

# INTERNATIONAL CRIMINAL LAW AND THE CAMBODIAN KILLING FIELDS

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I have been asked to discuss various models that might be available to address crimes committed by the Khmer Rouge during its murderous reign in the 1970s. Before turning to these, I would first like to identify several overarching considerations pertinent to the question, which model is most appropriate for Cambodia?

Let me begin by noting a paradox that lies at the heart of the issues addressed by this panel. On the one hand, since Nuremberg there has been a general acknowledgment, in principle if not always honored in practice, that some crimes are of genuinely universal concern and responsibility. That responsibility is captured by the very name of such offenses—"crimes against humanity." This conference, and this panel, affirm the degree to which crimes against the human condition engage international regard and responsibility.

Yet on the other hand, responses to such crimes must, in a meaningful way, reflect the peculiar social and historical culture of the country in which they occurred if the process of accountability is to achieve its central aims. There cannot be a one-size-fits-all response to crimes against human dignity.

Let me elaborate on both points, beginning with the first.

International *legal* responsibility for some offenses is reflected in the fact that genocide, certain war crimes, and crimes against humanity are subject to universal jurisdiction. Significantly, too, in a decision rendered on July 11, 1996, the International Court of Justice held that the obligation under the Genocide Convention to prevent and to punish genocide is not territorially limited.<sup>1</sup>

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1. The case, brought by Bosnia—Herzegovina against Yugoslavia, alleges that the respondent state committed genocide. In response to Yugoslavia's claim that the Court lacked jurisdiction under the Genocide Convention because the acts allegedly giving rise to responsibility by Yugoslav authorities occurred in Bosnia, the court wrote: "[T]he rights and obligations enshrined by the Convention are rights and obligations *erga omnes*. The Court notes that the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention." Decision on Preliminary Objections, Application of the Convention

This dimension of international law is deeply rooted in moral obligation. The nature of that responsibility was suggested in a recent article in the *Washington Post* about a lawsuit by a Holocaust survivor against Swiss banks. Those banks, the plaintiff alleged, withheld money deposited by her father before he fell victim to the Nazi machinery of death. The *Post* article quotes the plaintiff's husband reading a passage from the Talmud, which describes a debate among ancient rabbis: "If a mouse steals a piece of cheese and runs into a hole, then who's responsible? It's the hole who's responsible. If he didn't have the place to hide it, then he wouldn't steal it." This passage evokes the basic principle underlying international law's recognition of universal responsibility for assuring that those who commit crimes against humanity are brought to the bar of justice. If a state provides sanctuary to Nazis, it has breached the vow of universal conscience, "Never Again." If the world fails to demand justice for the sweeping crimes of the Khmer Rouge, it is complicit in those crimes.

Further, by the very nature of crimes against humanity, accountability will come, if at all, only when international society demands it. The decision of a United States Military Tribunal in Nuremberg is instructive. "Crimes against humanity are acts committed in the course of wholesale and systematic violation of life and liberty," the Tribunal wrote in the *Ohlendorf* case. The Tribunal continued:

It is to be observed that insofar as international jurisdiction is concerned, the concept of crimes against humanity does not apply to offenses for which the criminal code of any well-ordered state makes adequate provision. They can only come within the purview of this basic code of humanity because the state involved, owing to indifference, impotency or complicity, has been unable or has refused to halt the crimes and punish the criminals.

But if crimes against humanity engage the responsibility of international society, an effective response must include measures that meaningfully reflect the culture and circumstances of the nation that endured those crimes. In particular, to the extent that the aim of a process of accountability is to inoculate a country like Cambodia against the revival of brutal governance, the most effective approach will reflect the social, historical, and legal culture in which the crimes occurred.

Press accounts of the recent amnesty accorded Ieng Sary suggest the importance of this issue in respect of Cambodia. Much of the press coverage surrounding Ieng Sary's demand for an amnesty suggested that criminal prosecution might sound a dissonant chord in Cambodian Buddhist culture. For example, in an article on September 8 entitled *Why Cambodia May Overlook Its Past*, a reporter for the *New York Times* wrote:

Many Cambodians seem to prefer not to reopen old wounds, and on the streets of Phnom Penh today people seem more eager for peace than for retribution. Though human rights groups and foreign governments, along with a number of Cambodian public figures, voice dismay at the respectful treatment of Mr. Ieng Sary, most people here seem prepared to accept his proposal to forget the past. 'It does not feel good to have people who killed our parents coming to live with us, but as Buddhists, we are taught not to seek revenge,' said a restaurant owner in Phnom Penh.

I cannot say whether, or to what extent, this reporter's account fairly represents Cambodian views. I have seen and heard other accounts that give cause to doubt sweeping claims that prosecution of Khmer Rouge atrocities would offend Cambodian values. Notably, when he granted Ieng Sary a royal amnesty at the behest of Cambodia's two Prime Ministers but against his own conscience, Prince Sihanouk made plain that such a pardon should not prevent an international tribunal from prosecuting Ieng Sary. While Prince Sihanouk of course does not speak for all Cambodians, I suspect that he speaks for many. Again, I cannot speak with any authority about whether prosecutions would, as the *Times* suggests, comport with Cambodian values. My point is simply that, to be effective in inoculating a society against a recurrence of state violence, a process of accountability must be rooted in that society's culture.

Up to a point. We surely would not want to defer to cultural—relativist arguments counseling against accountability when the culture in question is one of wholesale impunity. A key aim of trials following sweeping violations of personal integrity is to help dispel the culture of impunity that enabled the crimes to occur. In some respects, then, the demands of universal justice may in fact require some measure of meddling with patterns of national culture.

The complex concerns on which I have focused are, as I have suggested, especially pertinent to the extent that a process of accountability seeks to prevent a country from returning to abuses of the past and to advance reconciliation within a deeply riven nation. But these are not the

only aims. Consider, for example, the work of the International Criminal Tribunal for the former Yugoslavia in The Hague. This Tribunal, established by the United Nations Security Council, seeks not only to establish a foundation for peace and security in Bosnia, but also to broadcast a global message: Those *anywhere* who might in the future contemplate crimes against the human condition should think again. They will not get away with it.

That processes aimed at establishing accountability may have multiple audiences surely complicates the question, what is the best model for a country like Cambodia? Criminal prosecution might, for example, send the strongest message to a global audience, while a more broad-ranging process, like that currently underway in South Africa, might best promote the sort of deliberative reflection that enables a brutalized society to heal.

How to reconcile these competing claims presents questions to which no easy answers are available. I would suggest, however, that we must take this challenge far more seriously than has heretofore been common. Too often, transnational efforts to establish accountability for gross abuses have evinced a tendency to disregard the voices of those most directly concerned.

With these general considerations in mind, let me turn now to the principal question which I have been asked to address—what models of accountability are available in respect of the Cambodian killing fields? A range of measures are potentially available to address the crimes of the Khmer Rouge, though it remains doubtful whether any will garner the political support essential to their success.

One option is the institution of a contentious case before the International Court of Justice. Such a case must be brought against Cambodia, which is a party to the Genocide Convention, by another state party. The case would, in essence, allege that the Cambodian government breached its treaty obligation to prevent and punish genocide.

The excellent report prepared by Jason Abrams and Steven Ratner for the United States Department of State on accountability for Khmer Rouge atrocities concluded, however, that this option is improbable for several reasons. First, despite diligent efforts, nongovernmental organizations have been unable to convince any government to institute proceedings against Cambodia before the International Court of Justice. Second, with the Khmer Rouge no longer in control of Cambodia's government, it might not be possible to establish that there is a genuine dispute between a petitioner state and the government of Cambodia.

The recent decision of the Cambodian government to grant an amnesty to Ieng Sary might change this legal calculation, establishing a

genuine dispute under the Genocide Convention. In particular, a petitioner state could allege that Cambodia breached its explicit duty under the Convention to punish genocide by granting Ieng Sary an amnesty. Still, it scarcely seems likely that a state will institute such a case now, when none could be found to do so throughout the years when the Khmer Rouge constituted, or was part of, the internationally recognized government of Cambodia. Further, as the State Department report concludes, even if such a case were instituted and led to a finding that Cambodia had breached its obligations under the Genocide Convention, it is by no means clear that such a judgment would stimulate national prosecutions in Cambodia.

National prosecutions would, of course, be the response to those crimes of the Khmer Rouge constituting genocide that is most consistent with Cambodia's obligations under the Genocide Convention. But national prosecutions against Ieng Sary are presumably precluded by the recent amnesty, and in any event that amnesty may signal the Cambodian government's general disinclination to institute genocide prosecutions against the Khmer Rouge.

Even if these obstacles could be surmounted, Cambodia's national legal system is by all accounts in a state of shambles—in no small measure a result of Khmer Rouge policies. International support for national prosecutions would therefore be necessary, and also problematic. The specter of a clash of legal cultures would loom large over such a venture. Foreign legal advisors assisting Cambodians would surely insist on benchmarks to measure the success of their efforts and to justify their continuing support. But such a process often entails the sort of paternalism that has been problematic in other contexts, like Ethiopia. National prosecutions underway in Addis Ababa for crimes against humanity have been the object of well meaning, but at times counterproductive, international advice. These risks should not deter us from pursuing more effective approaches in Cambodia, but should sound a cautionary note about how to proceed.

As Prince Sihanouk observed, any amnesty conferred by Cambodian authorities would not prevent an international tribunal from prosecuting Ieng Sary (or others) for the murderous policies of the 1970s. What, then, are the prospects for such a tribunal?

It is unlikely that the Security Council would establish an ad hoc tribunal for Cambodia's crimes similar to the tribunals it created for the former Yugoslavia and Rwanda. Both of those tribunals were created as enforcement measures under Chapter VII of the United Nations Charter. As such, they were predicated on Security Council determinations that the situations in the former Yugoslavia and Rwanda constituted threats to

international peace and security. Such a finding in respect of Cambodia seems unlikely, to put it mildly. Further, even if a permanent international criminal court is established, it is unlikely that such a tribunal would have retroactive jurisdiction.

One option that might be available is the establishment of an "international penal tribunal" by states parties to the Genocide Convention pursuant to article VI of that treaty. Presumably such a tribunal could be established by a small number of states. But Cambodia almost surely would have to agree to cooperate with such a tribunal. In light of the recent amnesty for Ieng Sary, the present government does not seem disposed to support such an effort.

Another model for establishing accountability for crimes of the past is through a "truth commission"—a body that attempts to establish a comprehensive and authoritative record of serious abuses committed during a specific period. In fact, such commissions represent "models" rather than "a model" for accountability, as their mandates, powers, and modes of operation have varied considerably from one country to another.

One of the principal virtues of truth commissions is the extent to which they can, potentially, engage society in a broadly gauged and broad—ranging deliberative process about its past. This process is, I believe, essential in securing one of the principal aims of accountability in nations recently scourged by crimes against human dignity. Such collective deliberation may help strengthen the sinews of civic culture, fostering a deep commitment to personal rights and a demand that they be respected. At the same time, a national truth—telling process provides a framework for healing the wounds of those who endured atrocious crimes. In these and other respects, the process of accountability engendered by truth commissions tends to be more inclusive than that of criminal trials.

One noteworthy process is now underway in South Africa. To reckon with apartheid-era crimes, the Mandela government has established an architecture of accountability that ingeniously facilitates both truth and justice. To qualify for amnesty for politically-motivated human rights abuses, potential and actual defendants must fully confess to their role in such crimes. Even then, amnesty may be denied if the confessor's crime is deemed disproportionate to its political aim.

This approach creates an incentive for human rights violators to come forward which has been missing in other countries that have recently emerged from periods of sweeping abuses, several of which have established truth commissions. Typically, such commissions have failed to breach the wall of silence surrounding participants in the prior regime's system of abuse. Instead, in Latin America, where the institution of truth commissions was inaugurated, such initiatives typically have encountered,

and perhaps helped inspire, a closing of ranks among those who were complicit in state-sponsored violence.

In South Africa, in contrast, the information obtained from those who seek amnesty through confession can lead to prosecution of those whom they implicate, while the threat of prosecution may prompt a broader reckoning with the past through an ever-widening circle of disclosures. Finally, the amnesty committee's residual power to deny an amnesty may prevent the South African approach from ultimately ratifying wholesale impunity.

The South Africa experience is a model in other respects as well. When South Africans grappled with the question of how to deal with abuses of their past, they received considerable international support in this deliberative process, and explored the experiences of other countries, such as Chile, that had tried to come to terms with their legacy of dictatorship. Ultimately, however, South Africa found its own solution—informed by the experiences of other nations, but uniquely South African.

In conclusion, then, I have tried to suggest that, as we seek to meet our responsibility for enforcing universal conscience, we must recognize that our charge begins at precisely the place where universal and local values converge. To make meaningful the vow "Never Again", there must be a genuinely global demand for justice in respect of crimes against human conscience. But if this project demands universal engagement, its basic themes must be composed, above all, by those who have endured offenses against *their* humanity.