

# Cambodia's Response to the Khmer Rouge

## War Crimes Tribunal vs. Truth Commission

Matthew J. Soloway\*

### INTRODUCTION

Numerous human rights atrocities have plagued the twentieth century. The mass genocide of the Holocaust, the killing fields of Cambodia, the ethnic cleansing of the former Yugoslavia and South Africa's apartheid will be remembered for the horror these events embedded in humanity. Yet, such massacres are not a new phenomenon. Human genocide and persecution motivated by race and religion date back thousands of years. What makes modern day human rights tragedies unique is the recent legal and political responses to these systematic violations. Specifically, two types of legal reactions have emerged: international or national war crimes tribunals and truth and reconciliation commissions. These responses signify an effort both to punish those individuals directly responsible for injustices and to serve notice to the international community that violations of human rights will not be ignored. Further, the establishment of tribunals and truth commissions functions to raise social awareness in order to prevent future atrocities by attempting to dissociate a present political climate from those of the past. Two factors have contributed to these developments. First, the post-Nuremberg growth of humanitarian laws of war crimes has expanded the number of offenses defined by international law. Second, the developing convergence of international humanitarian law and international human rights law in

relation to crisis situations has created a stronger relationship between two formerly distinct bodies of law.

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In order to understand the nature and effects of these two types of legal responses it is necessary to examine their organization and function in a political and legal setting. This paper will examine the role of international war crimes tribunals in the context of past atrocities, for example in the former Yugoslavia and in Rwanda, as well as the use of truth commissions in South Africa and Central America. Applying the strengths and weaknesses of both approaches to the present day political situation in Cambodia, the paper will then determine whether the Cambodian government's decision to try former Khmer Rouge officials before a national tribunal is likely to be their most effective option. The approach to be taken is twofold: first, from a national interest perspective, is the tribunal likely to lead to domestic reconciliation? Second, from an international law point of view, is the establishment of a domestic war crimes tribunal an adequate response to the Khmer Rouge regime in comparison to a national truth commission?

This paper will argue that a truth

\* Matthew J. Soloway is a 2nd year student, University of Victoria, Faculty of Law (LL.B.), McGill University (B.A.)



commission would be a more effective alternative to the establishment of a war crimes tribunal in Cambodia.

#### **HUMAN RIGHTS IN THE UNITED NATIONS ERA**

The Nuremberg trials in 1945 forever changed the focus of international human rights movements. Upon liberating concentration camps in Europe at the end of World War two, the Allied governments established the International Military Tribunal (IMT) to prosecute Nazi officials. The prosecution represented an unprecedented effort to punish people accused of war crimes and crimes against humanity.<sup>1</sup> Prior to Nuremberg, nation states were the only recognized subjects of international law and jurisdiction over the types of offenses prosecuted at

Nuremberg had been limited to domestic courts. By focusing on the offenses of surviving members of the Nazi regime, the IMT sought to publicly condemn aggressive war using principles of international law. Thus, Nuremberg was revolutionary in that it held individuals personally responsible for actions considered international in nature. In doing so, the trial at Nuremberg helped spur an international movement for human rights that focused on individual responsibility for crimes with universal scope.

Despite the revolutionary development of human rights in the United Nations era,<sup>2</sup> international efforts to establish war crimes tribunals were virtually non-existent for the next forty years. Perhaps no attempts were made because many of the atrocities that took place, for example in Cambodia, did

1 (War Crimes Tribunals), online: Issues and Controversies on File < [www.facts.com/icof/nazi.htm](http://www.facts.com/icof/nazi.htm) > at para. 3.

2 The definition of war crimes expanded in 1948 when the United Nations General Assembly approved the Convention on the Prevention and Punishment of the Crime of Genocide, which specified that religious or racial genocide is an international crime. The following year, the four Geneva conventions were adopted for the protection of prisoners of war.

not occur in the context of international wars. Theodor Meron asserts that “internal strife and even civil wars are still largely outside the parameters of war crimes and the grave breaches conventions of the Geneva Conventions.”<sup>3</sup> A more probable explanation for the lack of international efforts to respond to human rights violations is the opposing ideological perspectives dividing the international community as a consequence of the Cold War. In effect, these conflicting ideologies brought international co-operation to a standstill. However, since the end of the Cold War, there have been numerous international efforts to establish international war crimes tribunals to investigate human rights atrocities. Two of the most significant examples are the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Before examining the effect of these tribunals, it will be beneficial to outline the objectives of international war crime tribunals.

#### WAR CRIMES TRIBUNALS

A war crimes tribunal is a “judicial body created to investigate and prosecute individuals accused of violations of human rights or humanitarian law in the wake of violent conflict.”<sup>4</sup> Martha Minow, in her book, *Between Vengeance and Forgiveness*, argues that a trial in the aftermath of mass atrocity “announces a demand not only for accountability and acknowledgement of harms done, but also for unflinching punishment.”<sup>5</sup> Specific objectives of war crimes tribunals are to exorcize a possible

culture of impunity by holding those who commit violations accountable and to publicly demonstrate that the national government and the international community will take action against those who commit gross human rights violations.

In 1993, the UN Security Council created the ICTY; the first international war crimes court since Nuremberg. The ICTY’s mandate was to prosecute individuals alleged of violations of humanitarian international law during armed conflict in the territory of the former Yugoslavia since 1991.<sup>6</sup> Supporters of the ICTY argue that the tribunal was necessary in order to assign guilt for war crimes to individuals rather than assigning the blame on an entire nation or ethnic group. Critics, on the other hand, felt that the prosecution of individual leaders would hinder peace negotiations, as many of the leaders whose co-operation was needed to maintain political stability were themselves prosecuted.

In 1994, the Security Council established the ICTR to prosecute individuals responsible for violations of humanitarian law. The ICTR’S mandate calls on the commission to bring to justice those persons responsible for acts of genocide or other violations of humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighboring states.<sup>7</sup> The Preamble to the resolution states that the Council was convinced that prosecution of those responsible for serious violations would “contribute to the process of national reconciliation and to the restoration and maintenance of peace.”<sup>8</sup> Yet, one of the

3 Theodore Meron, *The Case for War Crimes Trials in Yugoslavia* 72 *Foreign Affairs* 122 (No. 3, 1993), at 123.

4 (Democracy and Deep Rooted Conflict), online: Institute for Democracy and Electorate Assistance <[http://www.idea.int/publications/democracy\\_and\\_deep\\_rooted\\_conflict/ebook\\_chapter4\\_10.html](http://www.idea.int/publications/democracy_and_deep_rooted_conflict/ebook_chapter4_10.html)> at chapter 4.10.

5 Martha Minow, *Between Vengeance and Forgiveness* (Boston: Beacon Press, 1998) at p. 26.

6 “Security Council Resolutions on Establishment of an International Tribunal for the Former Yugoslavia” reprinted in 14 *Hum. Rts. L.J.* 197 (1993).

7 Statute of the International Tribunal for Rwanda, reprinted in 33 *I.L.M.* 1590 (1994).

8 Statute of the International Tribunal for Rwanda, reprinted in 33 *I.L.M.* 1590 (1994).

strongest criticisms of the ICTR is that it failed to end the genocide in Rwanda in 1994, leading to hundreds of thousands of deaths. Consequently, this perceived failure<sup>9</sup> raises questions about a tribunal's ability to end on-going violations while utilizing its resources to indict those responsible for past crimes. Jose Alvarez argues that "for all their attention to the attribution of individual blame for these crimes," the international community "has not been attentive to wider circles of guilt."<sup>10</sup> Alvarez's point is simply that international efforts to prosecute individuals, like the ICTY, fail to identify the factors leading up to the incidence of war crimes. In this sense, the underlying objectives of international efforts to establish tribunals compromise their own ability to understand the political and historical context of a situation and thus make it more difficult to accomplish their own goals of national reconciliation and the restoration and maintenance of peace. If the inability to examine a political situation in context is a weakness facing tribunals, it is a problem that can be addressed by adopting an alternative legal response to war crimes, namely, truth commissions.

#### TRUTH AND RECONCILIATION COMMISSIONS

Truth and reconciliation commissions have played a critical role in a number of countries, for example El Salvador,<sup>11</sup> when a

former regime has committed internal systematic human rights violations. The main purpose of a truth commission is to provide an accurate record of past human rights atrocities so that the truth can be integrated into a country's common history. There are at least four factors that suggest that truth commissions are valuable for the reconciliation process. First, while the documentation of human rights violations will generally serve to educate future generations, Angelika Schlunk, a trial attorney at the Federal Department of Justice in Germany, asserts that "this is especially true in situations where those who have survived the atrocities refuse to deal with the conflict"; as was the case for many survivors of the Holocaust.<sup>12</sup> Second, truth commissions provide a forum for victims to convey their stories while at the same time demonstrating a government's commitment to democratic ideals, thus facilitating change in the public's perception of the government. Third, according to Tina Rosenberg, truth commissions can "assist in the examination of individual responsibility," by helping people to "re-examine the choices they have made and the ones they could have made."<sup>13</sup> She views this process as vital for building a democratic political culture. By acknowledging the violations of the past, both the new government and the private citizens accept their involvement and recognize the consequences of their action or inaction. Finally, the commission will report

9 A report by an international panel of experts claims that the UN made weak and equivocal decisions in the face of mounting disasters, while the United States persistently played down the problem. The report raises doubt on the effectiveness of the ICTR to deal with the actual crises it was created to respond to, specifically, genocide.

10 Jose Alvarez, "Crimes of States/ Crimes of Hate: Lessons from Rwanda" 24 *Yale J. Int'l L.* 365 (1999), at 441.

11 The "Commission on the Truth for El Salvador" was established pursuant to the Salvadoran Peace Accords negotiated with the support of the United Nations. Thomas Buergethalm, one of the appointed commissioners, reported that "one could not listen to them [the people who came before the commission] without recognizing that the mere act of telling what happened was a healing emotional release, and that they were more interested in recounting their story and being heard than in retribution."

Martha Minow, *Between Vengeance and Forgiveness* (Boston: Beacon Press, 1998) at 68.

12 Angelika Schlunk, (Truth and Reconciliation Commissions), online: <[www.nslaw.nova.edu/student/organisations/ILSAJournal/4-2/Schlur](http://www.nslaw.nova.edu/student/organisations/ILSAJournal/4-2/Schlur)>

13 Henry Steiner, *Truth Commissions: A Comparative Assessment*, (Cambridge: Harvard Law School Human Rights Program, 1997) at 41.

its findings to the government. Such reports can publicly identify individuals responsible for human rights violations and recommend action to be taken.

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While there is no standard model, Priscilla Hayner, in her book, *Unspeakable Truths—Confronting State Terror and Atrocity*, has identified several primary constitutive elements of a truth commission. Focusing on the past, a truth commission does not concentrate on a specific event but attempts to paint an overall picture of human rights violations over a period of time. Truth commissions aim to discover, clarify and formally acknowledge past abuses while responding to victims' particular needs.<sup>14</sup> These objectives are common features of a truth commission; other elements vary to shape each particular commission. The investigative capacity given to commissions has ranged from extensive staffs armed with legal powers, to reliance on voluntary testimony that may or may not be verified.<sup>15</sup> For example, the South African Commission was several times larger in terms of staff and budget than any previous commission.<sup>16</sup> Therefore, to best illustrate the design features of various truth commissions it will be beneficial to examine their organization in a particular political and legal setting.

Truth commissions have been widely used in Central and South America as a transitive tool from oppression to democracy. In 1990, Chile established a "National Commission for Truth and Reconciliation" to investigate violations committed over the previous seventeen years of military rule. When the commission's report was distributed in 1991, Congress passed a unanimous resolution commending it, and all political parties acknowledged the truth of the facts investigated.<sup>17</sup> Most of the relatives of victims interviewed stressed that what really mattered was to know the truth, "that the memory of their loved ones would not be denigrated or forgotten" in order to prevent future violations of human rights.<sup>18</sup> The decision in Chile not to indict and prosecute individuals, but rather to promote reconciliation, reflects the view that tribunals are not designed to address victims and community needs, whereas those who worked on the report of the Chilean National Commission on Truth and Reconciliation became aware of "the cleansing power of the truth."<sup>19</sup>

Among the commissions established to date, Henry Steiner asserts that "potentially the most significant for a country's future operate[d] in South Africa."<sup>20</sup> The African National Congress (ANC), led by Nelson Mandela, sought a truth commission to investigate the atrocities of the Apartheid regime. In 1992, Mandela created the "Commission of Enquiry" to investigate treatment of prisoners at ANC training camps in Angola. While the findings were

14 Priscilla Hayner, "Fifteen Truth Commissions—1974–1994: A Comparative Study", in 1 *General Considerations* 225–61, 600–11, 613–33, 635–55 (Neil J. Kritz ed. 1994).

15 Henry Steiner, *Truth Commissions: A Comparative Assessment*, (Cambridge: Harvard Law School Human Rights Program, 1997) at 7.

16 "Report of Truth and Reconciliation Commission of South Africa", 1998 5 Vols, online: <[www.truth.org.za](http://www.truth.org.za)>

17 *Ibid.*

18 "Report on the Chilean National Commission on Truth and Reconciliation" (1993), Vol.1, p.13.

19 *Ibid.*

20 Henry Steiner, *Truth Commissions: A Comparative Assessment*, (Cambridge: Harvard Law School Human Rights Program, 1997) at 7.

criticized for being biased, this process revealed truths about human rights violations committed within ANC prisons. Minow argues that the commission functioned to “[elevate] human rights standards and set a tone concerning values that departed from those that prevailed under apartheid.”<sup>21</sup> However, many black leaders, unsatisfied with the work of the commission, advocated setting up a tribunal similar to Nuremberg in order to punish the white leaders responsible for oppressing blacks during apartheid. Instead, the Mandela-led ANC believed a more extensive truth commission investigating the human rights violations committed by apartheid officials would reveal the truths about the apartheid period, a documentation they felt was necessary to reconstruct the country’s future.

The last 25 years have witnessed the emergence of truth commissions as a new field of transitional justice to deal with past human rights atrocities. These commissions function as an alternative to the judicial approach and thus have different mandates, authority and objectives. For Cambodia, a government looking into a pattern of abuses from its past, the main challenge is to determine whether a truth commission or a tribunal is best suited to meet its objectives. To address this issue as it affects Cambodia specifically, it is first necessary to examine the advantages and disadvantages of both truth commissions and international and national tribunals.

#### WAR CRIME TRIBUNALS VS. TRUTH COMMISSIONS

Significant advantages of a truth commission are that they can be established instantly at a relatively low cost and can be designed according to the specific needs of a society. The proceedings do not have to follow the

rigid rules of the criminal procedure, and thus, a commission is more flexible in hearing and accommodating witnesses and in evaluating evidence.<sup>22</sup> Another benefit of truth commissions is that they, unlike criminal prosecutions, have a broad mandate and thus are able to look at the context of gross human rights violations. While a court is not intended to give an account of the political, historic and economic causes of an offense, such accounts are the purpose of a truth commission. Many survivors argue that they need to know the truth as both part of a therapeutic process of dealing with the past, as well as to feel emotionally validated through a public acknowledgement of past events.

Despite the potential benefits of truth commissions, they are often the result of a negotiated compromise between parties in conflict, as was the case in South Africa, and thus may be at a disadvantage from the onset depending on the political climate. Since truth commissions are often seen as a means of maintaining peace during a transition period, they may take on unrealistically high expectations. A reality facing many truth commissions is that full access to government records is often not possible. Further, the mandate of truth commissions often prevents them from playing an active role in the implementation of their recommendations. Unless a government is committed to reforms and allows for significant changes, a commission’s recommendations may not be followed. Another problem is that truth commissions do not investigate the current situation in a country, as their objective is to reduce conflict about the past. Abuses by the new regime can be overlooked. For example, in El Salvador, death squads continued to operate after the establishment of the Commission on the Truth for El Salvador.<sup>23</sup> Moreover,

21 Martha Minow, *Between Vengeance and Forgiveness* (Boston: Beacon Press, 1998) at 53.

22 An illustrative report on the hearings before the Truth and Reconciliation Commission in South Africa, see Michael Ignatieff, *Digging up the Dead*, *The New Yorker*, Nov. 10, 1997, at 84–93.

23 *Democracy and Deep Rooted Conflict*, online: Institute for Democracy and Electorate Assistance <[http://www.idea.int/publications/democracy\\_and\\_deep\\_rooted\\_conflict/ebook\\_chapter4\\_10.html](http://www.idea.int/publications/democracy_and_deep_rooted_conflict/ebook_chapter4_10.html)> at chapter 4.10.

there are often conflicting versions of events reported and the commission has no way of determining what happened objectively.

The most significant difference between a truth commission and a war crimes tribunal is that a tribunal has the ability to prosecute individuals accused of human rights violations. Thus, the advantage of a tribunal is that it has the potential to rebuild a shattered society based on the rule of law through a process that is determined to be fair by the international community. The judgment of the Nuremberg Tribunal states that "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."<sup>24</sup> Thus, the importance of a tribunal is that it can assign blame on individuals instead of on an entire society or ethnic group.

The effectiveness of war crimes tribunals has several limitations. First, there is not an internationally accepted norm on the punishments to be imposed for war crimes. For example, in the Rwanda case, the punishments endorsed by the tribunal differed greatly from Rwandan national law.<sup>25</sup> A response to this criticism is that the International Court of Justice, should it be involved in future tribunals, would impose penalties determined to be fair by the international community. However, this solution would not solve potential problems regarding penal sanctions in a domestic war crimes tribunal. Second, tribunals lack enforcement mechanisms to apprehend individuals who have been indicted and thus rely on the co-operation of local governments and other international bodies. The reliance on other bodies may hinder a tribunal's effectiveness as local governments may themselves

have an interest in protecting certain individuals. This would have likely been a concern if the Cambodian government had gone ahead with an international tribunal to prosecute members of the Khmer Rouge who are still presently involved in Cambodian politics. Finally, many would argue that tribunals lack the ability to promote national reconciliation because they are not designed to address victims or communities but rather focus on a few high ranking officials from previous political regimes. In light of the advantages and disadvantages of truth commissions and tribunals, this paper will now assess the Cambodian government's decision to prosecute members of the Khmer Rouge before a national tribunal.

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#### CAMBODIA'S REACTION TO THE KHMER ROUGE REGIME

Between 1975 and 1979, the Khmer Rouge regime led by Pol Pot was responsible for the deaths of up to two million people.<sup>26</sup> Despite the scale and brutality of the atrocities committed in Cambodia, no credible efforts to punish those responsible were initiated until recently. The only trial established prior to recent developments, occurred in 1979, when Vietnam arranged for the People's Republic of Kampuchea, the government it had installed in Cambodia that year, to try and convict Pol Pot and Ieng Sary of genocide.<sup>27</sup> This trial, held in

24 Judgment of Nuremberg Tribunal, International Military Tribunal, Nuremberg (1946) 41 Am.J.Int.L. 172 (1947) at 221.

25 Democracy and Deep Rooted Conflict), online: Institute for Democracy and Electorate Assistance <[http://www.idea.int/publications/democracy\\_and\\_deep\\_rooted\\_conflict/ebook\\_chapter4\\_10.html](http://www.idea.int/publications/democracy_and_deep_rooted_conflict/ebook_chapter4_10.html)>

26 Sharmila Devi, (Cambodia: Bringing the Khmer Rouge to Justice), online: <[www.globalpolicy.org/intljustice/tribunals/2001/1005kmer.htm](http://www.globalpolicy.org/intljustice/tribunals/2001/1005kmer.htm)>

27 (Recent Initiatives to Prosecute CPK Crimes), online: Coalition for International Justice, <http://www.cij.org/index.cfm?fuseaction=homepage> (June 2001).

absentia, is generally regarded as a show trial.<sup>28</sup> Finally, in 1996, the United Nations began to revisit the issue of accountability for the Khmer Rouge.

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In April 1997, the UN Commission on Human Rights adopted resolution 1997/49 requesting the Secretary General to “examine any request by Cambodia for assistance in responding to past serious violations of Cambodian and international law as a means of addressing the issue of individual accountability.”<sup>29</sup> Two months later, Prime Minister Norodom Ranariddh and second Prime Minister Hun Sen requested the assistance of the UN and the international community “in bringing to justice those persons responsible for the genocide and crimes against humanity during the rule of the Khmer Rouge.”<sup>30</sup> The letter to UN Secretary General Kofi Annan stated that the Prime Ministers were “aware of similar efforts to respond to the genocide and crimes against humanity in Rwanda and the former Yugoslavia” and requested “that similar assistance be given to Cambodia.”<sup>31</sup>

Annan assembled a group of experts to assess the feasibility of bringing Khmer Rouge leaders to justice. This group, consisting of Sir Ninian Stephen from Australia, Judge Rajsoommer Lallah from Mauritius and professor Steven Ratner of the United States

visited Cambodia in 1998 and presented its report to the UN the following year. The report recommended the creation of an international tribunal to judge the crimes of the Khmer Rouge period. The Cambodian government, now under the exclusive control of Hun Sen, responded by cautioning the UN that any decision to prosecute Khmer Rouge officials must take into account Cambodia’s need for peace and national reconciliation. If former Khmer Rouge members perceived misconduct it could have led to renewed guerilla warfare.<sup>32</sup> By August 1999, the Cambodian government stated that they wanted to maintain overall control of a UN backed international tribunal, and that the tribunal should take place in a Cambodian court. However, the participation of foreign judges and legal experts would be accepted. Over the following few months, talks between UN and Cambodian officials failed to reach an agreement on how to set up a tribunal for Khmer Rouge leaders, thereby putting a tribunal on hold.

Mounting pressure on Hun Sen’s government amplified in September of 1999 when former Khmer Rouge leaders, now allies of the Hun Sen government, issued a statement warning of the possibility of a return to civil war if a tribunal was held. Sen responded to these concerns by proposing a domestic trial with international participation. The proposal endorsed a US design for a tribunal with three Cambodian judges and two UN-appointed judges. Wary of involving itself in what could be perceived as another “sham trial,”<sup>33</sup> the UN insisted that

28 *Ibid.*

29 Commission on Human Rights Resolution 1997/49, U.N. ESCOR, “Situation of Human Rights in Cambodia,” U.N. Doc.E/CN.4/RES/1997/49 (1997).

30 Letter dated June 21, 1997 from the first and second Prime Ministers of Cambodia addressed to the Secretary-General, annexed to U.N. Doc. A/1997/488 (24 June 1997).

31 *Ibid.*

32 United Nations Office of Legal Affairs, “Draft Law on the Establishment of a Tribunal for the Prosecution of Khmer Rouge Leaders Responsible for the Most Serious Violations of Human Rights.” For an account of Hun Sen’s public response, see Hun Sen Won’t Let U.N. Control Genocide Trials, Washington Times, August 20, 1999, at A14.

33 Cambodia Approves Khmer Rouge Trial, Associated Press, Phnom Penh, Jan 6, 2000.



organs and staff of the tribunal be politically and financially independent from any government authority and that the process not be selective with regard to suspects. In responding to the draft tribunal law approved by the Cambodian government, Kofi Annan identified four design characteristics of the tribunal upon which the UN was insistent: guarantees that those indicted would be arrested, no amnesties or pardons, the appointment of independent international prosecutors and the appointment of a majority of foreign judges. Several negotiations in 2000 failed to resolve these issues. In fact, the situation was further complicated when Hun Sen indicated that former Khmer Rouge Foreign Minister Ieng Sary should not be re-prosecuted since he was granted amnesty by King Sihanouk after he defected from the government in 1996.

Despite these uncertainties, in January 2001, the Cambodian National Assembly approved the draft law to establish a tribunal.<sup>34</sup> However, the UN did not approve of the draft law, proposing changes to 18 of the 49 articles. On June 22, the Cambodian government amended the draft law and expressed optimism that the Khmer Rouge tribunal could take place by the end of the year. The legislation states that the court's subject matter jurisdiction will include genocide as defined under the Genocide Convention of 1948, crimes against humanity and grave breaches of the 1949 Geneva Conventions, as well as homicide, torture and religious persecution as characterized by the Penal Code of Cambodia. As negotiations between the Cambodian government and the UN continue, there is uncertainty as to when, if ever, the tribunal will begin. There is even more skepticism from the

international legal community as to whether the Cambodian government's decision to respond to the Khmer Rouge period by prosecuting individual officials could meet international standards of justice.

A substantial difficulty facing the establishment of a tribunal is the granting of amnesty to former Khmer Rouge officials. Many criticisms of this tribunal emphasize the fact that most of the notorious Khmer Rouge leaders have already been granted amnesties under a deal in the 1990's to end the country's long running civil war.<sup>35</sup> At present, there are only two Khmer Rouge officials in prison awaiting trial. Pol Pot died in 1998 and many other former leaders live freely in Pailin, a former Khmer Rouge stronghold, after having surrendered in return for amnesty deals with the government. Hun Sen maintains that only four or five leaders at most would face trial, prompting Sam Rainsy, leader of the opposition, to label the proceedings a "mockery of justice."<sup>36</sup>

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From an international law perspective, the proposed domestic tribunal appears to lack legitimacy, both inside and outside Cambodia, due to the reputed lack of independence and professionalism of the Cambodian judiciary.<sup>37</sup> The international community has, and will continue to view concessions made by the UN to the Cambodian government in their negotiations with skepticism. According to Human Rights Watch, the plan as currently formulated does

<sup>34</sup> Seth Mydans, *Cambodian Deputies Back War Crimes Court*, N.Y. Times, Jan. 3, 2001.

<sup>35</sup> *(Cambodia set for Khmer Rouge Trials)*, online: Global Policy Forum <[www.globalpolicy.org/intljustice/tribunals/2001/0807camb.htm](http://www.globalpolicy.org/intljustice/tribunals/2001/0807camb.htm)> (August 7, 2001).

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

<sup>37</sup> Balakrishnan Rajagopal, *At Last There is a Chance to Bring the Khmer Rouge to Justice*, Boston Globe, June 20, 1999.

not meet minimum benchmarks to ensure a legitimate and credible process in line with international standards.<sup>38</sup> "The UN must avoid giving legitimacy to a process that does not meet international standards," remarks Sidney Jones, executive director of the Asia Division of Human Rights Watch, "the Cambodian people deserve justice, not a show trial."<sup>39</sup>

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The international community perceives the current design of the tribunal as problematic for ensuring a just process. More specifically, it has been argued that the UN plan fails to insist that Cambodia co-operate in attempting to apprehend suspects who have fled its territory, thereby leaving open the possibility of government collusion to shield cooperative former Khmer Rouge leaders by allowing them to quietly disappear over the border.<sup>40</sup> Further, Jones argues that "witnesses and defendants have often been tortured in Cambodia, and this tribunal would fail to give them protection," which demonstrates a very serious omission in the tribunal's design.<sup>41</sup> Further legal deficiencies include the absence of any appeal rights and the failure to allow defendants' recourse to lawyers of their choice.

The establishment of a tribunal reflects careful compromises struck between the Cambodian government and the UN, neither group wanting to cede too much

authority to the other. These negotiations have raised concerns around the world as to whether the prosecution of Khmer Rouge officials, utilizing the design now in place, would be an adequate response to the atrocities of the Khmer Rouge regime from an international law perspective. Moreover, if the international legal community views the proposed process as inadequate, should Cambodia follow through with the tribunal anyways or are there alternatives which better suit the needs of Cambodians?

The criticisms raised suggest that the international community will not be satisfied by the present design of the domestic tribunal. If a tribunal took place that failed to meet international standards of justice, it appears the Cambodian government would fail to meet its objectives on two levels. First, pending World Bank loans totaling five hundred million dollars of desperately needed funds for Cambodian development would likely be withheld if the international community viewed the tribunal as a sham. Hun Sen's decision to establish a court was motivated, at least in part, by these loans and international donors have made no secret of the connection between the granting of loans and efforts undertaken to punish former Khmer Rouge leaders.<sup>42</sup> Yet if these loans are no longer a factor, Sen may want to reconsider the establishment of a tribunal that risks re-igniting civil war. Further, Senator Kerry has announced that he will introduce legislation once the court is in operation that will lift restrictions on U.S. foreign aid to Phnom Penh. Again, if the trials in Cambodia proceed and fail to meet international standards, it is likely that these restrictions would not be lifted.

38 (UN Should Insist on International Standards for Khmer Rouge Trial), online: Human Rights Watch <[www.hrw.org/press/1999/aug/camb0824.htm](http://www.hrw.org/press/1999/aug/camb0824.htm)> (August 24, 1999).

39 *Ibid.*

40 *Ibid.*

41 *Ibid.*

42 Nicolas Berry (The Tangled Politics of the Cambodian Genocide Court), online: <[www.cdi.org/asia/fa070500.html](http://www.cdi.org/asia/fa070500.html)>

Therefore, the Cambodian government's objective of securing World Bank loans and having American restrictions on foreign aid lifted would not be met by pursuing a tribunal that is viewed as an inadequate response to the Khmer Rouge period. Second, the Cambodian government would fail to meet its own people's needs of national reconciliation with a domestic tribunal viewed from the outside world as a sham. While trials can be therapeutic, a process globally seen as illegitimate would severely limit the healing power of the prosecutions as victims may be skeptical of the accuracy of the tribunals' findings and thus find it difficult to move on. The Cambodian government may better serve its people by responding to the Khmer Rouge atrocities with a national truth and reconciliation commission.

#### CAMBODIA'S TRUTH COMMISSION?

The debate over whether a tribunal or truth commission is likely to be the most effective response to the Khmer Rouge regime must focus on the Cambodian people. An international tribunal, like the ICTY or ICTR, in addition to being very expensive, would take place far from Cambodia, thus lacking the ability to impact popular consciousness in Cambodia. Further, an international tribunal risks the outbreak of civil war in a unique time when the Cambodian people are living in relative peace. "For the first time in a long time we are seeing hope and stability," said Kassie Neou, director of the Cambodian Institute of Human Rights, "the general public wants to keep enjoying the peace."<sup>43</sup>

Similarly, a domestic trial appears to lack legitimacy for the aforementioned reasons, most notably the lack of independence and professionalism of the Cambodian judiciary. It has been argued that a truth commission, as in South Africa, seems impractical in

a country where massive crimes took place more than twenty years ago since truth commissions generally work best where there is an urgent moral desire for addressing immediate past crimes. Truth commissions cannot be standardized; each model must reflect the specific needs of a people who have survived a period of gross human rights violations, even if the commission is reacting to events 20 years in the past.

*Similar to the establishment of the Commission on the Truth for El Salvador, the Cambodian government would have to co-operate with the UN, allowing for the appointment of respected international figures to the commission.*

In Cambodia's case, a truth commission could provide the most accurate record of the atrocities that took place between 1975 and 1979, allowing victims to tell their stories as part of a therapeutic process of dealing with past events. Based on experiences in other countries, achieving unity and morally acceptable reconciliation requires that the truth about gross violations of human rights be established by an official investigation unit using fair procedures fully and unreservedly acknowledged by the perpetrators, and made known to the public. In order to legitimize the process and keep it out of the hands of Cambodian politicians, a Cambodian truth commission would have to be internationalized. However, to be effective, the truth commission would have to take place in Cambodia. Thus, the best option would be to establish a national truth commission with international representatives. Similar to the establishment of the Commission on the Truth for El Salvador, the Cambodian

<sup>43</sup> *Ibid.*

government would have to co-operate with the UN, allowing for the appointment of respected international figures to the commission. By doing so, the Cambodian government could solve the main problems it now faces with the establishment of a tribunal. On one hand, the international community would likely view the process as an adequate response to the Khmer Rouge period, thus guaranteeing badly needed World Bank loans and American foreign aid. On the other hand, the people of Cambodia could finally begin to feel emotionally validated through a public acknowledgement of the horrors they experienced. By basing the process in Cambodia, the commission is more likely to contribute to consciousness raising among the Cambodian public.

A significant advantage of a truth commission in Cambodia would be the ability of the commission to grant amnesty to those who confess their roles in full. While many Cambodians would argue that such a commission is too sympathetic, this design would encourage the full disclosure of crimes that took place during the Khmer Rouge period. By uncovering and documenting the atrocities of the past, this important process could heal the Cambodian people and support national reconciliation. This process of uncovering truths could also lead to the development of a public record based on individual experience and thus provide an opportunity for Cambodians to come to terms with traumatic events of the past. Furthermore, by granting amnesty, the threat of re-ignited civil war in Cambodia would be alleviated. "The threat of trial and imprisonment can drive the guilty into hiding or into re-igniting civil war," argues Nicholas Berry, "especially if a sanctuary exists for the fighters,"

as is presently the case in Cambodia.<sup>44</sup> This happened in Rwanda, where militant Hutus not apprehended by Tutsis renewed their attacks on the Tutsi government from their sanctuary in the Congo.<sup>45</sup> Therefore, by granting amnesty and taking away the threat of trial, a truth commission in Cambodia could satisfy both Khmer Rouge officials as well as the citizens of Cambodia. "War can be made any time here," argues Kassie Neou, "guns are everywhere and we know from experience that no outside government can prevent violence here."<sup>46</sup>

*An alternative would be the establishment of a truth and reconciliation commission that would take place in Cambodia...*

Virtually all Cambodians lost relatives to the genocide, and many still suffer post-traumatic stress disorder.<sup>47</sup> There are a wide range of both immediate and delayed emotional responses affecting survivors, including self-blame, depression and anxiety. A truth commission could therefore provide an opportunity for Cambodians to begin healing by re-telling their personal stories in a safe environment. Tina Rosenberg finds parallels between truth commissions and the therapeutic process that helps individuals deal with post-traumatic stress disorder.<sup>48</sup> She argues that in both contexts individuals need to tell their stories to someone who listens seriously and who validates them with official acknowledgement; in both settings, individuals must be able to reintegrate the narrative of atrocity into their whole life story.<sup>49</sup>

44 Nicolas Berry (The Tangled Politics of the Cambodian Genocide Court), online: <[www.cdi.org/asia/fa070500.html](http://www.cdi.org/asia/fa070500.html)>

45 *Ibid.*

46 *Ibid.*

47 *Ibid.*

48 Tina Rosenberg, *The Haunted Land: Facing Europe's Ghosts After Communism*. (New York: Vintage, 1995), at 26.

49 See note 50 at 62.

A truth commission would break the conspiracy of silence, providing an account of the historical and political factors that contributed to the genocide and offer symbolic acknowledgment of the suffering of victims. As a result, such a commission could function to prevent future violations of human rights in Cambodia through individual therapy that recognizes atrocities committed against the Cambodian people during the Khmer Rouge regime.

*Cambodian survivors of the Khmer Rouge would be the main focus of a truth commission—finally the citizens of Cambodia would have an opportunity to reveal to themselves, and to the world, the facts about one of the most horrific events in recorded history.*

#### CONCLUSIONS

In summary, the Cambodian government's decision to prosecute former Khmer Rouge leaders in a domestic court is problematic for several reasons. First, the design of the proposed tribunal does not meet international standards of justice and the tribunal will not be viewed as an adequate legal response to the Khmer Rouge regime. The consequences of this perception are that the tribunal may be seen as a sham by the international community, which in turn may affect World Bank Loans and American foreign aid to Cambodia. Second, from a national interest point of view, if the anticipated tribunal lacked support from within Cambodia for its inability to prosecute free from corruption, the healing power of the trials would be severely limited. Without the full support and confidence of the Cambodian people, which at present is in

doubt, it seems unlikely that the proposed national tribunal will lead to national reconciliation. An alternative would be the establishment of a truth and reconciliation commission that would take place in Cambodia with the aid of the international community. Cambodian survivors of the Khmer Rouge would be the main focus of a truth commission—finally the citizens of Cambodia would have an opportunity to reveal to themselves, and to the world, the facts about one of the most horrific events in recorded history.

Without a truth commission in Cambodia the full story may never be known. A primary account of the genocide would continue to be Roland Joffe's *The Killing Fields*. Based on a personal experience, this possibility is a frightening reality. One afternoon I had the opportunity to watch *The Killing Fields* at a guesthouse on Boeng Kak Lake on the outskirts of Phnom Penh with a Cambodian family and other travelers after returning from the Killing Fields at Cheoung Ek. Surprisingly, the most difficult part of this experience was not watching the recreation of the horrors experienced by Cambodians, but rather the response of the Cambodian family with whom I was staying. The older Cambodians expressed contempt for the American made film, arguing that the movie fails to paint an accurate picture of the experiences of Cambodians during the Khmer Rouge regime. In contrast, the children were yelling out certain lines of the film with actor Sam Waterston, especially when expressing any semblance of Cambodian pride, for example, in a speech honoring the Cambodian journalist with whom he worked. These children were proud Cambodians, fortunate to have been born after the Khmer Rouge era, who have relied on the personal accounts of their family as their main source of information. Based on the conversations we had, I had a sense these children were confused, torn between the

beliefs their family had instilled in them from a young age and the events presented in the film.

On the other side of the room sat several travelers from around the world that admitted the only thing they knew about Cambodia's history was what they had learned from the film. From an outsider's perspective, I immediately recognized the dangers of a lack of information of Cambodia's recent past. There is an inherent problem when many Westerners rely on an American film as their only source of information about Cambodia's history, especially considering America's role in the Khmer Rouge era. Reflecting on this experience, I cannot help thinking that a truth commission could provide a voice for all three groups of people I encountered on this day. The Cambodian public who survived the Khmer Rouge era would have the

opportunity to tell their side of the story, and document their history as they experienced it. Cambodian children would be presented with numerous recorded accounts of the past versus a single reflection from their family. Finally, the rest of the world would have a publicly documented account of the experiences of surviving Cambodians as a valuable source of information related to the Khmer Rouge. Personally, all it took was one viewing of *The Killing Fields* with a Cambodian family to realize the dangers of accepting this work of fiction as a complete picture. This realization leads me to recognize who is really hurt by an inaccurate record of history and persuades me that a truth commission in Cambodia would be the most effective response to the Khmer Rouge regime. ■

