

**EVOLVING DYNAMICS OF INTERVENTION TO
END ATROCITIES AND SECURE
ACCOUNTABILITY; SECURING
ACCOUNTABILITY FOR GROSS VIOLATIONS OF
HUMAN RIGHTS AND THE IMPLICATIONS OF
NON-INTERVENTION: THE LESSONS OF
CAMBODIA**

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I. INTRODUCTION

The present panel, captioned the “Evolving Dynamics of Intervention to End Atrocities and Secure Accountability,” analyzes developments in the doctrine of humanitarian intervention and corresponding efforts to secure accountability for mass atrocities in the context of recent events in Kosovo, East Timor, Sierra Leone, and Cambodia.

The doctrine of “humanitarian intervention,” defined for the purposes of this discussion as the threat or use of force or other coercive measures by states or international or regional organizations in response to gross violations of human rights, has assumed an increasingly prominent profile in recent years, both in international discourse and through United Nations and state practice in such regions as the former Yugoslavia, Rwanda, East Timor and Sierra Leone. The contemporary agenda of the United Nations Secretary-General has reflected this development. In his address to the United Nations General Assembly in September 1999, for example, Secretary-General Annan proclaimed that the core challenge to the United Nations, and specifically the Security Council, in

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the next century will be to “forge unity behind the principle that massive and systematic violations of human rights—wherever they may take place—should not be allowed to stand.” The Secretary-General repeated this challenge in his Millennium Report, “We the Peoples: The Role of the United Nations in the 21st Century,” in which he called upon United Nations member-states to unite in the pursuit of more effective policies to stop mass murder and egregious violations of human rights. In urging this approach, Secretary-General Annan emphasized that while armed intervention must always remain the option of last resort, in the face of gross and systematic violations of human rights that offend every precept our common humanity it is an option that cannot be relinquished.

This rise in instances of humanitarian intervention in gross human rights violations has also witnessed a recognition and practice on the part of the international community that such intervention must be accompanied by mechanisms to secure individual accountability for those human rights violations. The creation through United Nations Security Council resolutions of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda in the early 1990s constituted milestones in this respect. Variations on these initiatives have been canvassed more recently in the post-intervention environments in Sierra Leone and East Timor, with the United Nations playing a leading role in the development of accountability mechanisms in those regions. My colleagues on this panel will address the particulars of each of these instances in more detail.

My presentation considers the doctrine of humanitarian intervention in the context of current efforts to seek accountability for atrocities committed by the Khmer Rouge regime in Cambodia in the 1970s. In summary, the Cambodia experience suggests that the absence of timely intervention by the international community to prevent or punish Khmer Rouge atrocities significantly limited the United Nations’ present-day ability to influence the creation of a Khmer Rouge tribunal or to ensure that any such tribunal is competent, impartial, and effective. Correspondingly, these conclusions militate in favor of humanitarian intervention in future atrocities where, at least prior to the establishment of the International Criminal Court, *ad hoc* measures by the international community may be necessary to secure accountability for those atrocities.

II. THE HISTORY OF KHMER ROUGE ATROCITIES AND RECENT EFFORTS TO SECURE ACCOUNTABILITY FOR KHMER ROUGE CRIMES

In April 1975, the Communist Party of Kampuchea (CPK), more commonly known as the Khmer Rouge, seized power from Cambodia’s Khmer Republic Government and established a brutal authoritarian regime, which it subsequently named Democratic Kampuchea (DK), under the political and ideological leadership of Pol Pot. What followed during its nearly four years

of rule were increasingly widespread and violent campaigns of displacement, forced labor, arrests, torture, and executions. These atrocities were perpetrated under the guise of CPK policies that sought to construct a socially and ethnically homogeneous society and rid the country, and increasingly the Communist Party itself, of perceived enemies of the Communist revolution. Millions of Cambodians were displaced and subjected to inhumane living and working conditions during the period of DK rule, and it is estimated that over one million Cambodians perished as a consequence of the Khmer Rouge's deadly policies.

The Khmer Rouge's rule ended in January 1979, when, following a protracted and escalating border war with Vietnam, Vietnamese forces launched a full-scale invasion of Cambodia, took Phnom Penh, and installed the opposition group in power, which later declared itself the People's Republic of Kampuchea. With the collapse of Democratic Kampuchea, many remaining Khmer Rouge members fled and re-established themselves on the Cambodia-Thai border. Over the next decade, CPK forces maintained an armed resistance against the Vietnam-backed Cambodian government. In 1993, however, the Khmer Rouge ceased to be an active fighting force, due principally to the defection from the CPK of Khmer Rouge guerrillas in response to offers of amnesty from prosecution by the Cambodian government.

Throughout this period, neither the perpetration of atrocities by the Khmer Rouge nor the issue of accountability for those atrocities were the subject of constructive action by the international community. It was not until 1997 that the United Nations contemplated concrete measures to bring surviving Khmer Rouge members to justice. In a jointly-authored letter to the United Nations Secretary-General dated June 21, 1997, former first Prime Minister of Cambodia Prince Norodom Ranariddh and second Prime Minister Hun Sen requested the assistance of the United Nations and the international community in "bringing to justice those persons responsible for the genocide and crimes against humanity during the rule of the Khmer Rouge from 1975 to 1979." The letter also indicated that Cambodia did not have the resources or expertise to conduct this very important procedure, and specifically requested assistance similar to that of the ad hoc tribunals for the former Yugoslavia and Rwanda.

Following receipt of the June 1997 letter, the United Nations General Assembly adopted a resolution in December 1997 requesting that the Secretary-General consider the possible appointment of a group of experts to respond to Cambodia's request for assistance. In July 1998, the Secretary-General appointed a three-member group of experts with a three-fold mandate: 1) to evaluate existing evidence to determine the nature of the crimes Khmer Rouge leaders committed in the years 1975 to 1979; 2) to assess the feasibility of apprehending, detaining and extraditing, or surrendering Khmer Rouge leaders;

and 3) exploring options for bringing Khmer Rouge leaders to justice before an international or national jurisdiction.

The group of experts subsequently delivered its report to the Secretary-General on February 22, 1999, which concluded that serious crimes under international and Cambodian law had been committed during the period of CPK rule. These crimes included genocide, crimes against humanity, war crimes, and other acts incurring individual responsibility, in particular torture, forced labor, and crimes against internationally-protected persons. The group of experts also recommended that the United Nations Security Council or General Assembly establish an *ad hoc* international tribunal to prosecute those persons most responsible for the most serious violations of human rights during the DK era. In making this recommendation, the group specifically rejected the option of establishing a tribunal under Cambodian law. This was based upon the group's informed opinion that Cambodia continued to lack a culture of respect for an impartial justice system, and the group's corresponding concern that domestic prosecutors, investigators, and judges may be subject to political pressure and influence.

In the interim, however, events transpired in Cambodia that further complicated the United Nations' efforts to secure accountability for Khmer Rouge crimes. In July 1997, Hun Sen and his Cambodian People's Party seized exclusive control of the Cambodian government, and later rejected the group of expert's call for an *ad hoc* international tribunal, claiming that any decision to bring Khmer Rouge leaders to justice must take into account Cambodia's need for peace and national reconciliation and that Cambodian courts were "fully competent" to conduct trials of former CPK officials. At the same time, Pol Pot was captured and subjected to a show trial by his CPK compatriots in 1997. This, followed by Pol Pot's death in April 1998, galvanized world attention on the question of accountability of surviving Khmer Rouge members for DK-era crimes. This was accompanied in 1998 and 1999 by the surrender or capture of several of the most prominent surviving members of the Khmer Rouge leadership, including former CPK Deputy Secretary Nuon Chea, former CPK Foreign Minister Ieng Sary, former DK state president Khieu Samphan, former head of the Southwest Region Ta Mok, and former director of the prison and torture facility at Tuol Sleng, Kaing Guek Iev, better known as Duch.

These developments have since resulted in prolonged negotiations between the United Nations and Hun Sen's government to find a compromise on the convocation of Khmer Rouge trials. In the course of these negotiations, the Cambodian Government has steadfastly rejected the creation of a fully-independent international tribunal, but has at most expressed some support for the establishment of a domestic tribunal with limited international participation and a narrowly-defined personal jurisdiction. For its part, the United Nations appears to have abandoned any call for an international tribunal, and has

endeavored to negotiate attributes of a tribunal established under Cambodian law that would render Khmer Rouge prosecutions fair and impartial. Such attributes have included in particular an effective and independent role for the international community in any domestic prosecutions. Although the latest round of negotiations between the United Nations and the Cambodian government concluded in July of 2000, the particulars of any agreement between the parties have not been officially publicized. Currently, it appears to have been left to the Cambodian government to take the legislative measures necessary to establish a Khmer Rouge tribunal.

III. THE ABSENCE OF TIMELY INTERVENTION AND ITS IMPLICATIONS FOR PROSECUTING KHMER ROUGE ATROCITIES

As alluded to above, during the course of the Khmer Rouge regime and for much of the subsequent period of civil conflict in Cambodia, the international community did not intervene to prevent or seek accountability for the commission of DK-era atrocities. To the contrary, an anti-Vietnam coalition of states composed of China, the Association of Southeast Asia Nations, and the United States ensured through United Nations General Assembly's Credentials Committee that the Khmer Rouge retained Cambodia's seat in the United Nations General Assembly through most of the 1980s.

While the international community took concrete measures in the late 1980s to end the conflict between the warring factions in Cambodia, this process ultimately did not address the issue of accountability for Khmer Rouge crimes. An internationally-sponsored peace process, the Paris Conference on Cambodia, was convened in 1989 and ultimately led to a comprehensive peace settlement between the principal factions in Cambodia, although the Khmer Rouge subsequently refused to comply with most of the terms of the settlement. The agreement provided for the establishment of the United Nations Transitional Authority in Cambodia (UNTAC), which was given the mandate of establishing a peaceful and neutral environment in Cambodia for the conduct of elections and responsibilities for demobilizing and disarming the rival forces in Cambodia. However, the settlement contained no explicit provision for Khmer Rouge trials, and such a process was not included in UNTAC's mandate. Rather, the matter was left to the future Cambodian government.

In light of the absence of humanitarian intervention in CPK atrocities, and without addressing the feasibility of such intervention or the morality of the international community's conduct in this regard, the present analysis endeavors to draw insights respecting the effect of this non-intervention upon recent efforts by the United Nations to secure accountability for Khmer Rouge atrocities. The Cambodia experience suggests that the absence of timely intervention by the international community to prevent or punish Khmer Rouge atrocities

significantly limited the United Nations' present-day ability to influence the creation of a Khmer Rouge tribunal or to ensure that any such tribunal is competent, impartial, and effective.

More particularly, the international community's inaction in the face of Khmer Rouge atrocities has been depicted by some as undermining the United Nations' political and moral authority to call for the establishment of an international tribunal to prosecute DK-era crimes. Prime Minister Hun Sen has exploited this apparent weakness on numerous occasions, citing in particular the CPK's retention of Cambodia's seat in the United Nations General Assembly in challenging the legitimacy of current United Nations efforts to create an international Khmer Rouge tribunal. The Cambodian government has likewise disparaged the considerable delay in international action on Khmer Rouge crimes, arguing early on that after over twenty years, such matters may be best left buried in the past. And unlike the recent conflicts in the former Yugoslavia and Rwanda, the United Nations is not able to draw political or legal support from Security Council resolutions adopted contemporaneously with the perpetration of Khmer Rouge atrocities as to the international criminality of the conduct Khmer Rouge members and their susceptibility to prosecution before an international tribunal.

These limitations on the United Nations' negotiating authority have been exacerbated by the fact that, in the delay following the fall of Democratic Kampuchea, individuals who may potentially be implicated in Khmer Rouge atrocities have assumed influential positions with the current Cambodian government. In particular, Prime Minister Hun Sen and various other current Cambodian officials were previously members of the CPK and, according to some observers, may constitute potential targets in open-ended and rigorous Khmer Rouge prosecutions. Indeed, this possibility has been cited by some authorities as explaining in part Prime Minister Hun Sen's opposition to the establishment of a fully independent Khmer Rouge tribunal with broad personal jurisdiction.

In the face of these political shortcomings, the United Nations has had little choice but to abandon its recommended approach of establishing an international Khmer Rouge tribunal. Rather, it has been relegated to negotiating some degree of meaningful international participation in domestically-constituted Khmer Rouge trials, and this despite concerns expressed by its own group of experts and civil society more generally that the Cambodian justice system cannot support fair or impartial trials. Although this does not necessarily foreclose the possibility that an appropriate accommodation might be reached on Cambodian-constituted prosecutions, it has placed the United Nations in an exceedingly problematical negotiating position and with considerably less control over whether a Khmer Rouge tribunal will ultimately be established.

The absence of timely humanitarian intervention in preventing or punishing Khmer Rouge atrocities may also be considered to have limited the United Nations' ability to ensure that a Khmer Rouge tribunal, if established, is competent, impartial, and effective. It is apparent, for example, that the effective personal jurisdiction of a Khmer Rouge tribunal has been significantly restricted, resulting in a diminishing number of potential defendants available for prosecution. Among the key candidates for prosecution who have died since the period of DK rule are CPK Secretary Pol Pot and General Staff Chairman Son Sen. Moreover, in light of the fact that most, if not all, of the remaining potential candidates live within Cambodia's borders, the United Nations must rely entirely upon the Cambodian government to secure the arrest of suspects who may be indicted by a Khmer Rouge tribunal. While likely candidates for prosecution, such as Ieng Sary and Nuon Chea, reportedly live freely in Cambodia, the Hun Sen government's commitment in this regard is open to serious question. The early establishment of an appropriate international presence within a jurisdiction like Cambodia, on the other hand, arguably provides the international community with some independent avenue through which to secure effective jurisdiction over suspected perpetrators of atrocities.

The international community has also found itself at a considerable disadvantage in facilitating the search for pertinent evidence for potential Khmer Rouge prosecutions. As with potential suspects, victims and witnesses of Khmer Rouge atrocities have died or their memories have diminished since the 1970s. Despite the impressive efforts of institutions, such as the Documentation Centre of Cambodia, in gathering, cataloguing, and translating DK-era documentation, it has been recognized by the United Nations group of experts and other authorities that many potentially incriminating documents have been lost or destroyed since 1979. Further, the delays in investigations have aggravated difficulties in identifying and authenticating what documentary and other physical evidence may still be available for use in Khmer Rouge prosecutions. Conversely, a timely international presence may facilitate the collection and verification of potentially relevant documents and other evidence. International inaction on Khmer Rouge atrocities has also complicated the process of identifying the proper subject matter jurisdiction of a current CPK tribunal. In this connection, the general legal principle *nullum crimen sine lege* limits the crimes for which an individual may be prosecuted to those that were considered criminal under domestic or international law at the time they were committed. As a consequence, present-day efforts to establish a Khmer Rouge tribunal must endeavor to define the substance of Cambodian and international law as it stood over twenty years ago.

Finally and more generally, the absence of any effective international intervention initiative in Cambodia has diminished the United Nations' operational independence to serve as a control against unfairness and

impropriety in any domestic Khmer Rouge prosecutions that may be convened. This may be especially significant in respect to such matters as witness protection and tribunal staffing, which are particularly susceptible to improper influence and abuse.

IV. CONCLUSION

The foregoing analysis should not be taken to suggest that the international community lacks any authority to influence the creation or conduct of a Khmer Rouge tribunal by Cambodia, or that it is not still possible to convene proper and effective trials of surviving members of the Khmer Rouge regime through a carefully designed tribunal under Cambodian law with appropriate and effective international participation. The Cambodia experience should, however, serve as a stark illustration of the risks and complications posed when the international community fails to intervene in a timely manner in response to gross violations of human rights. The future implications of such intervention could mean the difference between accountability and impunity.