a general overview of the goals and aims of the ad hoc tribunals, see M. Cherif Bassiouni et al., *War Crimes Tribunals: The Record and the Prospects: Conference Convocation*, 13 *Am. U. Int'l L. Rev.* 1383 (1998).

<sup>221</sup> Cissé, *supra* note 61, at 106.

<sup>222</sup> Id.

the existence of an international threat and thus determine the fate of the tribunal.

Throughout the creation and operation of the tribunals, the U.N. has maintained that the international community, in addition to the victims, should benefit from the tribunals. Professor Diane F. Orntlicher states, “[W]e wanted to find a significant way to recognize that the Tribunals . . . are in a meaningful—but surely elusive—sense *our* Tribunals . . . created . . . to seek justice, not only on behalf of the survivors of ‘ethnic cleansing’ in Bosnia and genocide in Rwanda, but also on *our* behalf.”<sup>223</sup>

#### 4. *The Recent Proliferation of Mixed Tribunals*

The experiences of Sierra Leone and East Timor also help frame the debate over the pending Cambodia tribunal. On August 10, 2000, the Security Council received a request from the government of Sierra Leone for assistance with the establishment of an independent court.<sup>224</sup> The Security Council authorized negotiations with Sierra Leone,<sup>225</sup> which resulted in the creation of the Sierra Leone Special Court, a tribunal established by multilateral treaty, rather than Chapter VII, with mixed jurisdiction and composition.<sup>226</sup> “Like the ICTY and the ICTR, however, the Special Court [has] concurrent jurisdiction with and primacy over domestic courts . . . .”<sup>227</sup>

The composition of the Special Court, seated in Sierra Leone, is divided into one three-judge trial chamber and one five-judge appeals chamber. Sierra Leone appoints one judge to each chamber and the U.N. appoints the remaining judges.<sup>228</sup> The office of the prosecutor is charged with the responsibility to protect the due process rights of the defendants, “including a fair and public hearing[,] . . . the presumption of innocence, the right against self-incrimination, the right to representation, and the right to be present throughout the proceedings.”<sup>229</sup>

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<sup>223</sup> Bassiouni et al., *supra* note 220, at 1384.

<sup>224</sup> Daryl A. Mundis, *New Mechanisms for the Enforcement of International Humanitarian Law*, 95 *Am. J. Int'l L.* 934, 935 (2001).

<sup>225</sup> S.C. Res. 1315, U.N. SCOR, 4186th mtg. at 2, U.N. Doc. S/RES/1315 (2000).

<sup>226</sup> Mundis, *supra* note 224, at 935–36.

<sup>227</sup> *Id.* at 936.

<sup>228</sup> *Id.* at 937–38.

<sup>229</sup> *Id.* at 938.



International control over mixed tribunals is perhaps most evident in the U.N.'s involvement in East Timor. In addition to establishing a traditional government,<sup>230</sup> the U.N. in 2000 established a mixed tribunal with foreign control. The United Nations Transitional Administration in East Timor has jurisdiction identical to the ICTY, with emphasis on the "serious crimes" of war crimes, crimes against humanity, and genocide.<sup>231</sup> International law norms, customs, and treaties control with respect to these international crimes.<sup>232</sup> With respect to all other legal matters except jurisdiction, East Timorese law applies (unless in conflict with customary international law, in which case international law governs).<sup>233</sup> The mixed tribunals have special trial chambers, each with two international judges and one East Timorese judge, and a special appellate court of three international judges and two East Timorese judges.<sup>234</sup> Thus, the tribunal is primarily international in nature.

#### IV. IDENTIFYING THE SHORTCOMINGS AND RISKS OF THE MARCH AGREEMENT

Professor José Zalaquett noted, "A policy to deal with past human rights abuses should have two overall objectives: Preventing the recurrence of such abuses and, to the extent possible, repairing the damage they have caused."<sup>235</sup> In other words, both retributive justice and rehabilitation are necessary aims.

This Part addresses the shortcomings and failures of the March Agreement in relation to those two objectives, in light of international standards of justice, the best interests of the Cambodian people, and the needs of the international community. The March Agreement will fail to accomplish retribution or rehabilitation because of the lack of qualified, competent judges, the lack of respect for a culture of law, and the crippling influence of the Cambodian

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<sup>230</sup> Id. at 942.

<sup>231</sup> See Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 *Am. J. Int'l L.* 295, 298 (2003).

<sup>232</sup> See Mundis, *supra* note 224, at 943.

<sup>233</sup> See *id.*

<sup>234</sup> Id.

<sup>235</sup> José Zalaquett, *Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations*, 43 *Hastings L.J.* 1425, 1430 (1992).

government. In the process of describing the weaknesses of the March Agreement, this Part also highlights the comparative benefits of an ad hoc international tribunal.

*A. Lack of Competent Judges and Established Judicial Infrastructure*

One reason why the March Agreement fails to meet international standards of justice, and threatens the aforementioned goals, is lack of a competent, qualified judiciary. This is particularly problematic because the agreed upon tribunal will have a majority of Cambodian judges at both the Trial Chamber and Supreme Court Chamber levels.<sup>236</sup> Moreover, the March Agreement mandates that the composition of the Chambers take into account “the experience of the judges in . . . international law, including international humanitarian law and human rights law.”<sup>237</sup> It remains a mystery whether Cambodia will find such qualified domestic judges. These reservations have been expressed at the highest levels of the U.N., including the Secretary-General’s official report on the March Agreement.<sup>238</sup> Secretary-General Annan candidly admitted, “There still remains doubt . . . regarding the credibility of the Extraordinary Chambers, given the precarious state of the judiciary in Cambodia.”<sup>239</sup>

The physical limitations of the Cambodian judicial system largely stem from the decimation of the country’s judiciary following the Khmer Rouge’s attempt to establish a homogenous society without classes and distinctions. Threatened by the prospects of intellectuals with the ability to challenge their rule, the Khmer Rouge either stripped judges and lawyers of their positions or engaged in the systematic murder of those who represented potential opposition.<sup>240</sup> The result is a current lack of qualified personnel to staff any potential judicial chamber.

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<sup>236</sup> See March Agreement, *supra* note 111, art. 3(2)(a)–(b), at 4.

<sup>237</sup> *Id.* art. 3(4), at 4.

<sup>238</sup> Report of the Secretary-General on Khmer Rouge Trials, U.N. GAOR, 57th Sess., Agenda Item 109(b), at 1, U.N. Doc. A/57/769 (2003).

<sup>239</sup> *Id.*

<sup>240</sup> See Timothy Carney, *The Unexpected Victory, in Cambodia, 1975–1978: Rendezvous with Death*, *supra* note 12, at 13, 33.

Confidence in the abilities of judges and lawyers is a second critical element underlying the success of any judicial system. In Cambodia's case, the international community, the Cambodian people, and the Cambodian government all need to have faith that the Cambodian system can fairly and effectively run the Khmer Rouge trials, because the participation of all three parties is necessary to a successful enterprise. The U.N. and various non-governmental organizations have expressed serious doubts about the qualification and competence of the Cambodian judicial system. The Group of Experts and a coalition of legal aid organizations in Cambodia have issued several statements regarding the lack of a stable, established judicial system, and the international community's prior insistence on a majority of international personnel highlighted this concern.<sup>241</sup>

These doubts about the integrity of the Cambodian judicial system, therefore, present an immediate obstacle to the March Agreement. In order for any judicial tribunal to maintain credibility and to serve a rehabilitative function, it must have the faith of the Cambodian people. Jaya Ramji, in a study funded by the Cambodian Genocide Program at Yale University, conducted an in-depth interview process with over twenty-five Cambodians who survived the Khmer Rouge regime, and addressed the issue of the judiciary.<sup>242</sup> According to Ramji:

A domestic trial obviously relies on a functioning and impartial judiciary. Cambodia has never seen an impartial and independent judiciary, and most legal experts were murdered by the Khmer. . . . In a striking display of unanimity, every one of the interviewees stated that a trial could not be held in Cambodia because the judiciary is too corrupt and weak.<sup>243</sup>

Without the Cambodian people's belief that the tribunals have fairly reached the correct verdicts, the trials will not help the society close this terrible chapter in its history.

Perhaps the most telling evidence of the Cambodian judicial system's lack of preparedness and competency for such important trials is Hun Sen's prior concession that the domestic courts are ill-

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<sup>241</sup> Tittlemore, *Khmer Rouge Crimes*, supra note 21, at 4.

<sup>242</sup> See Ramji, supra note 76, at 137–38.

<sup>243</sup> *Id.* at 141.

equipped for tribunals. In its June 21, 1997, letter to the U.N. Secretary-General, the Cambodian government admitted that the country lacked the resources and expertise to shoulder this complex litigation and “specifically requested assistance similar to that of the ad hoc tribunals for the former Yugoslavia and Rwanda.”<sup>244</sup>

Even assuming the necessity of a mixed Cambodian tribunal, the inadequacy or lack of independence of Cambodian judges points to the absolute need for a majority of *international* judges. While the March Agreement states that all judges shall be independent from government influence,<sup>245</sup> the Agreement provides no mechanisms to ensure this independence. Rather, history points to an almost inevitable problem of government influence.

The international precedent for hybrid, or mixed, tribunals has been to accommodate the shortcomings of domestic judges by requiring a majority of international judges, as evidenced in both Sierra Leone and East Timor.<sup>246</sup> Thus, the current structure of the Cambodian tribunal fails to mitigate the risks of utilizing Cambodian judges by allowing these judges to exercise stranglehold control over the tribunal’s decisions. The judges not only have the ability to make decisions on the cases before them,<sup>247</sup> but the Cambodian controlled Pre-Trial Chamber also has the final authority to resolve conflicts between Cambodian and international prosecutors and investigators.<sup>248</sup> In all senses, the Cambodian judges have the “tie-breaker.”

The dearth of qualified judges and accompanying lack of faith in the judicial system in Cambodia closely parallels the situation in Rwanda. Similar to the targeted acts of the Khmer Rouge in Cambodia, the Rwandan atrocities were directed, in part, at professional lawyers and judges. “[O]ut of the 800 lawyers and judges of the national and provincial courts, only 40 were alive and in the country after July 1994.”<sup>249</sup> The Rwandan experience presents distinct lessons for attempts to balance the Cambodian desire for national sovereignty and control with the international community’s

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<sup>244</sup> Tittlemore, *Securing Accountability*, supra note 54, at 449.

<sup>245</sup> March Agreement, supra note 111, art. 3(3), at 4.

<sup>246</sup> See Dickinson, supra note 231, at 299–300.

<sup>247</sup> See March Agreement, supra note 111, art. 4, at 5.

<sup>248</sup> Id. art. 7(1)–(2), at 7.

<sup>249</sup> Carroll, supra note 207, at 172.

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need to ensure careful adjudication of contentious international law issues.

The international community did not trust the Rwandan judges with the responsibility of navigating issues of international law<sup>250</sup>— a choice which proved to be wise. The Committee of Experts for Rwanda acknowledged a lack of competent judges, and sought the division of jurisdiction as the appropriate remedy. The U.N. assigned the ICTR jurisdiction over charges of crimes against humanity and genocide alleged against the elite leaders, while assigning lesser crimes and offenses to the Rwandan national courts for adjudication under domestic law.<sup>251</sup> This division was intended to allow the U.N. control over issues of international law, while providing Rwandan courts the opportunity to gain credibility and judicial experience.<sup>252</sup>

Despite the division of jurisdiction, the Rwandan national courts still were unable to shoulder the responsibility of protecting the due process rights of the defendants. According to Christina M. Carroll:

The lack of defense counsel, well-trained judges, and other protections has led to violations of international standards of due process and Rwandan law during trials. Over 2,500 genocide cases have been tried since 1996, many of which were unfair according to international standards and Rwandan law. In many cases, witnesses, especially for the defense, were threatened and did not testify at trials. Some of the first trials involved multiple defendants . . . and lasted only a few hours.<sup>253</sup>

Given the lasting precedential effects of each human rights tribunal, the international community cannot trust unqualified judges and suspect legal systems with the adjudication of international law issues. As the Rwanda experience illustrates, the only viable choice is to insist on exclusive international control and jurisdiction over all international law issues involved in the atrocities.

This approach would have been better in Rwanda for several reasons. First, the only proceedings held would have been those

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<sup>250</sup> ICTR Statute, *supra* note 167, art. 8, at 5.

<sup>251</sup> *Id.* art. 8, at 1.

<sup>252</sup> See *id.*

<sup>253</sup> Carroll, *supra* note 207, at 188–89 (citations omitted).

governed and maintained by the international community, assuring that international standards of justice would be upheld. Second, despite a division of the jurisdiction between the ICTR and the national courts, the relative success or failure of either component proceeding necessarily impacted the public's overall perception of the handling of the atrocities. Removing the Rwandan court component would have meant that the credibility of the adjudications would have turned on one variable instead of two. Third, the Rwandan courts could focus exclusively on the interpretation of domestic law, freeing themselves from the responsibility of addressing issues derisive of civil stability, and building a history of credibility regarding the application and enforcement of national law. Fourth, the domestic courts would be able to observe the international tribunal and learn from the procedures and interpretation of law. Ultimately, a gradual return of the national courts would have provided the Rwandan people with the long-term benefits of a functioning, just legal system.

The lessons of Rwanda foreshadow the severe risks both for the Cambodian people and the international community should a majority of domestic judges on a mixed tribunal be entrusted with the responsibility of addressing complex international and human rights law issues. In addition, this argument extends to any individual Cambodian judge, notwithstanding the composition of the given tribunal.

*B. Lack of a Culture of Respect for the Judicial System and the Rule of Law*

In addition to the lack of qualified judges and a competent legal system, Cambodia also lacks a culture of respect for the judicial system and the rule of law. Such a culture of respect is necessary in order for a judicial system to function, be credible, and generate enforceable verdicts. Over the past ten years, as Hun Sen's government has solidified power, his government has demonstrated a continued and unequivocal lack of respect for the law. This was the conclusion reached by the Group of Experts when they stated that Cambodia "still lacks a culture of respect for an impartial criminal justice system."<sup>254</sup> More importantly, the U.N. still recognizes this

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<sup>254</sup> Group of Experts Report, *supra* note 67, ¶ 129, at 37.

reality. On the same day that the General Assembly passed a resolution to resume negotiations with Cambodia regarding a tribunal, it adopted another resolution concerning human rights abuses in Cambodia, “not[ing] with concern the continued problems related to the rule of law and the functioning of the judiciary resulting from, inter alia, corruption and interference by the executive.”<sup>255</sup>

Cambodia today is characterized by an instable and ineffective judicial system and a lack of respect for law in general. For example, in June 1997 the National Assembly had not met in over three months, despite a public outcry for the redress of political and social instability in the nation.<sup>256</sup> Moreover, President Hun Sen emphasized the upcoming importance of a Constitutional Court, which not only had not yet been created, but could not be appointed without the approval of the Supreme Council of the Magistracy—which also had not yet been created.<sup>257</sup> The importance of these courts and councils should not be trivialized. The Supreme Council of the Magistracy is the legal body charged with the “constitutional responsibility for ensuring judicial independence,” and the Constitutional Council is the legal body empowered with the authority to decide questions of constitutionality.<sup>258</sup> The U.N. Secretary-General’s Report on the Situation of Human Rights in Cambodia stated: “The lack of a Constitutional Council means that there is no legal forum to determine the constitutionality of various legislative enactments, including any election law or political party law. This seriously undermines both the reality and the appearance of the rule of law in Cambodia.”<sup>259</sup> The court system has not only become a mockery of justice, but also a symbol of the unfulfilled promises for the Cambodian people.

Perhaps more relevant for purposes of this discussion is the fact that, despite appealing to the international community for financial and political aid, the Sen government consistently prioritizes its

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<sup>255</sup> Situation of Human Rights in Cambodia, U.N. GAOR, 57th Sess., Agenda Item 109(b), at 2, U.N. Doc. A/RES/57/225 (2003) (emphasis omitted).

<sup>256</sup> See Ramji, *supra* note 76, at 147.

<sup>257</sup> *Id.*

<sup>258</sup> Amnesty Int’l, Kingdom of Cambodia: Human Rights at Stake, AI Index: ASA 23/04/98, at 3–4 (Mar. 1998), available at <http://web.amnesty.org/library/Index/ENGASA230041998?open&of=ENG-KHM>.

<sup>259</sup> Report of the Secretary-General: Situation of Human Rights in Cambodia, U.N. GAOR, 52d Sess., Agenda Item 112(b), at 18, U.N. Doc. A/52/489 (1997).

own power and authority over respect for the international community and the needs of the Cambodian people. In 1993, the U.N. invested over three billion dollars to support the establishment of a democratic infrastructure in Cambodia and to sponsor the country's first free elections, yet Prime Minister Hun Sen and his government defied the election results and wrestled back control through a violent coup.<sup>260</sup> This problem repeated itself during the July 26, 1998, election, in which Hun Sen, in an effort to maintain power, used threats of physical violence and economic pressure to ensure reelection.<sup>261</sup>

The illegitimate trials of Pol Pot and Ieng Sary in 1979 are, for the purposes of this inquiry, perhaps the most direct evidence of the lack of respect for a culture of law in Cambodia. This Note already has addressed the national trials of Pol Pot and Ieng Sary,<sup>262</sup> yet it is useful to extend this analysis to demonstrate the Cambodian attitude toward the judicial system. First, the Cambodian government had no reservations regarding the establishment of a court structure that failed to heed international laws and norms.<sup>263</sup> Second, the Cambodian government used (or abused) the court system to make a statement regarding conclusions already reached about the defendants, as illustrated in the Decree Law establishing the People's Revolutionary Tribunal.<sup>264</sup>

The 1979 trials can be explained, perhaps even excused, as representing a knee-jerk reaction to a tragic period of Cambodian history, greatly influenced by both the need for swift and immediate justice and the need for the government to assure Cambodians that these atrocities would neither be condoned nor ignored. Twenty-five years later, however, any international or domestic action taken against the Khmer Rouge not only has had time to be care-

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<sup>260</sup> Joseph P. Duggan, *Wishful Thinking on Cambodia*, St. Louis Post-Dispatch, Aug. 18, 1997, at B7; Christine Todd Whitman, *The Election Cambodia Deserves*, Wash. Post, Aug. 8, 2003, at A17.

<sup>261</sup> Seth Mydans, *Cambodians Counting Votes Amid Measured Optimism*, N.Y. Times, July 28, 1998, at A7.

<sup>262</sup> *Supra* Part I.C., pp. 902-96.

<sup>263</sup> Stanton, *supra* note 35, at 142.

<sup>264</sup> See Decree Law No. 1: Establishment of People's Revolutionary Tribunal at Phnom Penh to Try the Pol Pot-Ieng Sary Clique for the Crime of Genocide, in 1979 Trial Documents, *supra* note 18, at 45, 45; see also Schabas, *supra* note 14, at 289 (discussing the convictions of Pol Pot and Ieng Sary in light of the People's Revolutionary Tribunal).



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fully measured, but can draw on the experiences of two largely successful ad hoc international tribunals. Consequently, the tribunal emerging from the international negotiations likely will be the last effort to remedy these past atrocities. Any failure to respect the validity or holdings of the tribunal will shatter any remaining Cambodian confidence in either their country or the international community to protect their human rights.

Another alarming and salient example of the lack of respect for the rule of law is the Cambodian government's continuing human rights violations. From 1996 to 2000, the government engaged in guerilla warfare with several different rebel groups and utilized questionable means of warfare, including a highly publicized government grenade attack on peaceful Khmer Rouge demonstrators on March 30, 1997.<sup>265</sup> Eyewitnesses reported that a group of government soldiers stood close by the demonstration, watched the perpetrators throw the grenades, and allowed the individuals to run away from the demonstration without repercussions.<sup>266</sup> Perhaps best stated by Amnesty International, "[c]ommitments from the Royal Government to investigate the attack and bring those responsible to justice have not resulted in any concrete action . . . [and] this case appears to have been completely—and conveniently—forgotten by the authorities."<sup>267</sup> Cambodia's present refusal to respect its citizens' human rights does not bode well for its courts' abilities to shoulder such monumental proceedings.

The year 2003 at first seemed to signal a favorable shift toward greater respect for the rule of law and democratic ideals, a shift that would be encouraging for the success of a domestic tribunal. In July 2003, Cambodian citizens voted in just their third democratic election in the last decade, and their first since 1998.<sup>268</sup> Unfortunately, the election, though less violent than campaigns in 1993 and 1998, was marred by voter intimidation, vote buying, and registration irregularities.<sup>269</sup> In addition, an explosion was set off outside the headquarters of the opposition party seeking to unseat

<sup>265</sup> Amnesty Int'l, *supra* note 258, at 10–18.

<sup>266</sup> *Id.* at 18.

<sup>267</sup> *Id.*

<sup>268</sup> Despite Bumps, Vote Concludes in Cambodia, *N.Y. Times*, July 28, 2003, at A3.

<sup>269</sup> *Id.* Seth Mydans, U.N. and Cambodia Reach an Accord for Khmer Rouge Trial, *N.Y. Times*, Mar. 18, 2003, at A5; Associated Press and Reuters, Khmer Rouge Trial Deal Agreed, at <http://www.cnn.com/2003/WORLD/asiapcf/southeast/03/17/cambodia.trial/index.html> (Mar. 17, 2003) (on file with the Virginia Law Review Association).

the headquarters of the opposition party seeking to unseat Prime Minister Hun Sen.<sup>270</sup> Former New Jersey Governor and former chair of the Environmental Protection Agency Christine Todd Whitman monitored the election with the International Republican Institute and reported pervasive election irregularities.<sup>271</sup> Whitman reported that, in addition to routine threats and pressure against voters, the government allowed only Hun Sen to have access to radio campaign broadcasting, and exercised de facto control over the purportedly neutral National Election Commission.<sup>272</sup>

Election results were intended to be finalized on August 8, 2003, but the Cambodian People's Party (run by Hun Sen), Funcinpec (run by Prince Norodom Ranariddh), and the Sam Rainsy Party contested the results.<sup>273</sup> Three months after the conclusion of the election, the three parties agreed upon a coalition government, and allowed Prime Minister Hun Sen to retain his head post.<sup>274</sup> Thus, a year promising respect for free elections and democracy, as well as deep-rooted political change, resulted in the maintenance of the status quo. Hun Sen was thus allowed to continue his reign in Cambodia.

### *C. Burdensome Influence of Political and Governmental Elites*

Closely related to the risks associated with a lack of respect for the law is the burdensome influence of the Cambodian government on the Cambodian tribunal and its personnel. While the March Agreement contains rhetoric proclaiming the independence of the judges,<sup>275</sup> investigators,<sup>276</sup> and prosecutors,<sup>277</sup> neither its text nor Cambodia's history provides a guarantee of independence. As was the case with the two previous ad hoc international tribunals, the

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<sup>270</sup> Vote Counting Underway in Cambodia, at <http://www.cnn.com/2003/WORLD/asiapcf/southeast/07/27/cambodia.vote> (Jul. 27, 2003) (on file with the Virginia Law Review Association). Further, "[s]hortly after the explosion, two unexploded grenades were found outside the Royal Palace, home to King Norodom Sihanouk, in the center of Phnom Penh." *Id.*

<sup>271</sup> Whitman, *supra* note 260.

<sup>272</sup> *Id.*

<sup>273</sup> Despite Bumps, Vote Concludes in Cambodia, *supra* note 268.

<sup>274</sup> Cambodia: Coalition Government, *N.Y. Times*, Nov. 6, 2003, at A6.

<sup>275</sup> See March Agreement, *supra* note 111, art. 3(3), at 3.

<sup>276</sup> See *id.* art. 5(3), at 4.

<sup>277</sup> See *id.* art. 6(3), at 5.

independence and impartiality of the courts are critical. There are two distinct dangers: (1) that the judges will be controlled by the Cambodian government; and (2) that the Cambodian government's goals and ambitions will differ greatly from those of the international community.

The international community should question the sincerity of Hun Sen's purported desire to bring the former Khmer Rouge leadership to justice. As discussed above, Cambodia has demonstrated a substantial desire to assert its sovereignty over the international community's involvement.<sup>278</sup> The concern here is that, with this underlying motivation, it is implausible to assume that the Cambodian government would not continue to exert its influence over the proceedings.

The Cambodian government has refused to allow any permutation of a tribunal involving an independent and international prosecutor, like those employed in both the ICTY and ICTR. The March Agreement provides for co-prosecutors, one Cambodian and one international.<sup>279</sup> While seemingly a compromise, the international prosecutor is selected by the Cambodian Supreme Council of the Magistracy from a U.N. Secretary-General list of nominees,<sup>280</sup> and a Pre-Trial Chamber with a majority of Cambodian judges resolves disputes between the co-prosecutors.<sup>281</sup> This functional "veto power" for Cambodia renders the international "co-prosecutor" a mere figurehead and may grant the tribunal false legitimacy.

Two additional elements of the March Agreement illustrate this concern. The first is the Cambodian success in ensuring that the tribunal be seated in Cambodia,<sup>282</sup> which indicates Cambodian reluctance to allow the tribunal to be independent and impartial. The second is the composition of the court, with a majority of Cambodian judges at each level.<sup>283</sup> Proponents of this plan argue that the supermajority requirement<sup>284</sup> is a protection, because an interna-

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<sup>278</sup> See *supra* Part II.

<sup>279</sup> March Agreement, *supra* note 111, art. 6(1), at 5.

<sup>280</sup> *Id.* art. 6(5), at 6.

<sup>281</sup> *Id.* art. 7(2), at 6.

<sup>282</sup> *Id.* art. 14, at 10.

<sup>283</sup> *Id.* art. 3(2), at 3.

<sup>284</sup> *Id.* art. 4(1), at 4.

tional judge would be required for any decision, thus insulating the court from the Cambodian government's influence. This protection is illusory, however, as the structural setup allocates much more power to Cambodian judges.

As an illustration, consider that on the Trial Chamber level four votes are required to render a guilty verdict, as compared with just two votes required to render an acquittal.<sup>285</sup> For the purposes of this illustration, consider the international judges as a unit and the Cambodian judges as a distinct unit. With regard to acquittals, both units have equal block voting power—neither unit requires a “defection” of the other unit in order to achieve the desired voting result. With regard to guilty verdicts, however, the power shifts dramatically to the Cambodian judges. The international judges, if voting in tandem, require the defection of two of the three Cambodian judges; however, the Cambodian judges, if voting in tandem, require the defection of only one international judge. This system allows the Cambodian judges to have a more prominent role in the interpretation of contentious international law issues, and consequently allows the Cambodian government to have a more substantial impact on the proceedings.

Such speculation regarding the influence of the government officials is not without historical precedence. In May 1994, for example, policemen acting on government orders went to the home of the Cambodian Prosecutor, held him at gun point, threatened to kill him, and forced a reversal of a decision to press charges in an unrelated matter.<sup>286</sup> These types of encounters also occurred mid-trial, with policemen interrupting proceedings to threaten judges, prosecutors, and even defendants.<sup>287</sup> Even today, with the international spotlight focused on his behavior, Hun Sen has personally ordered arrests and provided recommendations for verdicts.<sup>288</sup>

Perhaps the most appropriate assessment of the judicial climate in Cambodia comes from the Group of Experts, who interacted

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<sup>285</sup> *Id.*

<sup>286</sup> Amnesty Int'l, Kingdom of Cambodia: Human Rights and the New Government, AI Index: ASA 23/02/95, at 19 (Mar. 14, 1995).

<sup>287</sup> *Id.*

<sup>288</sup> Seth Mydans, U.N. and Cambodia Reach an Accord for Khmer Rouge Trial, N.Y. Times, Mar. 18, 2003, at A5 (“In high-profile political cases, arrests are generally made only on [Hun Sen’s] orders and verdicts are often prescribed in advance.”).

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with the widest array of Cambodians—officials, judges, and citizens alike. Steven R. Ratner noted:

[T]he group basically reasoned that such options were simply too prone to manipulation by the Government of Cambodia and other political forces with an interest in certain outcomes. The level of corruption of Cambodia's courts was so high that the population had justifiably lost confidence in them. Even extensive involvement of foreign personnel—perhaps through a mixed tribunal—would not solve the problem in the group's view, as the Government could exert undue influence during prosecutions. As for a UN-supervised Cambodian court, it would still place too much initiative on the Cambodian Government, which would find ways to stall the process."<sup>289</sup>

Between the Cambodian government's repeated assertions of sovereignty and its history of treating the law and courts as objects of its control, it has become unambiguous that there is little respect for the culture of law.

*D. Critical Omissions and Limitations in The March Agreement*

As aforementioned, the predominant norm in international law is that a domestic tribunal that fails to meet international standards of justice does not preclude the U.N. from establishing an international tribunal.<sup>290</sup> Another set of flawed trials, however, will prove extremely costly, shatter any remaining faith in the Khmer Rouge being brought to justice, and serve only to reopen the Cambodian wounds without redress. Hans Holtuis, reflecting on the ICTY, noted, "[a] criminal process—be it national or international—is . . . largely determined by material and procedural standards which must be met."<sup>291</sup>

The March Agreement certainly takes several strides toward the protection of international due process rights, but it also leaves open several significant holes. This should be considered along with the substantive reasons, suggested by this Note, to doubt the

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<sup>289</sup> See Ratner, *supra* note 23, at 951.

<sup>290</sup> Tittlemore, *Khmer Rouge Crimes*, *supra* note 21, at 5.

<sup>291</sup> Hans Holthuis, *Operational Aspects of Setting Up the International Criminal Court: Building on the Experience of the International Criminal Tribunal for the Former Yugoslavia*, 25 *Fordham Int'l L.J.* 708, 709 (2002).

sincerity of the Cambodian government to effectuate these changes. Some of the compromised changes include provisions for publicly held proceedings<sup>292</sup> and the exclusion of the death penalty,<sup>293</sup> which both are consistent with other international courts.<sup>294</sup>

The first failure of the March Agreement, though, is that it limits due process protections to those “set out in articles 14 and 15 of the International Covenant on Civil and Political Rights.”<sup>295</sup> The Cambodian proposal does not incorporate the important provisions of Article 9 of the ICCPR.<sup>296</sup> This exclusion is uniquely important because it evidences a lack of protection for the pretrial rights of victims, witnesses, defendants, and suspects. Article 12 of the March Agreement mandates that the tribunals follow Cambodian law with respect to procedures—permitting, but not requiring, reference to international law in times of conflict or uncertainty.<sup>297</sup> Therefore, under the March agreement, domestic laws take primacy over international laws and several international norms and customs, other than Articles 14 and 15 of the ICCPR that comprise a significant portion of the protections for defendants, are ignored.

Another significant concern is the limited protection afforded to witnesses.<sup>298</sup> Amnesty International notes:

There is scant provision for victim and witness protection. Amnesty International recommends that these deficiencies are remedied in a subsequent accompanying document detailing the procedures of the Extraordinary Chambers that should provide an effective victim and witness protection program with sufficient resources, built on the extensive experience gained by existing international tribunals. Such a program would need to apply to judges, prosecutors, defense lawyers and others. Victims and witnesses will not come forward to testify without the

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<sup>292</sup> March Agreement, *supra* note 111, art. 12(2), at 9.

<sup>293</sup> *Id.* art. 10, at 8.

<sup>294</sup> Public Statement, Amnesty Int’l, Cambodia: Amnesty International’s Preliminary Views and Concerns About the Draft Agreement for the Establishment of a Khmer Rouge Special Tribunal, AI Index: ASA 23/003/2003, at <http://web.amnesty.org/ai.nsf/print/ASA230032003?OpenDocument> (Mar. 21, 2003) (on file with the Virginia Law Review Association).

<sup>295</sup> *Id.*

<sup>296</sup> See *supra* notes 155–57 and accompanying text.

<sup>297</sup> March Agreement, *supra* note 111, art. 12(1), at 8–9.

<sup>298</sup> *Id.* art. 23, at 14.

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necessary assurances for their safety from international, rather than domestic authorities.<sup>299</sup>

The Cambodian people will be unlikely to testify and participate should the trials fail to reflect international standards of justice. Amnesty International argues, “[i]nternational fair trial standards must not be for negotiation. If the Cambodian people lack confidence in the ability and will of the U.N. to assert its authority to hold trial proceedings which are independent, impartial and fair, according to international standards, they will not cooperate with the trials.”<sup>300</sup> Thus, there is more at stake than simply disappointing the Cambodian people by not providing an adequate remedy.

Holistically, it is clear that the March Agreement fails to guarantee the very baseline protections recognized by the international community. In his report on the March Agreement, Secretary-General Annan noted:

I cannot but recall the reports of my Special Representative for human rights in Cambodia, who has consistently found there to be little respect on the part of the Cambodian courts for the most elementary features of the right to a fair trial. I consequently remain concerned that these important provisions of the draft agreement might not be fully respected by the Extraordinary Chambers and that established international standards of justice, fairness and due process might therefore not be ensured.<sup>301</sup>

This is a frightening admission, particularly considering that it is embedded within a larger plan to move forward with a tribunal.

*E. Two Mutually Exclusive but Equally Detrimental Scenarios*

As was the case with Justice Jackson at Nuremberg, proponents of an ad hoc tribunal must be prepared for, and supportive of, any acquittals rendered, provided that the tribunal operates in an impartial and independent manner according to international stan-

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<sup>299</sup> Public Statement, Amnesty Int’l, *supra* note 294.

<sup>300</sup> Public Statement, Amnesty Int’l, Cambodia: Special Khmer Rouge Tribunals in Cambodia – Justice is Not Served by Diluting International Standards, at <http://web.amnesty.org/library/Index/ENGASA230122002?open&of=ENG-KHM> (Dec. 17, 2002) (on file with the Virginia Law Review Association).

<sup>301</sup> Report of the Secretary-General on Khmer Rouge Trials, *supra* note 238, ¶ 28 (footnote omitted).

dards. Before the ICTY heard its first case, Chief Prosecutor Richard Goldstein warned, "Whether there are convictions or whether there are acquittals will not be the yardstick [by which the ICTY will be measured]. The measure is going to be the fairness of the proceedings."<sup>302</sup> Cambodian dominance of the tribunal, however, could result in either of two dangerous scenarios: the domestic courts will be too harsh or, alternatively, they will be too lenient.

### *1. Domestic Courts Will Be Too Harsh (Vengeful)*

The 1979 Pol Pot trial reveals the risks of a domestic court being overly harsh in trying to resolve issues expediently, rather than with due diligence.<sup>303</sup>

Unequivocally, there needs to be a rigorous defense of the Khmer Rouge in order to give the trials any legitimacy or credibility.<sup>304</sup> First, in order to distinguish the new Cambodian government from the Khmer Rouge, the trials cannot be rubber stamps of predetermined guilt. An inadequate defense would render the tribunal "the same type of kangaroo court used by the Khmer Rouge."<sup>305</sup> An impartial and independent tribunal would distinguish the current government, and its place in the international community, from the Khmer Rouge regime preceding it.

Second, an overly harsh tribunal that does not respect the rights of the defendants would not generate an accurate historical record, which, as Justice Jackson noted at Nuremberg, is of great importance. Thus, an overly harsh tribunal is antithetical to the dual goals of a successful tribunal.

### *2. Domestic Courts Will Be Too Lenient*

While it is certainly a possibility that the Cambodian courts will be too harsh and demonstrate a lack of respect for defendants' due process rights, it is more likely that the Cambodian courts will be too lenient. Leniency is a likely outcome due to Hun Sen's status as

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<sup>302</sup> Chief Prosecutor Richard Goldstone, Address to the Central and East European Law Initiative and Coalition for International Justice (Oct. 2, 1996) (quoted in Mark S. Ellis, Comment, Achieving Justice Before the International War Crimes Tribunal: Challenges for the Defense Counsel, 7 *Duke J. Comp. & Int'l L.* 519, 526 n.37 (1997)).

<sup>303</sup> See supra note 264 and accompanying text.

<sup>304</sup> Bunyanunda, supra note 2, at 1584.

<sup>305</sup> *Id.*



a former Khmer Rouge leader, the Cambodian government's lack of aggressiveness in prosecuting the former leaders of the Khmer Rouge, the Cambodian government's treatment of the former leaders of the Khmer Rouge, including grants of amnesty, and the curious statements made by the former Khmer Rouge regarding the proposed tribunal.

First, the international community and Cambodians alike should be highly skeptical of President Hun Sen's participation because he once belonged to the Khmer Rouge himself.<sup>306</sup> His membership in the party not only raises concerns regarding kinship toward those who might be prosecuted, but also implies that he might still subscribe to some of the Khmer Rouge ideology. Thus, while Hun Sen publicly supports the trial, it is appropriate to be skeptical of his intentions. Even after the announcement of the March Agreement, Professor Steve Heder stated, "[Hun Sen] still may not want a trial. . . . He may not want to be blamed for it not happening, but he still may not want it to happen."<sup>307</sup>

Second, there is a considerable gap between Cambodia's stated intentions regarding the prosecution of the former leaders and its actions in the past. Until 1999, Hun Sen had not arrested any of the former leaders of the Khmer Rouge, and he had granted several former leaders (including Ieng Sary) either de facto or de jure amnesty, claiming it necessary to convince them to give up fighting against the government.<sup>308</sup> As explored above, the Cambodian government originally requested international assistance similar to that provided in Rwanda and the former Yugoslavia, but then immediately resisted the ensuing international involvement.<sup>309</sup> In addition, the Cambodian government rejected the report of the Group of Experts immediately upon its release, rejected no fewer than three U.N. tribunal proposals, accepted and then rejected a compromise tribunal with the United States, and publicly rebuked the involvement of the international community.<sup>310</sup> These actions all indicate the Cambodian government's desire to control the tribunal's proceedings and its proclivity for leniency.

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<sup>306</sup> Ron Moreau, *Asia's New Boss*, Newsweek (Atlantic Ed.), July 21, 1997, at 11.

<sup>307</sup> Mydans, *supra* note 288.

<sup>308</sup> Ratner, *supra* note 23, at 948.

<sup>309</sup> See *supra* Sections II.A–B.

<sup>310</sup> See *id.*

Third, the Cambodian government's treatment of the former Khmer Rouge and Hun Sen's multiple grants of amnesty indicate a government policy of leniency toward the former leaders of the Khmer Rouge. On Christmas Day 1998, Khmer Rouge leaders Khieu Samphan and Nuon Chea returned to Phnom Penh from exile and were granted amnesty by Hun Sen.<sup>311</sup> They were welcomed and taken on a tour of the city, while the Cambodian government covered the entire cost of their trip.<sup>312</sup> Just two months later, in February 1999, "the last holdouts from the Khmer Rouge army laid down their weapons and joined the Cambodian army," without any reprisal for their previous lack of allegiance.<sup>313</sup> In response to international skepticism regarding the favorable treatment of the former leaders of the Khmer Rouge, Hun Sen indicated that it was important to demonstrate that the Khmer Rouge threat was over. He asked his fellow Cambodians to "dig a hole and bury the past."<sup>314</sup>

The most threatening question surrounding the grants of amnesty is whether they will preclude the mixed Cambodian tribunal from prosecuting these individuals under international law. The majority of the immunities granted have been to the most prominently involved Khmer Rouge leaders, which deals a severe blow to the prospects of generating a true record of the events during the Khmer Rouge regime.

The March Agreement addresses amnesties in a circuitous manner. It first states that the Cambodian government pledges not to grant any additional amnesties after the establishment of the tribunal.<sup>315</sup> It then states, however, that the Extraordinary Chambers will have the exclusive authority to determine the scope of Ieng Sary's pardon (though without naming him directly).<sup>316</sup> Thus, the March Agreement fails to indicate whether the Extraordinary Chambers will hold that prior amnesties preclude prosecution before the mixed tribunal—yet it unambiguously prevents the international community from so deciding. It is discouraging that the March

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<sup>311</sup> Susan Berfield, *Forget the Killing Fields?*, *Asiaweek*, Jan. 8, 1999, at 30.

<sup>312</sup> *Id.*

<sup>313</sup> Ramji, *supra* note 76, at 139.

<sup>314</sup> Berfield, *supra* note 311.

<sup>315</sup> March Agreement, *supra* note 111, art. 11(1), at 8.

<sup>316</sup> *Id.* art. 11(2), at 8.

Agreement failed to include a guarantee that prior grants of amnesty would not preclude international prosecution. It would be consistent for the Cambodian Tribunal to allow such prosecution, as exemplified by the Sierra Leone mixed tribunal's explicit rejection of prior amnesties as a bar to prosecution.<sup>317</sup>

Fourth, the public comments made by the former Khmer Rouge regarding Sen's government and a potential mixed tribunal indicate potential collusion between the former leaders and Hun Sen. The former leaders of the Khmer Rouge have publicly supported the establishment of Sen's tribunal, but simultaneously asked the public to forget the past.<sup>318</sup> For example, when recently asked how many Cambodians died during the Khmer Rouge regime, Nuon Chea replied, "Please leave this to history. This is an old story."<sup>319</sup>

These comments are particularly alarming when considered with the public statements made by Ieng Sary regarding the establishment of a tribunal. Ieng Sary, granted amnesty in 1996, signed a document indicating that he "supports resolutely the [Royal Government's] idea and stance on defending national sovereignty by [prioritizing] the existing national tribunal in collaboration with foreign judges and prosecutors whose number is lesser than those from Cambodia."<sup>320</sup> This support immediately raises red flags,<sup>321</sup> particularly because Sary qualifies his support with the caveat that the tribunal must have a majority of Cambodian personnel—which the March Agreement ultimately stipulated. The symbiotic relationship between Sen's leadership and the support of the former leaders of the Khmer Rouge compels the conclusion that proceedings in the tribunal are likely to be quite lenient. As Professor Heder noted, "From the perspective of truth and justice, a de facto show trial of a few senior political figures would almost be a worst case scenario."<sup>322</sup>

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<sup>317</sup> Donovan, *supra* note 110, at 569.

<sup>318</sup> Orentlicher, *supra* note 180, at 707.

<sup>319</sup> Bunyanunda, *supra* note 2, at 1612 n.129.

<sup>320</sup> Etcheson, *supra* note 73, at 516 (first alteration in original) (quoting Press Release, Democratic National Union Movement, Statement of the Democratic National Union Movement on the so-called "U.N. Plan" (Sept. 2, 1999)).

<sup>321</sup> *Id.* at 516–17.

<sup>322</sup> Seth Mydans, Flawed Khmer Rouge Trial Better than None, *N.Y. Times*, Apr. 16, 2003, at A4.

*F. Interpretation of International Law and Subsequent Effects on the ICC*

This Note has argued that the domestic controlled, mixed tribunal will likely fail to be impartial and independent, fail to conform to international standards of justice, and fail to have a majority of competent, qualified judges well versed in international law. This latter concern carries with it unique risks for both the modern interpretation of international law, as well as the precedent established for the ICC.<sup>323</sup> As discussed above, there are several contentious issues of international law, specifically human rights law, that the Cambodian tribunal would need to resolve. These include, but are not limited to: whether a “nexus to armed conflict” is required for a finding of crimes against humanity, the appropriate meaning of “state action” for crimes against humanity, the effect of command orders on a defense, and the effect of a prior domestic grant of amnesty on an international prosecution.<sup>324</sup> The ICTY and the ICTR have made substantial progress in resolving certain principles of international criminal law, particularly the components of crimes against humanity, the defense of duress, and the effect of superior orders.<sup>325</sup> It would be irresponsible for the international community to establish a tribunal that could reverse this progress.

In addition to the fear that Cambodian judges would not fairly and accurately adjudicate matters of international law, the proceedings in Cambodia will greatly affect the precedent applied by the ICC. The movement to establish an international criminal court began in the wake of World War II, and gained support after the success of the Nuremberg and Tokyo War Crimes Tribunals.<sup>326</sup> The proponents for the establishment of the ICC gained momentum with the ad hoc tribunals in Rwanda and the former Yugoslavia, and more recently with the passage of the Rome Statute.

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<sup>323</sup> See Ball, *supra* note 7, at 188–216; David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 *Cornell Int'l L.J.* 47 (2002).

<sup>324</sup> See *supra* Sections III.B–C.

<sup>325</sup> Theodor Meron, *War Crimes Law Comes of Age*, 92 *Am. J. Int'l L.* 462, 465 (1998).

<sup>326</sup> See Symposium, *The International Criminal Court: Consensus and Debate on the International Adjudication of Genocide, Crimes Against Humanity, War Crimes, and Aggression*, 32 *Cornell Int'l L.J.* 431, 431 (1999).

The ICC will have jurisdiction over genocide, crimes against humanity, and serious war crimes,<sup>327</sup> meaning that it will rely on the procedures, holdings, and lessons of the ICTY, the ICTR, and potentially a tribunal established for Cambodia.<sup>328</sup> Professor Theodor Meron observes, “the rules of procedure and evidence each Tribunal has adopted now form the vital core of an international code of criminal procedure and evidence that will doubtless have an important impact on the rules of the future international criminal court.”<sup>329</sup> It is important to note that the Rome Statute itself places a heavy emphasis on the qualifications of its judges, requiring competence not only in international criminal and humanitarian law, but also in human rights law.<sup>330</sup>

The U.N., in addressing the crimes under the ICTY and ICTR’s jurisdiction, established a safety valve for the courts by giving them primacy jurisdiction over national courts. Both the ICTY and ICTR allow for the tribunals, at any stage of the proceeding, to “request” a national court to defer to its competence. The national courts, pursuant to the statutes, are then required to comply with the request.<sup>331</sup> Such a safety valve is noticeably absent in the March Agreement. The international community simply cannot establish a forum that is likely to hinder the development of international law, and its interpretation therein.

### *G. Pragmatic Concerns Regarding Voluntary Contributions*

Another concern regarding the March Agreement for a Cambodian war crimes tribunal is the method of financing the tribunal.

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<sup>327</sup> Rome Statute, *supra* note 168, arts. 5–8.

<sup>328</sup> It is important to note that the Rome Statute and the ICC do not preclude the establishment of ad hoc tribunals like those in Rwanda, former Yugoslavia, and potentially Cambodia. See *id.* art. 10.

<sup>329</sup> Meron, *supra* note 325, at 463. For a complete list of the ICTY Rules of Evidence and Procedure, see International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991: Rules of Procedure and Evidence, U.N. Doc. IT/32 (1994), amended by U.N. Doc. IT/32/Rev.1 (1994), U.N. Doc. IT/32/Rev.2 (1994), U.N. Doc. IT/32/Rev.3 (1995), *reprinted in* The Prosecution of International Crimes, *supra* note 197, at 439 app. C.

<sup>330</sup> Meron, *supra* note 325, at 468.

<sup>331</sup> Christian Tomuschat, International Criminal Prosecution: The Precedent of Nuremberg Confirmed, *in* The Prosecution of International Crimes, *supra* 197, at 17, 24.

The March Agreement provides that the Cambodian government will be responsible only for the salaries of Cambodian judges and personnel<sup>332</sup> and that the U.N. will be responsible for all other salaries and costs of establishing the tribunal.<sup>333</sup> U.N. Secretary-General Annan, whose administration has spanned several of the aforementioned tribunals, estimates that the Cambodian tribunal will carry a budget of more than nineteen million dollars.<sup>334</sup> This estimate raises the obvious concern that a faulty tribunal would be an inefficient expenditure of resources, especially given Hun Sen's disregard for the U.N.'s contributions to the 1993 elections, the results of which he completely ignored.<sup>335</sup>

In addition, the U.N. financing plan itself is highly controversial. The U.N. Social, Humanitarian and Cultural Committee recently decided to finance the tribunal through voluntary contributions by its member nations.<sup>336</sup> Secretary-General Annan, among other opponents of the financing plan, argues that it is inappropriate to make the execution of justice for the Cambodian people directly dependent on the generosity of U.N. member states.<sup>337</sup> This is a particularly salient concern, given the international community's historical apathy toward the plight of the Cambodian people.

#### V. CONSIDERING OTHER ALTERNATIVES

To this point, this Note has explored the relative merits of an ad hoc international tribunal for the prosecution of the Khmer Rouge, as compared to the risks and potential failures of a domestic or mixed Cambodian tribunal. This Part addresses the implied question of whether other alternatives exist for the international community should an ad hoc international tribunal prove to be unfeasible. This Part argues that complete withdrawal of U.N. involvement is preferable to the alternatives of either a compromised tribunal or a truth commission, the most frequently suggested alternative.

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<sup>332</sup> March Agreement, *supra* note 111, art. 15, at 9.

<sup>333</sup> See *id.* art. 16, at 9.

<sup>334</sup> Cambodia: Voluntary Funds for Khmer Rouge Trials, *N.Y. Times*, May 3, 2003, at A7.

<sup>335</sup> See *supra* note 260 and accompanying text.

<sup>336</sup> Cambodia: Voluntary Funds for Khmer Rouge Trials, *supra* note 334.

<sup>337</sup> See *id.*

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*A. Unfeasible Alternatives*

Several alternatives to an international or domestic tribunal have been presented regarding the prosecution of the former leaders of the Khmer Rouge. The first alternative is a military court, which would address any violations of laws of military engagement during a time of armed conflict.<sup>338</sup> The scope and jurisdiction of a military court, however, would be severely limited. Thus, it is unlikely to either create a detailed record of the Khmer Rouge regime or further the goal of deterrence. Amnesty International correctly notes that “[a] military court, which only has jurisdiction over breaches of military discipline, is not the competent forum for this trial. This is not a case of a breach of military discipline, it is about crimes against humanity.”<sup>339</sup>

The second alternative is for a state to exercise universal jurisdiction and try the former Khmer Rouge leaders in its domestic courts. Customary international law permits states, provided that they have coincident domestic laws, to exercise universal jurisdiction over crimes involving genocide, crimes against humanity, and serious war crimes.<sup>340</sup> Universal jurisdiction is exercised “when a state prosecutes crimes committed outside its borders, without regard to the nationality of the perpetrator or victim, the location of the crime or other specific link to the prosecuting state.”<sup>341</sup> After breakdowns in negotiations between the U.N. and Cambodia, the United States attempted to convince Canada, Denmark, Israel, and Spain to try Pol Pot, but was turned down without exception.<sup>342</sup> The United States has no laws granting its courts jurisdiction over crimes against humanity, and thus could not conduct its own trials.<sup>343</sup>

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<sup>338</sup> Amnesty Int’l, Cambodia: Time to Judge Past Atrocities, AI Index ASA 23/04/99, at <http://web.amnesty.org/library/Index/ENGASA230041999?open&of=ENG-KHM> (Mar. 8, 1999) (on file with the Virginia Law Review Association).

<sup>339</sup> *Id.*

<sup>340</sup> See Douglass Cassel, Empowering United States Courts to Hear Crimes Within the Jurisdiction of the International Criminal Court, 35 *New Eng. L. Rev.* 421, 426–28 (2001).

<sup>341</sup> *Id.* at 427–28.

<sup>342</sup> William A. Schabas, Follow Up to Rome: Preparing for Entry Into Force of the International Criminal Court Statute, 20 *Hum. Rts. L.J.* 157, 160 (1999).

<sup>343</sup> *Id.*

The third proposed alternative would be to wait and try the former leaders of the Khmer Rouge before the newly formed ICC. There is an absolute bar to this proposal, however, as Article 11 of the Rome Statute stipulates that the ICC will have jurisdiction only with respect to crimes committed after the treaty comes into force.<sup>344</sup>

*B. Consideration of the Arguments in Favor of a Truth Commission*

The most commonly suggested alternative to conventional prosecution is the establishment of a truth commission. This Section first provides a background on the use of truth commissions, then describes the circumstances most appropriate and conducive for their establishment, and finally illustrates that a truth commission would be an inappropriate mechanism for addressing the Khmer Rouge atrocities.

A truth commission is a commission of inquiry into past human rights violations in a particular country, and it is neither necessarily a substitute for, nor a bar to, prosecution.<sup>345</sup> Truth commissions are naturally flexible to the individual needs of a particular country or situation, and include public proceedings, private investigations, or some combination of the two.<sup>346</sup> The commissions usually submit reports of their findings, but lack the authority to determine culpability or impose sanctions.<sup>347</sup>

The use of truth commissions was revived in the mid-1970s, coincidentally during the same period in which the Khmer Rouge committed its atrocities.<sup>348</sup> Priscilla Hayner, who has studied twenty-one truth commissions since 1974, recognized four overarching characteristics of truth commissions: (1) a focus on the past; (2) an attempt to provide a larger picture of abuses, rather than an emphasis on a discrete event; (3) a finite and definite time span; and (4) the possession of some authority allowing greater access to information and security.<sup>349</sup>

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<sup>344</sup> Rome Statute, *supra* note 168, art. 11.

<sup>345</sup> See Priscilla B. Hayner, *Fifteen Truth Commissions—1974 to 1994: A Comparative Study*, 16 *Hum. Rts. Q.* 597, 604 (1994).

<sup>346</sup> *Id.* at 600–04.

<sup>347</sup> Klosterman, *supra* note 43, at 835.

<sup>348</sup> Hayner, *supra* note 345, at 606–07.

<sup>349</sup> *Id.* at 604.



Truth commissions are designed to “record and disseminate a full and independent historical record of human rights abuses in a specific country, performing a broader factfinding function than a tribunal.”<sup>350</sup> This serves the dual goals of allowing a society to fully comprehend the magnitude of the harms and providing a sense of closure that permits a nation to move forward.<sup>351</sup> It also should be noted that some truth commissions can be designed to generate an authoritative record as a foundation for future criminal trials.<sup>352</sup>

Truth commissions, although quite flexible, are appropriate only in certain circumstances. First of all, truth commissions are best utilized where there has been a recent changeover in power from the undemocratic, perpetrating government to a more democratic government.<sup>353</sup> In this regard, the truth commission serves as an indication of regime transition and as a method of closure for the country’s citizens. Second, truth commissions are more appropriate in cases where there is either uncertainty or dispute over the actual events or who is responsible.<sup>354</sup> Third, truth commissions are widely used in situations where the international community considers the sociopolitical climate of a country to be too precarious to support the potentially overwhelming nature of formal tribunal proceedings.<sup>355</sup> Finally, truth commissions are considered appropriate where quick reconciliation is prioritized over the meticulous protection of the accused’s due process rights.<sup>356</sup>

Jaya Ramji summarizes the three main arguments in favor of the establishment of a truth commission in Cambodia:<sup>357</sup> first, a truth commission would be more responsive to Cambodians’ desire for accurate information regarding the Khmer Rouge than would be a tribunal;<sup>358</sup> second, a truth commission is more likely to result in national reconciliation than a trial, due to the fact that “a fragile state such as Cambodia may not be able to withstand the ramifications

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<sup>350</sup> Ramji, *supra* note 76, at 142.

<sup>351</sup> *Id.*

<sup>352</sup> Klosterman, *supra* note 43, at 834.

<sup>353</sup> *See id.* at 837–38.

<sup>354</sup> *Id.* at 838.

<sup>355</sup> *See* Ramji, *supra* note 76, at 151.

<sup>356</sup> Klosterman, *supra* note 43, at 840.

<sup>357</sup> Ramji, *supra* note 76, at 150.

<sup>358</sup> *See id.* at 151.

of widespread trials”;<sup>359</sup> and third, as truth commissions are traditionally less costly than tribunals, it would be better to opt for the cheaper truth commission and allocate the money saved to economic and humanitarian aid for Cambodia.<sup>360</sup>

### *1. Generating an Authoritative Record*

Inevitably, proponents of a truth commission for Cambodia advance the argument that a truth commission would result in an authoritative record of the atrocities, which would provide not only a sense of closure, but also a demarcation of the different regimes.<sup>361</sup> This argument, however, is inapplicable to the specific events in Cambodia. First, addressing the need for an authoritative record, the Cambodian situation is unique because the Khmer Rouge were not covert in their plan to return Cambodia to “Year Zero.”<sup>362</sup> This is not analogous, for example, to Argentina’s National Commission on the Disappeared, in which an explanation was required to account for the missing persons and ambiguity surrounding the events at issue.<sup>363</sup>

The administrators of Tuol Sleng prison, for example, kept meticulous records of the daily tortures and killings, as specific as indicating the “bloodiest day” (582 killed on May 27, 1978).<sup>364</sup> Despite the presence of accurate records, advocates argue that it is important to establish an authoritative record for the younger generations of Cambodians,<sup>365</sup> as well as to prevent the Khmer Rouge from lying about the extent of the atrocities.<sup>366</sup> These nonunique arguments, however, are equally applicable against any transitional justice mechanism, and also do not explain how such a record would prevent the denial of the atrocities (individuals today, despite the Nuremberg trials and Nazi confessions, still deny the occurrence of the Holocaust). In addition, over the last twenty-five

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<sup>359</sup> Id.

<sup>360</sup> Id.

<sup>361</sup> See Klosterman, *supra* note 43, at 838.

<sup>362</sup> See *supra* notes 15–31 and accompanying text.

<sup>363</sup> See Hayner, *supra* note 345, at 614–15.

<sup>364</sup> David Hawk, *The Photographic Record, in Cambodia 1975–1978: Rendezvous with Death*, *supra* note 12, at 209, 210.

<sup>365</sup> See *id.*

<sup>366</sup> See Klosterman, *supra* note 43, at 857.

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years, a substantial amount of scholarship has been dedicated to generating such an authoritative record.

The second purpose of the authoritative record is to demarcate the former regime from the new regime:

The conventional model of a truth commission involves a democratic government following on the heels of dictatorial or military rule. In such cases, establishing the truth about what happened in an officially sanctioned manner is considered essential to the fragile democratic foundation, both to strengthen the rule of law and to affirm human rights practices.<sup>367</sup>

In the past two decades following the overthrow of the Khmer Rouge, however, there have been several “new regimes,” including a U.N. administered government.<sup>368</sup> It is unclear, therefore, why a truth commission is necessary to draw the distinction between two governments that already have been significantly divided by both time and varied leadership.

## *2. Allowing Alternatives to Normal Prosecution*

Truth commissions, it is often argued, are valuable because they offer alternatives to normal prosecutions. Truth commissions neither demand an independent judiciary nor require compliance with international standards of justice because there are no verdicts and no enforcement mechanisms.<sup>369</sup> For example, the truth commission in El Salvador was more expedient than a tribunal because it eliminated certain due process protections, such as the right to confront witnesses.<sup>370</sup> Proponents of a truth commission in Cambodia argue that a commission would be valuable because many Khmer Rouge leaders, who are in their late sixties and early seventies, are at risk of dying before the conclusion of trial proceedings.<sup>371</sup>

In this author’s opinion, the points raised above actually argue against the establishment of a truth commission. This Note has already demonstrated the importance of protecting the due process and international legal rights of the defendants, as well as the need

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<sup>367</sup> Id. at 837–38.

<sup>368</sup> Id. at 867.

<sup>369</sup> Id. at 840.

<sup>370</sup> See id. at 840–41.

<sup>371</sup> See id. at 863.

for a deliberate and meticulous tribunal for the creation of precedents for future tribunals.<sup>372</sup> Impartiality and independence are critical for the success of any remedy pursued for the redress of the Khmer Rouge atrocities. It is clear, as evidenced in the 1979 trials of Pol Pot and Ieng Sary, that sacrificing rights protections and respect for international law helps neither Cambodian reconciliation nor a healthy interpretation of international law.<sup>373</sup>

### *3. Laying the Foundation for Future Prosecutions*

The third major argument in favor of truth commissions is that they can be effective means of collecting data and evidence to be used in subsequent formal prosecutions of the human rights violators.<sup>374</sup> This has been the experience in Bolivia and Argentina.<sup>375</sup> For example, the work of Argentina's National Commission on the Disappeared later resulted in the prosecution of nine members of the former military regime, five of whom were convicted.<sup>376</sup>

As applied to Cambodia, however, this argument fails on three distinct levels. First, it contradicts the argument that truth commissions are more rehabilitative than tribunals, or are quicker, less restrictive alternatives to tribunals. Second, this possibly will force the Cambodian people to endure two separate proceedings in order to obtain international justice, which could further divide the country and cause civil unrest. Third, this would create a significant legal tension, insofar as the truth commission would not need to comport with international standards, while the subsequent tribunal would—begging skepticism regarding whether the subsequent use of the evidence obtained in the commission would violate the defendants' rights at the actual tribunal.

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<sup>372</sup> See supra notes 151–61 and accompanying text.

<sup>373</sup> See supra notes 34–37 and accompanying text.

<sup>374</sup> Klosterman, supra note 43, at 842.

<sup>375</sup> Hayner, supra note 345, at 604 n.4.

<sup>376</sup> David C. Anderson, What Kind of Justice? Experts Probe the Power of Truth After Political Trauma, Ford Foundation Report Online, 27 (Summer 2001), available at [http://www.fordfound.org/publications/ff\\_report/view\\_ff\\_report\\_detail.cfm?report\\_index=295](http://www.fordfound.org/publications/ff_report/view_ff_report_detail.cfm?report_index=295) (on file with the Virginia Law Review Association).

#### *4. Promoting Change and Reconciliation*

The overall aim of the aforementioned, purported benefits of a truth commission is to promote reconciliation, as well as institutional and symbolic changes, by publishing the assessments and conclusions regarding the alleged atrocities.<sup>377</sup> A truth commission, however, would serve only to further frustrate the Cambodian people for several reasons.

First, with the establishment of a truth commission, the international community would encounter similar problems of control and sovereignty involving the Cambodian government. The Cambodian government would likely raise objections regarding the structure of the commission, the authority of the commission, and the relative participation of Cambodian and international personnel. Moreover, Hun Sen and the Cambodian government are unlikely to participate in the truth commission at all. After all, they rejected the idea of a truth commission in March 1999 and have since hardened their stance.<sup>378</sup> Conversely, should the Cambodian government decide to participate in the truth commission, the flexibility of the commission has the potential to make it “inherently vulnerable to politically imposed limitations.”<sup>379</sup>

Second, a truth commission in Cambodia would require victim willingness—the participation of those individuals who were subjected to the Khmer Rouge atrocities. Yet the major incentive for individuals to risk both the emotional and physical consequences of testifying against the former leaders of the Khmer Rouge is the retributive justice associated with the leaders’ potential convictions. For example, Uganda’s truth commission failed largely because of victims’ unwillingness to rehash painful memories, due in part to their distrust of the nature of the proceedings.<sup>380</sup> In Cambodia, Bou Meng, one of the only seven survivors of Tuol Sleng, stated, “I want to tell the truth. I want to go to trial and say how I was tortured and that I’m still alive.”<sup>381</sup>

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<sup>377</sup> Klosterman, *supra* note 43, at 843.

<sup>378</sup> Ramji, *supra* note 76, at 139.

<sup>379</sup> Michael Scharf & Valerie Epps, *The International Trial of the Century? A “Cross-Fire” Exchange on the First Case Before the Yugoslavia War Crimes Tribunal*, 29 *Cornell Int’l L.J.* 635, 641 (1996).

<sup>380</sup> See Klosterman, *supra* note 43, at 839.

<sup>381</sup> Sipress, *supra* note 29.

Third, a successful truth commission must have the faith and confidence of the citizens for which it is established. Professor Steven R. Ratner concluded, “[a]fter careful consideration, [the Group of Experts] declined to recommend a truth commission because it found the Cambodians with whom it met simply unsure of the purpose of such a commission and its role in achieving both justice and national reconciliation through an accurate historical record of the period.”<sup>382</sup> With a publicly documented record of the Khmer Rouge atrocities, mixed messages sent by the government with its grants of amnesty, and a lack of punitive measures taken after twenty-five years, it is unclear what Cambodians should be asked to expect from a truth commission. Most Cambodians would likely assume these proceedings will serve only to reopen their emotional wounds.<sup>383</sup>

In addition, truth commissions work only if they reflect a nation’s desire to heal itself, as opposed to outsiders’ attempts to convince a society that such a commission is necessary.<sup>384</sup> Priscilla Hayner, addressing truth commissions that are more heavily driven by outside influences, stated: “Expectations for truth commissions are almost always greater than what these bodies can ever reasonably hope to achieve.”<sup>385</sup>

Fourth, the only way in which truth commissions succeed is to grant conditional amnesty to the alleged perpetrators—exchanging immunity for true testimony. The best example is the South African Truth and Reconciliation Commission.<sup>386</sup> The “conditional amnesty” worked as follows: The commission permitted individuals to apply for immunity from future prosecution provided that their offenses were associated with political objectives.<sup>387</sup> To be granted this immunity, the individuals had to disclose the full truth of their involvement and personal knowledge of the crimes.<sup>388</sup>

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<sup>382</sup> Ratner, *supra* note 23, at 951.

<sup>383</sup> See Hayner, *supra* note 345, at 609–10 (discussing similar difficulties elsewhere).

<sup>384</sup> See Anderson, *supra* note 376.

<sup>385</sup> *Id.*

<sup>386</sup> For a discussion of a South African amnesty program that addresses apartheid era crimes, see Orentlicher, *supra* note 180, at 710–11; Ramji, *supra* note 76, at 145–46, 152.

<sup>387</sup> See Orentlicher, *supra* note 180, at 710.

<sup>388</sup> Anderson, *supra* note 376.

Conditional amnesty in Cambodia, however, would likely encounter significant domestic and international opposition. Ramji, when polling the Cambodians that she interviewed, found that half of these Cambodians favored amnesty, and that only half of those in favor of amnesty would support amnesty for the top leaders of the Khmer Rouge.<sup>389</sup> This is an especially debilitating indication for the potential future of a truth commission in Cambodia. Truth commissions often generate much of their data from the testimony and confessions of leaders in exchange for grants of immunity. Due to the fact that Cambodians do not favor amnesty for the top leaders, and the fact that victim willingness hinges on satisfaction with the structure and aims of the commission, the default position would be to grant immunity to lesser leaders. As discussed in Part I, however, Pol Pot and the Khmer Rouge dealt in secrecy and centralized all leadership decisions in the top leaders of the Standing Committee. Thus, the organizers of a truth commission would be faced with a choice between granting amnesty to the top leaders and risking the loss of the support of the Cambodian people and granting amnesty to lesser leaders and risking getting little information of value.

Fifth, it is often quite difficult to define truth, or the mandate of the particular truth commission.<sup>390</sup> For example, commissions in both Argentina and Chile were considered successful in part because they were able to address well-defined, specific allegations: Chile's commission only addressed torture resulting in death (not including those who survived),<sup>391</sup> and Argentina's commission focused only on missing persons.<sup>392</sup> The Khmer Rouge regime, however, committed such a vast array of atrocities that limiting the mandate and scope of the commission could be an impossible goal.

#### CONCLUSION

Unquestionably, the international community shares a collective guilt for its inaction in Cambodia from 1975 to 1979, in which nearly twenty percent of the Cambodian population was extermi-

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<sup>389</sup> Ramji, *supra* note 76, at 152 n.113.

<sup>390</sup> Anderson, *supra* note 376.

<sup>391</sup> Hayner, *supra* note 345, at 621.

<sup>392</sup> *Id.* at 615.

nated by the Khmer Rouge regime. In addition, the international community, vying for the success of the International Criminal Court, is uniquely cognizant of the importance of sending an unambiguous message that crimes against humanity and genocide will neither be permitted nor ignored. As a result, the U.N., over the past decade, has become more proactive in establishing ad hoc international tribunals to prosecute those individuals guilty of grave violations of international law.

In this framework, however, there emerges a parallel importance to maintain both international standards of justice and the protection of the due process rights of the accused. Only by balancing the desire to prosecute genocide and crimes against humanity to their fullest extent with the need to protect the aforementioned rights can the requisite goals of justice and deterrence be effectuated. The enduring lessons of Nuremberg, the ICTY, and the ICTR are that procedural and substantive standards of justice are equally as important as deciding issues of guilt and innocence.

The U.N., perhaps fearing the consequences of another missed opportunity to address the Khmer Rouge atrocities, is in the process of compromising international standards of justice and the best interests of the Cambodian people by allowing a mixed tribunal with a majority of Cambodian personnel. While it seems promising to take any action against the former leaders of the Khmer Rouge, this particular course of action will prove detrimental not only to the victims of the atrocities, but also to the modern interpretation of international law. The tribunal envisioned by the March Agreement allows the Cambodian government altogether too much control and influence over the tribunals and, even worse, allows unqualified Cambodian judges to navigate complex issues of international law.

The U.N. must advocate an ad hoc international tribunal with a majority of international personnel. If this is not a feasible alternative, the U.N. should not settle for one of the suboptimal alternatives. Instead, it must withdraw its involvement from the Cambodian situation and allow the existing record and de facto indictment of the Khmer Rouge to stand as a lesson not only for the potential perpetrators of international human rights violations, but also for potential governments who resist international involvement in criminal tribunals.