

# THE FEASIBILITY AND PROPRIETY OF A TRUTH COMMISSION IN CAMBODIA: TOO LITTLE? TOO LATE?

Theresa Klosterman\*

## I. INTRODUCTION

During the 1990s, "truth commissions"<sup>1</sup> have gained acceptance as a strategic tool for governments to address gross human rights violations of a past regime.<sup>2</sup> In the wake of political transitions, El Salvador, Guatemala, Somalia, the former Yugoslavia, Rwanda, and South Africa all established truth commissions.<sup>3</sup> Still other commissions have been proposed to address new and old conflicts around the world. The United Nations is currently considering one of the most unusual proposals: To establish a truth commission to document the human rights abuses of the Khmer Rouge<sup>4</sup> in Cambodia.<sup>5</sup> The Cambodian proposal is unique because the Khmer Rouge atrocities occurred two decades ago. Since then, numerous scholars have documented the scope of murder and violence under the Khmer Rouge regime. Moreover, in fleeing the invading Vietnamese forces, the Khmer Rouge themselves left behind a vast amount of documentation and

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\* J.D. (Expected 1999), University of Arizona College of Law; M.P.A., University of Arizona, 1998; Law Clerk, Legal Aid of Cambodia, 1997; B.A. Stanford University, 1990. An earlier version of this Note was presented at the Law & Society Annual Meeting, June 1998. I thank the panelists and participants in that session for their invaluable comments. I am further indebted to Kimberly J. Chastain, John J. Klosterman, Toni M. Massaro, Leslye Obiora, Lionel Rombach, and Paula K. Weisberger for their encouragement and editorial advice. Any errors or omissions belong to the author. Research for this Note is current to June 1998; accordingly, this assessment is subject to further developments after that time.

1. Truth commission is the popular name for a commission of inquiry into past human rights violations in a particular country. For a more thorough explication of truth commissions, *see infra* Part II.

2. Douglass W. Cassel, Jr.'s description of truth commissions as a "valuable addition to the international human rights arsenal," is illustrative of much of scholarly opinion regarding truth commissions. *See* Douglass W. Cassel, Jr., *International Truth Commissions and Justice*, ASPEN INST. Q., Summer 1993, at 70.

3. *See* Michael P. Scharf, *The Case for a Permanent International Truth Commission*, 7 DUKE J. COMP. & INT'L L. 375, 377 (1997).

4. Cambodia's Prince Sihanouk created the derogatory term Khmer Rouge—literally, "red Cambodians"—as a general label for Cambodian communists. In this article, however, the term refers to the members of the Communist Party of Kampuchea who ruled Cambodia under the regime of Democratic Kampuchea, from 1975-1979. *See* THE CAMBODIAN AGONY 402, 407 (Davis A. Ablin & Marlowe Hood, eds., 1987).

5. *See* Leo Dobbs, *U.N. Official Calls for Cambodian Truth Commission*, REUTERS NEWS, Feb. 6, 1997.

physical evidence of their widespread executions. In light of such proof, can a truth commission reveal more facts about the atrocities than are already known? And with widespread consensus that the Khmer Rouge regime was one of the bloodiest in history, is there still a need to establish the "truth"? Would a truth commission serve to heal or simply exacerbate old wounds?

This Note argues that the international community, via the United Nations, should establish a truth commission in Cambodia to investigate the crimes committed by Khmer Rouge leaders under the regime of Democratic Kampuchea.<sup>6</sup> Such a commission would enable Cambodians to expose the criminal workings of the Khmer Rouge, while setting the foundation for a possible international criminal trial in the future. Establishing an official historical record of the Khmer Rouge atrocities would also prevent the events from being downgraded or denied.<sup>7</sup> A truth commission in Cambodia may also serve the emotional needs of Cambodians, allowing them to bring closure to that brutal era. Part II of this Note presents an overview of truth commissions, outlining their strengths, flaws, and historical uses. Part III provides general background on the Khmer Rouge and the scope of their barbarous acts. Part IV then analyzes the applicability and suitability of a truth commission to the Cambodian context.

Quite deliberately, this Note does not discuss the larger debate in international law regarding the duty to prosecute perpetrators of gross human rights violations. Many distinguished scholars have contributed to that discussion during the past decade.<sup>8</sup> They emphasize the non-derogability of prosecution in human rights violations involving torture, genocide, and crimes against humanity. By advocating prosecution in all grave cases of human rights violation, they strive to end the "culture of impunity" that encourages regimes to continue programs of widespread execution or torture, without accountability.<sup>9</sup>

Truth commissions stand in the periphery of this debate. They do not, in theory, restrict or mollify the duty to prosecute. Moreover, establishing a truth

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6. Although technically the Khmer Rouge state of Democratic Kampuchea was not declared until January 8, 1976, the entire period of Communist Party of Kampuchea rule—from April 17, 1975 to January 7, 1979—is widely referred to as Democratic Kampuchea. See Glossary, *supra* note 4, at 403.

7. See Seth Mydans, *In an Interview, Pol Pot Asserts He's No Savage*, N.Y. TIMES, Oct. 23, 1997, at A1.

8. See, e.g., Diane F. Orentlicher, *Settling Accounts: the Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2595 (1991); Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 38 CAL. L. REV. 451 (1990); Michael Scharf, *The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes*, 39 LAW & CONTEMP. PROBS. 41 (1996). But see Carlos Nino, *The Duty to Punish Past Abuses of Human Rights Put Into Context: The Case of Argentina*, 100 YALE L.J. 2619 (1991).

9. 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) (quoting Scharf).

commission need not automatically block the route to judicial action. Unfortunately, in practice, many states treat truth commissions as a substitute to prosecution. Only in recent years have truth commissions faced better chances of leading to prosecution than they did in the past, due to innovations in the truth commission model and a greater appetite of certain states to hold perpetrators accountable for their actions. The purpose of this Note is not to resolve the tensions between amnesty and prosecutions, which truth commissions often epitomize. Instead, the focus is on the valuable role that a truth commission may play under proper circumstances. The question is: Is Cambodia a proper circumstance? Evaluating the suitability of the proposed Cambodian truth commission enriches the ongoing discussion, both internal and external to Cambodia, of what should be done to bring the Khmer Rouge to justice.

## II. TRUTH AS JUSTICE: THE THEORETICAL BASIS OF TRUTH COMMISSIONS

Commissions of inquiry into past violations of human rights, now commonly called "truth commissions," are difficult to define and categorize precisely because there is no fixed model.<sup>10</sup> Generally, the commissions are bodies convened to investigate prior human rights abuses of government or armed opposition forces in a particular country.<sup>11</sup> Some commissions are composed of notable jurists, human rights workers, and philosophers of the country involved,<sup>12</sup> while others are staffed with international figures.<sup>13</sup> Each truth commission takes on a unique form, with public proceedings, private investigations, or a fusion of the two.<sup>14</sup> The commissions usually submit reports of their findings but, unlike international criminal tribunals, lack authority to determine culpability or impose criminal sanctions.<sup>15</sup> Wide latitude in the form and function of truth commissions

10. Priscilla B. Hayner, *Fifteen Truth Commissions 1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 597, 600, 607 (1994).

11. *See id.* at 604.

12. Chile's National Commission on Truth and Reconciliation, for example, was composed of eight distinguished Chilean human rights activists. *See* David Weissbrodt & Paul W. Fraser, Book Review, 14 HUM. RTS. Q. 601, 603 (1992) (reviewing REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION (1991)).

13. In El Salvador's United Nations-appointed Commission on the Truth, the UN Secretary General named three international authorities to conduct the inquiries, as opposed to Salvadoran nationals. *See* Mark Ensalcado, *Truth Commissions for Chile and El Salvador: A Report and Assessment*, 16 HUM. RTS. Q. 656, 661 (1994).

14. To date, most truth commissions in Latin America have been conducted privately and confidentially, mainly out of the victims' fear of reprisal. In Africa, however, the tendency has been to broadcast proceedings live on television or radio. Either method is valid, Priscilla Hayner points out, as long as a final report is released publicly. *See* Hayner *supra* note 10, at 647.

15. For that reason, truth commissions have been called "[a] step toward justice—

means that "their real value in a given context can range from token to historic, depending on their purposes, powers, composition, and resources."<sup>16</sup> Depending on one's view, the malleability of truth commissions gives them crucial flexibility or makes them "inherently vulnerable to politically imposed limitations."<sup>17</sup>

### A. History of Truth Commissions

Although the United Nations began re-experimenting with truth commissions in 1992,<sup>18</sup> commissions of inquiry have existed for more than eighty years. The Carnegie Endowment for International Peace established the first modern truth commission to investigate alleged killings of civilians and prisoners of war during the 1912 and 1913 Balkan Wars.<sup>19</sup> After World War I, the Allies investigated the atrocities by German and Turkish forces in the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties.<sup>20</sup> Under the auspices of the United Nations, other commissions investigated German and Japanese war crimes after World War II.<sup>21</sup> For more than two decades thereafter, no state introduced a truth commission. Political upheaval in several South American countries, however, prompted the revival of the truth commission as a tool to address atrocities of preceding regimes.<sup>22</sup> From 1974 to 1991, the president or parliament in nine South American countries initiated truth commissions.<sup>23</sup>

The popularity of truth commissions rose dramatically beginning in 1992.<sup>24</sup> This was partly due to the wide attention given to the El Salvador truth commission.<sup>25</sup> Perhaps more importantly, several notorious cases of bloody civil war, including Guatemala, Somalia, the former Yugoslavia, and Rwanda, raised a desire in the international community to investigate instances of brutality.<sup>26</sup> The latest wave of commissions is experimenting with the form of traditional truth commissions. In lieu of being sponsored by a state executive or legislature, more

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the truth, but not punishment . . ." Cassel, *supra* note 2, at 69.

16. *Id.* at 70.

17. Scharf & Epps, *supra* note 9, at 641.

18. That year, the United Nations-brokered peace accord to El Salvador's civil war included the establishment of the Salvadoran Commission on the Truth. See Ensalaco, *supra* note 13, at 657.

19. See Scharf, *supra* note 3, at 377.

20. See *id.*

21. See *id.*

22. Within the span of about a decade, truth commissions were instigated in Bolivia, Argentina, Uruguay, and Chile. See generally Hayner, *supra* note 10.

23. See *id.* at 606-67.

24. Six truth commissions were established during 1992 and 1993. See *id.*

25. See *id.* at 605.

26. See *id.*

recent truth commissions have been instigated by an opposition party, an alliance of nongovernmental organizations, or the United Nations.<sup>27</sup> Innovative use of technology is augmenting the public's awareness of truth commission proceedings, too. The South African Truth and Reconciliation Commission maintains an Internet site on which observers around the world can follow the proceedings.<sup>28</sup> These recent developments suggest that a strength of truth commissions is their pliancy, allowing for adaptation to the needs and constraints of each context.

A significant weakness of truth commissions, on the other hand, is the tendency to view them as a surrogate for formal prosecution.<sup>29</sup> Under certain circumstances, a truth commission may be viewed as an essential compromise to judicial action. Carlos Nino, describing the delicate political situation in Argentina following the Peronist government, argued that a truth commission was a necessary choice, given that country's constraints.<sup>30</sup> To say that a truth commission is a compromise or "necessary evil," however, is not to say that it is on par with formal prosecution.<sup>31</sup> Formal judicial proceedings impart "a solemnity and authority in individual cases that a 'truth commission' . . . cannot equal."<sup>32</sup>

## **B. An Overview of Truth Commissions**

Proponents of truth commissions cite four purposes for the commissions, each of which is discussed below. This Note then analyzes the Cambodian context to assess whether a truth commission in Cambodia would meet any of these four purposes.

### **1. Generating an Authoritative Record**

A country, coming to terms with its own history of massive human rights abuses, customarily employs truth commissions.<sup>33</sup> The conventional model of a

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27. See Hayner, *supra* note 10, at 607.

28. See generally *Truth and Reconciliation Commission* (last modified Sept. 13, 1998) <<http://www.truth.org.za/>>.

29. See *infra* notes 79-80 and accompanying text.

30. Responding to Professor Orentlicher's article on the duty to punish past human rights abuses, Nino maintains that "[a] legal duty selectively to prosecute human rights violations committed under a previous regime is too blunt an instrument to help successor governments who must struggle with the subtle complexities of re-establishing democracy." Nino, *supra* note 8, at 2640.

31. Naomi Roht-Arriaza, *Conclusion: Combating Impunity*, IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 281, 286 (Naomi Roht-Arriaza, ed., 1995).

32. *Id.*

33. See Hayner, *supra* note 10, at 604.

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>34</sup> It also offers a clear demarcation between the past and present regimes.<sup>35</sup> While most truth commissions set out to describe patterns of violence in a general way, often without naming the names of victims or perpetrators,<sup>36</sup> others may try to account for every person killed or "disappeared"<sup>37</sup> under the former regime.<sup>38</sup>

Determining the truth about human rights violations is crucial when the past regime engaged in clandestine crimes.<sup>39</sup> In Latin America, the hallmark of many military regimes was forced disappearances and killings by anonymous death squads.<sup>40</sup> Because unknown parties carry out these acts, governments often deny involvement, and point the finger at opposition groups. The mystery surrounding the disappearances fosters a general societal atmosphere of suspicion, fear, and social withdrawal.<sup>41</sup> The bodies of those disappeared are almost never recovered, leaving family members with uncertainty about the fate of loved ones. Hence, closure and healing are particularly difficult.<sup>42</sup> Chronicling the past is important for both individuals and society in general because it solves the mystery of these clandestine crimes.<sup>43</sup>

In countries where governments do not obfuscate human rights violations, fact finding may be less important than fact acknowledging.<sup>44</sup> According to Thomas Nagel, acknowledgment is "what happens and can only happen to knowledge when it becomes officially sanctioned, when it is made part of the public cognitive scene."<sup>45</sup> Former Director of Americas Watch Juan

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34. *See id.* at 608.

35. Margaret Popkin & Naomi Roht-Arriaza, *Truth as Justice: Investigatory Commissions in Latin America*, 20 L. & SOC. INQUIRY 79, 93 (Winter 1995).

36. The case of El Salvador is notable because, where sufficient evidence warranted, the commission published the names of individuals found to have committed, ordered, or covered up violent acts. *See Cassel, supra* note 2, at 74.

37. "Disappearances" usually involve the plucking of an individual off the street by anonymous agents. The individuals literally disappear—never seen again, alive or dead. *See Popkin & Roht-Arriaza, supra* note 35, at 81.

38. Chile's truth commission, for example, set out to investigate approximately 3,400 deaths, many involving forced disappearances. It reached final conclusions on the fate of over 2,700 individuals. *See Ensalaco, supra* note 13, at 659.

39. *See Popkin & Roht-Arriaza, supra* note 35, at 81.

40. *See id.* at 81-82.

41. *See id.* at 82.

42. *See id.* Because no body is recovered, family members also often face legal problems claiming pensions, selling property, or remarrying.

43. *See id.*

44. *See Hayner, supra* note 10, at 607.

45. Luc Huyse, *Justice After Transition: On the Choices Successor Elites Make in*

Mendez goes further, stating that knowledge that is officially sanctioned “acquires a mysterious quality that is not there when it is merely ‘truth.’ Official acknowledgment at least begins to heal the wounds.”<sup>46</sup> Such acknowledgment is important because, in many religious and ethical traditions, it is a prerequisite to societal forgiveness and atonement.<sup>47</sup>

The process of ascertaining the truth is often highlighted as being as important as, if not more significant than, the end conclusions. In publicly describing personal traumas, individuals often achieve some measure of catharsis.<sup>48</sup> Moreover, the fact that the government is listening to and validating the stories of victims affirms their dignity.<sup>49</sup> Proponents of both criminal tribunals and truth commissions underscore the importance, indeed the moral obligation, of a successor government to allow victims to “bear witness” to the hardships they endured.<sup>50</sup> Where societies have failed to give victims a forum, a country is said to be “plagued by continuous brooding and pondering.”<sup>51</sup>

The fulcrum of public attestation is, of course, victim willingness. Uganda’s truth commission failed largely because of the victims’ unwillingness to rehash painful memories, cynicism about the nature of the proceedings, reluctance to attract attention, and lack of interest.<sup>52</sup> In some cases, the victims’ legitimate fears of reprisal also curtail their cooperation.<sup>53</sup> This weakness of truth commissions, however, is often curable. Given proper assurances of victim safety (i.e., victim anonymity), options to attest *in camera*, and full disclosure to the public of the motives for and uses of the truth commission report, truth commissions can usually augment the willingness of victims to testify.<sup>54</sup>

The function of generating an authoritative record and its corollaries—acknowledging the past and catharsis for victims—is often regarded as the foremost achievement of truth commissions.<sup>55</sup> While the *ancien regime* will likely dispute the findings, history has proved that an authoritative description of events eventually comes to be accepted, thereby giving structure to a historical record.<sup>56</sup>

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*Dealing with the Past*, 20 L. & SOC. INQUIRY 51 (Winter 1995).

46. Hayner, *supra* note 10, at 607.

47. See HUMAN RIGHTS PROGRAM, HARVARD LAW SCHOOL, TRUTH COMMISSIONS: A COMPARATIVE ASSESSMENT 23 (1997) (quoting Jose Zalaquett).

48. See *id.* at 24 (quoting Bryan Hehir).

49. See Popkin & Roht-Arriaza, *supra* note 35, at 114.

50. See Huyse, *supra* note 45, at 55.

51. See *id.*

52. See Weissbrodt & Fraser, *supra* note 12, at 610.

53. Both the Ugandan and Salvadoran truth commissions established *in camera* proceedings as a means of addressing such fears. See *id.* at 610 & n.39. See also Hayner, *supra* note 10, at 647.

54. See Weissbrodt & Fraser, *supra* note 12, at 610. See also Hayner, *supra* note 10, at 647.

55. See Popkin & Roht-Arriaza, *supra* note 35, at 113.

56. See *id.* at 113-14.

## 2. Allowing Alternatives to Normal Prosecution

A second purpose of truth commissions is to provide an alternative to the normal procedure of prosecution. Because commissions do not involve prosecution, they do not demand an independent judiciary.<sup>57</sup> In many cases of transitional government, the police and courts are incapable of addressing the magnitude of past human rights violations.<sup>58</sup> Indeed, some argue that if the judiciary and police had fulfilled their duties as charged, an *ad hoc* truth commission would not be necessary.<sup>59</sup> The question of judicial complicity also raises concerns about public faith in formal prosecutions. Many people view truth commissions as more vigorous and autonomous than the courts of a country because of their *ad hoc* nature.<sup>60</sup>

The time demands of formal prosecution are also largely bypassed by the use of a truth commission.<sup>61</sup> The time requirements for preparation and formal prosecution of human rights complaints make tribunals infeasible in some circumstances. In the current International Criminal Tribunal for Rwanda, for example, the last of twenty-seven prosecution witnesses testified in November 1997, ten months after the trial began.<sup>62</sup> At that rate, it will take more than twenty years just to try the thirty-five people indicted by the Tribunal.<sup>63</sup> The glacial pace of criminal tribunals, coupled with the sheer volume of violations, can thus impede the effectiveness of formal prosecution. Truth commissions can produce results relatively quickly, compared to prosecutions in national or international courts. Chilean President Patricio Aylwin established his country's truth commission only a month after assuming power. Its 850-page report was issued less than a year later.<sup>64</sup> By contrast, the Rwanda tribunal was created in 1994; three years later it had yet to convict a single defendant.<sup>65</sup>

The comparative informality of truth commissions also allows for bypasses to due process. In the case of El Salvador, the truth commission did not sanction confrontation of witnesses,<sup>66</sup> a standard due process requirement. In that country, witnesses were extremely reluctant to disclose their identities for fear of

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57. *See id.* at 82.

58. *See id.*

59. *See id.*

60. As Weissbrodt and Fraser point out, however, composition of a truth commission is crucial to its perceived independence and nonpartisanship. *See* Weissbrodt & Fraser, *supra* note 12, at 603.

61. *See generally* Popkin & Roht-Arriaza, *supra* note 35, at 82.

62. *See* James C. McKinley, Jr., *On 1994 Blood Bath in Rwanda, Tribunal Hews to a Glacial Pace*, N.Y. TIMES, Nov. 21, 1997, at A1.

63. *See id.*

64. *See* Ensalaco, *supra* note 13, at 657 & n.2.

65. *See* McKinley, *supra* note 62, at A1.

66. *See* Cassel, *supra* note 2, at 84.



reprisal.<sup>67</sup> Additionally, formal tribunals have the problem of being unable to prosecute individuals who have been granted amnesty. A truth commission, however, could conduct investigations of those with amnesty.<sup>68</sup> More formal prosecutions also confront problems with ex post facto application of criminal laws and ad hoc courts, both of which are avoided in the more flexible, non-judicial truth commissions.<sup>69</sup>

Clearly, such “shortcuts” of due process make some commentators uncomfortable. Jose Zalaquett underscores the importance of restraining truth commissions from attempting to prosecute when he describes the “fine line between an ethical commission and a kangaroo court.”<sup>70</sup> The publication of perpetrators’ names draws perhaps the heaviest criticism. In the introduction to the Chilean Truth Commission report, Zalaquett writes that “to name culprits who had not defended themselves and were not obliged to do so would have been the moral equivalent to convicting someone without due process. This would have been in contradiction with the spirit, if not the letter, of the rule of law and human rights principles.”<sup>71</sup> Opponents argue that publication of names, even with qualifications that the proceedings are non-judicial, is popularly regarded as a token of guilt.<sup>72</sup> Proponents of publication, however, counter that to mask names “would be to reinforce the very impunity to which the parties instructed the Commission to put an end.”<sup>73</sup> Notions of fairness also come into play. The public will lose faith in a commission, some argue, that provides former torturers and dictators with the “judicial guarantees and procedural protections that they never afforded their victims.”<sup>74</sup> Other criticisms of the non-judicial nature of truth commissions include their lack of power to subpoena witnesses or discourage perjury, and their potential manipulation as victor’s justice.<sup>75</sup> Thus, the potential advantages that come from flexible, non-prosecutorial proceedings hinge upon the facts of a particular situation.

67. *See id.*

68. Adam Fifield, *Peace Without Justice*, 21 IN THESE TIMES 3, 27 (Dec. 23, 1996/Jan. 5, 1997).

69. *See* Popkin & Roht-Arriaza, *supra* note 35, at 82.

70. HUMAN RIGHTS PROGRAM, *supra* note 47, at 30 (quoting Jose Zalaquett).

71. 1 REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION xxxii (Phillip E. Berryman, trans., 1993), *quoted in* Hayner, *supra* note 10, at 648.

72. *See id.*

73. FROM MADNESS TO HOPE; THE 12-YEAR WAR IN EL SALVADOR: REPORT OF THE COMMISSION ON THE TRUTH FOR EL SALVADOR, UN Security Council, U.N. Doc. 2/2500 at 18 (1990), *quoted in* Hayner, *supra* note 10, at 649.

74. 1 NEIL J. KRITZ, TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES xxix, xxxiv (1995).

75. *See* Scharf & Epps, *supra* note 9, at 641 (quoting Michael Scharf).

### 3. Laying a Foundation for Later Prosecution

Truth commission proponents tout them as a means of collecting data and evidence to be used later in formal prosecutions of the human rights violators. Under the mandate of Chile's truth commission, for instance, commission members were directed to submit any evidence of criminal action directly to the courts.<sup>76</sup> By collecting evidence in advance of formal prosecution, truth commissions address critical timing issues. The evidence is gathered shortly after the transition to the new government, when memories are freshest. Because this is also the time when the judiciary is likely to be weak and ineffectual, prosecutions may not be practical until the judiciary is reformed and strengthened.<sup>77</sup> Hence, the information gathered during truth commission proceedings can provide the foundation for later prosecutions.

In this respect, however, the theory and practice of truth commissions have been incongruent: evidence from truth commissions has led to prosecutions in only a few cases.<sup>78</sup> In most cases, there are no trials of any kind, even where the scope of brutality and identity of perpetrators are widely known. Sometimes amnesty laws are passed that categorically prevent future trials.<sup>79</sup> More often, though, truth commissions are regarded a priori as an alternative for prosecution; the result is de facto amnesty.<sup>80</sup> At the extreme, investing truth commissions with broad investigatory powers may actually hamper later prosecutions. In the Iran-Contra investigations (akin to a truth commission investigation) and the resulting trial of Colonel Oliver North, for example, the testimony of several witnesses was found to be prejudicially influenced by exposure to defendant's compelled testimony before a Congressional Committee. His conviction was later reversed.<sup>81</sup>

Recently, a more aggressive stance toward human rights violations appears to be increasing the chances that truth commissions will culminate in formal prosecutions. A 1993 truth commission investigation of egregious human rights violations in Rwanda provided impetus for the United Nation's criminal tribunal on later, related atrocities.<sup>82</sup> In 1995 Chilean courts convicted two top

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76. See Ensalaco, *supra* note 13, at 658-59.

77. See generally Popkin & Roht-Arriaza, *supra* note 35, at 82.

78. Both Bolivia and Argentina did conduct trials in conjunction with or as a result of truth commission findings. See Hayner, *supra* note 10, at 604 & n.4.

79. For instance, shortly after the publication of El Salvador's Truth Commission report, the government passed a blanket amnesty law for all those identified as responsible for violent acts. See Thomas Buergenthal, *The United Nations Truth Commission for El Salvador*, 27 VAND. J. TRANSNAT'L L. 497, 537 (1994).

80. See Popkin & Roht-Arriaza, *supra* note 35, at 116.

81. *United States v. North*, 910 F.2d 843, 872 (D.C.Cir. 1990), *rev'd in other respects* 920 F.2d 940 (D.C. Cir. 1990). See Weissbrodt & Fraser, *supra* note 12, at 621-22.

82. See Hayner, *supra* note 10, at 629-32 (describing the Rwandan truth commission model).

officials for organizing the 1976 murder of former foreign minister Orlando Letelier.<sup>83</sup> Those convictions arose out of proceedings of the Chilean National Commission on Truth and Reconciliation, which took place three years earlier.<sup>84</sup> South Africa's Truth and Reconciliation Committee also appears to be laying groundwork for later prosecutions in its selective and qualified dispensing of amnesties.<sup>85</sup> If these cases are any indication, future truth commissions may boast a better record of laying a foundation for subsequent prosecutions.

#### 4. Promoting Institutional Changes and Reconciliation

A fourth feature of truth commissions is the promotion of institutional and symbolic changes designed to prevent future human rights abuses. To accomplish this goal, truth commissions generally publish recommendations along with a report of findings.<sup>86</sup> The Chilean report's 100 pages of recommendations for reparations, institutional improvements, and educational proposals is typical.<sup>87</sup> These recommendations can be categorized as institutional or symbolic. Institutional changes involve strengthening democratic institutions, such as an independent judiciary, improving safeguards against police and military abuse, or even recommending that certain individuals be removed from official posts. Although recommendations for institutional changes are often critical to the rebuilding of a country in the wake of gross human rights violations, the success of widespread reforms hinges on the political and economic constraints of the country. International pressure to accomplish the reforms may also increase the chance of success.<sup>88</sup>

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83. See Brook Larmer, *The Long Goodbye*, NEWSWEEK ATLANTIC EDITION, Mar. 16, 1998, at 17.

84. See *id.*

85. See Brandon Hamber, *The Need for a Survivor-Centered Approach to the Truth and Reconciliation Commission*, (visited Sept. 2, 1998) <<http://sunsite.wits.ac.za/wits/csvr/artcdrt.htm>>. See also *Talk of the Nation: The Politics of Forgiveness*, (Mar. 25, 1997) (Transcript 97032501-211) (quoting Diana Orentlicher). Prof. Orentlicher points out that people seeking amnesty before the South African Truth and Reconciliation Committee often implicate those high up the chain of command, which also advances prosecution. See also *South African Truth and Reconciliation Commission website*, *supra* note 28 (showing statistics of the number of amnesties granted and denied).

86. See Hayner, *supra* note 10, at 609.

87. See HUMAN RIGHTS PROGRAM, *supra* note 47, at 56 (quoting Jose Zalaquett).

88. See Popkin & Roht-Arriaza, *supra* note 35, at 103. According to Popkin and Roht-Arriaza, international pressure can substitute for political will, especially when a truth commission has been instigated through the United Nations. For example, the United Nations-brokered peace accords in El Salvador bound both sides to follow the recommendations of the truth commission. See *id.* at 103-04.

Truth commission recommendations for symbolic changes often achieve greater implementation than proposals for institutional reform.<sup>89</sup> These recommendations are faster, easier, and cheaper than institutional changes. That is not to say that symbolic changes are inconsequential. The need for reconciliation can be as pressing as institutional reforms, particularly when the past violence reflects deep ethnic discord.<sup>90</sup> In such cases, any measure of future peace is contingent upon harmony, or at least settlement, between ethnic groups. Past truth commission recommendations include symbolic reparations, such as the construction of a public monument and the establishment of a national holiday in remembrance of victims.<sup>91</sup> Recommendations for material compensation to victims is also common, including recommendations for social security, housing, and medical care for individuals who suffered physical and mental ordeals.<sup>92</sup> Symbolic changes thus aim to facilitate a process of reconciliation and unity-building by reliving the past while simultaneously aiming at the future.<sup>93</sup>

The criticism of these recommendations is that, in lieu of healing wounds, they foment old issues and foster deeper animosity.<sup>94</sup> On a personal level, victims may suffer from rehashing old traumas.<sup>95</sup> On the societal level, critics of truth commissions question the good of injecting divisive issues and painful memories into a politically fragile environment.<sup>96</sup> In "cleansing" old wounds, society may find that the entire political body is infected, to the point of near death.<sup>97</sup> In her analysis of several truth commissions, however, Priscilla Hayner suggests that such fears are often overblown. The facts show that "no truth commission to date has caused a situation to become worse."<sup>98</sup> Even in countries where truth commission reports have been candid and unequivocal, she contends, the overall impact of the commissions have been positive, lessening tension while augmenting national reconciliation.<sup>99</sup>

This overview of the major components of truth commissions, including their strengths and weaknesses, provides the background for analysis of the applicability of a truth commission in Cambodia. Before progressing with that analysis, however, it is helpful to understand the nature and scope of the atrocities committed by the Khmer Rouge.

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89. *See id.* at 101-04.

90. *See* Hayner, *supra* note 10, at 655.

91. *See* Ensalaco, *supra* note 13, at 663.

92. *See id.* at 663-64.

93. *See* HUMAN RIGHTS PROGRAM, *supra* note 47, at 56 (quoting Jose Zalaquett).

94. *See* Hayner, *supra* note 10, at 609.

95. *See infra* note 239 and accompanying text.

96. *See generally* Hayner, *supra* note 10, at 609-10.

97. *Id.* at 610.

98. *Id.*

99. *See id.*

### III. THE KILLING FIELDS: SYMBOL OF THE KHMER ROUGE ATROCITIES

#### A. History and Scope of the Cambodian Genocide

The brutal story of the Khmer Rouge begins fifteen years before the faction gained control of Cambodia in 1975. Beginning in 1960, Pol Pot<sup>100</sup> served as a senior member of the Workers' Party of Kampuchea,<sup>101</sup> and became secretary a few years later. Under increasing surveillance and pressure from the government, Pol Pot and the Khmer Rouge moved their operations to the jungle in order to evade government observers.<sup>102</sup> For more than twelve years, the Khmer Rouge led a resistance: first against Prince Sihanouk, and then against the pro-American General Lon Nol.<sup>103</sup> Finally, in April of 1975, the Khmer Rouge seized control of the capital, Phnom Penh, and within hours began the forced evacuation of the city's 2.5 million residents.<sup>104</sup> Thus began Pol Pot's planned Maoist experiment: to achieve self-sufficiency through agrarian communism.<sup>105</sup> Cambodian society was beginning from "year zero" under the Khmer Rouge regime of Democratic Kampuchea.<sup>106</sup>

Within days, the capital and all cities were emptied. Doctors, lawyers, monks, teachers, and other professionals transformed overnight into farmers.<sup>107</sup>

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100. Referred to by his comrades as "Brother Number One," Pol Pot maintained control of the Khmer Rouge for more than three decades, and controlled Democratic Kampuchea from 1975 to 1979. Nate Thayer, *Pol Pot Unmasked*, FAR E. ECON. REV., Aug. 7, 1997, at 19-20.

101. From 1960-1966, the Worker's Party of Kampuchea was Cambodia's communist organization. As the French-educated intellectuals, such as Pol Pot, Ieng Sary, and Son Sen assumed greater leadership, the party changed its name to the Communist Party of Kampuchea in 1966. See Glossary, *supra* note 4, at 413.

102. See Thayer, *supra* note 100, at 19.

103. Right-wing General Lon Nol seized power from Prince Sihanouk in a 1970 coup that led to civil war. The United States supported the Lon Nol regime from 1970 to 1975, when the Khmer Rouge succeeded in displacing him. See *A Dictator's Rise and Fall*, N.Y. TIMES, Apr. 17, 1998, at A15.

104. See FRANCOIS PONCHAUD, *CAMBODIA: YEAR ZERO 18-20* (Nancy Amphoux trans., Holt Rinehart and Winston 1978) (1977).

105. Pol Pot's radical vision for Cambodia was influenced in part by a five-month trip to China in 1965, on the eve of the Cultural Revolution. After gaining control of Cambodia in 1975, Pol Pot continued to maintain ties with his friend and mentor, Mao Zedong. See Thayer, *supra* note 100, at 20. See also Karl D. Jackson, *The Ideology of Total Revolution*, in *CAMBODIA 1975-1978: RENDEZVOUS WITH DEATH* 37, 38, 74 (Karl D. Jackson ed., 1989); Kenneth M. Quinn, *Explaining the Terror*, in *CAMBODIA 1975-1978: RENDEZVOUS WITH DEATH* 215, 219-31 (Karl D. Jackson ed., 1989).

106. See PONCHAUD, *supra* note 104, at 192-93.

107. The Khmer Rouge sought, *inter alia*, to cure the war-ravaged economy by transferring the urbanites into food production. See Timothy Carney, *The Unexpected Victory*, in *CAMBODIA 1975-1978: RENDEZVOUS WITH DEATH* 13, 33 (Karl D. Jackson

Under Pol Pot's direction, troops immediately executed any officers associated with the toppled Lon Nol regime, as well as their wives and children.<sup>108</sup> The next surge of killings focused on the elite of the old regime: professors and monks in particular, but often any Cambodians who might be considered intellectuals.<sup>109</sup> Wearing glasses or speaking foreign languages immediately raised suspicions. Many Cambodians were forced to conceal their previous lives.<sup>110</sup> The driving force behind this purge was the immutable belief that "a person who has been spoiled by a corrupt regime cannot be reformed; he must be physically eliminated . . . ."<sup>111</sup> Torture or death was the fate for all but the peasant farmers, who were the only ones deemed pure.<sup>112</sup>

From the start, secrecy was the modus operandi of the Khmer Rouge. All orders came from the *Angkar*, literally the "organization."<sup>113</sup> This anonymous title masked the communist nature of *Angkar*, a tactic previously used by Vietnamese communists to entice peasants without revealing the party's ties.<sup>114</sup> The Khmer Rouge maintained that veil of secrecy even after victory was secured.<sup>115</sup> It was a year before Pol Pot announced a new government.<sup>116</sup> In the meantime, the communist cadre enshrouded *Angkar* in omnipotence: "Angkar has as many eyes as a pineapple and cannot make mistakes."<sup>117</sup> The secrecy of the Khmer Rouge was preserved through the internal practices of keeping any member from knowing too much, as well as the external policy of international isolation.<sup>118</sup> From the time Phnom Penh was seized, all telephone, cable, and mail services ceased. The borders were closed and foreigners expelled—even those

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ed., 1989).

108. See PONCHAUD, *supra* note 104, at 28, 50-51. See also LEO KUPER, *THE PREVENTION OF GENOCIDE* (1985).

109. See KUPER, *supra* note 108, at 130.

110. See Interview with Sok Seam, Attorney, Legal Aid of Cambodia, in Svay Rieng, Cambodia (June 14, 1997). Sok Seam survived the Khmer Rouge by disguising his education as a literature teacher and feigning illiteracy. See also SYDNEY SCHANBERG, *THE DEATH AND LIFE OF DITH PRAN* 44 (2d ed. 1985).

111. PONCHAUD, *supra* note 104, at 50.

112. See *id.*

113. The Khmer Rouge used the term "*Angkar*" to refer to ruling authorities within the Communist Party of Kampuchea. See Glossary, *supra* note 4, at 402.

114. See ELIZABETH BECKER, *WHEN THE WAR WAS OVER* 156 (1986).

115. See *id.* When a French diplomat petitioned the new regime for discussions with an envoy, for example, he was told: "We have no leaders." PONCHAUD, *supra* note 104, at 11.

116. See BECKER, *supra* note 114, at 179.

117. That adage was recorded by Ith Sarin, who wrote about the Khmer Rouge after spending nine months with them in the early 1970s. ITH SARIN, *REGRETS FOR THE KHMER SOUL* (1973), quoted in BECKER, *supra* note 114, at 156.

118. See Jackson, *supra* note 105, at 45. See also BECKER, *supra* note 114, at 180.

married to Cambodian spouses.<sup>119</sup> Cambodia's sole contact to the world was a flight to Beijing every fortnight.<sup>120</sup>

As they emptied the cities, the Khmer Rouge set the tone for the draconian policies that continued for the next four years. Money and markets were eradicated, private property abolished, and religious life forbidden.<sup>121</sup> The Khmer Rouge suspended formal education<sup>122</sup> and closed hospitals in favor of traditional medicine.<sup>123</sup> Above all, the state feared the family more than any remnant of the former society. Parents were often separated from their children, marriages arranged for convenience, and family members given new names<sup>124</sup> to symbolically sever the bonds with their families. By blending together people from all walks of life, the Khmer Rouge intended to preempt any organized opposition.<sup>125</sup> Eliminating any loyalties to other individuals or to an ethnic group, by Khmer Rouge logic, created a purer society; one devoted solely to the state.<sup>126</sup> Consequently, *Angkar* installed policies to foster societal atomization, such as forcing cultural and religious minorities to forsake their distinctive customs.<sup>127</sup>

Brutality was the means for achieving the national purity the Khmer Rouge sought. During their exile years in the jungles, the Khmer Rouge raised a generation of teenage soldiers to be exceptionally cruel and disrespectful to their elders.<sup>128</sup> Dith Pran, a survivor of the Khmer Rouge, described his fear of the soldiers younger than fifteen years old. They were "the most completely and savagely indoctrinated . . . [without] any feelings about human life because they were taught only discipline."<sup>129</sup> When the rule of terror was combined with the

119. See SCHANBERG, *supra* note 110, at 32-33.

120. See EVA MYSLIWIEC, PUNISHING THE POOR: THE INTERNATIONAL ISOLATION OF KAMPUCHEA 7 (1988).

121. See BECKER, *supra* note 114, at 45.

122. See JACKSON, *supra* note 105, at 75-77.

123. See MYSLIWIEC, *supra* note 120, at 6.

124. The Khmer Rouge obsession with secrecy and subterfuge is also apparent in its habit of hiding members behind a *nomme de guerre*. Pol Pot himself was born Saloth Sar and adopted his *nomme de guerre* after establishing the Khmer Rouge. Ith Sarin, a Cambodian who spent nine months with the Khmer Rouge in 1972, described the obsession with secrecy: "Members of the Bureaus must keep confidential their personal information . . . That is why each person must have a new name and must hide their former name . . ." Ith Sarin, *Life in the Bureaus of the Khmer Rouge (3 January 1972 to 15 January 1973)*, in TIMOTHY CARNEY, COMMUNIST PARTY POWER IN KAMPUCHEA (CAMBODIA): DOCUMENTS AND DISCUSSION 47 (1977).

125. See PONCHAUD, *supra* note 104, at 19.

126. See BECKER, *supra* note 114, at 223.

127. See *id.* at 222-23.

128. See Youk Chhang, *The "Poisonous Hill" That was Tuol Sleng*, PHNOM PENH POST, May 3-15, 1997, at 20. (translated by Phat Kosal). The ruthless teenagers were picked as guards of the infamous S-21 prison, known as Tuol Sleng, the site of nearly 15,000 executions. See Quinn, *supra* note 105, at 237-38.

129. SCHANBERG, *supra* note 110, at 48 (the book on which the movie "The Killing

subjugation of cultural and religious minorities, the result was predictable: hundreds of thousands of ethnic minorities were massacred because they were considered a threat to the nation. Before long, the party issued a directive that effectively relegated minorities.<sup>130</sup> Countless attacks targeted the Muslim minority, Chams, as well as ethnic Chinese, Thai, Vietnamese, and native hill tribes.<sup>131</sup>

Ethnic Chams, people of Malayo-Polynesian descent, suffered particularly high losses. Under the "Khmerization" program, the Khmer Rouge prohibited the speaking of the Cham language, practicing Islam, and observing the customs of marriage, traditional meals, and funeral ceremonies.<sup>132</sup> Cham families were often broken up and dispersed among the Cambodian population.<sup>133</sup> Although estimates of the Cham population in Cambodia before the Democratic Kampuchea regime vary widely, most estimates conclude that at least one-half or more of the population did not survive the four years of Khmer Rouge rule.<sup>134</sup>

Religious groups faced similar oppression under the Khmer Rouge. Theoretically, Article 20 of the Democratic Kampuchean Constitution provided the right to worship according to any religion, but it also strictly prohibited "all reactionary religions that are detrimental to Democratic Kampuchea and the Kampuchean people . . ."<sup>135</sup> In practice, all religion and religious activities were regarded as reactionary and therefore strictly prohibited.<sup>136</sup> The Khmer Rouge assault on religious groups fell most heavily on Buddhism, which was the established state religion of Cambodia.<sup>137</sup> *Angkar* prohibited any religious observances, rituals, and practices. Moreover, the state executed monks who refused to disrobe or otherwise disobeyed orders. By the time the Khmer Rouge

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Fields" was based).

130. In Kampuchea there is one nation, and one language, the Khmer language. From now on the various nationalities do not exist any longer in Kampuchea. "Like their other arbitrary divisions of society, the decree banishing minorities was a license to harass and murder thousands of innocent victims." BECKER, *supra* note 114, at 253-54.

131. *Id.*

132. David Hawk, *The Photographic Record, in* CAMBODIA 1975-1978: RENDEZVOUS WITH DEATH 209, 212-13 (Karl D. Jackson ed., 1989).

133. See BECKER, *supra* note 114, at 261-63.

134. Cham survivors and refugees estimate the pre-1970 population as approximately 500,000 to 700,000 and the post-1979 population as 200,000. See *Khmer People's National Liberation Front Bulletin* No. 22, April 25, 1984, at 14 (on file with the Cambodian Documentation Commission), cited in Hurst Hannum, *International Law and Cambodian Genocide: The Sounds of Silence*, 11 HUM. RTS. Q. 82, 87 (1989).

135. *Constitution of Democratic Kampuchea, in* PONCHAUD, *supra* note 104, at 206.

136. *Id.* at 126-32.

137. As Cambodia scholar Karl Jackson writes, "Before the Khmer Rouge, Cambodia was considered to be the most Buddhist country in Southeast Asia. To be Khmer meant to be Buddhist." Jackson, *supra* note 105, at 68.



lost power, fewer than one thousand of Cambodia's approximately sixty thousand monks survived and returned to the temples.<sup>138</sup>

The purges did not stop there. Documents from Tuol Sleng prison<sup>139</sup> show that the vast majority of victims there were Cambodian communists themselves, accused of sedition or suspected of dissident ties.<sup>140</sup> The most common method of execution involved leading victims to a field with massive graves and bludgeoning them with a club or hatchet in order to save precious bullets. Archives from Tuol Sleng indicate that twenty thousand people were killed inside the prison and in the "killing fields."<sup>141</sup> Remarkably, four out of five of those killed were Khmer Rouge personnel.<sup>142</sup> Tuol Sleng clearly lived up to its Cambodian pseudonym as "place of entering, no leaving."<sup>143</sup>

When the Vietnamese invaded Cambodia in 1979 and installed a puppet regime, the full scope of the Khmer Rouge atrocities came to light. Like the Nazis in Germany, the Cambodians kept meticulous records of their executions.<sup>144</sup> Schedules of the daily killings show the bloodiest day in the Tuol Sleng prison was May 27, 1978, when 582 prisoners were killed.<sup>145</sup> When Pol Pot and the Khmer Rouge fled to the jungle less than a day before Vietnamese victory, they abandoned the lists of prisoners admitted and executed, as well as confessions and other documents.<sup>146</sup> Excluded from these documents, however, is information about the enormous numbers of Cambodians who died of starvation, forced labor, or disease as a direct result of Khmer Rouge policies.<sup>147</sup> Estimates are that

138. See *Hearings on the Crime of Genocide Before the Senate Comm. On Foreign Relations*, 99th Cong., 1st Sess. 195 (1985) (statement of David R. Hawk).

139. A converted school in Phnom Penh, Tuol Sleng, once known as S-21, was the primary prison-execution center for enemies of Pol Pot and Democratic Kampuchea. See Glossary, *supra* note 4, at 412.

140. See Elizabeth Becker, *The Death Chambers of the Khmer Rouge*, WASH. POST, Aug. 2, 1981, at C4.

141. See Hawk, *supra* note 132, at 209-10. The "Killing Fields" refers to the mass graves in often remote areas, marking the site of large scale political killings. The most notorious of such sites is Cheung Ek, where some 8,000 skulls have been counted. See *id.* at 211.

142. See Quinn, *supra* note 105, at 198, citing Peter White, *Kampuchea Wakens From a Nightmare*, 161 NATIONAL GEOGRAPHIC, May 1982, at 600.

143. DAVID P. CHANDLER, *A HISTORY OF CAMBODIA* 218 (2d. ed., 1982).

144. See generally Jon Swain, *Khmers Try to Bury Their Evil with Pol Pot*, TIMES NEWSPAPERS LIMITED, Aug. 3, 1997, available in LEXIS, News Library. Yale University's Cambodian Genocide Programme, funded by the American State Department, has searched through half a million documents left by the fleeing Khmer Rouge. All evidence points to extermination centers more systematic and widespread than previously imagined. More than 20,000 mass graves have also been mapped. See *id.*

145. See Hawk, *supra* note 132, at 210.

146. See BECKER, *supra* note 140, at C4.

147. See CHANDLER, *supra* note 143, at 233.

between 1.7 and 2 million people died under the Khmer Rouge,<sup>148</sup> making it one of the most murderous regimes in history. Indeed, with as many as one-quarter to one-third of the population perishing,<sup>149</sup> evidence suggests that the Khmer Rouge killed "a greater proportion of the population than . . . in any other revolution during the twentieth century."<sup>150</sup> A 1979 United Nations report determined that the human rights violations in Cambodia were "the worst to have occurred anywhere in the world since Nazism."<sup>151</sup>

## **B. Efforts to Address Khmer Rouge Crimes**

### **1. International Impassivity**

Although the enormity of the Cambodian genocide is startling, perhaps the most stunning aspect of the Khmer Rouge crimes has been the lack of attention given to them by the Cambodian government and the international community. The very laws and institutions designed to address such crimes, including the United Nation's Convention on the Prevention and Punishment of the Crime of Genocide,<sup>152</sup> have failed. No countries invoked the Genocide Convention on behalf of Cambodian victims.<sup>153</sup> No countries insisted on a criminal tribunal for Khmer Rouge perpetrators, as were conducted for Rwanda and the former Yugoslavia.<sup>154</sup> No country made serious efforts to extradite Pol Pot for trial in another country following his capture in 1997.<sup>155</sup> For more than a decade, no Western country even voted against the Khmer Rouge's retention of

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148. See Melissa Roberts, *The Case Against Pol Pot*, NEWSWEEK ATLANTIC EDITION, July 21, 1997, at 15.

149. See Hawk, *supra* note 132, at 213.

150. Jackson, *supra* note 105, at 3.

151. Hawk, *supra* note 132, at 213.

152. See Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signatures* Dec. 9, 1948, *entered into force* Jan. 12, 1951, 78 U.N.T.S. 277.

153. See MYSLIWIEC, *supra* note 120, at 91.

154. See Michael Vickery & Naomi Roht-Arriaza, *Human Rights in Cambodia, in IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE*, *supra* note 31, at 247. As Richard Goldstone points out, an international criminal tribunal may not be workable in Cambodia because the Security Council, using the powers granted to it under Chapter VII of the U.N. Charter, may only instigate such proceedings when necessary to "bring to an end a situation which constitutes a threat to international peace and security." Richard J. Goldstone, *Justice as a Tool for Peace-Making: Truth Commissions and International Criminal Tribunals*, 28 N.Y.U. J. INT'L L. & POL. 485, 486-87 (1996). Because the Khmer Rouge are no longer in power, the situation would not qualify as a current threat to peace and security.

155. See Suchada Kulawat, *International Criminal Court: Trying Our Worst Criminals*, BANGKOK POST, Aug. 14, 1997, at 8.

Cambodia's United Nations seat.<sup>156</sup> Beyond perennial United Nations resolutions condemning the atrocities, the international community has missed every opportunity to indict the government of Democratic Kampuchea and to bring the Khmer Rouge leaders to justice.<sup>157</sup>

## 2. Geopolitics and the Khmer Rouge

The roots of the international impassivity toward the Cambodian genocide lie in the geopolitics of the Cold War.<sup>158</sup> When the invading Vietnamese troops dismantled the government of Democratic Kampuchea in 1979, the international community reacted with alarm, not acclaim.<sup>159</sup> Some countries feared Vietnam and its communist ally, the Soviet Union, more than the Khmer Rouge.<sup>160</sup> The anti-Soviet Chinese were among the first to support the Khmer Rouge resistance.<sup>161</sup> Thailand, Cambodia's neighbor to the west, also feared Vietnamese domination of southeast Asia. Both China and Thailand supplied financial and military support to the Khmer Rouge and other resisters.<sup>162</sup>

The United States found itself between Scylla and Charybdis. On the one hand, the United States was aware of the atrocities committed in Democratic Kampuchea, and condemned them.<sup>163</sup> American factions which wanted to facilitate the return of United States soldiers missing in action in Vietnam also reacted strongly against the Khmer Rouge.<sup>164</sup> On the other hand, politicians faced a powerful anti-Vietnamese sentiment in the wake of the American failure in

156. See MYSLIWIEC, *supra* note 120, at 90.

157. See Hannum, *supra* note 134, at 136-38.

158. Fully exploring the multiple and interdependent reasons for the international paralysis toward the Khmer Rouge is beyond the scope of this paper. Further information on the geopolitics of the Cold War can be found in Jamie Frederic Metz, *The U.N. Commission on Human Rights and Cambodia, 1975-1980*, 3 BUFF. J. INT'L L. 67 (1996); WILLIAM SHAWCROSS, *SIDESHOW: KISSINGER, NIXON, AND THE DESTRUCTION OF CAMBODIA* (1979); NAYAN CHANDA, *BROTHER ENEMY* (1986).

159. See Vickery & Roht-Arriaza, *supra* note 154, at 244-45.

160. See generally *id.* at 247.

161. See CHANDLER, *supra* note 143, at 231. See also Kathryn Railsback, *A Genocide Convention Action Against the Khmer Rouge: Preventing a Resurgence of the Killing Fields*, 5 CONN. J. INT'L L. 457, 460 n.15 (1990).

162. See Vickery & Roht-Arriaza, *supra* note 154, at 245.

163. In early 1978, the United States, along with the governments of Canada, Norway, the United Kingdom, and Australia, submitted evidence of the atrocities occurring in Cambodia to the United Nations Human Rights Commission. Instead of voting to study the human rights situation in Cambodia, however, the majority voted to defer consideration of the proposal, while inviting comments from the government of Democratic Kampuchea. See KUPER, *supra* note 108, at 135.

164. See ROBERT G. SUTTER, *THE CAMBODIAN CRISIS AND U.S. POLICY DILEMMAS* 47 (1991).

Vietnam.<sup>165</sup> In the end, the United States chose to side with its treaty ally, Thailand, and the rest of the Association of Southeast Asian Nations (ASEAN) countries. In doing so, Washington subjugated its human rights interests to the strategic and geopolitical advantages of opposing the Vietnamese-Soviet axis.<sup>166</sup> For years it followed the policy lead of the ASEAN countries,<sup>167</sup> supplying the Khmer Rouge and other resistance forces with aid in order to destabilize the Vietnamese-backed government.<sup>168</sup> The Khmer Rouge also found unlikely support in nongovernmental organizations. Amnesty International and the Lawyers' Committees for Human Rights prepared reports that highlighted the flaws of the Vietnamese-backed State of Cambodia.<sup>169</sup> The outcome was to shift attention away from the horrors of Democratic Kampuchea, and effectively stymie efforts to bring the Khmer Rouge leaders to justice.<sup>170</sup>

The United Nations also dragged its feet on the matter of Democratic Kampuchea. In 1978 the United Nations Human Rights Commission postponed investigations of the massacres in Cambodia, despite refugees' plentiful testimonies of the repressive government policies.<sup>171</sup> Even when a United Nations commission concluded in 1979 that the killings in Cambodia were "nothing less than auto-genocide,"<sup>172</sup> that report was tabled. Amazingly, the Khmer Rouge controlled Cambodia's seat in the United Nations until 1990.<sup>173</sup> The international press also supported the isolation and condemnation of the State of Cambodia, thereby implying lenience for the Khmer Rouge.<sup>174</sup> From these political and geographic considerations, it is easy to see why the atrocities of Democratic Kampuchea have been called "The Forgotten Tragedy."<sup>175</sup>

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165. See Vickery & Roht-Arriaza, *supra* note 154, at 247-48.

166. See Metzl, *supra* note 158, at 96.

167. See SUTTER, *supra* note 164, at 47.

168. See Vickery & Roht-Arriaza, *supra* note 154, at 246. See also Metzl, *supra* note 158, at 91.

169. See Vickery & Roht-Arriaza, *supra* note 154, at 247. See also 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 141-61 (Ben Kiernan ed., 1993).

170. See Vickery & Roht-Arriaza, *supra* note 154, at 246-48.

171. For a more complete list of recent accounts by refugees and eyewitnesses, see *infra*, note 211.

172. Report by Bouhdiba, Chairman of the Subcommission, U.N. Doc. E/CN.4/SR.1510, 6 (1979).

173. See Vickery & Roht-Arriaza, *supra* note 154, at 245.

174. See *id.* at 248.

175. Commander Sir Robert Jackson, *Preface to MYSLIWIEC*, *supra* note 120, at iii.

### 3. Cambodia's Actions to Address the Khmer Rouge Atrocities

How has the Cambodian government attempted to address the atrocities of Democratic Kampuchea? Professor Orentlicher argues that successor regimes have a duty to prosecute and punish past atrocities, and that a change in government does not relieve a state of its duties under international law.<sup>176</sup> By all accounts, however, the successor governments<sup>177</sup> to the Khmer Rouge have largely failed to address the Khmer Rouge atrocities. Shortly after the Vietnamese invaded Cambodia in 1979, a tribunal was convened to prosecute the Khmer Rouge.<sup>178</sup> The trial singled out two leaders, Pol Pot and Ieng Sary, as being responsible for the entirety of brutal acts by the Khmer Rouge.<sup>179</sup> Defense counsel attempted to excuse them, proclaiming that Pol Pot and Ieng Sary were "criminally insane monsters carrying out a program . . . which had been written elsewhere for them."<sup>180</sup> The tribunal sentenced the defendants to death in absentia.<sup>181</sup> The international community reacted by villifying the trial for its lack of formality, lucidity, and sufficient defense.<sup>182</sup> Meanwhile, Pol Pot eluded his potential captors for eighteen years while continuing to lead the resistance to the Vietnamese-backed government.<sup>183</sup>

In the summer of 1997, however, Pol Pot's own troops seized him.<sup>184</sup> A second trial, dubbed the "People's Tribunal," was conducted by the Khmer Rouge against Pol Pot and three younger commanders.<sup>185</sup> Instead of charging Pol Pot for the deaths of a million or more Cambodians, however, the tribunal focused

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176. See Orentlicher, *supra* note 8, at 1595.

177. The state of Democratic Kampuchea ended in January 1979, when the Vietnamese invaded Cambodia and established a client government. The Vietnamese-backed government, known as the State of Cambodia, possessed control of Cambodia until 1989, when the United Nations began negotiating peace accords between the government and opposition forces. The United Nations Transitional Authority in Cambodia (UNTAC) then controlled Cambodia until it sponsored elections in 1992. Following the elections, Prince Ranariddh and Hun Sen formed a coalition government—The Kingdom of Cambodia—which functioned until July 1997. At that time, Hun Sen launched a military coup, effectively taking control of Cambodia. See, e.g., *House Comm. on Int'l Relations, Subcomm. on Asia and the Pacific*, FEDERAL NEWS SERVICE, July 16, 1997 (Statement of Marvin C. Ott, Professor, National War College), available in LEXIS, News Library.

178. See William Shawcross, *Tragedy in Cambodia*, N.Y. REV., Nov. 14, 1996, at 41.

179. See *id.*

180. *Id.*

181. See *id.* at 45.

182. See Railsback, *supra* note 161, at 460 n.15.

183. See Thayer, *supra* note 100, at 20.

184. See Nate Thayer, *Brother Number Zero*, FAR E. ECON. REV., Aug. 7, 1997, at 15.

185. See *id.* at 15.

charges on the murder of Pol Pot's comrade, Son Sen.<sup>186</sup> Most observers considered the second trial of Pol Pot equally farcical as the first trial. It was described alternatively as a "ritual scolding,"<sup>187</sup> "a political game,"<sup>188</sup> and "reminiscent of the show trials that Stalin put on in the 30's."<sup>189</sup> Condemning the trial as "inconsistent with accepted United Nations and international legal norms," the United States, along with many other governments, declared that it would not recognize the proceedings.<sup>190</sup> That tribunal sentenced Pol Pot to life imprisonment.<sup>191</sup>

While under house arrest, Pol Pot died on April 15, 1998, at age seventy-three.<sup>192</sup> World reaction ranged from relief, to suspicion, to regret. Prominent Cambodians decried the loss of opportunity to confront the most notorious Khmer Rouge leader. "Pol Pot was not frightening to me anymore," said Ahmad Yahya, a member of the Cambodian Parliament, "but I lament that he passed away, like I lost something, lost some answers."<sup>193</sup> Meanwhile, his death aroused the suspicion of international observers when it occurred within days of a renewed effort by outsiders to capture and prosecute the former Khmer Rouge leader.<sup>194</sup> The hasty cremation of Pol Pot's body before outside authorities could conduct an autopsy led many to conclude that the movement was cleansing its image by sacrificing the former leader.<sup>195</sup> "As of now," said Khmer Rouge spokesman Noun Nou, "there is no more Pol Pot and no more Khmer Rouge."<sup>196</sup>

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186. *See id.* at 18. Charges also included the attempted murder of other Khmer Rouge leaders. *See id.*

187. Kevin Whitelaw, *A Feeble Monster Emerges In the Jungle*, U.S. NEWS & WORLD REP., Aug. 11, 1997, at 40.

188. Cambodian Premier Hun Sen described the tribunal in this way. *Id.*

189. Newshour with Jim Lehrer, Aug. 6, 1997, transcript #5888 (quoting Steven Ratner, criticizing the second tribunal), available in LEXIS, News Library.

190. Elizabeth Becker, *Videotape Shows Pol Pot on Trial, Facing the Khmer Rouge's Justice*, N.Y. TIMES, July 29, 1997, at A6.

191. Seth Mydans, *Confined, Pol Pot Tells of Feeling 'Bit Bored,'* N.Y. TIMES, Oct. 24, 1997, at A16.

192. *See* Seth Mydans, *Pol Pot's Body is Shown to Reporters in Jungle Hideout*, N.Y. TIMES, April 17, 1998, at A1.

193. Seth Mydans, *The Demons of a Despot: Why? Pol Pots Takes His Answers With Him*, N.Y. TIMES, April 17, 1998, at A13.

194. *See* Seth Mydans, *With 'No More Pol Pot,' the 'New' Khmer Rouge Hopes the World Will Forgive and Forget*, N.Y. TIMES, Apr. 20, 1998, at A6.

195. *See* Seth Mydans, *Cambodia Is Swept by Reports Saying That Pol Pot Has Died*, N.Y. TIMES, Apr. 16, 1998, at A3. Over two weeks before Pol Pot's death, a Khmer Rouge mutineer hinted that Pol Pot might be killed if his illness and immobility slowed the troops. *See also* Seth Mydans, *Khmer Rouge Factions Battle Each Other in the Jungle*, N.Y. TIMES, Mar. 30, 1998, at A3.

196. Mydans, *supra* note 194, at A6.

While the remnants of the Khmer Rouge<sup>197</sup> hope that the world will forget their atrocities, the international community appears unwilling to feign amnesia. For one, most of the remaining core leadership of Democratic Kampuchea, including Ta Mok, Nuon Chea, and Khieu Samphan, remains cloistered along the Thai border.<sup>198</sup> Other former leaders are serving in government positions or living quietly as farmers.<sup>199</sup> They may still be brought to justice. President Clinton urged that “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.”<sup>200</sup>

Pol Pot’s death does not lessen the feasibility of a Cambodian truth commission. It may, in fact, impel it. As mentioned in this Note, truth commissions, unlike prosecutions, do not require the presence of perpetrators. When key parties are unavailable or unwilling to participate, commissions may seek the testimony of subordinates, bystanders, or survivors. Certainly hearing about the Khmer Rouge from Pol Pot himself would have been most helpful, but other officers, soldiers, and survivors can still testify. Pol Pot’s death may actually be a boon to a Cambodian truth commission. By diffusing the tendency to focus on the most prominent Khmer Rouge, his absence may force a wider involvement and more penetrating investigation. For those Cambodians who continued to fear Pol Pot, his death may also stimulate greater participation in a truth inquiry. If anything, Pol Pot’s death underscores the need to address the atrocities of the Khmer Rouge as soon as possible—before that knowledge is lost with the passing of other aged Khmer Rouge leaders.

The options for prosecuting other Khmer Rouge leaders remain limited. In late April, 1998, President Clinton appealed to the United Nations to expand the jurisdiction of the war crimes tribunal for the former Yugoslavia to include Cambodia.<sup>201</sup> Such an expansion, however, requires the vote of the United Nations Security Council. China, a permanent member of the Security Council, protested the proposal on the grounds that it violates Cambodia’s sovereignty.<sup>202</sup> China continues to hint that it may veto the tribunal proposal.<sup>203</sup> A second option

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197. *See id.* In an effort to cleanse their image, the Khmer Rouge renamed themselves the National Solidarity Party.

198. *See Mydans, supra* note 193. During the regime of Democratic Kampuchea, Khieu Samphan was President and Ta Mok served as military commander of the Khmer Rouge. Nuon Chea, in charge of party organization and ideology, was deputy chief to Pol Pot until October 1996. *See Steven Erlanger, U.S. Wants to Try Khmer Rouge Leaders, N.Y. TIMES, Apr. 18, 1998, at A5.*

199. *See Mydans, supra* note 194, at A6.

200. Elizabeth Becker, *Pol Pot’s End Won’t Stop U.S. Pursuit of His Circle*, N.Y. TIMES, Apr. 17, 1998, at A13.

201. *See Colum Lynch, UN Seeks Khmer Rouge Trials; Call for UN Tribunal on Cambodia Spurs Protest by China, BOSTON GLOBE, May 1, 1998, at A10.*

202. *See Erlanger, supra* note 198, at A5.

203. *See id.*

is to extradite Khmer Rouge leaders to another country with "universal" jurisdiction. Germany, Canada, the Netherlands, Sweden, and Spain all have such jurisdiction, but none has indicated that it would be willing to try the extradited leaders.<sup>204</sup>

In recent months, the Clinton Administration has also pushed to establish an International Criminal Court.<sup>205</sup> Although 185 countries will confer in June 1998 to discuss the establishment of such a court, it is unlikely that it would be ready to prosecute Khmer Rouge perpetrators for several years.<sup>206</sup> Moreover, the United States is lobbying heavily to limit the court's authority and independence.<sup>207</sup> Hence, in the foreseeable future, trying Khmer Rouge leaders in an International Criminal Court is probably not a workable option.

Because other options appear unworkable, much attention continues to be placed on the proposal for a truth commission in Cambodia as at least a step toward truth, if not punishment.<sup>208</sup> However, the enormity of the human rights violations in Cambodia, coupled with the passage of almost twenty years, raises serious questions about the appropriateness of such a commission. Part IV of this Note analyzes the feasibility and propriety of employing a truth commission in Cambodia.

#### IV. THE FEASIBILITY OF A TRUTH COMMISSION IN CAMBODIA

As discussed in Part II, truth commissions serve four compelling purposes: (1) establishing an authoritative record of events; (2) providing flexibility over formal prosecution; (3) laying a foundation for later prosecutions; and (4) promoting national reconciliation. Truth commissions also provide tools for giving victims catharsis and deterring further violations of human rights. To what extent are these purposes served in Cambodia? Have the purposes already been fulfilled by other means? Do other hurdles exist in the Cambodian context that make a truth commission unwarranted or inappropriate?

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204. *See id.*

205. *See* Eric Schmitt, *Pentagon Battles Plans for International War Crimes Tribunal*, N.Y. TIMES, Apr. 14, 1998, at A11. In anticipation of a future tribunal, President Clinton also asked Cambodian officials to refrain from granting amnesty to any remaining Khmer Rouge leaders. *See* Erlanger, *supra* note 198, at A5.

206. *See* Schmitt, *supra* note 205, at A11.

207. *See id.*

208. *See generally* Dobbs, *supra* note 5.



### A. The Need for an Authoritative Record of Events in Cambodia

In the eighteen years since the Khmer Rouge lost power, there has been no dearth of truth telling about the Cambodian atrocities.<sup>209</sup> In the years after defeating the Khmer Rouge, the Vietnamese-backed State of Cambodia inundated the country with propaganda on the viciousness and injustice of the former regime.<sup>210</sup> Even in the West, the media gave prominent attention to the Cambodian genocide in the 1984 movie *The Killing Fields*. The numerous accounts of Khmer Rouge atrocities by refugees and journalists,<sup>211</sup> coupled with the vast documentation in the Khmer Rouge archives, leaves little doubt about the magnitude of the crimes committed. Why would a truth commission still be necessary in Cambodia?

Despite the general knowledge of the Khmer Rouge atrocities, there is much that can be uncovered by a truth commission investigation. When fleeing the capital, the Khmer Rouge left behind more than half a million documents chronicling the killing of their fellow Cambodians.<sup>212</sup> Yet hardly more than a half dozen names of jailers and torturers have been discovered.<sup>213</sup> Notwithstanding the existing documentation of the Cambodian genocide, the Khmer Rouge obsession with secrecy means that a commission would still have plenty of work to do in explaining the patterns of violence under Democratic Kampuchea. The United States-funded Cambodia Genocide Programme reports that in the last two years it has continued to unveil new evidence implicating the Khmer Rouge in crimes against humanity.<sup>214</sup> In short, the search for truth is incomplete.

A proper investigation would also prevent the Cambodian genocide from being denied. Already, Khmer Rouge leaders have tried to whitewash or categorically repudiate the atrocities. In 1980, for instance, Ieng Sary estimated that only about ten thousand Cambodians died during the Khmer Rouge reign.<sup>215</sup> More recently, Pol Pot disavowed responsibility for the mass killings and denied the existence of the Tuol Sleng execution center, claiming it was a "Vietnamese exhibition" set up for propaganda purposes.<sup>216</sup> "My conscience is clear," Pol Pot

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209. See Vickery & Roht-Arriaza, *supra* note 154, at 246.

210. *See id.*

211. *See, e.g.,* HAING S. NGOR, *A CAMBODIAN ODYSSEY* (1987); TEEDA BUTT MAM, *TO DESTROY YOU IS NO LOSS: THE ODYSSEY OF A CAMBODIAN FAMILY* (1987); PIN YATHAY, *STAY ALIVE, MY SON* (1987); WILLIAM SHAWCROSS, *THE QUALITY OF MERCY* (1984); SCHANBERG, *supra* note 110; PONCHAUD, *supra* note 104; BECKER, *supra* note 114.

212. *See* Swain, *supra* note 144.

213. *See* Vickery & Roht-Arriaza, *supra* note 154, at 246.

214. *See* Dobbs, *supra* note 5.

215. *See* Railsback, *supra* note 161, at 479.

216. Maggie Farley, *Ailing Pol Pot Looks Back on Reign Without Remorse*, L.A. TIMES, Oct. 24, 1997, at A6.

reported.<sup>217</sup> In light of these efforts to rewrite history, determining what actually happened during the Khmer Rouge rule is historically significant.

Establishing an authoritative record is also important to Cambodia's younger generations. At least half of Cambodia's population of ten million was born in the aftermath of Khmer Rouge rule.<sup>218</sup> Many children were raised in state orphanages or with relatives after losing their parents. For both the victims and their children growing up in the shadow of the Khmer Rouge violence, a truth commission would ensure that the lessons of the past continue to live in the memory of the collectivity.<sup>219</sup> Such a reminder is particularly necessary since all references to the Khmer Rouge killings were deleted from school textbooks in 1991.<sup>220</sup> The younger Cambodian generations have also faced high rates of crime and domestic violence, attributed by sociologists to an erosion of social norms after nearly three decades of war and political turmoil.<sup>221</sup> Establishing a truth commission may contribute to the restoration of the society's moral foundation.<sup>222</sup>

A truth commission investigating the Khmer Rouge would, most importantly, acknowledge and validate the experience of the survivors of that brutal regime.<sup>223</sup> Truth commissions provide the opportunity for a survivor to recount his individual story to a sympathetic ear and unburden years of repressed memories.<sup>224</sup> In this way, an investigation is seen as an "unofficial apology" for state-sanctioned abuses.<sup>225</sup> Addressing the psychic pain of survivors is especially important in a communist regime such as Democratic Kampuchea.<sup>226</sup> Communist regimes involve a dynamic of complicity that is not found in democratic regimes. In Cambodia, citizens were forced into complicity with the Khmer Rouge regime. Many of them served as spies, executioners, and gravediggers for their own families and friends.<sup>227</sup> Facing their own collusion is often extremely difficult for survivors, but a truth commission can encourage citizens to understand their

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217. Mydans, *supra* note 7, at A1.

218. *See* Swain, *supra* note 144.

219. *See* Huyse, *supra* note 45, at 51. *See also* Dobbs, *supra* note 5.

220. The Cambodian government deleted all mention of the Khmer Rouge atrocities from textbooks in submission to the peace process negotiations occurring in 1991. *See* Fifield, *supra* note 68.

221. *See* Robin McDowell, *War-Ravaged Cambodia Racked by Domestic Violence*, L.A. TIMES, Sept. 22, 1996, at A18.

222. *See* HUMAN RIGHTS PROGRAM, *supra* note 47, at 16 (quoting Jose Zalaquett).

223. *See generally* Railsback, *supra* note 161, at 478-79 (describing the potential psychic benefits of acknowledging victims' survival).

224. *See* Popkin & Roht-Arriaza, *supra* note 35, at 100.

225. Naomi Roht-Arriaza, *IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE*, *supra* note 31, at 8.

226. *See* HUMAN RIGHTS PROGRAM, *supra* note 47, at 40 (quoting Tina Rosenberg).

227. "We were all conspirators, we were all victims," is the phrase Cambodians use to describe their involvement in the Khmer Rouge atrocities. Terrence Duffy, *Toward a Culture of Human Rights in Cambodia*, 16 HUM. RTS. Q. 82, 91 (1994).

individual responsibility under such a system.<sup>228</sup> As one scholar put it, "Cambodia must confront the worst of its past if it is to move from negatively apportioning blame for past wrongs to recognizing that a whole society has been victimized."<sup>229</sup>

Additionally, retelling their stories may help survivors deal with psychological and psychosomatic illnesses. Trauma-related mental illness is widespread in Cambodia.<sup>230</sup> A recent survey indicates that up to forty percent of Cambodians suffer from such illness, and approximately fifteen percent are incapacitated from their suffering.<sup>231</sup> Another study of Cambodian refugees described 150 people who went blind during the Khmer Rouge regime for no detectable physical reason other than mental suffering.<sup>232</sup> It is hoped that giving survivors an opportunity to address their traumatic experiences will provide sufferers of trauma-related illnesses a sense of closure that time alone has not provided.<sup>233</sup>

A counterargument may be made, however, that Cambodians will not want to revisit the past. With much of the population earning a subsistence income, most Cambodians are preoccupied with poverty and survival amidst corruption and political turmoil.<sup>234</sup> Others, particularly survivors of Democratic Kampuchea, are extremely reluctant to discuss their experiences in public for fear of recrimination. When asked how they survived Democratic Kampuchea, many people avoid answering by claiming that they lived in one of the numerous Thai refugee camps, whether or not they actually did.<sup>235</sup> Cambodians in general are very reluctant to express public or even private criticism.<sup>236</sup> Given these concerns, convincing survivors to tell their stories to a truth commission may be difficult. As mentioned earlier, however, a truth commission may design methods to overcome victim reluctance to testify publicly, such as anonymous testimonies or *in camera* proceedings.

A related concern is that reliving painful experiences may fracture whatever coping mechanisms survivors have already developed. One scholar cites evidence that Holocaust survivors who suppressed their memories had a

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228. See HUMAN RIGHTS PROGRAM, *supra* note 47, at 40 (quoting Tina Rosenberg).

229. Duffy, *supra* note 227, at 82.

230. See Railsback, *supra* note 161, at 478-79.

231. See U.N. Team to Investigate Khmer Rouge Atrocities, JAPAN ECON. NEWSWIRE, Jan. 28, 1998, available in LEXIS, News Library.

232. See Tina Rosenberg, *Cambodia's Blinding Genocide*, N.Y. TIMES, April 21, 1997, at A14.

233. See Railsback, *supra* note 161, at 478.

234. See Swain, *supra* note 144.

235. During my stint with Legal Aid of Cambodia during the summer of 1997, many of the Cambodian attorneys with whom I worked claimed, initially, to have been refugees during Democratic Kampuchea. Only after forming a close friendship did a few of them reveal their true experiences under the Khmer Rouge to me.

236. See PONCHAUD, *supra* note 104, at 141. Cambodians consider public criticism inappropriate, for "words kill just as surely as weapons." *Id.*

better chance of reconstructing their lives than those who recounted their experiences.<sup>237</sup> Other truth commission critics question the grandiose claims of catharsis. According to psychologist Trudy de Ridder, reliving such painful memories may provide an initial sense of relief, but in the weeks following their depositions, testifiers' anguish can resurface even stronger.<sup>238</sup> By retelling their stories some survivors experience retraumatization.<sup>239</sup> Of course, in any truth commission in Cambodia, the decision to give testimony should be made by the survivors. They remain the best judges of whether reliving the horrors of the Khmer Rouge would be beneficial or detrimental to them. It is also crucial to proffer participants appropriate counseling, including testimony preparation and debriefing.<sup>240</sup> With these safeguards, the concern that a truth commission would hurt survivors' coping mechanisms is mitigated.<sup>241</sup>

With regard to the purpose of establishing an authoritative record of human rights abuses during Democratic Kampuchea, the advantages of a commission inquiry outweigh the potential drawbacks, both in number and strength.

## **B. Providing a More Flexible Alternative to Prosecution**

The inherent flexibility of a truth commission holds promise within the Cambodian context. One of the most salient reasons for the government's reluctance to prosecute past crimes is that very few members of Cambodia's current government have "clean hands."<sup>242</sup> Even Hun Sen, Cambodia's current Premier, was a former Khmer Rouge officer.<sup>243</sup> It is not surprising that he has been uncooperative in the efforts to establish a formal criminal tribunal. Because trials are by nature coercive, they depend both on the will of the state and the mobilization of force.<sup>244</sup> In contrast, truth commissions do not have authority to make a final determination of culpability, and thus do not require the same amount

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237. See HUMAN RIGHTS PROGRAM, *supra* note 47, at 75 (quoting Yael Tamir).

238. Trudy de Ridder, a clinical psychologist, counseled the staff of South Africa's Truth and Reconciliation Commission, as well as testifiers before the commission. Trudy de Ridder, *The Trauma of Testifying*, 6 TRACK TWO 30 (Dec. 1997) <<http://www.truth.org.za/reading/tracktwo/p30.htm>>.

239. See Hamber, *supra* note 85.

240. See *id.*

241. Furthermore, recent polls indicate that the vast majority of Cambodians support calls for an international tribunal to address human rights violations by Khmer Rouge leaders. See Rosenberg, *supra* note 232, at A14.

242. Virtually all senior leaders of Hun Sen's government were Khmer Rouge officials during Democratic Kampuchea. See Senate Foreign Relations Comm., Asia-Pacific Subcomm. Mtg., FED. NEWS SERVICE, Sept. 4, 1997 (prepared statement of Brad Adams).

243. Ron Moreau, *Asia's New Boss*, NEWSWEEK, July 21, 1997, at 11.

244. See HUMAN RIGHTS PROGRAM, *supra* note 47, at 37 (quoting Abram Chayes).

of political will or coercive powers. A truth commission may therefore be more practicable for Cambodia than a formal prosecution. It will allow the current government to address the past atrocities, with minimal risk to itself. Says one United Nations worker in Cambodia, "If something is feasible, it is a truth commission."<sup>245</sup>

On the other hand, even if it is feasible, does sufficient political will exist to conduct a truth commission in Cambodia? Hun Sen was a puppet ruler of the State of Cambodia during the first trial of Pol Pot in 1979.<sup>246</sup> By most accounts Hun Sen did not approach that tribunal seriously, as evidenced by the lack of attention to internationally accepted due process standards.<sup>247</sup> However, his willingness to pursue a Khmer Rouge inquiry today may be stronger due to economic factors. Hun Sen is presently more dependent on outside funding than he was in 1979. Hanoi no longer backs the Cambodian government. Ieng Sary and his Khmer Rouge defectors now largely control gem mining, one of the country's prime sources of income.<sup>248</sup> Fortunately for Hun Sen, the burgeoning drug trade is supplanting the income role of the gem mines.<sup>249</sup> Notwithstanding that income, Hun Sen is increasingly dependent on outside donors to support his government: half of Cambodia's \$600 million budget is supplied by foreign donors.<sup>250</sup> Thus, considerable incentive exists for Hun Sen to adhere to the human rights demands of his donors.<sup>251</sup> That economic leverage may be enough to create sufficient political will for a truth commission in Cambodia.<sup>252</sup>

Recent reports from Cambodia suggest that Hun Sen's political will for a truth commission may be strengthening. In January 1998 he took the first step toward establishing a truth commission in Cambodia by agreeing to admit a group of United Nations-appointed experts to investigate the evidence of Khmer Rouge atrocities.<sup>253</sup> At the same time, however, Hun Sen criticized United Nations

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245. Dobbs, *supra* note 5.

246. See Moreau, *supra* note 243, at 12.

247. See Vickery & Roht-Arriaza, *supra* note 154, at 246.

248. See Shawcross, *supra* note 178, at 45.

249. See Joseph P. Duggan, *Wishful Thinking On Cambodia*, ST. LOUIS POST-DISPATCH, Aug. 18, 1997, at B7.

250. See Moreau, *supra* note 243, at 11.

251. Similarly, the United States has sent a clear message to Phnom Penh that future American economic aid is contingent upon the completion of the planned 1998 elections in Cambodia. See *Nightline: The Trial of Pol Pot* (ABC television broadcast, July 30, 1997) (Transcript # 97073001-j07).

252. The international community's economic leverage over Cambodia has arguably increased since the July 1997 coup. The suspension of foreign aid, coupled with drastic cuts in foreign trade and the exodus of many expatriates living in Cambodia, amounts to a bleak economic forecast. See Eric Altbach, *Cambodian Crisis Brings Measured Response from Japan, ASEAN*, JEI REPORT, July 18, 1997, available in LEXIS, News Library.

253. See *UN Rights Chief to Evaluate Evidence Against Khmer Rouge: Report*, AGENCE-FR. PRESSE, Jan. 28, 1998, available in LEXIS, News Library.

reports on the human rights situation in Cambodia as containing "many errors or false information."<sup>254</sup> He further criticized the "frantic efforts" to put the Khmer Rouge leaders on trial, claiming that it undermines peace in Cambodia.<sup>255</sup> State efforts to establish a national or international tribunal, he emphasized, must wait until after Cambodia's general elections in late July 1998.<sup>256</sup>

Procedurally, a truth commission in Cambodia is attractive because it need not rely exclusively on the country's existing judicial system. Cambodia's justice system is just beginning to rebuild after its destruction under Democratic Kampuchea. The Khmer Rouge exterminated nearly all of the country's lawyers and judges, demolished the courts, and burned law libraries.<sup>257</sup> In 1993, only about five lawyers remained in the country.<sup>258</sup> Although the number of lawyers and judges is growing, the vast majority has never had formal legal training.<sup>259</sup> Instead, the state relies on United Nations "judicial mentors" to conduct cursory training for lawyers, judges, prosecutors, and police officers.<sup>260</sup> Additionally, the capacity of the court system remains severely limited by space and funding shortages.<sup>261</sup> For example, only one appeals court exists for the entire country.<sup>262</sup> Given the state of Cambodia's nascent justice system, it is unlikely that the Khmer Rouge could be prosecuted in the existing legal system. A truth commission, however, could be funded by the United Nations and staffed by overseas advisors, thus compensating for Cambodia's lack of resources.

However, even that solution is subject to criticism. El Salvador conducted a similar truth commission under the auspices of the United Nations. While an international commission may appreciate a certain distance or impartiality, the Salvadoran commission suffered under that distance by being labeled as immune to cultural and political subtleties.<sup>263</sup>

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254. *Co-Prime Ministers Hun Sen, Ung Huot Complain to UN Secretary-General* (National Voice of Cambodia broadcast, Jan. 29, 1998), available in LEXIS, Nexis Library, CURNWS file.

255. *Second Premier 'Indirectly' Criticizes Attempt to Try Khmer Rouge* (National Voice of Cambodia broadcast, May 25, 1998), available in LEXIS, Nexis Library, 90DAYS file.

256. *See id.*

257. *See* Seth Mydans, *New in Cambodia: Justice Without Torture*, N.Y. TIMES, Feb. 10, 1997, at A1.

258. *See id.*

259. Cambodia now has approximately seventy judges. A dozen or so have studied law in places like Vietnam, Ukraine or Kazakhstan, but most have never attended law school. *See id.* at A7.

260. *Id.*

261. *See* Report on Legal and Justice System in Cambodia (Oct. 18, 1996) (on file with Legal Aid of Cambodia).

262. Based on the author's experience as a Law Clerk with Legal Aid of Cambodia, during June and July of 1997.

263. *See* Naomi Roht-Arriaza, *supra* note 31, at 283.

Moreover, because truth commissions are not bound by the constraints of prosecutorial actions, they can profit from a more comprehensive inquiry. The spotlight need not be only on the perpetrators. Victims participate significantly in most commissions as both victims and witnesses.<sup>264</sup> Likewise, truth commissions may examine the role of international actors in the history of the country, or the importance of other political or socio-economic forces. By their fluid nature, truth commissions "can, potentially, engage society in a broadly gauged and broad-ranging deliberative process about its past."<sup>265</sup> Cambodia has been a pawn, at various times, of France, the United States, China, and Vietnam. Examining those influences will provide a more thorough backdrop for the rise of the Khmer Rouge.<sup>266</sup>

The relatively short time frame for organizing and conducting a truth commission also makes it an enticing option for Cambodia. The original Khmer Rouge leaders are now in their late sixties and seventies.<sup>267</sup> After living in the jungle for more than two decades, many of the officers suffer from cerebral malaria and poor health.<sup>268</sup> Pol Pot's death underscores the need to address the atrocities of the Khmer Rouge as soon as possible. As both perpetrators and victims grow older, memories dim, and evidence is lost. These legitimate time concerns make a truth commission, which could be convened much quicker than a criminal tribunal, well suited to the Cambodian context.<sup>269</sup>

### C. Laying the Foundation for a Later Prosecution

That the government may view a commission inquiry as a substitute for formal prosecution is possibly the greatest liability of a truth commission in Cambodia. As previously mentioned, *supra* subsection B, the government may be reluctant to prosecute Khmer Rouge criminals, partly because so many current politicians, police, and judges are potentially complicitous.<sup>270</sup> Thus, the strong

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264. See Juan E. Mendez, *In Defense of Transitional Justice*, in TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES 1, 16 (A. James McAdams ed., 1997).

265. Diane F. Orentlicher, *International Criminal Law and the Cambodian Killing Fields*, 3 ILSA J. INT'L & COMP. L. 705, 710 (1997).

266. See, e.g., SHAWCROSS, *supra* note 158 and CHANDA, *supra* note 158.

267. See Mydans, *supra* note 191, at A16.

268. See Becker, *supra* note 190, at A6. In fact, Pol Pot suffered from chronic malaria before his death. *Id.*

269. Thomas Hammarberg, UN Special Representative for Human Rights in Cambodia, emphasizes that while it would be desirable for individuals to be tried in a tribunal, an investigation could still be worthwhile, even if leaders were no longer alive, if it meant that closure could be achieved. See *UN Official Urges War Crimes Tribunal for Khmer Rouge*, AGENCE-FR. PRESSE, June 17, 1997, available in LEXIS, News Library.

270. See *supra* note 242 and accompanying text.

tendency will likely be to view a truth commission as a panacea to avoid the hazards of a public trial.<sup>271</sup> Likewise, a truth commission could be used as a political tool, validating the current government and serving as a testament to its commitment to human rights.

On the other hand, establishing a truth commission may be just the impetus the international community needs to overcome the *realpolitik* and institutional paralysis that has plagued it for decades with regard to the Khmer Rouge atrocities.<sup>272</sup> In recent years, the international community has taken a tougher stance toward Cambodian politics. In September 1997 the United Nations declared the Cambodia seat to be vacant, in protest of Hun Sen's ouster of co-Prime Minister Prince Ranariddh in a military coup.<sup>273</sup> Two months later, the United Nations General Assembly adopted a resolution condemning the Khmer Rouge for crimes against humanity and acts of genocide.<sup>274</sup> The resolution further authorized United Nations Secretary General Kofi Annan to appoint an expert commission to investigate the evidence against the Khmer Rouge and then propose further measures.<sup>275</sup> In addition, international donors have for the first time imposed conditions on their aid to Cambodia, based on commitment to the rule of law.<sup>276</sup> ASEAN also departed from its traditional passivity regarding the politics of its neighbors, and suspended Cambodia's invitation to join the association after Hun Sen's coup.<sup>277</sup> While the international community may presently be more willing to judge Cambodian politics than it has in the past, it remains unclear whether such actions will translate into a willingness to prosecute the Khmer Rouge after a truth commission investigation.

The United States has also taken encouraging steps to push for prosecution of Khmer Rouge leaders. Three years ago, the United States Congress passed the Cambodian Genocide Justice Act, announcing that "consistent 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 . . ."<sup>278</sup> In 1997 the Clinton Administration appointed the first Ambassador at Large for War Crimes Issues to ensure that egregious human rights violations are prosecuted.<sup>279</sup> Those steps indicate a stronger political will to prosecute Khmer Rouge leaders than has existed in the past.

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271. See Popkin & Roht-Arriaza, *supra* note 35, at 115.

272. See Railsback, *supra* note 161, at 460.

273. See Barbara Crosssette, *Cambodia Might Bar the U.N. From Vote if Denied Vacant Seat*, N.Y. TIMES, Oct. 1, 1997, at A1.

274. See U.N. Team to Investigate Khmer Rouge Atrocities, *supra* note 231.

275. See *id.* Indeed, the United Nations recently selected a three-person team to investigate Ta Mok, Nuon Chea and Khieu Samphan. See Erlanger, *supra* note 198, at A5.

276. See Moreau, *supra* note 243, at 11.

277. See *id.*

278. Cambodian Genocide Justice Act, Pub. L. No. 103-236, 572(a), 108 Stat. 382, 486 (1994).

279. See Steven Lee Myers, *Making Sure War Crimes Aren't Forgotten*, N.Y.



Nevertheless, the United States must contend with what one commentator has dubbed "Cambodia fatigue." Such fatigue is said to be caused by the seemingly endless cycle of violence and political turmoil, combined with skepticism of the Cambodian leaders' commitment to accountability, and heavy financial expense incurred by the international community.<sup>280</sup> The United Nations has already invested almost \$3 billion, two-thirds of which came from American taxpayers, to oversee Cambodia's first free national election in 1993.<sup>281</sup> In light of the fallout of those elections (Hun Sen defied the election results and demanded a co-premier position with the majority winner), investments in Cambodia lack impressive returns. The international community may be unwilling to make additional investments based on such returns.

Given the history of international impassivity toward the Cambodian genocide, it is questionable whether a truth commission will lead to formal prosecution of Khmer Rouge perpetrators. International indignation toward the Khmer Rouge has probably subsided, not risen, in the intervening decades.<sup>282</sup> The lack of justice for the former Khmer Rouge leaders appears to pose no immediate threat to world peace, thus lessening the need for an international tribunal.<sup>283</sup> Finally, truth commissions rarely lead to formal prosecutions. Nevertheless, the recent, albeit modest, successes in Chile and South Africa suggest that a properly implemented truth commission could lead to prosecution of Khmer Rouge leaders.

#### **D. Promoting Institutional Change and National Reconciliation**

The prospect of national reconciliation through truth telling is tied to the notion of forgiveness. But how realistic is forgiveness within Cambodian religious thought? Unlike the Western Christian countries that have instigated truth commissions,<sup>284</sup> the Cambodian religious tradition, Theravada Buddhism, does not emphasize forgiveness. Indeed, there is no concept in Buddhism

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TIMES, Sept. 22, 1997, at A1. David J. Scheffer, U.S. Ambassador at Large for War Crimes, spearheaded the Administration's efforts to extradite Pol Pot to Canada when the leader was captured by his troops in June, 1997. *See id.*

280. *See* Kulawat, *supra* note 155, at 6.

281. Ironically, this amount exceeds Cambodia's gross domestic product. *See* Duggan, *supra* note 249, at B7.

282. Scholar Steven Ratner sums up the indolence of the international community toward Khmer Rouge crimes: "It's not a question of 'nobody can do anything about it.' It's a question that nobody wants to do anything about it." Kulawat, *supra* note 155, at 8.

283. *See id.* *See also* Fifield, *supra* note 68, at 27.

284. To date, most of the truth commissions have been conducted in the Catholic or Christian countries of South America and Asia, including Bolivia, Argentina, Uruguay, the Philippines, Chile, and El Salvador. The African truth commissions have taken place in countries with both Christian and animist traditions, such as Uganda, South Africa, and Rwanda. *See* Hayner, *supra* note 10, at 252.

equivalent to the notion found in other religions of "forgiveness."<sup>285</sup> Khmer Buddhism is grounded in gentleness, serenity, and compassion for the downtrodden.<sup>286</sup> Forgiveness is viewed as "losing face" and is tantamount to weakness, or even assumption of some amount of blame.<sup>287</sup>

Such attitudes [about forgiveness] incorporated into ideologies and exacerbated by war, can easily be imagined to lead to the wildest extremes. The conquerors can never *forgive* the conquered that had caused them so much suffering in the past. In practice, the nationalist myth that says, "we can always come to an understanding among Khmers" turned out to be untrue. The lust for revenge . . . has run its course implacably, even at the risk of the country's annihilation.(emphasis in original)<sup>288</sup>

Due to this attitude toward forgiveness, the chance for individuals to personally pardon their aggressors may be slim. That is not to say, however, that the effort may not reinforce national reconciliation. The difference may be that individual forgiveness is not achieved but that collective reconciliation is augmented through educational measures, remembrances for the dead, and institutional reforms.

A truth commission may also lead to national reconciliation by further eroding the Khmer Rouge involvement in current Cambodian politics. Experts propound that the continued presence and power of the Khmer Rouge in the nineteen years since Democratic Kampuchea have been a "psychological burden" for a nation attempting to reconstruct its society.<sup>289</sup> It is important to see that the Khmer Rouge acts described in Part III are not merely historical. Up until July of 1997, Pol Pot continued to order executions of citizens and cadre members alike.<sup>290</sup> For example, his orders to execute Son Sen<sup>291</sup> and ten family members were conducted in characteristically brutal Khmer Rouge manner.<sup>292</sup> Other Khmer Rouge-factions also continue to commit grave human rights violations. In

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285. Interview with Robert M. Gimello, Religious Studies Professor, University of Arizona, in Tucson, Az. (Feb. 20, 1998).

286. See PONCHAUD, *supra* note 104, at 140.

287. See *id.*

288. See *id.* at 140-41.

289. See Seth Mydans, *Cambodia's Pol Pot Flees his Own Troops*, N.Y. TIMES, June 15, 1997, at A6.

290. See Thayer, *supra* note 184, at 15-17. See also Senate Foreign Relations Comm., *supra* note 242.

291. In 1975, Son Sen directed the capture and evacuation of Phnom Penh, and later directed the executions at the Tuol Sleng detention center. See Seth Mydans, *Khmer Rouge's Pol Pot Kills Comrade, Runs for Life*, N.Y. TIMES, June 14, 1997, at A15.

292. The victims were shot in the head and the bodies were run over by a truck. See *id.*

early 1997, eleven government negotiators flew into Khmer Rouge territory to negotiate defections. They were executed shortly after their arrival.<sup>293</sup>

Though today's Khmer Rouge are heavily splintered, they continue to espouse virulent anti-Vietnamese beliefs, and campaign for the overthrow of Premier Hun Sen. Some Khmer Rouge defectors also continue to exercise *de facto* governmental powers. Khieu Samphan controls a portion of northern Cambodia, with a force of three thousand troops, while Ieng Sary rules over the extremely profitable gem mine area of Paillin.<sup>294</sup> It is clear that many of the former Khmer Rouge commanders remain involved, formally or informally, in Cambodia's political life. By revealing and acknowledging the full scope of Khmer Rouge atrocities, a truth commission will be likely to impact public opinion. A truth commission may also recommended the removal of implicated leaders, whether they hold official or unofficial power. Such a recommendation in Cambodia could be another step toward national reconciliation.

Underlining the discontinuity between regimes is another way that truth commissions promote national reconciliation. In Cambodia, four regimes have controlled the country since the Khmer Rouge (including the United Nations, under UNTAC).<sup>295</sup> In that sense, it is an atypical candidate for a truth commission; most truth commissions are conducted by the regime immediately following the one committing human rights abuses. Since all of the interim governments failed to effectively address the Khmer Rouge atrocities, however, there remains a need to demarcate the end of the Khmer Rouge regime. Once that demarcation is made, Cambodia stands a better chance of fostering stability and promoting a human rights culture.<sup>296</sup>

On the other hand, scholars cite the dangers of "building reconciliation on victimization and suffering."<sup>297</sup> When the basis for rights is somehow tied to the degree of suffering, Yael Tamir contends, both sides of a dispute are loathe to forget anything.<sup>298</sup> The result is a tendency to create backward-looking politics. Moreover, because the catharsis of one person is the suffering of another, a truth commission may serve to perpetuate victimization and suffering.<sup>299</sup> In Cambodia, this is an earnest threat given the fact that few people escaped being either a perpetrator (by choice or by force) or a victim. Consequently, there is a chance

293. See Whitelaw, *supra* note 187, at 40.

294. Although Ieng Sary officially defected to the government in 1996, the move was one of political expedience. In exchange for the defection of 3,400 to 4,000 guerrillas to the government, Ieng Sary and his remaining troops were granted control of the profitable gem mines. The government thus hoped to drain Pol Pot's troops of crucial income. See Shawcross, *supra* note 178, at 45.

295. See *supra* note 177 and accompanying text. See also Nate Thayer et al., *Law of the Gun*, FAR E. ECON. REV., July 17, 1997, at 14.

296. See Duffy, *supra* note 227, at 82.

297. HUMAN RIGHTS PROGRAM, *supra* note 47, at 34 (quoting Yael Tamir).

298. See *id.*

299. See *id.*

that a truth commission might intensify past tensions and frustrate reconciliation.<sup>300</sup>

On the whole, it thus appears that a truth commission may be better equipped to foster institutional changes than it is to engage a national reconciliation. While institutional changes may constitute a transition toward reconciliation, they can do little to effect individual forgiveness, which seems unlikely within the Cambodian world view.

## V. SUMMARY AND CONCLUSION

Although extensive scholarship has attempted to capture and explain the brutality of the Khmer Rouge regime, significant benefits still can be reaped by establishing an authoritative history of the Khmer Rouge atrocities through a truth commission. A truth commission investigation may unearth heretofore unknown details of the Khmer Rouge secret operations, thus preventing the former leaders from minimizing their actions. Moreover, an investigation can serve to educate the younger generation about their country's history. Acknowledging the agony endured by individuals may also serve cathartic purposes. It would provide survivors with a voice, and a modicum of closure to the era of Democratic Kampuchea. A truth commission could also be implemented much faster than a criminal tribunal, an important consideration in light of the age of the perpetrators and victims. Finally, by marking a clear line between the past and present regimes, and curtailing the Khmer Rouge involvement in current politics, a truth commission would allow Cambodians to rebuild their country in a spirit of conciliation.

A truth commission in Cambodia would achieve some, but not all of the major purposes of such an inquiry. The hope of national reconciliation through a truth commission may be impeded by the Khmer Buddhist conception of forgiveness. In lieu of actual forgiveness, however, symbolic forgiveness may achieve some of the same ends. Moreover, the lack of political will to investigate the Khmer Rouge atrocities has existed for decades and continues to be a shortcoming for the application of a truth commission. Economic pressure from Western countries, however, may compensate for an insufficient internal desire to investigate Khmer Rouge atrocities.

Whether Cambodians themselves would support a truth commission, however, is up in the air. Some reporters and commentators portray Cambodians as eschewing both prosecution and formal inquiry into the acts of the Khmer Rouge, desiring instead "not to reopen old wounds."<sup>301</sup> In my own experience in

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300. *See id.*

301. Seth Mydans, *The Curious Case of Ieng Sary: Why Cambodia May Overlook Its Past*, N.Y. TIMES, Sept. 8, 1996, at E3. *See also* Stephen P. Marks, *Forgetting "The Policies and Practices of the Past": Impunity in Cambodia*, 18 FLETCHER F. WORLD AFF.

Cambodia, the Khmer lawyers, judges, and human rights officials with whom I worked expressed a desire, more often than not, for non-prosecution.<sup>302</sup> Of those disfavoring prosecution, some cited the themes of reconciliation preached by the Buddhist patriarch in Cambodia,<sup>303</sup> while others were simply too preoccupied with daily subsistence to think much about the proposal. On the other hand, prominent Cambodian refugees such as Dith Pran have demanded full prosecution of Pol Pot's cadre members.<sup>304</sup> Clearly, Cambodians vary in their appraisal of whether and how the Khmer Rouge should face accountability. Cambodian attitudes on this topic deserve further inquiry before undertaking any effort for a truth commission or other action. Without both political and social support, no approach will meet success.<sup>305</sup>

If sufficient political will can be mustered to conduct a truth commission, Cambodian officials might use the inquiry as a substitute for formal prosecution of perpetrators. Care must be taken, therefore, to ensure the best possible chances for later prosecution. These precautions might include broad investigatory powers, preclusion of blanket amnesties, and mandates to pass important evidence on to prosecutorial bodies. The South African Truth and Reconciliation Committee may prove a constructive model if it leads to prosecution of the Apartheid perpetrators, as is planned. This Note does not propose a Cambodian truth commission as a solitary or comprehensive answer to the problem of impunity in Cambodia. It does acknowledge a truth commission as an important facet of a multifarious approach. In the event that a truth commission results in *de facto* amnesty for Khmer Rouge perpetrators—despite these precautions—a truth commission will nevertheless provide an opportunity for the Cambodian government and outsiders alike to give meaningful attention to the annihilation of 1.7 million Cambodians under the regime of Democratic Kampuchea. And in light of the past two decades of insensibility, a step toward justice may be better than no justice at all.

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17, 19 (1994).

302. It is unclear whether these colleagues would be amenable to a truth commission or not.

303. Stephen Marks' quotation by Supreme Patriarch of Cambodian Buddhism, Maha Ghosananda, is illustrative of this attitude: "I do not question that loving one's oppressors—Cambodians loving the Khmer Rouge—may be the most difficult attitude to achieve. But it is the law of the universe that retaliation, hatred, and revenge only continue the cycle and never stop it. Reconciliation does not mean that we surrender rights and conditions, but rather that we use love in all our negotiations." Marks, *supra* note 301, at 38.

304. See Robert D. McFadden, *Survivor of Killing Fields is Resolute in Quest for Justice*, N.Y. TIMES, April 17, 1998, at A13.

305. See, e.g., Orentlicher, *supra* note 265, at 707.

