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# THE KHMER ROUGE ON TRIAL: WHITHER THE DEFENSE?

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*"I want you to know that everything I did, I did for my country."*<sup>1</sup>

-Pol Pot

## I. INTRODUCTION

April 17, 1975 was the beginning of the end. After a long and costly civil war, the Communist insurgency in Cambodia had triumphed and marched on the capital city of Phnom Penh, ending the rule of President Lon Nol, the American-backed head of state. Some of the city's residents cheered with cautious optimism as their would-be liberators streamed through the wide avenues, a feature of the capital's French colonial past. Clothed in black pajamas and traditional scarves and toting automatic weapons, many of the rebels were mere children. As the weary populace of "the gentle land" anticipated an end to the decade-long struggle for power between the government and the rebels, they could not have known the horror and abominations that would visit their nation in only a few short years. The Khmer Rouge, as they were called,<sup>2</sup> would turn Cambodia back to the "Year Zero" in their efforts to establish a new revolutionary society, Democratic Kampuchea, in place of what they viewed as an old, corrupt

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1. From Pol Pot's final interview. Nate Thayer, *Day of Reckoning*, FAR E. ECON. REV., Oct. 30, 1997, at 14, 20.

2. "Khmer Rouge" or "Red Khmer" was coined by Norodom Sihanouk, the current King of Cambodia. The term has become synonymous with atrocity and mass murder in many circles. In this Note, I have chosen to use the term "PDK" or Party of Democratic Kampuchea, the official name of the group and "Khmer Rouge" interchangeably.

and decadent regime. During the brief three and a half years that the Khmer Rouge or Party of Democratic Kampuchea (“PDK”) was in power, an estimated 1.7 million individuals would lose their lives to execution, murder, starvation, and disease.<sup>3</sup>

Upon taking control of the urban areas, the Khmer Rouge leadership began evacuating all city dwellers to the countryside in an attempt to consolidate their control over the country and to begin the collectives that would form the base for a new agrarian revolution. The strata of Cambodian society were to be assimilated into a new, unified national race divided along new class boundaries. The government abolished money and markets in an attempt to establish an entirely new societal order. The state looked inward and became dominated by a virulent xenophobia, manifested in the cloak of secrecy that was thrown around the identities of the PDK leaders and in the general paranoia at the top echelons of power.<sup>4</sup> Not surprisingly, the utopian society that the PDK envisioned never materialized. Instead, the PDK plunged Cambodian society into a hell on earth.

In December of 1978, after nearly four years of oppressive and murderous PDK rule, Vietnamese forces invaded Cambodia, capturing Phnom Penh and consolidating control in January of 1979.<sup>5</sup> The Vietnamese installed a puppet regime under new premier Heng Samrin, known as the People’s Republic of Kampuchea.<sup>6</sup> The PDK forces were driven back into the jungles of Cambodia where they regrouped to fight as a guerilla force, as they had in the years before 1975. The Khmer Rouge survived in the jungles for more than one decade on the largesse of sympathetic patrons such as the People’s Republic of China (“PRC”) and

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3. This figure is a generally accepted one. See, e.g., Brian D. Tittmore, *Khmer Rouge Crimes: The Elusive Search for Justice*, 7 HUM. RTS. BRIEF 3, 3 (1999).

4. Pol Pot, General Secretary and Prime Minister of the PDK, was very fearful of assassination. When addressing the party, he had those attending strip searched before they could be in his presence. See DAVID CHANDLER, *BROTHER NUMBER ONE: A POLITICAL BIOGRAPHY OF POL POT* 132 (rev. ed. 1999).

5. The Vietnamese and their Soviet allies were perhaps the most hated enemy of the Maoist Khmer Rouge. Throughout the existence of the Democratic Kampuchea regime, bloody border conflicts became commonplace. NAYAN CHANDA, *BROTHER ENEMY: THE WAR AFTER THE WAR: A HISTORY OF INDOCHINA SINCE THE FALL OF SAIGON* 193 (1986). The Vietnamese government claimed that the border incursions by the Khmer Rouge and the killing of Vietnamese civilians justified their invasion. This Note does not consider possible crimes stemming from these border clashes and incursions, although an international tribunal likely would do so.

6. *Id.* at 371–74.

members of the Association of Southeast Asian Nations (“ASEAN”).<sup>7</sup> These allies shipped aid and munitions to the PDK in their strongholds along the Thai-Cambodian border to further their common interests. With the help of the United Nations (“U.N.”), however, a nascent peace has come into existence since the withdrawal of Vietnamese forces in 1991. The new government made it a priority to finish the stalled peace process and to end the civil war. As a result of government policies of amnesty for rank-and-file members of the PDK, the rebel movement waned in power. This has been true especially during the past four years when an intra-party leadership schism and mass defections of troops to the government’s side decimated PDK strength.

Today, the infamous Khmer Rouge is no more. As of this writing, the last of the top leaders have either defected to or have been captured by the government. With the end of their struggle, the international community has exerted great pressure to establish an international criminal tribunal to bring the top leaders of the PDK to justice for atrocities of the past. Indeed, a trial is very close at hand, thus making the Khmer Rouge issue increasingly relevant in contemporary international law and current events.

Although the process of bringing the PDK leadership to justice has been at times glacial, scholars have painstakingly collected evidence documenting the crimes of the regime, preparing for the day when the PDK would finally face the legal consequences of its actions.<sup>8</sup> Despite the collective research efforts of scholars on the period, there exists little literature, if any at all, analyzing the perspective of the PDK. While scholars and jurists have noted the shortcomings of some of the relevant international legal authorities under which the Khmer Rouge leaders would be tried,<sup>9</sup> a clear and definite dearth of scholarship from the Khmer Rouge perspective on these matters also exists.

Admittedly, few scholars or legal experts would wish to concern themselves with constructing a case *for* the Khmer Rouge and the record of abominations compiled during their regime. Nonetheless, Article 14 of the International Covenant on Civil and Political Rights sets forth that

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7. *Id.* at 372–389.

8. Pol Pot and Ieng Sary, Standing Committee Member and Deputy Prime Minister for Foreign Affairs, were tried *in absentia*, convicted, and sentenced to death in 1979 by a tribunal in Phnom Penh. The trial did not meet international rules for fairness and due process, however, and was basically for show. Hope Stevens, “an aged communist from the New York branch of the Association of Democratic Lawyers,” represented the defense. Gregory H. Stanton, *The Cambodian Genocide and International Law*, in *GENOCIDE AND DEMOCRACY IN CAMBODIA* 141, 142 (Ben Kiernan ed., 1993).

9. See Beth Van Schaack, Note, *The Crime of Political Genocide: Repairing the Genocide Convention’s Blind Spot*, 106 *YALE L.J.* 2259, 2259 (1997).

“[e]veryone charged with a criminal offense shall have the right to be presumed innocent until proved guilty according to law.”<sup>10</sup> Furthermore, the Covenant gives individuals the right to defend themselves “in person or through legal assistance of [their] own choosing.”<sup>11</sup> Even the very top leaders of the PDK are entitled to the protections of basic due process consistent with prevailing international standards.

Although it may be lost on some, even their most ardent detractors would concede that in order to convict the Khmer Rouge defendants and to serve justice, a plausible defense necessarily must be constructed and presented. This vigorous defense must challenge the evidence, as international standards of fairness demand it. The defense can neither be half-hearted nor incomplete. A less than genuine defense for the Khmer Rouge could turn any international tribunal into the same type of kangaroo court used by the Khmer Rouge. In short, while defense of the Khmer Rouge is a “bitter pill” to some, it remains necessary to justice. One might ask that if the acts of the Khmer Rouge leadership were so wicked, why do they need a defense? Because even the most heinous criminals enjoy the right to test the evidence presented against them, the PDK leadership can be afforded no less. A vigorous and legitimate defense is a prerequisite for a conviction to stand up to international notions of fairness and justice.

This Note examines selected ideas from the Khmer Rouge perspective. In light of the overwhelming evidence compiled against the Khmer Rouge, this Note broadly considers the reasonableness and potential de facto futility of a defense. It must be clearly and unequivocally stated at the outset, however, that this author is *not* an apologist for the PDK and in no way denies the pure wretchedness of what took place during the Democratic Kampuchea regime.<sup>12</sup> This Note takes a small step into an area that has been sparse in terms of scholarship, exploring the evidence from the PDK point of view.<sup>13</sup> As is consistent with the Note’s goals, the scope of analysis is limited to two major concepts of international law, two areas

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10. International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 14, 999 U.N.T.S. 171.

11. *Id.*

12. The author has personally visited the museum at Tuol Sleng as well as the Killing Fields at Cheoung Ek and holds no misconceptions or unrealistic notions as to the suffering and sorrow that occurred in Cambodia during the Khmer Rouge era.

13. This Note is limited in scope. Research is generally limited to secondary sources and translations of primary sources from the original Khmer. The cases considered have also been circumscribed out of necessity and lack of access to original language materials. Because of these restrictions and the limited objectives of the Note, evidence is included and examined in a way not necessarily consistent with a strict legal analysis.

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of alleged Khmer Rouge crimes, and a discussion of the contemporary political considerations that work in favor of a PDK defense. Unfortunately, the student Note format necessarily limits the boundaries and depth of treatment of matters to be discussed. Furthermore, the fact that each eventual defendant will be situated differently with respect to the evidence prevents a full and robust individualized discussion herewith.

Part II of this Note briefly explains the leadership structure of Democratic Kampuchea and anticipates which former leaders would stand trial, were an international tribunal convened. Part III is presented in two Sections. To start, it provides an overview of the first of the two major concepts of international law considered in this Note: crimes against humanity as enunciated at the post-World War II Nuremberg Trials. It then examines the political executions that took place during the Khmer Rouge era in light of the Nuremberg principles. More specifically, this section considers Tuol Sleng, the central prison where political enemies and their families were tortured and executed.<sup>14</sup> Part IV is also presented in two sections. The first section briefly provides background on the Genocide Convention, the second major piece of international law considered in this Note. The subsequent section considers PDK treatment of Buddhist monks, a group widely believed to have been targeted for persecution, as possible crimes under the Genocide Convention. It also considers loopholes in the Genocide Convention that might be used in a defense. The analysis concludes by arguing that although defenses seeking total exculpation are unrealistic, partially exculpatory defenses, mitigating defenses, contradictory facts, varying degrees of culpability among defendants, and several legal loopholes may be useful starting points for establishing the foundations of a Khmer Rouge defense before an international tribunal. Finally, Part V provides some perspective on the genesis of the tribunal initiative and explores how recent events have hastened the creation of a tribunal. It considers the current legal and political problems pertaining to the creation of an ad hoc international tribunal for the Khmer Rouge and how politics may have created a situation that is more favorable to the defense than expected. Lastly, Part V speculates on whether these problems will, in the end, conspire to aid the Khmer Rouge leadership in avoiding punishment, either partially or entirely.

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14. See discussion *infra* Part III.B.

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## II. THE DEFENDANTS

The question of culpability must start with who will be charged with violations of international law. The government of Democratic Kampuchea was unique in that its leaders issued no decrees and passed no laws beyond the January 1976 Constitution.<sup>15</sup> Not only does this complicate the assignment of culpability for international crimes that occurred, but it also serves to obscure the identity and individual roles of those in leadership positions at the time. Nonetheless, over the years, scholars have been able to piece together the leadership structure of the PDK and have now identified high-ranking leaders and their positions and responsibilities.

The fact that many lower-ranking cadres and foot soldiers of the PDK have either died or been re-absorbed into society, coupled with the Cambodian government's desire for a socially non-disruptive trial,<sup>16</sup> makes it unlikely that any of them will face a tribunal. This leaves the higher-ranking leaders to stand trial alone. Therefore, it is almost assured that if an international tribunal were convened, it would try the remaining members of the Standing Committee of the PDK and the top leaders who held government posts. A recent report by the War Crimes Research Office ("WCRO") at American University and the Coalition for International Justice identifies seven possible candidates for prosecution, although credible evidence exists to prosecute others as well.<sup>17</sup> Cambodian Premier Hun Sen has indicated that up to five former leaders of Democratic Kampuchea deemed responsible for atrocities would be tried, although he has declined to identify them by name.<sup>18</sup> Nonetheless, it is not very difficult to anticipate at least some of the former leaders who would stand before a tribunal.

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15. See *CAMBODIA 1975–1978: RENDEZVOUS WITH DEATH* 79 (Karl D. Jackson ed., 1989) [hereinafter *RENDEZVOUS WITH DEATH*]. Laws, government decrees, or even official government journals are absent from the archives of Democratic Kampuchea. The only statutes are those of the Communist Party of Kampuchea (CPK). See *id.*

16. See discussion *infra* Part V.

17. See *STEPHEN HEDER WITH BRIAN D. TITTEMORE, WAR CRIMES RESEARCH OFFICE, SEVEN CANDIDATES FOR PROSECUTION: ACCOUNTABILITY FOR THE CRIMES OF THE KHMER ROUGE* 6 (2001). The report identifies seven former officials of Democratic Kampuchea: Nuon Chea, Communist Party Deputy Secretary; Ieng Sary, Deputy Prime Minister for Foreign Affairs; Khieu Samphan, State Presidium Chairman; Ta Mok, Central Committee Member; Kae Pok, Central Committee Member; Sou Met and Meah Mut, both Military Division Chairmen. See *id.* at 5–6.

18. Associated Press, *Cambodia Cabinet Approves Khmer Rouge Tribunal Plan*, available at <http://www.cnn.com/2000/ASIANOW/southeast/01/06/cambodia.rouge.01> (last modified Jan. 6, 2000).

For a majority of the Democratic Kampuchea era, the PDK leadership consisted of a Central Committee with a Standing Committee led by General Secretary Pol Pot. Pol Pot, who died in 1998, and the surviving members are listed in the following table:<sup>19</sup>

Name	Standing Committee Position/Government Position	Current Status
Pol Pot (deceased)	General Secretary/Prime Minister	Died mysteriously in 1998 while under house detention imposed by the PDK for the murder of Son Sen and family.
Nuon Chea	Deputy Secretary/Chairman, Standing Committee of the People's Representative Assembly (PRA)	Pol Pot's second in command. "Defected" to the government in December of 1998 along with Khieu Samphan after promise of amnesty from Hun Sen, which was later revoked. He vacationed in a seaside villa after surrender and is currently free and living in Western Cambodia.
Ta Mok	Second Deputy Secretary/First Deputy Chairman, Standing Committee of PRA	Toppled Pol Pot for control of Khmer Rouge in 1997. Currently in Cambodian jail. Charged with genocide under a 1979 decree and a 1994 Cambodian law banning the Khmer Rouge.
Ieng Sary	Member/Deputy Prime Minister for Foreign Affairs	Granted amnesty by King Norodom Sihanouk in 1996 and now heads his own political party. He lives in the gem-mining town of Pailin on the Thai border.
Khieu Samphan	Chairman of State Presidium, de facto head of state (no Committee position)	"Defected" along with Nuon Chea to live as "ordinary citizens." He currently lives in Western Cambodia.

19. See STEPHEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 231 (1997); Timothy Carney, *The Organization of Power*, in RENDEZVOUS WITH DEATH, *supra* note 15, at 100-04. The remaining deceased members of the original Standing Committee include Vorn Vet, who was purged and executed in 1978; Son Sen, who was executed in 1997; and So Phim, who was purged and executed in 1978.

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Because the party was the primary force in the government and because high-ranking party members formed the leadership core, possible defendants are likely to come from those living members listed in the above table. As one would expect, the army, government, and the party were very much intertwined, with leaders wearing several hats from each entity.<sup>20</sup> Most of the defendants will likely be former Standing Committee members.

It is very likely that those who will face the tribunal will be the living former members: Ieng Sary, Khieu Samphan, Ta Mok, and Nuon Chea. A possible fifth defendant is Kang Khek Ieu or "Duch," the former warden of Tuol Sleng prison who was arrested by the government in May of 1999.<sup>21</sup> Whether Ta Mok will be tried before an international tribunal (as opposed to a Cambodian court with no foreign participation) is not clear. Ta Mok was the last leader of the Khmer Rouge and was the last of the living Standing Committee members to be arrested. Because he did not defect to the government, he was placed in jail, whereas those who did defect (Nuon Chea, Ieng Sary, and Khieu Samphan), continue to live as free men. The remaining leaders, however, will likely face charges under clearly delineated international standards, namely the charges under the Genocide Convention and crimes against humanity.

### III. THE NUREMBERG PRINCIPLES AND THE PDK

Although the PDK will likely be charged with several crimes under international law,<sup>22</sup> the ones relevant to this Note, and the two that undoubtedly would be central to such a trial, are crimes against humanity and genocide. The Genocide Convention and the Nuremberg Principles were both forged from the atrocities of the World Wars. The aftermath of World War II spurred the international community to address massive

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20. See Carney, *supra* note 19, at 94.

21. See discussion *infra* Part III.B.

22. In any international criminal trial, it is very likely that leaders of the PDK would be charged with one or more of the following crimes under international agreement (in addition to genocide and crimes against humanity): slavery and forced labor under the 1930 Convention on Forced Labor and the 1956 Supplementary Convention on Slavery (Cambodia is a party to both); torture, under customary international law since the U.N. Convention on Torture was not concluded until 1984; various violations of laws of international armed conflict under the Geneva Conventions for acts stemming from Democratic Kampuchea's persistent border conflict with Vietnam; and for other various crimes against persons protected under international law. This Note does not purport to consider these authorities for the case of the Khmer Rouge. The recent report by the WCRO and the Coalition for International Justice discusses culpability based on the concepts of individual responsibility and superior orders. HEDER WITH TITTEMORE, *supra* note 17.

human rights abuses through the development of an international body of law that would define, punish, and deter the devastation wrought by the Axis.<sup>23</sup> Today, both the Genocide Convention and the Nuremberg Principles are significant elements of international human rights law. Below is a discussion of the Nuremberg Principles and their application to the Khmer Rouge, followed by a discussion of the Genocide Convention and its relevance to this case.

#### A. THE NUREMBERG PRINCIPLES

The first notions of crimes against humanity were not born in the wake of World War II. Rather, the first modern attempt at imputing criminal responsibility for crimes against humanity occurred after World War I.<sup>24</sup> Due to disagreement amongst the parties, however, the concept never made its way into the Treaty of Versailles. The birth of a modern definition of crimes against humanity was delayed until the end of World War II and the creation of the Charter of the International Military Tribunal (IMT) for the prosecution of Axis leaders. The new definition was necessary in light of the Axis' wartime actions, which, by their unprecedented levels of horror, exceeded the scope of long-recognized concepts of warfare. Article VI of the Charter created three categories of international war crimes. The U.N. General Assembly later made Article VI part of international law through codification of the Nuremberg Principles.<sup>25</sup>

One of the three categories of the Nuremberg Principles defined the specifics of what constitutes crimes against humanity.<sup>26</sup> It enunciated a list of crimes, including "murder, extermination, enslavement, or deportation before or during the war, or persecutions based on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the tribunal, whether or not in violation of the domestic law of the country where perpetrated."<sup>27</sup>

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23. For history on the drafting of the Genocide Convention and the Nuremberg Code, see HOWARD BALL, *PROSECUTING WAR CRIMES AND GENOCIDE* (1999); RATNER & ABRAMS, *supra* note 19.

24. See RATNER & ABRAMS, *supra* note 19, at 45.

25. The three crimes under the Nuremberg Principles were crimes against the peace, war crimes, and crimes against humanity. See BALL, *supra* note 23, at 86-87.

26. The other categories were crimes against the peace and war crimes. See International Military Tribunal, Nuremberg Charter, art. 6, available at <http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm> (last visited Nov. 8, 2001).

27. BALL, *supra* note 23, at 86-87 (quoting IMT Charter, art. 6).

Authorities on international law generally agree that the definition of crimes against humanity includes three or four elements.<sup>28</sup> The first of these elements is the nexus to armed conflict.<sup>29</sup> This element is perhaps the source of greatest disagreement. The IMT Charter requires that crimes against humanity have a nexus to the other crimes over which the IMT had jurisdiction—crimes against the peace and war crimes. That is, the crimes against humanity must have occurred during or in the context of armed conflict or all-out war. The disagreement over whether or not the nexus is required arose through the seemingly contradictory language in the Charter and Control Council Law No. 10 which, in giving occupation courts jurisdiction over crimes against humanity, did not mention a link to armed conflict.<sup>30</sup> Furthermore, national laws promulgated to penalize such international crimes have not been in agreement as to the nexus requirement either.<sup>31</sup> These national laws provide persuasive evidence of prevailing international opinion on the topic. Subsequent international tribunals in Yugoslavia and Rwanda have been split on the issue, with the former tribunal maintaining a nexus to armed conflict.<sup>32</sup>

The second element that characterizes crimes against humanity is the pattern of occurrence.<sup>33</sup> In other words, there must be an inquiry into the scale of the possible crime, as well as into the planned and systematic nature of the crime. The acts in question must have been directed against civilian populations as part of a widespread and systematic attack.<sup>34</sup> Naturally, the areas in which problematic interpretations arise involve those isolated acts directed against only a few individuals. In the case of Cambodia, however, such concerns do not apply. For acts to fall under the rubric of crimes against humanity they must be more than mere isolated incidents.

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28. See RATNER & ABRAMS, *supra* note 19, at 49–67.

29. See *id.* at 49.

30. See *id.* at 50.

31. For example, Israel's relevant statute lacks a nexus, while Canada's war crimes statute is ambiguous on the issue. Australia and the United Kingdom have retained the nexus, while The Republic of China's (Taiwan) 1946 statute strongly suggests a link to war. See *id.* at 51–52.

32. See Statute of the International Tribunal of the Former Yugoslavia, art. 5, at <http://www.un.org/icty/basic/statut/stat2000.htm> (last visited Nov. 8, 2001); Statute of International Tribunal for Rwanda, art. 3 reprinted in *United Nations: Security Council Resolution 955 (1994) Establishing the International Tribunal for Rwanda*, 33 INT'L LEGAL MATERIALS 1598 (1994), available at <http://www.un.org/icty/basic/statut/stat2000.htm> (last visited Nov. 8, 2001).

33. See RATNER & ABRAMS, *supra* note 19, at 57.

34. See *id.*

Motive is a third element closely linked to mass action.<sup>35</sup> The perpetrator must have acted on a particular characteristic of the victim or group of victims. The IMT Charter called for acts committed “against any civilian population” and “persecutions on political, racial or religious grounds.”<sup>36</sup>

The final element is state action.<sup>37</sup> The inquiry here goes to whether governmental direction is necessary to transform an act into a potential crime against humanity. Again, authorities are divided on the issue. The recent tribunals in Rwanda and Yugoslavia suggest that such a link is not necessary. However, both the IMT Charter and the subsequent United Nations Codification retain the requirement that crimes against humanity be instigated or tolerated by governmental authorities.

#### B. APPLICATION TO THE PDK AND TUOL SLENG

Crimes against humanity, as developed from the Nuremberg trials, will be of critical importance in an international trial of the PDK leaders. A successful defense of the PDK under the charge must focus on the above-mentioned nexus to armed conflict. In short, the PDK must argue for a conservative view requiring a link between the acts in question and the civil war leading to the toppling of the Lon Nol government. It can be argued that many political killings did not take place in the context of armed conflict, but rather during political consolidation after the civil war. This stance would eliminate a significant majority of acts from consideration before the tribunal—acts that would be devastating to PDK leaders if considered.

The defense will need to confront evidence suggesting that a link to armed conflict is no longer required for a charge of crimes against humanity.<sup>38</sup> A favorable fact for the defense is that the war crimes statutes of several nations still require a connection to armed conflict or are silent on the issue.<sup>39</sup> This requirement can be used as persuasive evidence that the burden of showing the nexus must be met. The bifurcation of opinion

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35. *See id.* at 60.

36. International Military Tribunal, *supra* note 26, at art. 6(c). Article 6(c) of the IMT Charter defined crimes of humanity as: “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal.” *Id.*

37. *See* RATNER & ABRAMS, *supra* note 19, at 64.

38. This argument will be difficult because, arguably, the linkage has been broken by the Rwanda Tribunal.

39. *See* RATNER & ABRAMS, *supra* note 19, at 51–53.

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on this issue contributes to the unpredictability and uncertainty of whether a tribunal would strictly interpret the Nuremberg principles as requiring the nexus to armed conflict. The statutes establishing the Yugoslavia and Rwanda tribunals speak to whether the nexus will be required in a trial of the Khmer Rouge. Although the Yugoslavia tribunal maintained a nexus to armed conflict, it remains unclear whether the limitation is jurisdictional or definitional.<sup>40</sup> The United States government, however, in an *amicus curiae* brief presented to the Yugoslavia tribunal, stated that the prohibitions on crimes against humanity apply “even in times of peace.”<sup>41</sup>

The defense might challenge the fairness of an *ex post facto* application of the standards established by the Yugoslavia and Rwanda tribunals. An appropriate question may be whether or not the link to armed conflict existed in the customary international law of the mid- to late 1970s, when the crimes in question were perpetrated. A quarter of a century ago, the nexus requirement was perhaps more entrenched and less likely to be eliminated by a tribunal. The presiding judges must consider whether it is fair to use precedent that was developed more than a decade after the fall of the PDK regime. Furthermore, if contemporary international standards are not used, the tribunal may consider whether a requirement of international armed conflict, as opposed to domestic armed conflict, existed during the PDK era. While it is doubtless that raids conducted against civilians along the Vietnamese border are international in character, the question arises whether internal purges within the PDK fall into the purview of the tribunal.

Assuming, *arguendo*, that the tribunal is silent on the nexus requirement or removes it entirely, prosecutors might then focus on proving the core elements that make up the charge of crimes against humanity: the systematic or mass nature of the act, the motive (in terms of the identity of the victims), and state action. At a minimum, some of the PDK’s acts against their political enemies are congruent with the elements of crimes against humanity. Because lower-ranking cadres in remote sites around Cambodia killed political enemies of the state, however, many instances will have to be traced back to the PDK leaders, who would stand trial before a potential tribunal. The recent report from the WCRO undertakes a painstaking evidentiary analysis of archival documents in Cambodia and

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40. *See id.* at 54.

41. *Id.* (citing *Prosecutor v. Tadic*, No. IT-94-I-T, *Amicus Curiae Brief Presented by the Government of the United States of America*, July 25, 1995, at 33 n.53).

presents a prima facie case that contradicts the ignorance publicly professed by many former PDK leaders.<sup>42</sup>

In order to analyze possible PDK crimes under the rubric of crimes against humanity, this Part focuses on Tuol Sleng, the main PDK prison and interrogation center where officials kept meticulous records detailing the confessions and subsequent executions of the victims of political purges. The prison is perhaps the most lasting symbol of the killings in Cambodia. One scholar wrote that “if a regime can be understood by the institutions it creates, Democratic Kampuchea should be remembered through Tuol Sleng.”<sup>43</sup> Undoubtedly, the records from Tuol Sleng and the nature of the killings there make it an evidentiary treasure trove for prosecutors and a potential poison pill for the defense.

### 1. The Case of Tuol Sleng

Unlike the Genocide Convention, which does not cover the extermination of political groups, the Nuremberg Principle of crimes against humanity, as codified by the U.N., includes “persecutions based on political grounds.”<sup>44</sup> The existence of Tuol Sleng, or S-21 as it was also known, is highly problematic for the PDK. A Phnom Penh secondary school turned prison/interrogation facility, S-21 was the nerve center for Democratic Kampuchea’s security apparatus. It was there that many purged Khmer Rouge cadres and their families confessed, after intense torture, to crimes against Democratic Kampuchea.<sup>45</sup> Most of these

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42. In July of 2001, Nuon Chea stated that he had no regrets in fulfilling his duty of the nation and continued to deny that there was ever a Khmer Rouge policy to take people’s lives. He added that it was the goal of the government to “give rice three times a day and dessert once a week” to those who died from starvation and illness. *Pol Pot’s Henchmen Deny “Killing Fields” Allegations*, AGENCE FRANCE PRESSE, July 20, 2001.

43. BALL, *supra* note 23, at 112.

44. *Id.* at 86–87.

45. Those who were “processed” at S-21 were often subjected to interrogation methods ranging from “electric shocks and severe beatings to the pulling out of toenails and submersion in vats of water.” Nic Dunlop & Nate Thayer, *Duch Confesses*, FAR E. ECON. REV., May 6, 1999, at 19. The Tuol Sleng archives also mention that prisoners were burned by cigarettes, jabbed by needles, suffocated by plastic bags, and forced to eat their own excrement and drink their own urine. DAVID CHANDLER, VOICES FROM S-21: TERROR AND HISTORY IN POL POT’S SECRET PRISON 130 (1999). Torturers were also known to force feed prisoners as well as demand that they pay homage to images of dogs, a wall, a table, or a chair in order to elicit confessions. Other methods of torture also included suspending individuals with their hands bound behind their backs from high wooden beams. When hoisted up, the weight of the individual would necessarily dislocate both shoulder sockets. *See Id.*

individuals were eventually executed. Between 16,000 and 20,000 people were interrogated at Tuol Sleng, with only seven surviving to tell about it.<sup>46</sup>

The evidence from Tuol Sleng could be damning against the top leaders of the PDK. Up to 4,000 confessions were discovered in the prison archives.<sup>47</sup> The documents found in the prison establish a powerful and compelling case for persecution on political grounds falling squarely within the definition of crimes against humanity. If true, the acts that took place at Tuol Sleng fit the elements of the crime.

First, the entire operation at S-21 can be considered systematic and large-scale in nature. It was the center of the security apparatus and was a collection center for victims of political purges throughout the country. Sixteen thousand people “processed” would seem to be more than sufficient to meet the necessary threshold for a large-scale act. Second, the written confessions found in the prison archives show that these people were targeted for political reasons, whether real or imputed.<sup>48</sup> In other words, they were targeted based on political grounds. The final element is state action. Evidence of direction seems overwhelming and potentially devastating. Despite the fact that only political enemies of the state were brought to Tuol Sleng, its size and location in the capital city strongly indicate that S-21 was an organ created by the central government leadership.

## 2. The Challenge of Tuol Sleng for the Khmer Rouge Defense

Faced with the compelling evidence found at Tuol Sleng, the former leaders of Democratic Kampuchea have only a few defensive options, none of which are particularly strong. The first of these options would be to challenge the veracity and validity of the evidence found at Tuol Sleng. The second option would be to admit knowledge, but to “pass the buck” and place the blame for what occurred at Tuol Sleng on other defendants or on those not before the tribunal. This option may also entail denying knowledge of the existence of what took place at Tuol Sleng and definitely

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46. The seven people who survived escaped certain death when Vietnamese troops captured Phnom Penh in January of 1979. Dunlop & Thayer, *supra* note 45, at 19. Other sources have estimated that 20,000 people were killed at Tuol Sleng. DAVID P. CHANDLER, *THE TRAGEDY OF CAMBODIAN HISTORY: POLITICS, WAR AND THE REVOLUTION SINCE 1945* at 285 (1991).

47. See CHANDLER, *supra* note 4, at 123.

48. Although the PDK engaged in document destruction as invading Vietnamese forces advanced toward the capital, the prison warden apparently was never told that the capital was in danger and consequently continued torturing prisoners without destroying any of the incriminating documentation. Nate Thayer, *Death in Detail*, FAR E. ECON. REV., May 13, 1999, at 21.

entails establishing a gradient of culpability among the top leaders of the PDK. It will be difficult, however, for a PDK defendant to evade culpability if he or she had any knowledge of the atrocious mass killings and tortures, yet did nothing to stop it. A final option might be a novel use of the necessity or duress defense.<sup>49</sup> Given the violent and widespread purges at the time, a defense of “killed or be killed” could be introduced. Meah Mut, a possible defendant identified by the WCRO report, stated, “We were in a cage, like today,” suggesting that many Khmer Rouge had no choice in carrying out their orders during the height of the regime.<sup>50</sup> Obviously, some of these options are mutually exclusive. On the other hand, the latter two defenses may, in some cases, be necessarily related, as anyone seeking to blame another for political killings also would likely deny knowledge that such acts were even taking place in Tuol Sleng. Depending on the individual, each defense must be chosen carefully to attain either the full mitigating effect or the full, though very unlikely, exculpatory effect.

In the mid-1970s, international law principles were not derived from treaties that governed the defense of superior orders.<sup>51</sup> Customary international law at that time had no definitive solutions to the superior orders defense.<sup>52</sup> A defense based on such international law principles could be exempt or mitigate a defendant’s sentence. Some authorities recognized that sometimes opposition to an order was impossible.<sup>53</sup> In that case, an examination as to whether a moral choice existed is necessary. Additionally, the recognition by a subordinate of the illegality of a particular order would not circumscribe culpability in international law. For most of the contemplated Khmer Rouge defendants, individual criminal responsibility would likely stem from superior responsibility, but the potential use of the superior orders defense is not automatically precluded on other distinct charges.

The first defense challenging the validity of the evidence found at Tuol Sleng has been the general position of the PDK since it was ousted in

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49. The fact that the defense of “superior orders” is not allowed under the law may be an impediment to constructing a duress defense.

50. *3 of 7 Khmer Rouge Suspects Deny Killings*, JAPAN ECON. NEWSWIRE (Phnom Penh), July 20, 2001.

51. Theo Vogler, *The Defense of “Superior Orders” in International Criminal Law*, in A TREATISE ON INTERNATIONAL LAW, VOL. 1 CRIMES AND PUNISHMENT 624 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973).

52. *Id.* at 625.

53. *Id.*

1979.<sup>54</sup> That is, the PDK has always claimed that the victims of Tuol Sleng died at the hands of the Vietnamese and that the prison was a construct of the invading Vietnamese assembled in order to discredit the PDK and to hide the atrocities of Vietnam's own subsequent occupation of Cambodia.<sup>55</sup> The fact that this claim has been dismissed by scholars as an impossibility, coupled with the fact that the existence of S-21 has been acknowledged by former Democratic Kampuchea foreign minister Ieng Sary, makes it a true long-shot claim. Nevertheless, Pol Pot, in his final interview, again enunciated the long-held PDK position that the notorious prison was a "Vietnamese propaganda exhibit."<sup>56</sup> Since Tuol Sleng was uncovered, this has been the most persistent explanation given by the PDK. It is the weakest and most unrealistic of the explanations available, however, given the overwhelming amount of evidence and the subsequent admissions by leaders of the PDK.<sup>57</sup> Barring the unexpected appearance of never-before-seen evidence proving that Tuol Sleng was indeed the manifestation of Vietnamese propaganda, this option is not at all viable.

The second option involves "passing the buck." In other words, should either Nuon Chea, Ieng Sary, or Khieu Samphan find themselves before a tribunal, they may choose to place blame on each other or on those who are not before the tribunal. Although this tactic may be futile (depending on the defendant relying on it), a showing of justifiable ignorance may be helpful in mitigating any consequences of unfavorable tribunal rulings. Nevertheless, the evidence seems to suggest that all three men were aware of what was taking place at S-21, although their governmental roles and responsibilities vis-à-vis the operation of the prison varied.<sup>58</sup>

One of the likely Khmer Rouge defendants has already publicly set in motion his own defense exemplifying the "passing the buck" strategy. In his statements since "defecting" from the Khmer Rouge, Ieng Sary has maintained that he was unaware of the huge death toll in the Killing

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54. See MICHAEL VICKERY, *CAMBODIA: 1975-1982* at 151, 209 (1984).

55. See *id.*

56. Thayer, *supra* note 1, at 14.

57. Interestingly, in his final interview, Pol Pot told journalist Nate Thayer not only that he believed Tuol Sleng to be a fabrication of the Vietnamese propaganda machine, but that he himself had heard of Tuol Sleng only after being forced into the jungle by the Vietnamese. Ironically, he claims the source of this information was the *Voice of America*. He went on to describe documents that showed that the skulls found in the Killing Fields are smaller than skulls of the Khmer people, thereby implying that the victims in the graves were not of Cambodian origin. *Id.* at 17.

58. See Dunlop & Thayer, *supra* note 45.

Fields.<sup>59</sup> He told reporters that he had no regrets about the past “because I had nothing to do with ordering the execution of anyone or even suggesting it.”<sup>60</sup> In fact, the Research and Documentation Center of the Democratic National Union Movement, the political party which Ieng Sary now heads, published a short tract entitled “The True Facts About Pol Pot’s Dictatorial Regime.”<sup>61</sup> The piece, distributed to journalists in September of 1996, is an attack on Pol Pot and his Secret Security Committee. The document asserts that Ieng Sary had numerous policy disagreements with Pol Pot and that “[i]t [was] Pol Pot and his handful of henchmen . . . who are mass-murderers of the people of Cambodia, committing until now enormous crimes against mankind.”<sup>62</sup> Since rejoining the government fold, Ieng Sary has been vehement in alleging that the atrocities committed were entirely on the orders of Pol Pot.<sup>63</sup>

Leaders of the PDK who find themselves before an international tribunal will surely use the tactic of directing blame on others, as has skillfully been demonstrated by Ieng Sary. Given the weight of the evidence that scholars and experts have collected from Tuol Sleng, it is unlikely that leaders in the Standing Committee of the PDK could plausibly deny any and all knowledge of what took place. Evidence brought to light through the use of the above defenses would likely have a mitigating value at best. For example, a demonstration of knowledge may be less damaging if it can be shown that the particular defendant was not, and could not have been, in a position to halt the tortures and executions.

A final option that could be used as a last resort in this case is the defense of duress. International law, beginning with Nuremberg, has recognized this defense.<sup>64</sup> That is, the accused lacked a moral choice in committing the act(s) in question.<sup>65</sup> The defense of duress typically is used when someone is in a “kill or be killed” situation. There may be insurmountable limits, however, on how this defense might be used with regard to large-scale killings. A duress defense would be unnecessary if a sufficient link is not established between leaders of the PDK and the acts that occurred at Tuol Sleng.

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59. Some of what is known generally as “the Killing Fields” are several mass graves located just outside of Phnom Penh at Cheoung Ek.

60. Matthew Lee, *Out of the Loop*, FAR E. ECON. REV., Sept. 19, 1996, at 20.

61. *Id.*

62. *Id.*

63. See Nayan Chanda, *Face the Facts*, FAR E. ECON. REV., Sept. 26, 1996, at 22.

64. RATNER & ABRAMS, *supra* note 19, at 123.

65. *Id.*

If needed, however, a claim of duress might be founded upon the political purges that led to so many individuals being sent to Tuol Sleng. Pol Pot suspected many of his fellow comrades-in-arms in the PDK to be Vietnamese agents and spies, and given the brutality and swiftness of the purges against those in the Eastern Zone of Cambodia who were believed to be Vietnamese/CIA/Western agents, a defense of duress might be considered. The fact that even the highest-ranking leaders were purged could be used as the kill-or-be-killed justification for carrying out heinous orders.<sup>66</sup> Pol Pot, in a struggle among the old guard leaders of the PDK, purged and ordered executions to the very end—he had former Defense Minister Son Sen and his family killed in June of 1997.<sup>67</sup> This defense, if successful, would indeed be a novel twist on the standard duress claim.

Imposing impediments block the successful use of this defense by PDK leaders linked by the prosecution to political executions at S-21. First, the defense is generally limited to lower-level defendants carrying out orders. A high-ranking PDK defendant found guilty of overseeing the state security apparatus would likely not be able to use the defense given their knowledge and the power they conceivably could have used to at least minimize the carnage. Second, in proceedings before it, the Yugoslavia Tribunal ruled that in the context of crimes against humanity, the life of the accused and the life of the victim are not fully equivalent for purposes of the duress defense.<sup>68</sup> Furthermore, it is difficult to envision a scenario where a tribunal would equate the life of a few top leaders to the lives of 16,000 to 20,000 people who were tortured and executed based on their real or imputed political beliefs and those of family members—real or imputed.

The evidentiary key linking the highest members of the PDK to the political killings at S-21 may be Kang Kek Ieu, alias “Duch.”<sup>69</sup> Duch, now in his mid-fifties, was a former school teacher who served as the chief of the Democratic Kampuchea national security apparatus.<sup>70</sup> He served as the

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66. The PDK leadership executed their own top cadres and other prominent individuals within the government. CHANDLER, *supra* note 45, at 54–68.

67. See Thayer, *supra* note 1, at 14; Nate Thayer, *Brother Number Zero*, FAR E. ECON. REV., Aug. 7, 1997, at 14, 17. Son Sen was murdered along with fourteen family members, including grandchildren. Their corpses were taken to a field where they were repeatedly run over by trucks. *Id.*

68. See RATNER & ABRAMS, *supra* note 19, at 124 n.28.

69. Throughout the relevant literature on the subject, one can also find his name spelled “Khang Gek Iev” and his alias spelled “Deuch,” although the man himself spells his name “Kang.” See Nate Thayer, *I am in Danger*, FAR E. ECON. REV., May 13, 1999, at 18–19.

70. See *id.*

on-site overseer at Tuol Sleng. Duch was in hiding in the jungles of Cambodia's Battambang province before a western journalist was able to interview him regarding the role of the top leaders of the PDK in what happened at Tuol Sleng.<sup>71</sup> After the interview, he was arrested and now awaits trial in a Cambodian prison. Duch's statements, if true, present another potential blow to defenses of ignorance and blame shifting. One prominent Cambodian scholar says that "Duch would in fact be in a key position to close key gaps in the evidence."<sup>72</sup>

Because the documentary link between the top leaders of the PDK is not yet incontrovertible, Duch's testimony might shed light on the role of key figures in ordering the interrogations, torture, and executions at Tuol Sleng. Duch identified three individuals responsible for the decisions at Tuol Sleng: Pol Pot, Nuon Chea, and Ta Mok.<sup>73</sup> As for Khieu Samphan, Duch said that "Khieu Samphan knew of the killings, but less than the others."<sup>74</sup> Surprisingly, Duch offered words of exoneration for Ieng Sary, the foreign minister of Democratic Kampuchea; "[Ieng Sary] only knew a little of the internal situation of the country because his work was outside Cambodia."<sup>75</sup>

Having spoken to western journalists, Duch's life was in danger, leading U.N. officials to fear for his safety.<sup>76</sup> Because his testimony before a criminal trial would be potentially damning, the leaders of the PDK would certainly have breathed easier if Duch was eliminated before he could testify. After his arrest in May of 1999, however, this is not likely to occur. Nonetheless, because of Duch's own role in the acts at Tuol Sleng, his credibility and his motives might be called into question.<sup>77</sup> Duch's detailed knowledge about meetings that he did not attend weakens the validity, and calls into question the veracity of his statements.

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71. See Dunlop & Thayer, *supra* note 45, at 18; Thayer, *supra* note 48, at 20.

72. Dunlop & Thayer, *supra* note 45, at 19 (quoting Stephen Heder, a Cambodia expert at London University's School of Oriental and African Studies).

73. *Id.* at 20.

74. *Id.*

75. *Id.* Duch recounted that, "for some people (probably high-ranking purge victims) Nuon Chea wanted me to give him pictures of their dead bodies for proof. He ordered me to bring pictures of the dead bodies to his office." Thayer, *supra* note 69. Duch claims that Nuon Chea was in command of the S-21 apparatus and that Son Sen was second in command. See *id.*

76. See *id.*

77. Duch identified handwriting on documents from Tuol Sleng as belonging to, among others, Son Sen and Nuon Chea. He further asserted that decisions to execute those at Tuol Sleng were made by the entire Central Committee. See *id.* Duch also contradicted Pol Pot's pleas of ignorance regarding Tuol Sleng, saying that Pol Pot "knew about S-21, but did not direct it personally." *Id.*

The most difficult issue that an international tribunal responsible for trying cases of crimes against humanity committed in Democratic Kampuchea will face is the determination of whether or not a nexus to armed conflict is still a definitional requirement of the crime. If the conservative view (nexus required) is taken by the tribunal, acts such as the tortures and executions at Tuol Sleng, and perhaps the majority of PDK atrocities, may be totally excluded from the jurisdiction of the tribunal.<sup>78</sup> Although the authorities and legal trends provide conflicting signals, it would not be unreasonable for a tribunal to de-link crimes against humanity to armed conflict. Without the linkage, the case for the PDK becomes very precarious indeed.

In light of the evidence that scholars and researchers have gathered over the past twenty years, as well as the surprise reappearance of Duch, prosecutors seem to have an iron-clad case. The evidence suggests that Tuol Sleng “processed” close to 20,000 individuals, a number clearly suggestive of a systematic or mass nature of the killings. Also, the confessions that remained at Tuol Sleng clearly show that prisoners were tortured and executed because of their political views and their crimes against the state.<sup>79</sup> Finally, witnesses such as Duch who were responsible for interrogations and executions are likely to provide the evidence of state action necessary to find the top leaders of Democratic Kampuchea guilty of crimes against humanity.

Faced with such daunting prospects, a viable defense of the PDK must then necessarily focus on the nexus of crimes against humanity to armed conflict and the tribunal’s acceptance of that concept. Although the acts at Tuol Sleng are but a portion of those that might be considered crimes against humanity, it is, given the existing evidence, the easiest case for prosecutors to gain a conviction for crimes against humanity, provided that the tribunal does not require a nexus to armed conflict. Although the issue remains unclear, it would not be surprising for a tribunal to de-link crimes against humanity from armed conflict. If that were to occur, the defense

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78. It should again be emphasized that political crimes are not the only ones that would be considered under crimes against humanity. Under international law, crimes against humanity include persecutions based on political as well as racial and religious grounds. See International Military Tribunal, *supra* note 26, at art. 6. The case of Tuol Sleng, and this Note, touches on only possible political crimes against humanity.

79. For an example of the political confessions extracted from prisoners at Tuol Sleng, see POL POT PLANS THE FUTURE: CONFIDENTIAL LEADERSHIP DOCUMENTS FROM DEMOCRATIC KAMPUCHEA, 1976–1977 at 227–317 (David P. Chandler et al. eds., 1988) [hereinafter CONFIDENTIAL LEADERSHIP DOCUMENTS].

would be overwhelmed by a torrent of devastating evidence. Furthermore, given the relative weakness of exculpatory and mitigating defenses available to the PDK, the conservative interpretation of the Nuremberg principles (nexus required) seems to be the best and *last* hope on which to establish a PDK defense to crimes against humanity. The presentation of claims challenging the authenticity of the evidence found at Tuol Sleng, and the pleas of ignorance and duress are marginally useful, at best. It would probably give the PDK leaders on trial the same chance of escaping conviction as the prisoners at Tuol Sleng had of escaping torture and death.

First, the above analysis illustrates that the Khmer Rouge is not a monolithic entity. Although it is easy and convenient to refer to the Khmer Rouge as a unified whole, there seem to be varying levels of culpability in terms of governmental responsibility among the various Standing Committee members of the PDK. For example, Ieng Sary may not incur the same level of criminal liability for what happened at Tuol Sleng as Nuon Chea or Duch might. Second, exploitation of legal loopholes will be crucial to the defense in this area. Regarding crimes against humanity, the elimination of the nexus to armed conflict would certainly be fatal to the defense. Inclusion of the nexus would, on the other hand, remove hundreds of thousands of murders and executions from the jurisdiction of the court. In the case of Tuol Sleng, the defense must argue strongly for inclusion of the nexus to armed conflict or face having to rely on a precarious and untenable defense for thousands of politically motivated executions.

#### IV. THE GENOCIDE CONVENTION AND THE MONKHOOD

##### A. THE BIRTH OF THE GENOCIDE CONVENTION

Like the Nuremberg Principles' crimes against humanity, the Genocide Convention of 1948 was realized after the chaos and tragedy of World War II. The Polish scholar and jurist, Raphael Lemkin, coined the term "genocide" to describe what the Jews and other "undesirable" groups suffered at the hands of the Nazis.<sup>80</sup> The Genocide Convention was an attempt to codify the international community's universal condemnation of mass human extermination and to "liberate mankind from such an odious scourge."<sup>81</sup> Although it is a relatively concise document, the Convention

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80. See Van Schaack, *supra* note 9, at 2262. The term "genocide" is derived from the Greek *genos* meaning race or tribe and the Latin *caedo* meaning to kill. *Id.* at n.20.

81. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, pmbl., 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention].

and its framers had the loftiest of intentions. It should be noted, however, that the Convention only covers a portion of the acts prosecuted at Nuremberg. The Convention does not address the issue of superior orders, nor does it require a nexus to armed conflict that is found in the definition of crimes against humanity.<sup>82</sup> In fact, the framers of the Convention intended to codify a crime distinct from the precedent of Nuremberg and rejected proposals to refer specifically to Nuremberg and to crimes against humanity in any part of the Convention's text.<sup>83</sup> Article II of the Genocide Convention defines "genocide" as the following:

[A]ny of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

Killing members of the group;

Causing serious bodily or mental harm to members of the group;

Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

Imposing measures intended to prevent births within the group;

Forcibly transferring children of the group to another group.<sup>84</sup>

Therefore, the Convention requires that an act, in order to qualify as genocide, must be specified in Article II and directed against a group specified in Article II, with the intent to destroy that group, in whole or in part. Examples include mass extermination of individuals or the incarceration of individuals in concentration camps where the sole purpose could be only to inflict harm and to create conditions that would eventually lead to the death of the internees.

The Convention further enumerates punishable acts: genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide.<sup>85</sup> In addition, the acts enumerated in Article III apply to those found guilty of the crimes, be they constitutionally responsible rulers, public officials, or private individuals.<sup>86</sup>

The Genocide Convention is not without its own major areas of controversy. One loophole is that it does not cover political or economic

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82. See RATNER & ABRAMS, *supra* note 19, at 27.

83. *Id.*

84. Genocide Convention, *supra* note 81, at art. II. The enumeration of genocidal acts in Article II is exhaustive rather than illustrative. See RATNER & ABRAMS, *supra* note 19, at 27.

85. Genocide Convention, *supra* note 81, at art. III.

86. *Id.* at art. IV.

groups. When Soviet bloc nations and several Latin American delegations balked at the inclusion of political groups under the Convention, the adoption of the Genocide Convention was seriously threatened.<sup>87</sup> It was argued that political groups were not stable and did not have the permanent attributes that the other covered groups possessed.<sup>88</sup> States that opposed inclusion of political groups also believed that they would lose a measure of control in domestic affairs if political groups were included, something that would threaten their national security. Consequently, political groups were eventually dropped from the final version of the Convention approved by the U.N.<sup>89</sup>

Another area in which political compromise limited the scope of the Convention is “cultural genocide.” While “physical genocide” is the deliberate physical extermination of a group through killing, cultural genocide includes acts such as the suppression of the language of a particular group, and the destruction of cultural institutions, libraries, schools, and historical monuments of the group.<sup>90</sup> The framers of the Convention recognized that both types of genocide were part and parcel of each other, and so, included both in the initial drafts of the Convention.<sup>91</sup> “Nevertheless, [it was determined] that the prohibition against cultural genocide was best included within a human rights instrument or in a supplemental convention.”<sup>92</sup> Delegates who opposed inclusion of cultural genocide felt that states might interpret it as inhibiting the assimilation of cultural or linguistic groups and would thus refuse to ratify the Convention.<sup>93</sup> Therefore, cultural genocide is not covered under the Convention. Anything short of partial or total physical destruction or intent to destroy would not qualify as genocide. Acts of cultural genocide, however, can provide circumstantial evidence of an intent to destroy a group.

In sum, the notion of crimes against humanity and the crime of genocide were finally codified in international law because of the horrors of World War II. Crimes against humanity covers many concepts,

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87. See Van Schaack, *supra* note 9, at 2264–65.

88. See RATNER & ABRAMS, *supra* note 19, at 32.

89. For a discussion of the negotiations leading to the adoption of the Genocide Convention, see Van Schaack, *supra* note 9, at 2259–70; Alexander K.A. Greenawalt, Note, *Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation*, 99 COLUM. L. REV. 2259 (1999).

90. See Matthew Lippman, *The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-Five Years Later*, 8 TEMP. INT'L & COMP. L.J. 1, 38–39 (1994).

91. *Id.* at 38.

92. *Id.*

93. *Id.*

including political killings, but arguably only as they are related to armed conflict. The Genocide Convention, because of the politics involved in its ratification process, is more limited in scope in that it does not cover political or economic groups. It is not constrained, however, by the requirement of a nexus to armed conflict.

#### B. THE PDK AND THE MONKHOOD

Even before its codification, problems of interpretation plagued the Genocide Convention. The Genocide Convention consists of two important elements, an intent element (*mens rea*) and an action element (*actus reus*). Both elements have been open to dispute with multiple, varied understandings.<sup>94</sup> A key part of the defense of the PDK must necessarily attack the Convention at these weak points, areas where the case for them has the best chance for success. Given the language of the Convention, the PDK must provide evidence that there was never intent on its part to physically destroy, in whole or in part, groups within Khmer Society. Furthermore, the Genocide Convention's loophole, the exclusion of political and economic groups, should be used to the advantage of the defense. That is, as many victims as possible must be subsumed under the larger group of those who were killed because of their politics and their perceived threat to the state.

The evidence on the subject seems to present a solid *prima facie* case that the PDK committed acts of genocide against ethnic minority groups as well as the Buddhist monkhood during their three-and-a-half years in power.<sup>95</sup> Scholars have found that the "Khmer Rouge singled out certain religious and ethnic groups for elimination."<sup>96</sup> There is evidence, however, that could support a conclusion that groups succumbed because of poor policy implementation by the PDK rank and file in the countryside and not necessarily because the PDK leadership wanted them eliminated. Nonetheless, it is generally agreed upon that the case against the Khmer Rouge leadership for the genocide of Buddhists is a strong one, perhaps the strongest. The following section confronts the issue directly, and begins by asking whether evidence that could support a viable defense, in fact, exists.

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94. See generally Greenawalt, *supra* note 89 at 2267-70 (discussing the meaning of "intent" under the Genocide Convention).

95. See, e.g., BEN KIERNAN, *THE POL POT REGIME: RACE, POWER, AND GENOCIDE IN CAMBODIA UNDER THE KHMER ROUGE, 1975-1979* (1996).

96. Stanton, *supra* note 8, at 141.

### 1. Buddhism and the Intent to Destroy

It is interesting, and at the same time ironic, that while some scholars have argued that the PDK was out to destroy organized religion, the Constitution of Democratic Kampuchea had enshrined the freedom of religion among its major tenets.<sup>97</sup> The freedom not to hold a faith was also included, although “reactionary” religion was specifically prohibited.<sup>98</sup> Evidence indicates, however, that after 1975 the practice of any religion was not tolerated.<sup>99</sup> Although there was hostility between monks and the communists, there seems to have been no mass executions of monks.<sup>100</sup> There was not even the immediate expulsion of monks from their temples.<sup>101</sup> In seeking to create a revolutionary society built on agriculture, the PDK government asked that monks not live off of alms provided by others. Instead, monks had to work to produce their own food, as everyone else did. Many monks, once forced to work, simply returned to the peasant life that they had known before entering the temple; indeed, most may have had little choice but to return to the fields. It is likely that some perished at the hands of lower-level cadres because of their faith, but not because of a central plan to exterminate them. It is also probably true that some monks were executed for their political activities. As discussed in Section 2, these executions could fall outside of the Convention’s ambit.

If the leadership targeted Buddhist monks, one would certainly expect widespread and deliberate destruction of temples throughout the country. Temple buildings were not razed *en masse*, however, as one would expect, had the PDK been intent on a total physical eradication of Buddhism. Even in 1981, nearly three years after the PDK had been driven out of power, “all [of the] important temples [in the major cities of Battambang, Phnom Penh, and Siemreap] were still standing and had suffered little or no damage.”<sup>102</sup> Although some temples had been destroyed, the majority of temples in urban areas remained intact.<sup>103</sup> Temples destroyed in the

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97. See CONST. OF DEMOCRATIC KAMPUCHEA, ch. XV, art. 20. “Every citizen of Kampuchea has the right to worship according to any religion and the right not to worship according to any religion.” *Id.*

98. See *id.* “Reactionary religions which are detrimental to Democratic Kampuchea and the Kampuchean people are absolutely forbidden.” *Id.*

99. See KIERNAN, *supra* note 95, at 55–59.

100. See VICKERY, *supra* note 54, at 179.

101. *Id.*

102. VICKERY, *supra* note 54, at 183. Destruction of Catholic cathedrals may have been primarily an attempt to eliminate vestiges of the colonial era, rather than an attempt to eradicate the Christian faith. See *id.* at 181.

103. See *id.* at 183.

countryside, were razed along with other buildings for basic construction materials needed in other areas,<sup>104</sup> suggesting a lack of specific intent on the part of the PDK leadership to target Buddhist structures. It seems that structures of all kinds were cannibalized for building materials in areas where they were scarce or especially needed. Furthermore, destruction of temples was more prevalent in rural areas controlled by low-level cadres from the peasantry than in the small towns where central government officials resided.<sup>105</sup> In areas under less influence and control from the center, it seems the abuse of monks was greater.

The above evidence suggests something about the intent of the PDK leadership to specifically destroy Buddhists and bring about their demise. It questions whether there was a desire by the central leadership to physically exterminate Buddhist monks. Article II of the Genocide Convention establishes an exhaustive list of enumerated acts that constitute the crime of genocide, none of which seems to fit this case.<sup>106</sup>

Admittedly, the PDK leadership wanted to eliminate religion despite its constitution. There is evidence that Pol Pot had told his commanders to “[d]efrock all Buddhist monks and put them to work growing rice.”<sup>107</sup> This would be in line with the desire to create an agricultural foundation for a new society. The defense must ask, however, if the leadership intended physical destruction of people because of their status as monks or former monks. Recall that cultural genocide was discussed in the framing process of the Convention, but specifically excluded.<sup>108</sup> Because wet-rice cultivation is labor intensive, destruction of peasants who had previously entered the monkhood would have been foolhardy from the perspective of the central leadership. It was a primary objective of the PDK in their first four-year plan to “produce rice for food to raise the standard of living of the people, and in order to export so as to obtain capital for . . . imports.”<sup>109</sup> Through the dramatic increase of rice harvests, the leadership hoped “the country would produce 26.7 million tons of paddy over the lifetime of the

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104. *See id.*

105. *Id.*

106. *See* Genocide Convention, *supra* note 81, at art. II.

107. KIERNAN, *supra* note 95, at 55. Kiernan notes that the information was gathered from Khmer Rouge sources of the Eastern Zone of Cambodia that later rebelled against the central leadership in Phnom Penh. *See id.*

108. Lippman, *supra* note 90, at 36–39.

109. CONFIDENTIAL LEADERSHIP DOCUMENTS, *supra* note 79, at 51. Some regions, under the PDK’s plan to “build socialism in all fields,” were to more than double their rice production in four years. *See id.* at 65.

plan, recreating what [it] assumed had been the state-directed plenitude” of the thirteenth century Angkor period.<sup>110</sup> Monks were not useful to the state, but defrocked monks were worth more alive than dead to the PDK leadership. Perhaps it was the case that any killings of monks were the result of local prejudices on the part of low-level cadres and were not the result of a central directive. Furthermore, the deaths of many former monks may have been caused by the dire conditions that took the lives of other individuals. Simply because few monks survived does not mean that they all perished as a result of acts criminalized in the Genocide Convention.<sup>111</sup>

Despite assertions by scholars that the PDK leadership singled out certain religious groups for elimination,<sup>112</sup> evidence exists that suggests that no religion was specifically targeted. While the government, in practice, attempted to create a society without religion, it seems that the top leaders sought a gradual transition of former monks into the new society rather than their total physical extermination. Although the attempt to eliminate and eradicate the physical (e.g., temples and edifices) and ritualistic aspects of Buddhism helps prove intent by establishing the prima facie case against the PDK leadership, it may not be sufficient by itself to convict for genocidal crimes enumerated in Article II of the Convention.<sup>113</sup> While there is the possibility that documentary evidence incriminating the top leaders in directing mass killings of Buddhists exists, at the very least, the foundations for a mitigating—if not an exculpatory—defense for the PDK leadership are present.

## 2. Exploiting the Loopholes in the Genocide Convention

It is a well-known fact that the Genocide Convention has a prominent “blind spot.”<sup>114</sup> It does not cover political and economic groups. The majority of those who were killed during the existence of the Democratic Kampuchea government were singled out because of their perceived threat to the continued existence of the state. According to one scholar, there were three main causes of violent death during the Democratic Kampuchea

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110. *Chandler, supra* note 4, at 117.

111. *See also* Michael Vickery, *Democratic Kampuchea—Themes and Variations, in* REVOLUTION AND ITS AFTERMATH IN KAMPUCHEA: EIGHT ESSAYS 99, 99–135 (David P. Chandler & Ben Kiernan, eds., 1983) (arguing that the central policy was less murderous than believed and that the worst conditions were aberrations from the central policy rather than its goals).

112. *See* Stanton, *supra* note 8, at 141.

113. Genocide Convention, *supra* note 81, art. II.

114. *See generally*, Van Schaack, *supra* note 9 (describing the drafting compromises leading to the exclusion of political groups from the ambit of the Genocide Convention).

era.<sup>115</sup> First, the killing of those identified with the predecessor Lon Nol Regime began immediately after the PDK took power.<sup>116</sup> Second, the intra-party purges, especially in the Eastern Zone, were the result of Pol Pot's attempt at "purification" of the Cambodian Communist Party.<sup>117</sup> The cadres in the Eastern Zone were thought to be colluding with the hated Vietnamese in an effort to oust the newly installed Democratic Kampuchea regime.<sup>118</sup> Finally, there were the "assertive killings" which, like the killings of monks in the countryside, were committed by "mostly uneducated peasants or half-educated teachers, [who] had risen to power because they had been good petty military leaders [during] the war [with the Lon Nol government]."<sup>119</sup> In all, the first two groups may have included as many as 400,000 individuals.<sup>120</sup> The final group is massive, but "[i]t is impossible to estimate the number of those killings not derived from central orders but from the psychological drives of youngsters who needed to assert undue authority."<sup>121</sup>

In addition to these three groups, those who died of hunger and illness make up a fourth group that would not be included under a Genocide Convention prosecution of PDK leadership. Some evidence suggests that a large portion of bodies found in most of the mass graves were the corpses of those who died of hunger and illness.<sup>122</sup> Therefore, it is conceivable that the deaths of one million Cambodians during the Democratic Kampuchea regime may not be prosecutable under the Genocide Convention because of this "blind spot."

In determining which cases can be charged as crimes of genocide against the PDK leadership, the *prosecution* needs to overcome three major hurdles, the first of which is the problem of establishing the requisite intent and motive. The drafters of the Convention did not include specific motive

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115. Serge Thion, *Genocide as a Political Commodity*, in *GENOCIDE AND DEMOCRACY IN CAMBODIA* 163, 166-67 (Ben Kiernan ed., 1993).

116. *Id.* at 166.

117. *Id.*

118. The Eastern Zone, along with the Southwest, was one of the better administrated zones with less killing than in other areas. Nonetheless, the purge in the Eastern Zone was by far the most virulent of all of the purges of the Democratic Kampuchea regime. The reasons are ambiguous, but it is likely the treason in favor of Vietnam that was imputed to leaders in the Eastern Zone. Aiding the hated Vietnamese was the worst kind of treasonous act. See VICKERY, *supra* note 54, at 131-139.

119. Thion, *supra* note 115, at 166.

120. *See id.*

121. *Id.*

122. *See VICKERY, supra* note 54 at 187-88. The corpses found at the Killing Fields of Cheoung Ek, however, were generally those who were brought from S-21 to be executed and buried.

tests but required that intent be directed at a protected group “as such.”<sup>123</sup> This means that the victims necessarily must have been targeted based on their status as a member of a *protected group*. Consequently, if the PDK leadership targeted some of their victims solely as members of political, professional, or economic groups, it would be difficult to prove that the acts constitute the crime of genocide as defined by the Convention. Included in groups not found within the Convention’s ambit are those who were killed through random violence or who succumbed to the brutal living conditions of the time. But other cases of alleged persecution exist that are not examined in this Note, meaning that PDK leaders likely will not escape conviction on genocide. For example, there is strong evidence that the Thai, Vietnamese, and Cham minorities were victims of the government program to assimilate or eliminate.<sup>124</sup>

A second hurdle the prosecution faces will be that of finding enough documentary evidence to show a connection between PDK leaders and the killings of protected groups. It is doubtless that complete documentary evidence does not exist because many documents have been either destroyed or lost. But through its examination of previously unanalyzed and forgotten documentation, the WCRO report has closed several key gaps in the case against the PDK leaders.

Finally, there is the hurdle of finding credible eyewitnesses to help establish links of causation and intent to the PDK leadership in instances where the documentary evidence is thin or non-existent. Considering the number of people with such knowledge who may have perished during the period in question and those who have died since, the task is unenviable. In fact, those who have such incriminating knowledge may be themselves prosecutable for genocidal crimes which may make them reluctant to come forward.

### C. TOWARD THE FORMULATION OF A DEFENSE

The examples that have been presented in this Part illustrate three points that may be useful for establishing a defense. First, even in the strongest cases, the *prima facie* case may not be what it seems. Both

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123. See Greenawalt, *supra* note 89, at 2265.

124. See generally KIERNAN, *supra* note 95 (discussing persecution of Chams (Muslim indigenous groups descended from the ancient Hindu-Islamic Kingdom of Champa) and other minorities in Cambodia during the PDK era). The case of genocide against ethnic Vietnamese in Cambodia is especially strong, given the leadership’s hatred of the Vietnamese. Sources indicate that all urban and rural ethnic Vietnamese in Cambodia perished during the Democratic Kampuchea regime. See BALL, *supra* note 23, at 112.

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examples of political killings and Buddhist monks illustrate that there may be an evidentiary gap between the anecdotal evidence and the evidence necessary to convict. Twenty years of gathering evidence to condemn the Khmer Rouge may have obscured the truth to some extent. What may seem like a clear case of intent to exterminate may be something entirely different. The distinction between commands from the very top echelons of leadership and what was actually carried out is crucial for determining culpability. Evidence showing that not all killings were ordered from the center can be used as mitigating evidence—or even exculpatory evidence—depending on the situation.

Furthermore, the case of Buddhist monks is especially important in destroying the image of the “Khmer Rouge” as a single-minded whole. Too many times the Khmer Rouge has been depicted as a monstrous monolith.<sup>125</sup> National leaders should not always be blamed for the acts of their subordinates in situations where the acts of the subordinates are not reasonably tied to the acts of the superiors. The Khmer Rouge certainly was monstrous, but for the purposes of a judicial proceeding involving top PDK leaders, a collective characterization is not very useful for the prosecution’s case, outside of its prejudicial effect against the defense.

Second, the evidence at Tuol Sleng illustrates the varying levels of culpability among the PDK leaders. Given the varied responsibilities of the different PDK leaders and the words of Duch, S-21’s warden, certain defendants may be able to offer a somewhat credible defense of ignorance regarding some of the atrocities that occurred during the Democratic Kampuchea regime.

Finally, the analysis of political killings illustrates the compelling importance of loopholes in the legal authorities to a PDK defense. As for the Nuremberg Principles of crimes against humanity, the elimination of the required nexus to armed conflict would alter which crimes against humanity are charged to the PDK leadership. If the nexus remains, the viability of charging the PDK with crimes against humanity for many of the actions they took to consolidate power is questionable. Tuol Sleng illustrates the importance of preserving the nexus to armed conflict for a PDK defense; there are no credible defenses for the executions of “traitors” without the nexus.

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125. See KIERNAN, *supra* note 95, at 31–156 (describing the “cleansing” of Khmer society by the PDK).

From the perspective of a PDK defense, the Genocide Convention is riddled with enormous loopholes, namely the omission of cultural genocide, political groups, and economic groups from its legal ambit. These omissions were part of the great compromises necessary to ratify the Convention. The forced assimilation by the Khmer Rouge of monks into the new society may not be illegal. Furthermore, the hundreds of thousands of political killings would be removed at once from the jurisdiction of a tribunal. It would be a fair assessment to say that successful exploitation of the loopholes in the Genocide Convention would remove the deaths of more than one million Cambodians from consideration as crimes under international law.

The foundations for a defense, however, may be superfluous if an actual tribunal never convenes. Rather than helping to bring PDK leaders to justice, the mountain of evidence collected by scholars and researchers would remain a sheathed sword if Cambodia and the international community cannot agree on a tribunal format. The final part of this Note considers the recent developments toward the establishment of a tribunal for the Khmer Rouge leaders.

#### V. JUSTICE ON HOLD: ESTABLISHING THE TRIBUNAL

Scholars have spent more than two decades gathering evidence to convict the PDK leadership for the horrors brought on Cambodia. Now, after years of hiding, the former guerillas have finally come out of the jungle and are closer to trial than ever before. The cruel irony is that although the whereabouts of these individuals are known, they have yet to face international justice and are simply living out their lives as ordinary citizens. For years, the intransigence of the international community has been the best “defense” for the PDK leadership and may in fact continue to be. Not all nations, however, were recalcitrant. ASEAN nations and the PRC did their best to *sustain* the PDK as a guerilla fighting force along the Thai-Cambodian border.<sup>126</sup> The withdrawal of PRC support began the decline of the PDK as a viable guerilla force, but the PRC also stands ready to block any U.N. attempts to proceed against their erstwhile allies. The

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126. The PRC was the PDK’s main benefactor. The Khmer Rouge ascribed to a very extreme form of Maoism and put it into practice during its three years in power. After the Vietnamese invasion of Cambodia in 1978, the PRC continued its support with Thailand acting as a conduit of arms and supplies to the border area. The Sino-Soviet rivalry drove the relationship as the PRC sought to neutralize Soviet influence in Southeast Asia by engaging the Soviet-backed Vietnamese in a war of attrition. After the 1993 U.N.-brokered Paris Peace Accord, the Chinese agreed to withdraw all assistance to the PDK.

delicate political steps required to bring the defendants to justice, U.N. concerns about the tribunal, and Hun Sen's political goals are three factors that have become enmeshed and intertwined in a way that has hampered the goal of having a tribunal. This section describes the long process of convening the tribunal and considers how politics, as opposed to law, may be the best ally of the PDK.

#### A. ASSEMBLING THE DEFENDANTS

On Christmas Day 1998, top PDK leaders Khieu Samphan and Nuon Chea ended their struggle against the government. Their return to Phnom Penh sparked new hopes that the civil war that had raged in Cambodia since 1979 was finally over. Furthermore, the surrender of two top-ranking PDK leaders raised hopes for an international criminal prosecution of the PDK. The former leaders were spared arrest by Premier Hun Sen upon their return to the capital and were welcomed—not with handcuffs—but with flowers and embraces.<sup>127</sup> During their stay, Khieu Samphan and Nuon Chea had no less than first-class accommodations at an elegant riverside hotel.<sup>128</sup> The men later took a sightseeing trip around Phnom Penh before heading to the seaside resort town of Kompong Som for an extended vacation. Although both men apologized for any suffering that had been inflicted during the time they were in power, they made it clear that they wished to live as “ordinary citizens” and insisted that the past be put to rest.<sup>129</sup> Hun Sen asked that Cambodians “dig a hole and bury the past.”<sup>130</sup> The Christmas surprise in Phnom Penh, however, is important in that it was the first step that allowed Hun Sen to later declare in February 1999 that the Khmer Rouge threat was over.

Today, most of the potential defendants are free. Ieng Sary is active in political life on the Thai border, leading his own political party, while

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127. King Norodom Sihanouk specifically refused to grant amnesty to Khieu Samphan and Nuon Chea. The King said, “Taking into account the very large and undeniable discontent of the majority of the Khmer people, I will not renew my granting of an amnesty to the big Khmer Rouge criminals.” Susan Berfield, *Forget the Killing Fields?* ASIaweek, Jan. 8, 1999, <http://www.asiaweek.com/asiaweek/99/0108/nat6.html>.

128. Their entourage had reserved rooms at more than \$105.00 per night. *See id.*

129. At the press conference arranged for their arrival in the capital, Khieu Samphan stated, “I would like to say sorry to the people. Please forget the past and please be sorry for me. Let bygones be bygones.” Nuon Chea added: “Naturally, we are sorry—not only for the lives of the people but also for the animals.” When asked about how many had perished during the Democratic Kampuchea regime, Nuon Chea replied, “Please leave this to history. This is an old story.” *Id.*

130. *Id.*

Khieu Samphan and Nuon Chea are living as free men in Western Cambodia. Others continue to hold positions in the current government as only two men remain in custody: Ta Mok and Duch. Even for these two, confinement may not be for long, as the men are to be freed in the spring of 2002 when their three-year legal detention period ends.<sup>131</sup> Although their release remains unlikely, the truth is that compromises were made to either coax out or capture many of these individuals. The fact that many of these men have been treated in such a deferential manner only puts off the day when the government will have to swallow the bitter pill and arrest those who will face the tribunal.

The government, in the realization that many of its citizens and officials have ties to the PDK regime in some way or another, has consistently attempted to provide reassurance that only a select few will be brought before a tribunal. Recently, the Prime Minister announced that “[c]harges will only be brought against the ten or more who were most responsible during the [Democratic Kampuchea] regime. It is not necessary for you to go back to the jungle to protect your people.”<sup>132</sup> Even King Sihanouk expressed trepidation about the negative effects a tribunal could have on the nation’s fragile peace. Sihanouk recently met with former U.N. official Dr. Yasushi Akashi and intimated that peace was more important than justice. He emphasized the importance of honoring previous amnesties given to men like Ieng Sary in exchange for defection.<sup>133</sup> Clearly, the possible destabilizing consequences of arresting the former Khmer Rouge leaders lurks beneath the surface. This uneasiness and tension could be used favorably by some of the potential defendants.

Ieng Sary, who endorsed a mixed-tribunal proposal in 1999,<sup>134</sup> may benefit the most. Even though he has already been pardoned, he is still vulnerable to charges on other international crimes. Furthermore, his 1996 pardon for genocide may not be valid under relevant international law. Khieu Samphan and Nuon Chea also may have cards to play in that they have their own sympathizers, who owe loyalty to them and who are established in parts of the country that are remote from the capital and that

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131. Vong Sokheng & Bill Bainbridge, *King Signs KR Law, but Obstacles Loom*, PHNOM PENH POST ONLINE EDITION (Issue 10/17, Aug. 17–30, 2001), available at <http://www.phnompenhpost.com/TXT/currentstories/king.htm>.

132. *Id.*

133. *Cambodian King Says He Will Not Interfere in Tribunal*, DEUTSCHE PRESSE-AGENTUR, July 12, 2001.

134. See Craig Etcheson, *Accountability Beckons During a Year of Worries for the Khmer Rouge Leadership*, 6 INT’L L. STUDENTS ASS’N J. INT’L & COMP. L. 507, 516 (2000).

have been PDK-friendly regions in the past. Ta Mok and Duch, having not defected and under lock and key, are more vulnerable. In reality, they could conceivably end up as scapegoats in a tribunal.

#### B. THE END GAME AND THE IMPASSE WITH THE U.N.

Today, the end game is still being played out between the Hun Sen government and the U.N. The details of a tribunal lie at the heart of the issue between the government and the U.N. in an often strained relationship. The U.N. formally became a player in attempts to try the PDK in 1997 after Secretary General Kofi Annan received a letter from then First Prime Minister Norodom Ranariddh and then Second Prime Minister Hun Sen seeking assistance in trying the PDK leadership. Within a year, the Secretary General had created the Group of Experts for Cambodia. The three-member panel was convened with a mandate to: (1) evaluate the existing evidence and determine the nature of the crimes committed, (2) assess the feasibility of bringing Khmer Rouge leaders to justice, and (3) explore options for trials before international or domestic courts.<sup>135</sup>

In February of 1999, the panel delivered its conclusions. The group found that documentary evidence was quite extensive for some atrocities such as those at Tuol Sleng.<sup>136</sup> It was lacking for other crimes, however, suggesting that “[w]itness evidence would need to be the mainstay of a prosecutor’s case for many defendants.”<sup>137</sup> The group also found that the jurisdiction of any tribunal would include the crimes of genocide, crimes against humanity, war crimes, forced labor, torture, and crimes against internationally-protected persons.<sup>138</sup> The report went on to recommend that those most responsible for the most serious violations of human rights be tried, including senior leaders and those at lower levels who were “directly implicated in the most serious atrocities.”<sup>139</sup> The bulk of the report focused

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135. The group consisted of Sir Ninian Stephen, former Governor-General of Australia and former judge of the International Criminal Tribunal for the former Yugoslavia as the chairman; Judge Rajsoomer Lallah, a longtime member of the U.N. Human Rights Committee and Special Rapporteur for Myanmar of the U.N. Commission on Human Rights; and Steven Ratner who had participated in the Cambodian settlement talks and served as a consultant to the U.S. State Department on bringing the Khmer Rouge to justice. Steven R. Ratner, *The United Nations Group of Experts for Cambodia*, 93 AM. J. INT’L L. 948, 949 (1999).

136. *Id.* at 950 (citing U.N. Doc. A/53/850-S/1999/231 at paras. 52–58).

137. *Id.*

138. *Id.*

139. *Id.*

on options for trial. The group of experts concluded that only an ad hoc U.N. tribunal<sup>140</sup> held outside of Cambodia would be effective, rejecting possible trials in the Cambodian courts, whether or not they were U.N.-supervised. The group feared that domestic trials organized under Cambodian law would not meet international standards of due process because, in their opinion, Cambodia “still lacks a culture of respect for an impartial criminal justice system.”<sup>141</sup>

The Cambodian government immediately rejected the proposals set forth in the report. In response, the U.N. began developing plans for a mixed tribunal composed of foreign and Cambodian members (foreign prosecutor and a majority of foreign judges). This was rejected as well by the Cambodian government, which continued to insist that Cambodian courts were fully competent to conduct the trials and that the U.N. should do nothing more than provide legal expertise. After several proposals and counter-proposals, the Cambodian government endorsed a United States proposal for a mixed tribunal in October 1999, only to later reject it and propose a domestic tribunal that would allow participation by foreign judges. The U.N. still was dissatisfied with the proposal, however. In a letter to Premier Hun Sen, in February of 2000, Secretary General Annan identified four remaining issues regarding U.N. participation in a trial: the status of the foreign prosecutor; apprehension of suspects; amnesty; and the number of foreign judges.<sup>142</sup> The U.N. is concerned with adequate standards of justice, fairness, and the due process of law in the Cambodian courts and will not give its blessing to a Cambodian trial unless it is assured that its concerns will be addressed.<sup>143</sup>

Eventually, the two sides reinitiated negotiations to establish a joint tribunal comprised of both U.N. and Cambodian judges and prosecutors based on draft articles of cooperation. The U.N. wanted the Cambodian law that would establish the tribunal to be in conformity with the draft of articles of cooperation. Cambodian negotiators eventually proposed

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140. Such a tribunal could be created by the Security Council under Chapters VI or VII of the Charter or by the General Assembly under Chapter IV. Each of these options has varying legal implications. One consideration in Security Council-created tribunals is the veto power of the PRC. The PRC has threatened to veto any tribunals imposed on Cambodia unwillingly. *See id.* at 951–952.

141. Tittlemore, *supra* note 3, at 4. *See also* Ratner, *supra* note 135, at 951 (noting the fear of manipulation of and interference with an international court sitting in Cambodia).

142. *See* George Chigas, *A Litmus Test for Hun Sen*, BANGKOK POST ONLINE EDITION, at [http://www.bangkokpost.com/260300/260300\\_Perspective01.html](http://www.bangkokpost.com/260300/260300_Perspective01.html) (last visited Mar. 27, 2000).

143. Cambodian prosecutions that do not meet international standards of impartiality and independence will not preclude the U.N. from addressing the same acts in other international fora. Since the PDK leaders are under Cambodian government “control,” however, a solution will necessarily be a compromise. *See* Tittlemore, *supra* note 3, at 4.

several amendments to the draft articles. In January of 2001, the National Assembly approved legislation that established a tribunal. The Constitutional Council, however, rejected legislation because of the inclusion of the death penalty—something the 1993 Constitution abolished.<sup>144</sup> The legislation was resubmitted and signed into law. While the legislation was based largely on matters negotiated by the two sides, it deviated sufficiently enough that the U.N. requested changes and clarifications to the law before it received final approval. These changes were ignored as Hun Sen's government dismissed the necessity of amending the law.

Despite the relative progress that has been made on the tribunal, Hun Sen has never held back from excoriating, or entirely ignoring, the U.N., a body that continued to recognize the PDK government long after it had been deposed by a Vietnamese invasion. In July 2001, the Premier, speaking about U.N. concerns regarding the Cambodian legislation required for the tribunal, made it clear that he did not care whether the U.N. was involved in the tribunal, and that it would proceed with or without the support of the U.N.<sup>145</sup> The Premier has complained that through the body's demands, the U.N. is forcing Cambodia to follow its will.<sup>146</sup> Many times throughout the process, the government has flouted U.N. concerns. The recent passage of the tribunal statute is no different. As it now stands, however, the disagreement between the Cambodian government and the U.N. still persists. The successful agreement on a Memorandum of Understanding remains the final legal hurdle to the establishment of a tribunal.

### C. HUN SEN'S BALANCING ACT

With the end of the civil war, one of the top priorities of the Hun Sen Government has been the maintenance of Cambodia's newfound peace for the purposes of spurring on the country's sagging economy. When barraged by questions about the Khmer Rouge, Hun Sen made it clear that concern is not exclusively focused on an international tribunal for the PDK.

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144. A tribunal formed under the new laws will not include capital punishment within its purview. *Cambodian Senate Passes Bill on Khmer Rouge Tribunal*, JAPAN ECON. NEWS WIRE, July 23, 2001.

145. *Tribunal Will Go Forward with or Without U.N. Support, Says Hun Sen*, DEUTSCHE PRESSE-AGENTUR, June 29, 2001.

146. *Cambodian PM Lashes out at U.N. Over War Crimes Tribunal*, AGENCE FRANCE PRESSE, June 29, 2001.

The Premier wanted to send a message to “the entire world” so that they would “pay more attention to peace, national reconciliation, national unity, economic and social development to reduce poverty, rather than think only about a Khmer Rouge trial.”<sup>147</sup> National stability and development have been the main reason given by the government for limiting the number of former PDK leaders that may be indicted. An attempt to remove former PDK leaders ensconced in their gem-rich jungle fiefdoms<sup>148</sup> could easily trigger more domestic turmoil in Cambodia. In a tragic twist of irony, the current state of affairs in Cambodia, born of the disastrous policies of Democratic Kampuchea, has impeded prosecution of those most responsible for creating and implementing those policies in the first place. Nonetheless, the validity of these claims may be debatable, as evidence shows that no Khmer Rouge remnants remain to resume a war of resistance and that some members of Hun Sen’s own Cambodian People’s Party favor a tribunal.<sup>149</sup>

An additional concern voiced by the government is national sovereignty. Hun Sen and the U.N. cannot agree as to the number and the nationality of potential prosecutors. The U.N. wants foreign prosecutors issuing indictments, while Cambodia is only willing to have co-prosecutors, one foreign and one Cambodian. Having co-prosecutors may lead to Cambodian veto power over the indictments, leaving one to wonder about the true objectives of the government’s declared concerns. Meanwhile, delays in the process benefit Hun Sen by giving him time to shore up support both domestically and internationally, particularly with the PRC.<sup>150</sup>

Nonetheless, the prospects of a trial today are much greater than the dismal outlook for one just a few years ago. At that time, the Khmer Rouge rebels were highly courted players in an intra-governmental conflict between Hun Sen and co-Premier Norodom Ranariddh. The government’s recalcitrance in bringing the Khmer Rouge leaders before a tribunal was based in part on the role the Khmer Rouge could play in tipping the scales in the struggle for leadership of the country. Now, with Hun Sen more firmly in control, the Khmer Rouge is no longer in such a favorable position.

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147. UN Wire, *UN Rejects Latest Tribunal Proposal* (Feb. 9, 2000), available at <http://www.globalpolicy.org/security/issues/cambodia/rejectn.htm>.

148. Sales of gems in Thailand provided extra capital with which the Khmer Rouge supported its guerilla movement. PDK leaders had investments in gems, timber, and real estate as well as ventures in Thailand and along the border worth at least \$100 million. See CHANDLER, *supra* note 4, at 171.

149. See HEDER WITH TITTEMORE, *supra* note 17, at 17 n.41.

150. Kelly McEvers, *Final Leap*, FAR E. ECON. REV., April 6, 2000, at 20.

The international community has recognized Cambodia's desire to begin reassembling a society shattered by civil war. The need to prosecute the PDK leadership, however, is not lost. International aid is tied to how the PDK leaders are dealt with, among other issues.<sup>151</sup> The United States is considering resuming direct aid to Cambodia and is closely watching the developments pertaining to a tribunal. Failure by the government to provide adequate justice will certainly be viewed by international donors as unacceptable. If international donors have their way, the U.N. will play a substantial role.<sup>152</sup> The delays that have plagued the process have donor nations impatient.

Conversely, some nations might prefer the perceived foot-dragging that has taken place in Phnom Penh during the past three years. The presentation of evidence at a tribunal has the potential of embarrassing many governments that gave aid and comfort to the PDK regime. The PRC, as the biggest supporter of the Khmer Rouge, has the most to lose in the potentially revelation-filled proceedings. The PRC has consistently made it clear that it would veto any Security Council resolutions to create a U.N. tribunal for Cambodia.<sup>153</sup> Opposition lawmakers have accused the government of being influenced by the PRC in the wake of a flurry of visits by senior Chinese officials.<sup>154</sup>

In handling the establishment of the tribunal, Hun Sen must balance among achieving his own policy goals, meeting the concerns of the international community, and satisfying the desire among the Cambodian people for a sense of justice and closure. Doubtless, the Premier has the unenviable task of trying to keep his own domestic situation stable, while trying to cater to major foreign players with conflicting views. Once again, the situation favors the potential PDK defendants. The possibility that these pressures would result in selective prosecution has been considered and is a reality. For at least some of the potential defendants, the quiet recovery of the nation from the bloody throes of the Khmer Rouge may end up being an undeserving windfall.

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151. See Chigas, *supra* note 142; Kelly McEvers, *Price of Justice*, FAR E. ECON. REV., Feb 17, 2000, at 27.

152. McEvers, *supra* note 151, at 27.

153. See Ratner, *supra* note 135, at 952.

154. *Cambodian Senate Approves Khmer Rouge Draft Law*, DEUTSCHE PRESSE-AGENTUR, July 23, 2001.

## D. A KHMER ROUGE TRIAL: DREAM OR REALITY?

The possibility of a fair prosecution of the PDK leadership for genocide, crimes against humanity, and other international human rights violations is now, more than ever, a reality. The surviving leaders of the PDK have either surrendered or have been captured and incarcerated. As of this writing, the Cambodian government passed the necessary laws for the creation of a domestic tribunal. The second draft of the law passed both the National Assembly and the Senate.<sup>155</sup> In August of 2001, the measure cleared its last official domestic hurdle after approval by the Constitutional Council and ratification by King Sihanouk. Despite this success, great impediments remain.

The Cambodian government is set on exercising its control and supervision over the entire process. The U.N. is still unhappy with some aspects of the law as its provisions may not be sufficient to ensure international standards of fairness. If a Cambodian tribunal did not meet such standards, however, the U.N. will not necessarily be precluded under international law from subsequently organizing a future trial.<sup>156</sup> But just how the defendants in any new trial would be extradited from Cambodia remains to be seen. The new law also fails to address another concern of the U.N.: Cambodian judges possess minimal training in the intricacies of international law, and have a poor reputation for independence, creating another advantage for the defendants. Cambodian judges will enjoy a 3-2 majority at each trial and a 4-3 advantage on the tribunal's appellate court, although at least one international judge must be a party to any majority ruling.<sup>157</sup> The last chance for the U.N. to have its own concerns addressed will be in the negotiations on the Memorandum of Understanding, the final agreement that has to be reached before the mechanisms set up by the tribunal legislation can be put into motion.

The politics of the tribunal and the behind-the-scenes diplomatic maneuvering may have worked to the advantage of the defense in creating an atmosphere more favorable than could have been imagined. Hun Sen's insistence on Cambodian participation, despite U.N. disagreement, has set the stage for a tribunal in Phnom Penh rather than in the Hague. Furthermore, as mentioned, Cambodian judges and prosecutors will play a key role in the proceedings. The domestic situation that resulted in pardons

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155. The measure received eighty-six of eighty-eight votes in the National Assembly and passed by a unanimous fifty-one votes in the Senate.

156. See Tittmore, *supra* note 3, at 5.

157. *Better Late than Never*, ECONOMIST, July 14, 2001.

for many former leaders of the Khmer Rouge, like Ieng Sary, continues to exist, or at least an air of the residual influence of the Khmer Rouge still pervades the atmosphere. This influence, whether real or imagined, looms large over Cambodia's nascent development and also over Hun Sen's own grasp on power. Finally, international pressure from nations opposed to a tell-all tribunal further hinder the comprehensiveness of potential proceedings, all to the advantage of the defense. These factors contribute to the serious possibility that a group smaller than anticipated will actually end up on trial. Even if most of the top PDK leaders are indicted, the prospect of rulings, verdicts, and sentences determined more by extra-legal factors than by international law remains.

The report by the WCRO and the Coalition for International Justice echoes these concerns about the tribunal law. Provisions have been included which allow the government to apply national law that may not comply with international standards on matters pertaining to proceedings, indictments, and arrests.<sup>158</sup> Furthermore, the law "omits reference to the effect [of] previous pardons," something that could allow Ieng Sary to escape prosecution.<sup>159</sup>

At this point, a trial is very likely, but whether or not it will satisfy the international community's notion of justice, due process, and fairness remains to be seen. In addition, the recalcitrance of the government will likely not end. Hun Sen may choose to proceed without U.N. support, or perhaps final negotiations with the U.N. could delay the process indefinitely. Cambodia has waited more than twenty years to see the PDK leaders in the dock—a few more months of waiting will seemingly make little difference.

## VI. CONCLUSION

The construction of a vigorous and competent defense is a prerequisite to the conviction of the leaders of the Khmer Rouge. No matter how unpalatable such a task may seem, international standards of justice and due process require that even those who are widely believed to be responsible for suffering and death on an unthinkable scale deserve to have the evidence against them challenged and tested. In a fair trial of the PDK leadership, the defense must be comprehensive and robust, not half-hearted

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158. HEDER WITH TITTEMORE, *supra* note 17, at 24

159. *Id.*

and flaccid. Only then can a tribunal deliver justice that satisfies the international community and the people of Cambodia.

This Note has taken a step into an area of research that is very bare yet increasingly important and topical. Favorable interpretations of the relevant international law, exploitation of loopholes in the law, and a recognition of varying degrees of culpability among possible defendants are just some of the notions on which the foundations of a defense for the Khmer Rouge can be built. For sure, the mountain of documentary evidence continues to build against the defense. Success in mitigation of or exculpation from criminal liability may be found in an approach that looks at the bigger picture as opposed to confronting the detailed documentary evidence head-on. Furthermore, the political backdrop of the entire tribunal will certainly aid the PDK defense. A savvy defense team may be able to manipulate the system provided that its methods are not illegal.

This analysis is only an initial inquiry into the viability of a PDK defense, an analysis that is a prerequisite to conviction. The author recognizes that this Note is invariably limited in form and also by the author's inability to utilize Khmer-language primary sources. A defense team, in addition to reviewing all the evidence gathered against the Khmer Rouge, must conduct further interviews with each of the potential defendants. Only then can a clear and coherent defense truly begin to take shape. More research is needed on what defenses, if any, are available for other international crimes that the Khmer Rouge leadership may face. If the initiative for an international tribunal collapses, something unlikely at this point, other options may include non-prosecutorial solutions, such as a truth commission,<sup>160</sup> designed to function in harmony with the culture, social, and religious norms of Cambodia.

Whatever the final form of inquiry may be, the people of Cambodia, the international community, and posterity deserve an outcome that is just and that will bring closure to an atrocious chapter of human history.

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160. For a discussion of the possibility of a truth commission in Cambodia, see Theresa Klosterman, Note, *The Feasibility and Propriety of a Truth Commission in Cambodia: Too Little? Too Late?*, 15 ARIZ. J. INT'L & COMP. L. 833 (1998).