

Human Security through Retributive Justice? The Cases of East Timor & Cambodia

(Very rough draft only, not for circulation or citation. All comments are most welcome and can be emailed to me at s.peou@uwinnipeg.ca)

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There is no consensus among scholars and policymakers on how to promote human security objectives and whether retributive justice as a policy instrument can protect and promote this type of security. Those who adopt the so-called narrow approach tend to define human security as freedom from fear - from direct physical violence, such as war. Those who adopt the so-called broad approach tend to define the concept as freedom from both fear and want (i.e., socioeconomic needs). Retributive justice has now been adopted as an international policy instrument to promote freedom from fear. Mark Freeman's remark about the significance of this development is noteworthy: "the importance of criminal trials remains unrivaled. No other mechanism is perceived to have a greater impact on deterrence, public confidence in the state's ability and willingness to enforce the law, and a victim's sense of justice."² Some scholars have assessed the impact of national trials on human rights practices within states,³ while others have focused on national courts, hybrid criminal tribunals, ad hoc international criminal courts, and the International Criminal Court (ICC).⁴ Proponents remain upbeat about the positive impact of criminal trials on both war-ridden and post-war societies, but their critics are not.

This paper focuses on freedom from fear and pays analytical attention to the question of whether retributive justice can achieve this human security objective. Three arguments are advanced. First, human security through retributive justice has emerged as a new approach. There is no consensus on whether this approach is effective, but it is worth testing the optimistic proposition that this legalistic method for the promotion of human security is one most effective way to end war and violent conflict, as well as to promote democracy and respect for human rights. The second argument shows that retributive justice in East Timor (now officially known as Timor-Leste) as the independent variable shows no clear relationship with the end of war or violent conflict as well as democratization and human rights. The third argument focuses on Cambodia as another case study. There is also no clear relationship between retributive justice and the end of war as well as democratization and respect for human rights. The conclusion compares and contrasts the two case studies and draws some general lessons. Normative commitment to retributive justice is quite noble, but security and power relations suggest that political reconciliation remains a more viable strategy for peace and security.

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². Mark Freeman, *Truth Commissions and Procedural Fairness* (Cambridge: Cambridge University Press, 2002), p.10

³. Kathryn Sikkink and Carrie Booth-Walling, "The Impact of Human Rights Trials in Latin America," *Journal of Peace Research* 44, no.4 (2007): 427-45;

⁴. James D. Meernik, Angela Nichols, and Kimi L. Ling, "The Impact of International Tribunals and Domestic Trials on Peace and Human Rights After Civil War," *International Studies Perspectives* 11 (2010): 309-34;

I. Human Security through Retributive Justice: Arguments & Method of Analysis

The academic literature has established a positive relationship between retributive justice and human security for various reasons. But the proposition that this type of justice helps promote this kind of security has been called into question by critics who regard this instrument as having shortcomings or even posing new dangers to the security of individuals (contrary to the high expectations of legalistic proponents). This section examines the optimistic and critical perspectives on the idea of human security through retributive justice and proposes comparative case studies as a method of analysis.

1. Human versus National Security:

Traditionally, the concept of security has been state-centric (known as national security and is not timeless). From the Westphalian era from in the 17th to the 20th and 21st centuries, nation-states have existed and always been regarded by political realists as the principal actors in international politics, but this understanding of security is said to have ignored “the reification of national security” that “is largely of European origin.”⁵ Ramesh Thakur further contends that “[w]e tend to assume that the phrase ‘national security’ has been around forever. In fact, it was only in 1945 that Secretary of Defense James Forrestal invoked the concept as a guiding principle of US foreign policy.”⁶ For Thakur, “national security is more of a slogan for political mobilization [to consolidate state power by suppressing individual, group or majority demands on government, as well as to plunder resources of a society] than an analytically useful concept.”⁷

What makes human security more distinct from national security is the fact that the referent object of security goes beyond the need to provide citizens with security by emphasizing the need to provide security for individual human beings regardless of their nationalities, racial identities, religious faiths, and other personal characteristics. This means that individual humans who are eligible for security include those who are different and “strangers”⁸ – those not part of known or familiar communities.

Academics have thus adopted the concept of human security and shifted their attention away from nation-states to humans. People stand at the center of their analyses: “they do share a common point of reference or ‘object’ of security,” which is “individual people” or “humanity as a collective body in which all individuals are members.”⁹ One of the chief advocates of human security, Lloyd Axworthy (a former Canadian minister of foreign affairs) writes in defense of “putting people first” – over and above states and their national security. In his words, “[h]uman security today puts people first and recognizes that their safety is integral to the promotion and maintenance of international

⁵. S. Neil MacFarlane and Yuen Foong Khong, *Human Security and the UN: A Critical History*, p.25: see Oliver Richmond in Peou’s book

⁶. Ramesh Thakur, *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect* (New York: Cambridge University Press, 2006), pp.75-76

⁷. Ramesh Thakur, *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect*, p.78

⁸. Nicholas Wheeler, *Saving Strangers* (

⁹. Fen Osler Hampson, *Human Security and World Disorder*, p.37

peace and security.” He goes on to stress that “[t]he security of states is essential, but not sufficient, to fully ensure that the safety and well-being of the world’s peoples.”¹⁰ This position was officially adopted by the International Commission on Intervention and State Sovereignty (CISS), which was sponsored by the liberal Government of Canada and published a major report, *The Responsibility to Protect* (R2P), in 2001.

More recently, the Commission on Human Security (2003) also recognizes the need for a paradigm shift – from national to human security. “From a foreign policy perspective,” according to its report, “human security is perhaps best understood as a shift in perspective or orientation. It is an alternative way of seeing the world, taking people as its point of reference, rather than focusing exclusively on the security of territory or governments.”¹¹ From this angle, it is safe to assert that proponents of human security embrace the ontological position that individual human beings are real, that humans have pursued their security from time immemorial (across time and space) and that they need to be protected. To be fair, proponents of human security do not ignore states as a referent object of security, but add that humans should be regarded as another or “the primary point of reference” or taking “precedent over ‘national’ security.”¹²

However, proponents of human security disagree on the question of who should be protected. The term ‘people’ as the key referent object of security is what initially united them, but they have since disagreed on who ‘people’ exactly are. According to some observers, there are three distinct vulnerable groups: children, women, and displaced persons. These groups are defenseless and used as a cover for military operations, a target for reprisals, a bargaining chip as a way for some political groups to put pressure their adversaries to make concessions, and as a target of ethnic cleansing and genocide (a term coined in 1943 by Raphael Lemkin, who referred to the Nazi German atrocities against the Jews during the 1930 and 1940s (until the end of World War II)).¹³ Other threats include crimes against humanity, the phrase coined by George Washington Williams, who described the atrocities committed by Belgium against natives of Congo during the last two decades in the 19th century. According to Article 7.1.g of the Rome Statute, victims of crimes against humanity are those who are subject to “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.” Victims are mainly children and women.

As to the question of what existential *threats* to humans are, advocates of R2P expand the nature of insecurity to include various sources of violent crime. Unlike political realists who emphasize the perennial nature of interstate war, they see intra-state or uncivil wars in the 1990s as a growing source of threat to humans. As the ICISS puts it, “The overwhelming majority of today’s armed conflicts are internal, not interstate. Moreover, the proportion of civilians killed in them increased from about one in ten at the start of the 20th century to around nine in ten by its close.”¹⁴ Threats to humans include especially those that cause “large-scale loss of life, actual or apprehended, with genocidal

¹⁰. Lloyd Axworthy, “Human Security and Global Governance: Putting People First,” *Global Governance* 7 (2001), p.20 (19-23)

¹¹. Commission on Human Security, *Human Security Now* (New York: Commission on Human Security, 2003), p.???

¹². Fen Osler Hampson, *Human Security and World Disorder*, p.6

¹³. Claude Bruderlein, “People’s security as a new measure of global stability,” *International Review of the Red Cross* 83, no.842 (June 2001), p. 356 (353-66);

¹⁴. ICISS, *The Responsibility to Protect*.

intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or large-scale ‘ethnic cleansing’, actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.”¹⁵

There are four specific types of mass atrocity crimes against humans identified in the norm of R2P: war crimes, genocide, ethnic cleansing, and crimes against humanity. On *war crimes*, human security advocates pay attention to physically suffering civilians who are unprotected and defenseless – those who have been used as a cover for military operations or as a bargaining chip as a way for some political groups to put pressure on their adversaries to make concessions, or are targets for reprisals or ethnic cleansing and genocide. *Genocide* is a term coined in 1943 by Raphael Lemkin, who referred to the Nazi atrocities against the Jews during the 1930 and 1940s.¹⁶ *Ethnic cleansing* usually refers to the removal of members of one or more ethnic groups from their territory through the use of systematic, deliberate, and often brutal force by another ethnic group. *Crimes against humanity* (the phrase coined by George Washington Williams, an African-American, who described the atrocities committed by Belgium against natives of Congo during the last two decades of the 19th century) are those, according to Article 7 of the Rome Statute, committed “as part of a widespread or systematic attack directed against any civilian population,” and include murder, extermination, and “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity” (art. 7, sec. 1(g)). The majority of victims tend to be children and women. Children have been killed in armed conflicts, recruited to serve as child soldiers, exploited as sexual slaves, and subject to other forms of physical abuse (such as mutilation). Women also have been murdered, subject to systematic rape, forced pregnancy, forced abortion, especially when ethnic cleansing is carried out.

2. Retributive Justice as Method for Human Security Promotion:

Many legalists regard retributive justice as a beacon of hope for peace and security. Cherif Bassiouni, for instance, asserts that “the vast tragedies of the 20th century are also due to the absence of a permanent system of international retributive justice.”¹⁷ Proponents make several claims supporting the thesis that peace – both negative and positive - can be achieved through the pursuit of justice. Those who study human security make a similar general claim: human security through retributive justice. Up until the ICTY, the pursuit of retributive justice still aimed to maintain or restore international peace and security, rather than to ensure human security. Peace building in war-torn societies was regarded as a way to achieve international security goals. More recently, retributive justice has been regarded as an instrument that helps prevent threats to human security. Retributive justice is regarded as ‘part of an integrated peacebuilding’¹⁸ - a dual process aimed at preventing armed conflict from recurring and promoting peace and security through justice, namely working toward eliminating structural violence.

15. ICISS, *The Responsibility to Protect*, xii

16. Claude Bruderlein, “People’s Security as a New Measure of Global Stability,” *International Review of the Red Cross* 83, no. 842 (June 2001): 356

17. M. C. Bassiouni, ‘Policy Perspectives Favoring the Establishment of the International Criminal Court’, *Journal of International Affairs* 52, no.2 (1999): p.796 (795-810)

18. R. Kerr, “International Peace and Security and International Retributive justice,” p.129

One of the major arguments in human security studies is that the global pursuit of retributive justice helps promote freedom from fear in several ways. First, such a pursuit helps put an end to war or armed conflict - a form of direct physical violence regarded as a major source of threat to humans. Retributive justice is thus viewed by some as an effective method for conflict or war termination. The ICTY, for instance, was meant to end a real war – a case of war termination.¹⁹ War ends when criminal leaders are arrested, convicted, sentenced, and put away. Retributive justice “will contribute to the reduction of social harm and to the preservation or restoration and maintenance of peace.”²⁰

Second, retributive justice can also help prevent war or armed conflict. Without any recourse to this type of justice, victims of violence may take matters into their own hands, but the cycle of revenge can be broken by the pursuit of such justice, which further helps “restore peace and stability, respect for the rule of law, and reconciliation.”²¹ Payam Akhavan contends that, “A postconflict culture of justice...makes moral credibility a valuable political asset for victim groups, rendering vengeance less tempting and more costly.”²² Persecution of individual leaders furthers the process of individualizing guilt and “can help defuse the animosities and mistrust among formerly warring communities.” Armed factions are no longer subject to collective punishment for crimes committed by individuals, “thus contributing to social and political healing and reconstruction.”²³ More specifically, retributive justice rests on the hopes that it can help end impunity, contribute to the prevention of the most serious crimes, and ultimately aid in the maintenance of peace and security. Moreover, according to David Wippman, “for many [proponents of retributive justice], deterrence is the most important justification [for pursuing retributive justice], and the most important goal.”²⁴ Humanitarian atrocities can be deterred.²⁵ In pre-conflict situations, political oppressors may be discouraged or prevented from making fateful decisions that foment ethnic hatred and violence. Optimists may now count on the fact that tyrants can no longer “feel confident of escaping international justice” because “[t]he certainty of impunity is gone.”²⁶

Society can also play a role in preventing armed conflict through “the progressive entrenchment of a more moral self-conception [that] can occur among a wider public, which could stiffen resistance to the blandishments of a leader seeking to exploit ethnic enmity and thereby reduce the prospect of renewed violence after a conflict.”²⁷

Retributive justice also helps promote freedom from fear through democracy and human rights. According to some, then, ‘the continuing legacy of impunity proved a

¹⁹. M. Feher, *Powerless by Design: The Age of the International Community* (Durham, NC: Duke University Press, 2000), p.85

²⁰. M. C. Bassiouni, ‘Policy Perspectives Favoring the Establishment of the International Criminal Court’, 808

²¹. R. Kerr, “International Peace and Security and International Retributive justice,” p.129

²². P. Akhavan, “Beyond Impunity: Can International Retributive justice Prevent Future Atrocities?,” p.7

²³. F. Watt, “An Independent and Effective International Criminal Court” (1998) Online: Available HTTP:<
www.worldfederalistscanada.org/icceffective.html, accessed 7 July 2004), p.2

²⁴. Wippman, D., ‘Atrocities, Deterrence, and the Limits of International Justice’, *Fordham International Law Journal*, 23, no.473 (1999-2000), p.474 (473-88)

²⁵. Julian Ku and Jide Nzelibe, “Do International Criminal Tribunals Deter or Exacerbate Humanitarian Crises?” *Washington University Law Review* 84, no.4 (2006), p.779 (777-833);

²⁶. Ramesh Thakur, *The United Nations, Peace and Security*, p.132

²⁷. P. Akhavan, “Beyond Impunity: Can International Retributive justice Prevent Future Atrocities?,” p.13

serious impediment to democratization'.²⁸ Retributive justice also works to promote human rights by restoring/rebuilding or promoting the rule of law and legal institutions in war-torn countries.²⁹ They view the norm of accountability as capable of addressing the problem of impunity, if peace is to be built and sustained. Peace comes when dictators and torturers are excluded from positions of political power and influence or put away, and when politicians come to power through peaceful and legitimate means, such as free and fair elections. The idea of 'peace through justice' further rests on the growing belief that impunity has not prevented human rights violations from recurring.³⁰

Some scholars further make the case that even if this method produces no immediate results, it will provide an important learning process that could introduce new judicial norms to help locals establish new legal institutions, based on a new political culture that rejects atrocities.³¹ New moral force can be established through "unconscious inhibiting against crime" or "a condition of habitual lawfulness" within society.³²

In short, there are several assumptions about the positive effects of retributive justice on human security: this policy instrument helps promote freedom from fear. Humans are free when not subject to direct physical violence associated with war or armed conflict, various forms of crime (such as war crimes, genocide, ethnic cleansing, and crimes against humanity), as well as political repression and human rights abuses. Retributive justice as a policy instrument can help end these threats to human security and prevent them by promoting peace and respect for democratic and human rights.

3. Critics of Retributive Justice and a Method of Analysis:

Proponents of retributive justice still face some challenges, however. There is no lack of critics who contend that this policy instrument can do more harm than good. In other words, its effects are limited and can be counterproductive. This also raises the question of whether international retributive justice is an effective method for the promotion of human security. To this day, even its proponents have yet to provide convincing evidence that this international instrument works as intended. First, even proponents of human security question the utility of international retributive justice.³³ International retributive justice is selective, politicized, and does not necessarily work to advance the causes of peace and human security. Second, the concept of retributive justice is almost always subject to politicization. The notion of victors' justice or selective justice remains prevalent in contemporary politics. The trials of Iraqi leaders, most notably Saddam Hussein, were another example. Third, international retributive justice can be executed when criminal elements are first militarily defeated or carried out by the use of military force. The ICTY, for instance, arrested and indicted Serb leaders, most notably Slobodan

²⁸. Roht-Arriaza, N., "Institutions of Justice," *Journal of International Affairs* 52, no.2 (1999): 474-84

²⁹. James Meernik, "Justice or Peace: How the International Criminal Tribunal Affects the Societal Peace in Bosnia," *Journal of Peace Research* 42, no.3 (2005): 271-90; Jane Stromseth, David Wippman, and Rosa Brooks, *Can Might Make Right?* (Cambridge: Cambridge University Press, 2006)

³⁰. R. Goldstone, 'Exposing Human Rights Abuses: A Help or Hindrance to Reconciliation', *Hastings Constitutional Law Quarterly* 22, no.3 (1995): 607-621

³¹. Akhavan, P. 'Justice in The Hague: Peace in the former Yugoslavia?' *Human Rights Quarterly* 20, no.4 (1999b): 737-816

³². P. Akhavan, "Beyond Impunity: Can International Retributive justice Prevent Future Atrocities?," p.12

³³. Ramesh Thakur, *The United Nations, Peace and Security*, pp.128-29

Milosevic, after NATO forces had defeated the Serbian armed forces. Fourth, it is very difficult to see how exactly international retributive justice can be effectively executed when international justice institutions, including the ICC, have no credible police forces that can effectively carry out their official duties. International criminal tribunals, especially ad hoc tribunals have proved to be “expensive, time-consuming, and contributed little to sustainable national capacities for justice administration.”³⁴

Fifth, even if states and international justice institutions are both willing and able to execute retributive justice effectively, it does not necessarily mean that it will lead to peace or promote human security.³⁵ According to Jack Snyder and Leslie Vinjamuri, the prosecution of perpetrators of atrocities according to universal standards “risks causing more atrocities than it would prevent it, because it pays insufficient attention to political realities.”³⁶ They reinforce this point by adding the following: “When a country’s political institutions are weak, when forces of reform there have not won a decisive victory, and when political spoilers are strong, attempts to put perpetrators of atrocities on trial are likely to increase the risk of violent conflict and further abuses.”³⁷

Other academic work lends further support to the point about a real tension between justice and peace. Sriram, for instance, contends that retributive “justice processes and mechanisms may, like liberal peacebuilding, destabilize post-conflict countries.”³⁸ They tend to be divisive, as in the case of the Slobodan Milosevic trials shows, regarded as unfair as well as conducive to social unrest or political instability, as the Special Court for Sierra Leone showed. International retributive justice tends to perpetuate cycles of violence, especially when it engages in the politics of blaming and scapegoating, pitting people against each other.³⁹ The ITCY, for instance, does not seem to have left an enduring legacy. According to one scholar, “Bosnia is far from a success: the country is ethnically polarized and sectarian.” Also, “‘democratic’ politics [still] mirrors the nationalist agendas of militant parties... There is little consensus amongst the different communities regarding the causes of the civil war in Bosnia – and thus no ‘reconciliation’.” Moreover, “it is questionable whether self-sustaining national institutions would be durable in the absence of external support.”⁴⁰ Even in Kosovo, sectarian extremism persists and “is certainly not a demonstration of conflict resolution and accommodation.” There is still “the danger of ever more ‘ethnic security dilemmas’,” even after Kosovo declared its independence.⁴¹ Often forgotten by proponents of retributive justice is that they tend to rely on few success stories to make their point without realizing that criminals can also learn to evade justice by holding on to power. The case can also be made that the security dilemma makes it difficult for the warring

³⁴. Ramesh Thakur, *The United Nations, Peace and Security*, p.133

³⁵. Jack Snyder and Leslie Vinjamuri, “Trials and Errors: Principle and Pragmatism in Strategies of International Justice,” *International Security* 28, no.3 (Winter 2003/04): 5-44

³⁶. Jack Snyder and Leslie Vinjamuri, “Trials and Errors: Principle and Pragmatism in Strategies of International Justice,” p.5

³⁷. Jack Snyder and Leslie Vinjamuri, “Trials and Errors: Principle and Pragmatism in Strategies of International Justice,” p.15

³⁸. Chandra Lekha Sriram, “Retributive justice and the liberal peace,” p.112, see also pp.119-20

³⁹. Read Jamie Malmud-Got, *Game Without End: State Terror and the Politics of Justice* (Norman, OK: University of Oklahoma Press, 1996)

⁴⁰. Edward Newman, “‘Liberal’ peacebuilding debates,” in Edward Newman, Roland Paris and Oliver Richmond (eds.), *New Perspectives on Liberal Peacebuilding*

⁴¹. Edward Newman, “‘Liberal’ peacebuilding debates,” p.35

factions to disarm,⁴² that disarmament is a matter of life and death, and that criminals learn that fighting to their death is the most assuring way to ensure survival. A statistical analysis further concludes that neither international tribunals nor domestic human rights trials appear to make a significant impact on peace or human rights.⁴³

Sixth, proponents of international retributive justice tend to ignore the question of causality. Does the pursuit of retributive justice in post-conflict societies tend to lead to peace, or does the pragmatic pursuit of peace tend to provide them with a new opportunity to promote retributive justice? Snyder and Vinjamuri question the logic that justice leads to peace and defend the logic that justice follows democracy and peace.⁴⁴

Disagreement between proponents and critics of retributive justice continues and further raises the question of whether this policy instrument actually promotes human security in the form of freedom from fear. More specific questions can thus be raised: Does this policy instrument help end or prevent war or armed conflict? Does it really promote democratic and human rights against repressive authoritarian rulers?

Since there is no consensus on whether retributive justice can promote human security objectives, this paper proposes that more research be further conducted and that comparative case studies adopted to shed more light on the debate. This method of analysis helps overcome some of the shortcomings that can be found in single-case studies and statistical analyses. Single-case studies allow scholars to study separate cases in-depth but leave no room for comparative analysis and their findings are thus not easily generalizable. Statistical methods of analysis are best in terms of their ability to make generalizations but remain severely limited in terms of explanatory power. Some scholars who studied the impact of retributive justice, using quantitative methods, acknowledge that “[i]n-depth examination of the establishment of such legal mechanisms [such as international tribunals and domestic human rights trials] and process tracing of their effects may reveal the details of their impact than are concealed in large N studies.”⁴⁵

Comparative methods focusing on several cases (usually countries) are not without weaknesses, but they are better than single-country cases at establishing social scientific generalizations. The comparative method of agreement can help us assess the impact of retributive justice on human security. The cases selected should differ in various aspects except the variables (retributive justice, peace, democratic and human rights as the focus of this paper) being studied.⁴⁶ Two such country cases came to mind: Cambodia and East Timor. Although they both are located in Southeast Asia, they are different in several aspects: they are different in population size (In 2010, Cambodia had 14,805,000 people; East Timor had 1,134,000); their dominant religions are different (Cambodia is predominantly Buddhist; East Timor is predominantly Catholic).

⁴². Sorpong Peou, *Conflict Neutralization in the Cambodia War: From Battlefield to Ballot-Box*;

⁴³. James D. Meerkik, Angela Nichols, and Kimi L. King, “The impact of International Tribunals and Domestic Trials on Peace and Human Rights After Civil War,” *International Studies Perspectives* 11, Is.4 (November 2010): 309-34

⁴⁴. Jack Snyder and Leslie Vinjamuri, “Trials and Errors: Principle and Pragmatism in Strategies of International Justice,” p.6

⁴⁵. James D. Meerkik, Angela Nichols, and Kimi L. King, “The impact of International Tribunals and Domestic Trials on Peace and Human Rights After Civil War,” p.323

⁴⁶. Jonathan Hopkin, “Comparative Methods,” in *Theory and Methods in Political Science*, edited by David March and Gerry Stoker (New York: Palgrave Macmillan, 2002)

Both the cases are similar in one respect, however: they experienced the destruction of war/armed conflict, bore the brunt of mass atrocities, and were under pressure from the international community to pursue retributive justice. In addition, both cases are excellent because of their experience with hybrid tribunals.⁴⁷ The question is whether the pursuit of retributive justice in these two countries has had a positive impact on peace, democratization, and respect for human rights. The difficulty lies in how the impact can be effectively assessed and explained. This paper proposes that we divide each case into three sections. The first section describes the historical background of war and atrocities and the introduction as well as the implementation of retributive justice. The second section assesses the levels of peace before and after the introduction and implementation of retributive justice and explains whether this policy instrument played a significant role in the peace process. The third section assesses whether retributive justice significantly contributed to the development of democracy and human rights. In the end, the experiences of both country cases are compared, contrasted, and generalized.

II. The Case of East Timor

The case of East Timor still disconfirms the optimistic proposition that retributive justice can have a significantly positive impact on war-afflicted and post-war societies in that this legalistic policy instrument helps put an end to war or armed conflict and prevent it from recurring, as well as to promote democracy and human rights.

1. Human Insecurity & Retributive justice:

East Timor suffered tremendously from the ravages of colonization, war, and armed violence. The territory was colonized by the Portuguese in the nineteenth and early twentieth centuries and gained independence when the latter abandoned its colonial rule early in 1975. A civil war broke out when two armed groups – the leftist FRETILIN and the right-wing Timorese Democratic Union (TDU), engaged in an armed struggle for independence. In December 1975, Indonesia invaded the territory by sending in its armed forces and subsequently annexed the territory as its 27th province. The anti-communist Indonesian armed forces continued to wage a counter-insurgency war against the leftist FRETILIN's military wing (East Timorese National Liberation Army or FALINTI) and committed mass atrocities against local people. By 1979, 200,000 Timorese died of armed conflict and starvation. Repressive violence continued unabated. In November 1991, for instance, Indonesian soldiers massacred dozens of Timorese civilians who were holding a peaceful demonstration for independence in the territorial capital of Dili.

Armed conflict and violence against East Timorese did not end when Indonesian President B. J. Habibie reversed the hard-line policy of his predecessor, President Suharto, when announcing in January 1999 that his government would let the East Timorese determine their own political future in a referendum.⁴⁸ The announcement did

⁴⁷. See Suzanne Katzenstein, "Hybrid Tribunals: Searching for Justice in East Timor," *Harvard Human Rights Journal* 16 (2003): 245-78;

⁴⁸. Anthony L. Smith, "Constraints and Choices: East Timor as a Foreign Policy Actor," *New Zealand Journal of Asian Studies* 7, No.1 (June 2003): 15-36;

not put an end to violence against the East Timorese but in fact exacerbated it, as the Indonesian military supplied arms to pro-Indonesia militias, which began a killing spree when they attacked pro-independence activists and suspected sympathizers. During the summer of 1999, Indonesian soldiers and militias drove between 400,000 and 600,000 villagers out of their homes. Threats to the security of Timorese did not end after 98.5 percent of those who cast their votes on 30 August 1999 favored independence. Early in the following month, Indonesian forces and militia fighters waged a violent campaign, killing up to 1,000 civilians, driving more than 250,000 others into Indonesia's West Timor, and destroying up to 70 percent of buildings and road in East Timor. After Indonesia ceded East Timor to Indonesia in October 1999, the pro-Indonesia militia fighters continued their reign of terror as they harassed refugees in West Timor.

Militia violence that threatened the personal security of East Timorese still occurred after that. The last armed attacks by pro-Indonesia militia broke out again in 2003, when half a dozen small groups of men with extensive military training from West Timor attempted to infiltrate East Timor, where they also killed villagers. This infiltration was part of wider plans with tacit support from the Indonesian military.⁴⁹ In 2006, Timor-Leste fell back into violence, when widespread armed clashes in Dili threatening civil war erupted in April and May. A series of violence intensified when the Commander of the Military Police, Alfredo Reinado, left the military, joined protestors and got involved in a shoot-out with members of the East Timor Defense Force (F-FDTL), and was reported to have killed 10 unarmed police officers under UN protection. The armed clashes also left 25 people dead and displaced 150,000 residents in Dili.⁵⁰

After that, political divisions remained but armed clashes between the military and police subsided. Between 2007 and 2010, the political and military security situation improved in that there were no reports on serious violent incidents similar to those in 2006. The only major violent incident during this 4-year period was an unsuccessful attempt by a group of former soldiers (led in February 2008 by Alfredo Reinado) to assassinate Prime Minister Xanana Gusmao and President Jose Ramos Horta (who was badly wounded). The years 2009 and 2010 saw better political stability and security.

Up until the mid-2000s, formal efforts to execute justice had been made. In 1999, a new justice mechanism - comprising the Special Panels for Serious Crimes (SPSC), the Serious Crimes Unit (SCU) and the Defense Lawyer Unit - was established by UNTAET to investigate and prosecute those who committed crimes between January 1 and 25 October 1999. The Special Panels,⁵¹ constituted under the Dili District Court, adjudicated the trials. In 2001, UNTAET created an independent Commission for Reception, Truth, and Reconciliation (CAVR) whose task was to investigate human rights violations committed between April 1974 and 25 October 1999. The Commission worked to facilitate reconciliation with justice involving those who committed less serious offences, but the Commission could not grant any amnesty.⁵² Its final report, released in 2005, provides evidence of systematic human rights violations under Indonesian rule, which

⁴⁹. Anthony L. Smith, "Constraints and Choices: East Timor as a Foreign Policy Actor," p.33

⁵⁰. United Nations, *Report of the United Nations Independent Special Commission of Inquiry for Timor-Leste* (Geneva: 2 October 2006)

⁵¹. Each Panel was made up of 2 international judges and 1 East Timorese judge.

⁵². John Roosa, "East Timor's Truth Commission: Introduction to Pacific Affairs Special Forum," *Pacific Affairs* 80, No.4 (Winter 2007-08): 563-67; Paulo Gorjão, "The East Timorese Commission for Reception, Truth and Reconciliation: Chronicle of a Foretold Failure," *Civil Wars* 4, No.2 (Summer 2001): 142-62;

contributed to the deaths of 100,000 and 180,000 East Timorese.⁵³ Another *ad hoc* court, the Human Rights Court on East Timor, was also created in 2000 by the Indonesian government to ensure that military and civilian leaders would be held accountable for human rights violations. In March 2005, Indonesia and Timor-Leste took an idea from Jose Ramos Horta by creating the Truth and Friendship Commission (TFC) whose aim was only to investigate past crimes - not to prosecute the perpetrators.

In general, global efforts to find justice for the victims of East Timor have had severe limitations. The Truth and Friendship Commission was even accused of protecting the perpetrators of crimes.⁵⁴ The formal trials have also been considered unsuccessful. The Human Rights Court on East Timor completely failed to achieve its objectives.⁵⁵ Of the 18 accused, 12 were acquitted; the rest subsequently had their convictions overturned. The Serious Crimes Unit (SCU) was able to produce 76 convictions regarding 20 defendants but unable to bring senior Indonesian government officials to justice.⁵⁶ It was closed down in May 2005, despite the fact that more than 600 cases were still pending and the Timorese courts could not be counted on to handle most of them. In August 2009, Amnesty International called on the UN Security Council to establish an independent criminal tribunal, but the government of Timor-Leste rejected the idea. Overall, the hybrid tribunal accomplished little when assessed in terms of what proponents of retributive justice expected. The question is whether the hybrid tribunal has had a positive impact on armed politics and the promotion of democracy and human rights.

2. Retributive justice & the End of War/Violent Conflict:

The extent to which the pursuit of retributive justice significantly contributed to the end of civil conflict and other forms of direct physical violence is difficult to assess. Proponents of retributive justice have argued that the lack of justice contributed to the armed clashes and other forms of insecurity. But this argument still has difficulty establishing a relationship between justice and peace or the end of violent conflict.

Evidence shows that the end of armed conflict in East Timor did not directly result from the pursuit of retributive justice. First, military intervention proved successful. The violence committed against East Timorese by the Indonesian and pro-Indonesia forces ended when an Australian-led multinational force under UN auspices entered East Timor in September 1999 and was replaced by a UN peacekeeping force and civilian police, which then fought with pro-Indonesia militia fighters, who killed three peacekeepers in the summer of 2000 and harassed East Timorese living in Indonesia's West Timorese refugee camps. The UN peacekeepers, which included 3,372 and 387 civilian police, alone were not responsible for putting an end to armed conflict. During the 2006 uprising, Australia had to intervene by leading a contingent of 2,200 foreign troops – the International Stabilization Force (ISF) - to ensure peace and security.

⁵³. Commission for Reception, Truth and Reconciliation, *Chega! The Report of the Commission for Reception, Truth and Reconciliation Timor-Leste* (CAVR 2005)

⁵⁴. Setyo Budi, "East Timor/Indonesia: Reconciliation at the Cost of Justice?" *Inter Press Service*, 30 May 2008.

⁵⁵. David Cohen, "Seeking Justice on the Cheap: Is the East Timor Tribunal Really a Model for the Future?" *AsiaPacific Issues* (East-Center, No.61, August 2002);

⁵⁶. The SCU, for instance, issued a warrant for General Wiranto's arrest but failed to bring him to justice because of the Indonesian government's refusal to cooperate.

Second, relative peace inside Timor-Leste also has resulted from improved bilateral relations between the newly independent country and Indonesia. The leaders of these two countries did not support formal efforts to prosecute those who had committed the alleged crimes.⁵⁷ Instead, the two countries established the toothless Commission on Truth and Friendship (CTF), accused of protecting the perpetrators of crimes. In June 2007, President Jose Ramos Horta agreed to extend the mandate of the CTF for another six months and to grant amnesty to those who committed crimes against humanity if they would confess to the Commission. On 20 May 2008, he offered full and partial pardons to 94 listed prisoners, including Rogerio Lobato and seven militia members involved in the 1999 killings. As a small state with a fragile regime, Timor-Leste was in no position to demand justice from Indonesia whose military leaders were untouchable. Timorese leaders have shown considerable concerns about the survival of their newly independent but vulnerable state and the security of their regime. Their official opposition to any attempts to bring Indonesian military leaders to justice reflects their sense of political realism when making foreign policy decisions. As Anthony Smith puts it, “Indonesia remains East Timor’s primary security concern, but East Timor’s strategy, as a small and vulnerable state, has been to seek cordial relations with its former occupier.”⁵⁸

Third, peace within Timor-Leste has had little to do with the execution of justice but more to do with political reconciliation.⁵⁹ As noted, the UN criminal courts are judged to have been unsuccessful. The trials did not deter further armed violence, which occurred in 2003, 2004, and 2006 until after the trials ended. A more rigorous pursuit of justice would have exacerbated the tensions that existed between the political parties. Just months after the 2005 CARV report was released, the whole country slid back into anarchy driven by a series of incidents that led to the 2006 uprising. Tension resumed in October 2006 when the United Nations published the report of its Special Commission of Inquiry for East Timor, which blamed Prime Minister Alkatiri (leader of FRETILIN) for the violent uprising and for his government’s failure to prevent the transfer of weapons to civilians, implicated the former interior and defense ministers, and called for prosecution against those responsible for activities leading to the 2006 uprising.⁶⁰

But reconciliation remained the only viable force for peace and security in the newly independent state. Charges against Alkatiri were dropped; after all, he was the prime minister and leader of FRITILIN with considerable support. When former

⁵⁷. When the Serious Crime Unit took action to arrest two Indonesian generals, a judge on the Special Panels on Serious Crimes did not support. When the Prosecutor General criticized the international judges, President Xanana Gusmao told him that this action would harm his country’s relations with Indonesia.

⁵⁸. Anthony L. Smith, “Constraints and Choices: East Timor as a Foreign Policy Actor,” p.35

⁵⁹. In 2002, Xanana Gusmao made the following remarks: “our priority is reconciliation...in our country, reconciliation must be the first step. After people forgive each other, we can be sure that the justice that we do will be without any sentiments of revenge or hatred...Our people are willing to eradicate hatred and vengeance.” Rachel S. Taylor, “Interview: East Timorese President Xanana Gusmao,” *Worldpress.org*, 1 October 2002 (http://www.worldpress.org/print_article.cfm?article_id=851&dont=yes, accessed 20 April 2011), p.2. In 2008, he maintained the same position. When addressing the Indonesian Council on World Affairs, he said the following: “our two peoples together in an uncommon approach in the search for truth and in the promotion of friendship – instead of starting legal cases – contributed to their further unity, based on the common acknowledgement that we all suffered because of a regime.” Cited in Setyo Budi, “East Timor/Indonesia: Reconciliation at the Cost of Justice?”

⁶⁰. United Nations, *Report of the United Nations Independent Special Commission of Inquiry for Timor-Leste* (Geneva: 2 October 2006);

FRITILIN Interior Minister Rogerio Lobato was found guilty of arming a hit squad involved in activity leading to the 2006 uprising and sentenced to 7.5 years in jail in March 2007, observers considered this legal outcome a victory for justice. However, the FRETILIN-dominated Parliament passed a clemency law in June 2007 that would allow those who committed “appropriate crimes” between April 2006 and April 2007 to apply for clemency. President Jose Ramos Horta opposed the law, but could only submit it to the Court of Appeals for constitutional review. The reality was that the interior minister commanded loyalty from members of the police forces, some of whom had acrimonious relationships with President Xanana Gusmao – an ally of Jose Ramos Horta, who was even willing later on to pardon the 28 defendants put on trial in July 2009 for their February 2008 attempt to assassinate him and Prime Minister Xanana Gusmao.

Reconciliation has never been based on the sole question of who is right and who is wrong but on the fact that armed politics in post-war Timor-Leste remained a political reality. Tensions within the armed forces persisted. Before the 2006 uprising, the military (F-FDLT) fell under the command of President Xanana Gusmao, but the police (PNTL) reported to Prime Minister Mari Alkatiri. The armed forces remained deeply politicized, in that they maintained loyalty to their political leaders or parties. Political parties even relied on armed gangs for protection.⁶¹ Moreover, it is questionable whether political leaders like Xanana Gusmao had full control over the military. The President broke away from FALINTI, the armed wing of FRITILIN, before the 2002 presidential elections and can thus hardly be said to have had right control over the military, which remained a fragile institution. The 2006 uprising showed how fragile the government was when one-third of military personnel rebelled against it. The assassination attempt further shows how vulnerable political leaders were to dissenting elements.

The armed forces themselves remained institutionally fragile. The military and police faced their internal challenges, as their own members were still region-based and did not trust each other (between easterners who dominated FALINTI, the guerrilla movement fighting Indonesian occupation forces, and westerners who felt discriminated by easterners).⁶² The F-FDLT and PNTL did not trust each other, either, as the former was dominated by easterners, whereas the latter was dominated by westerners (some of whom were former members of the Indonesian military). High levels of mutual distrust and contempt (for various reasons), for instance, led to a series of armed clashes between members of the two armed forces in 2003 and 2004. Not only did these two armed forces distrust each other, but they also enjoyed little trust from Timorese people because they

⁶¹. TLAVA, “Groups, gangs, and armed violence in Timor-Leste,” *Timor-Leste Issue Brief*, no.2 (April 2009), p.2 (pp.1-8)

⁶². When the F-FDLT recruited its personnel, FALINTIL High Command was allowed to select applications without any oversight. As a result, the selection process was based on political allegiance. See Desmond Ball, “The Defense of East Timor: A Recipe for Disaster?” *Pacifica Review* 14, no.3 (October 2002): 175-89; International Crisis Group, *Timor-Leste: Security Sector Reform* (2007). According to Edward Rees, a former political officer working for the UN in East Timor, “Falintil commanders and their followers admitted to the ETDF [East Timor Defense Force] were loyalists of President Xanana Gusmao, who was the Falintil commander-in-chief. Of those who were excluded from the ETDF, a sizeable minority had a acrimonious relationship with Gusmao....Old divisions in the anti-Indonesian resistance movement are being institutionalized in the new East Timorese state with one political grouping – President Gusmao’s allies – finding a home in the defense force and dissidents under the patronage of the Minister for the Interior finding a home in the police service, and some elements in the local government. Cited in Anthony L. Smith, “Constraints and Choices: East Timor as a Foreign Policy Actor,” p.31

could not provide the population with adequate security. Complete anarchy reigned when the 2006 uprising erupted. As one Catholic priest noted, “It’s east against west, soldiers against soldiers, police against soldiers, everyone against everyone...It’s total madness”⁶³ John Roosa further notes that “it was difficult for anyone to understand precisely who was fighting whom.”⁶⁴ In the aftermath, the armed forces were left in ruins.

Third, armed clashes in East Timor, especially the ones in 2006, also resulted from factors that were not directly related to the lack of retributive justice. The 2006 uprising resulted from the firing of 600 F-FDTL troops, frustration over rampant corruption, and high levels of unemployment, not from the actions of those who had committed crimes up until the end of 1999. Other factors can better help explain the causes. Socio-economic conditions remained poor. In 2002, between 85 and 90 percent of urban adults were unemployed. In 2006, about 40 percent of the population lived under the poverty line. Even by the late 2000s, the unemployment rate remained around 50 percent.⁶⁵ The economy relied mainly on small-scale coffee production. Nearly half of East Timorese were illiterate. Timor-Leste remains the poorest country in Southeast Asia. According to a UNDP report issued in March 2006, the government did not execute its budget effectively and did not distribute funds nationally but instead devoted income to the capital. It was poor socio-economic conditions and weak institutional capacity (not the lack of retributive justice dealing with past abuses) that led to violent incidents. The fact that Timorese leaders have placed emphasis on economic development has little to do with Asian cultural values but more do with desperate socio-economic needs.

Three notable lessons that can be drawn from the case of Timor-Leste are the overemphasis on the need for retributive justice, inadequate attention toward reform needs in the security sector,⁶⁶ and limited attention to economic development.⁶⁷ In short, it remains questionable whether a more vigorous pursuit of justice would have further minimized threats to human security. The leaders of Timor-Leste and Indonesia did not consider formal trials to be the most effective way for building peaceful relations between themselves. Violent incidents had their roots in socioeconomic and political factors that had little to do with pre-2000 abuses or crimes. Military intervention by foreign troops, especially those of Australia, helped to provide peace and stability in Timor-Leste. As shall be discussed next, peace and security also resulted from the promotion of electoral democracy and human rights – not directly from justice.

3. Retributive justice, Democratization, & Human Rights:

After gaining independence in May 2002, Timor-Leste enjoyed a degree of electoral democracy. By all accounts, the people of Timor-Leste have enjoyed more freedom from fear than when they were under Indonesian colonial rule. Freedom House, for instance,

⁶³. Cited in “Total madness as gangs fight in Dili,” *ABC News Online* (<http://www.abc.net.au/cgi-bin/common/printfriendly.pl?http://www.abc.net.au/news/newsitems/200605/s1648937.htm>, accessed 5 May 2011)

⁶⁴. John Roosa, “East Timor’s Truth Commission: Introduction to Pacific Affairs Special Forum,” p.566

⁶⁵. On poor socio-economic conditions in Timor-Leste, see Anthony L. Smith, “Constraints and Choices: East Timor as a Foreign Policy Actor,” p.16; TLAVA, “Groups, gangs, and armed violence in Timor-Leste,” p.2;

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has given the country favorable marks. Based on its criteria (Free: scores from 1 to 2.5; Partly Free: from 3 to 5.5, and Not Free: from 5.5 to 7), Freedom House has been consistent in rating Timor-Leste as Partly Free (See Table 1).

The people of Timor-Leste have enjoyed their democratic and human rights more than they did under Indonesian colonial rule. The road to democracy began with an interim UN authority (UNTAET) tasked with a Security Council mandate to set up a democratic government. In 2001, East Timor elected a Constituent Assembly to draft a constitution. In April 2002, presidential elections took place. A former resistance commander, Xanana Gusmao, was elected. The elections were considered free and fair. In 2007, Timor-Leste held both presidential and legislative elections, which were also judged to be generally free and fair. The local elections, held in 442 villages, also took place in October 2009 and were also deemed generally free and fair.

Election results show that no party in Timor-Leste has emerged as the hegemonic force capable of monopolizing power. In the last two presidential elections, no party won and maintained power by force. Xanana Gusmao won the 2002 presidential elections by forming a wider resistance coalition after he had broken away from FALINTI. In the 2007 presidential elections, none of the eight presidential candidates secured a 50 percent majority, and this led to a runoff on May 9 between the Independent Ramos Horta (who received 23 percent of vote in the first round) and FRETILIN party president Francisco Guterres (who obtained 29 percent). Ramos Horta won the runoff (replacing President Xanana Gusmao, who formed a new political party, the National Congress for Timorese Construction or CNRT, which competed in June 2007 legislative elections).

The June 2007 legislative elections were also deemed free and fair in that no political party was in the position to dictate the electoral process and determine the results. Despite its victory in the 2001 elections, FRETILIN did not receive a majority in 2007: it won only 21 out of the 65 seats. The CNRT received only 18 seats and had to form a coalition (the Alliance of the Parliamentary Majority or AMP) with three other political parties. The AMP obtained 37 seats. President Jose Ramos Horta then asked the CNRT to form a government, but supporters of FRETILIN staged protests. FRETILIN lawmakers also refused to recognize the government, but eventually took their seats.

In general, the presidential, legislative and local elections in Timor-Leste during the 2000s were free and fair, because no political party was in the position to dominate the electoral process, and the transfer of political power took place peacefully.

If the pursuit of retributive justice was regarded as the cause of democratization in Timor-Leste, evidence does not strongly validate the relationship between the two variables, because efforts to bring to justice those who had committed crimes have proved to be unsuccessful. A stronger pursuit of retributive justice would have made it more difficult for the major political parties to engage in the electoral process.

Although levels of respect for human rights have not been as high as those in Western democracies, evidence shows that the East Timorese population has now enjoyed more human rights than ever before. In addition to political rights, other individual rights have also been better respected. If some human rights continue to be violated, it is not because the justice institutions established by the UN had failed, but it is because judicial and legal institutions in Timor-Leste have not been strengthened fast enough because of deep historical and institutional legacies and limited resources devoted

to institution building.⁶⁸ The hybrid tribunal revealed its shortcomings: it operated in a very short period of time and did not seem to have done much for the justice and security sector.⁶⁹ Today, there are only two functioning courthouses in the country. The UN server Development Program's 2004 establishment of the National Judicial Training Center to provide legal training for public defenders, prosecutors and judges has been a significant step toward remedying ongoing judicial and legal challenges, but the process of institution building in the judicial and legal systems will take a long time, especially when the political institutions remain fragile and the country remains poor.

In sum, progress on the democracy and human rights fronts in Timor-Leste throughout the 2000s could not be said to have directly resulted from the unsuccessful pursuit of retributive justice against those who had committed crimes up until 1999. Political stability and security through political reconciliation have made it possible for the political parties to feel more secure or secure enough to continue their competition for power through the ballot-box and not to abuse human rights.

III. The Case of Cambodia

The international pursuit of retributive justice in Cambodia arose out of the dominant concern about the culture of impunity deeply rooted in repressive violence, committed especially during the Khmer Rouge reign of terror. The country is an excellent case to question the proposition that retributive justice is an effective method for war termination and the promotion of democracy and human rights under repressive regimes.

1. Human Insecurity & Retributive justice:

There is no doubt that the Khmer Rouge reign of terror marks one of the most ruthless periods in world history and was one of the greatest threats to human security. The Cambodian 'killing fields' (following the Khmer Rouge's military victory in 1975 and lasting until the end of 1978) are known worldwide as a case of genocide. For most scholars, the Khmer Rouge regime led by Prime Minister Pol Pot committed murder against entire civilian populations, especially ethnic groups. Violence initiated by the Pol Pot leadership was associated with racialism (racialist not socialist ideology) and its lust for power.⁷⁰ The majority of the victims were Khmer (estimated at around 1,325,000), the largest ethnic group in the country (7,100,000 in 1975); however, they demonstrate that the ethnic minorities suffered disproportionately in far greater numbers. Non-Khmer ethnic minorities included the Chinese, Vietnamese, Thais, Laos, and Muslim Chams. More than 215,000 of the 430,000 Chinese perished. The Khmer Rouge expelled some 100,000 Vietnamese from Cambodia in 1975 and then murdered 125,000 of those who remained. About 90,000 of the 250,000 Muslim Chams were also slaughtered.⁷¹

There is no doubt that ethnic minorities did suffer disproportionately in greater numbers than the Cambodians of Khmer origin and racism may have played a role, but a

⁶⁸. On the tribunal's failures of capacity-building programs, see Center for International Governance Innovation, Timor-Leste, no.3 (Waterloo, ONT: January 2011)

⁶⁹. Suzanne Katzenstein, "Hybrid Tribunals: Searching for Justice in East Timor," pp.265-68;

⁷⁰. See my book review in *Holocaust and Genocide Studies* 11, no.3 (Winter 1997): 413-25.

⁷¹. Howard Ball, *Prosecuting War Crimes and Genocide: The Twentieth-Century Experience*, p.112.

far more powerful reason appears to have had more to do with the threats that the Khmer Rouge leaders perceived to their personal and regime security. Cham Muslims, for instance, were forced to abandon their texts and eat pork; however, their opposition may have been perceived by the Khmer Rouge as a threat. For instance, the Khmer Rouge massacred the entire populations of several Cham villages, but they did so after a series of armed Cham rebellions between June and November 1978 (in one district of the country's Eastern Zone) and after the Cham had "slaughtered half a dozen [Khmer Rouge soldiers] with swords and knives."⁷² The Chinese and Vietnamese were not killed simply because they belonged to ethnic minorities, but more importantly because they were regarded as an existential threat to the socialist regime. In general, the Khmer Rouge elites and its peasant army deeply distrusted capitalists, regarded them as enemies of their revolution potentially hostile to the regime, and thus sought to destroy them.⁷³

The fact that the Khmer Rouge regime primarily targeted the ethnic Vietnamese can be also explained by the fact that the Pol Pot leadership perceived them as a growing threat because of its deep distrust of Vietnam's political ambitions. The Khmer Rouge had always felt threatened by Vietnam, having learned from the failure of Sihanouk's policy of letting the Vietnamese communists dominate eastern Cambodia. Early in the 1970s, the Vietnamese communists fought the Republican government forces on behalf of the nascent Khmer Rouge movement (still weak and vulnerable to Vietnamese influence). Prior to 1975, the Khmer Rouge had purged those judged as pro-Vietnam because of longtime affiliations with Hanoi and begun to reassert state sovereignty in the eastern part of the country. Fears of Vietnamese ambitions – in the alleged form of an Indochinese Federation – led the Khmer Rouge leadership to reject outright the 'special relationship' demanded by Hanoi after 1975. If the Khmer Rouge had decided to expel ethnic Vietnamese after their victory and to eliminate those who remained, it was not simply because of their race (otherwise all of them would have been killed right after the 1975 victory) but because of the escalation in the war between the two countries.

Whether the killing fields represent a case of genocide remains debatable, but the regime undoubtedly committed heinous war crimes and crimes against humanity. The word "genocide" itself has been both used and abused by all sides of the ideological spectrum. Those in the United States, for instance, branded indiscriminately as evil or genocidal or genocide-prone those regimes or movements that interfered in the imperial interests of capitalism. Those in socialist states or scholars who advocated socialism did the same. Enemies of socialism were branded as evil or genocidal. By and large, socialist thinkers and activists tend to remember the heinous crimes committed by the Nazi but "have neglected the crimes committed by the Communists...As for Lenin, Mao, Ho Chi Minh, and even Stalin, they have always enjoyed a surprising reverence."⁷⁴

It came as no surprise that members of the international community have pursued retributive justice against members of the Khmer Rouge regime. Even before the signing of the Peace Agreements in 1991, lawmakers, scholars, and human rights activists pressed for legal action against them with the aim of preventing the resurgence of

⁷². Edward Kissi, "Rwanda, Ethiopia and Cambodia: links, faultlines and complexities in a comparative study of genocide," p.126.

⁷³. Maureen S. Hiebert, "The Three 'Switches' of Identity Construction in Genocide: The Nazi Final Solution and the Cambodian Killing Fields," pp.17-20.

⁷⁴. Stéphane Courtois, "Introduction: The Crimes of Communism," p.17.

genocide and promoting peace and democracy.⁷⁵ They have differed on how to deal with the legacies of Khmer Rouge atrocities. Those working for the United Nations and living in the West make several notable arguments in support of retributive justice.⁷⁶ First, such justice serves as a way to demonstrate that the Khmer Rouge regime committed crimes. Without such knowledge, the Cambodians would not learn that what the Khmer Rouge committed was a crime. These advocates assume that the Cambodians did not know what had happened and would now want to know. One of the tasks, then, would be to conduct research by collecting data revealing that genocide, war crimes and crimes against humanity had been committed. Second, retributive justice would bring about peace based on a sense of closure and reconciliation and will also deter Khmer Rouge leaders (and other potential criminals) from committing more crimes, especially after they have been put away in jail where they belong. Third, without justice there would be no democracy and human rights. Some even condemned the Peace Agreements that included the Khmer Rouge as a legitimate player, advocated war as the best way to break their back, and assumed that democracy would have been better promoted had the Khmer Rouge been destroyed. Fourth, retributive justice would further promote respect for human rights by ending the Cambodian culture of impunity and promoting accountability.

The execution of retributive justice has made some progress. In June 1997, the Cambodian Government requested the United Nations to proceed in a joint effort to hold Khmer Rouge leaders accountable for their past crimes. The Cambodia–UN negotiations on how to conduct Khmer Rouge trials proceeded in fits and starts. Differences between the two sides remained then. One issue was centered on the question of whether a justice institution would be able to enjoy independence. Another issue was the scope of trials: whether or not to try all Khmer Rouge officials or just a small number of those most responsible for the crimes committed during their reign of terror. It was not until 2003 that both sides finally agreed on the need to establish the Extraordinary Chambers in the Court of Cambodia (ECCC) – a hybrid judicial body made up of Cambodian and international judges and prosecutors. Only Khmer Rouge leaders ‘most responsible’ for the crimes committed from 1975 to the end of 1978 would be subject to justice.

Further progress was made after the ECCC was inaugurated in July 2006. In June 2007, the Court began its formal proceedings. Kaing Guek Eav (better known as Duch), the chief executioner at the infamous Toul Sleng extermination center, was the first to face justice: charged with war crimes, crimes against humanity, torture, and premeditated murder, he was put on trial and accepted his personal responsibility for the torture and death of approximately 15,000 people. The trial was concluded late in 2009, when the prosecutors demanded that he be put in jail for forty years. On 26 July 2010, the ECCC finally sentenced him to 19 years in prison. In December 2009, the ECCC finally issued for the first time additional genocide charges against Khieu Samphan (79 years old, the Khmer Rouge’s former head of state), Nuon Chea (78 years old, known as Brother

⁷⁵. K. Railsback, “A Genocide Convention Action against the Khmer Rouge: Preventing a Resurgence of the Killing Fields,” *Connecticut Journal of International Law*, 5, no.457 (1989-1990): 457-81

⁷⁶. On various reasons for transitional justice, see Sorpong Peou, “The East-Asian Challenge for Collaborative Action on International Retributive justice,” in *Human Security in East Asia: Challenges for Collaborative Action*, edited by Sorpong Peou (New York, NY & Oxon, UK: Routledge, 2008); “Reassessing the Role of Senior Leaders and Local Officials in Democratic Kampuchea Crimes,” in *Bringing the Khmer Rouge to Justice: Prosecuting Mass Violence Before the Cambodian Courts*, edited by Jaya Ramji and Beth Van Schaack (Lewiston, NY: The Edward Mellen Press, 2005).

Number Two, second only to Pol Pot), and Ieng Sary (86 years old, former Khmer Rouge minister of foreign affairs). (They were first charged only with war crimes and crimes against humanity). In March 2010, the international prosecutor finally announced that the ECCC would soon move toward bringing to trial four senior Khmer Rouge leaders who had been held in custody – Khieu Samphan, Nuon Chea, Ieng Sary, and Khieu Thirith (Ieng Sary's wife and a former Khmer Rouge minister for social affairs).

2. Retributive justice & the End of War/Armed Conflict:

The Cambodia case also does not lend strong empirical support to the argument that peace (defined in negative terms) can be built only when retributive justice is fully executed. In fact, the argument is weak on several grounds. The signing of the Peace Agreements in October 1991 among former armed enemies (including the three allies of the Coalition Government of Democratic Kampuchea or CGDK – the Khmer Rouge; the Royalists, known as FUNCINPEC; and the Khmer People's National Liberation Front or KPNLF; and the State of Cambodia, or SOC, whose party was named the Cambodian People's Party or CPP) made it possible for the peace process to get started.

The pursuit of retributive justice, which was initially proposed by the Cambodian government in June 1997 and formally began in 2006, did not help end the war. In fact, one could argue that the two co-prime minister had submitted a joint request to the UN for assistance (in their effort to bring Khmer Rouge leaders to justice) before a violent coup by Hun Sen that led to the overthrow of Prince Ranariddh in July 1997. The peace process also resulted from the disintegration of the Khmer Rouge's armed rebellion, especially after Pol Pot's death in April 1998. One reason for these developments was that the Government used an effective strategy to divide the Khmer Rouge leadership by granting an amnesty to Ieng Sary. The Khmer Rouge leadership's infighting then intensified and led to the arrest of Pol Pot by his 'defense minister' Ta Mok (who subsequently put him on show 'trial') and his death. The disintegration from within was a blessing to the Government, which subsequently agreed to grant informal amnesties to other Khmer Rouge leaders, such as Nuon Chea and Khieu Samphan. It is still far from clear that by putting few Khmer Rouge leaders away, the formal trials have promoted the cause of negative peace. As noted earlier, they are quite advanced in age; they no longer command any armed rebels and would be unable to commit similar crimes again.

A more rigorous pursuit of retributive justice could have destabilized the country, however. Hun Sen has also repeatedly rejected any idea of bringing more Khmer Rouge officials (in addition to the few ones already in custody) to justice, because he saw this move has having the potential to give rise to instability or civil war. He preferred to see the ECCC fail rather than succeed, especially when the latter considered pursuing more suspects. Late in October 2010, he told the UN Secretary General Ban Ki-moon that he would not allow the ECCC to try other former Khmer Rouge officials not in custody, reiterating his concern that such an effort would plunge the country back into civil war. Early in November 2010, Foreign Minister Hor Namhong also told US Secretary of State Hillary Clinton (during her first visit to Cambodia) that a move to bring more Khmer Rouge members to justice would jeopardize the peace and stability of his country.

The fears of prosecution among government officials evidently remain widespread today. The UN Group of Experts wrote: "[t]he current Prime Minister [Hun

Sen] and many of his colleagues in the...CPP...were once members of the Khmer Rouge before defecting to Vietnam.” Moreover, “FUNCINPEC and other parties were closely allied with the Khmer Rouge in the struggle against Vietnam and the PRK/SOC.”⁷⁷ Foreign Minister Hor Namhong sued three journalists over allegations that he was put in charge of prisoners in a camp where innocent people were tortured and executed; they were found guilty and ordered them to pay the minister \$6,500 in compensation and \$1,280 in fines to the state.⁷⁸ In June 2008, Dam Sith, a candidate of the Sam Rainsy Party and editor of the *Khmer Conscience* newspaper, was arrested because he questioned the alleged role that the foreign minister played during the Khmer Rouge period. Although there is no evidence against Hun Sen, files compiled by the Documentation Center of Cambodia provide “enough evidence to indict CPP President and Senate Speaker Chea Sim and CPP Honorary President and National Assembly Deputy Speaker Heng Samrin for crimes against humanity and/or war crimes.” Chea was a district chief under the Khmer Rouge regime and “could be accused of mass killings.” At the 29th anniversary marking the Khmer Rouge’s January 1979 downfall, for instance, Chea Sim warned against politicizing the Khmer Rouge trials, calling those with the intent to do so “absent-minded elements” and “ill-willed political circles” who were opposed to the process of reconciliation after years of civil strife. In his words, “We condemn any acts to use the courts with the aim of creating instability or disrupting society.”⁷⁹

The peace process proceeded with the UN intervention – in the form of United Nations Transitional Authority in Cambodia or UNTAC – from 1992 to late 1993. Although the Khmer Rouge pulled out of the electoral process (just weeks before the election in May 1993) and violated the cease-fire, the other Cambodian signatories competed for public office and ended up forming a coalition government presided over by two co-prime ministers: First Prime Minister Norodom Ranariddh (FUNCINPEC) and Second Prime Minister Hun Sen (CPP). The Khmer Rouge leadership continued its armed rebellion, but the democratic process served as a powerful weapon to delegitimize the armed rebels. The rebels now could no longer count on the support of its former allies – the BLDP and FUNCINPEC – as they did throughout the 1980s. Nor could the rebels enjoy international support from the United States, the Association of Southeast Asian Nations, and China, which had lent them a helping hand throughout the 1980s.

Other factors have also contributed to the peace-building process – a form of deterrence against future crimes. None of the political parties, not even the CPP, has embraced the type of radical egalitarianism that the Pol Pot regime did; all of them have advocated capitalism and globalization. Cambodia has since the early 1990s been a member of the United Nations, joined ASEAN in 1999, and has maintained good relations with all of its neighbors. Cambodian–Thai ties are far from ideal (because of minor border clashes that resulted from their dispute over an ancient temple), but remain positive. Cambodia was the world’s first ‘least developed’ country to have received permission in September 2003 to join the World Trade Organization as a member.

Moreover, the international community has been supportive of the Cambodian regime. Between 1998 and 2008, the total amount of international aid Cambodia received

⁷⁷. United Nations, Report of the Group of Experts for Cambodia Pursuant to General Assembly Resolution 52/135, New York: United Nations, 1999.

⁷⁸. *Cambodia Daily*, 15-16 September 2001.

⁷⁹. *Agence France-Presse*, 7 January 2008.

amounted to US\$5.5 billion. The donor community continued to pledge more assistance. In 2009, it pledged US\$950 millions. In June 2010, it pledged another US\$1.1 billion – one of the largest aid packages ever (particularly since the early 1990s). Other major powers in the region, especially China, Japan, and the United States, have also shown growing interest in maintaining positive relations with the Hun Sen regime.

3. Retributive justice, Democracy, & Human Rights:

The argument that the pursuit of retributive justice has made Cambodia more democratic has little empirical support. It is highly questionable whether the ongoing pursuit of retributive justice has met the expectations that advocates of democracy and human rights had hoped for. The limits of retributive justice are still quite evident. Witnesses have been blocked from testifying. Efforts to bring cases against Khmer Rouge leaders have been thwarted. By mid-2010, only one Khmer Rouge official had been sentenced; four others remained in custody, still awaiting their trials (which requires somewhere between \$40 and \$60 million). The Cambodian administrative staff within the ECCC has been marred by serious corruption scandals. In 2010 and 2011, the Court is reported to have a budget shortfall of \$40 million. The large amount of money spent on the trials would have been justified if the Court had achieved other purposes, but the jury is still out.

Since members of the international community have pursued retributive justice in Cambodia, the country has become increasingly authority. As noted, soon after the government had requested the UN for advice on how to go ahead with legal proceedings against Khmer Rouge leaders, Hun Sen staged a violent coup against his co-premier and has since consolidated power at the expense of democracy. Cambodia has since drifted toward a hegemonic-party system. The CPP has maintained a monopoly of power over the communes across the country. The election results between 1998 and 2008 allowed the CPP winning more and more seats in the National Assembly. Members of the CPP, especially powerful allies of Hun Sen, have also dominated the Senate.

Top CPP leaders and their political supporters can not afford, and are unlikely, to give up power. Hun Sen said he intended to stay in power until he is 90 years old. Winning at all costs appear to be the only option now available to the CPP elites – the only guarantee of their personal security. Perceived insecurity helps explain why Hun Sen and other members of the CPP have sought to keep justice institutions weak or to prevent the judiciary and legal system from becoming politically independent. The CPP elite is well aware of the fact that once one loses power, such as the Khmer Republican and Khmer Rouge government officials did, one lies at the mercy of the victor.

The CPP has also turned the judicial system into its political instrument. The annual budgetary allocation to the judiciary remains far from sufficient (usually less than 1 percent of the national budget) and is much, much less than that to the armed forces. Opposition lawmakers who dare to challenge the prime minister often end up having their parliamentary immunity lifted, being charged with defamation and brought to court, always losing, and paying heavy fines. When he visited Cambodia late in October 2010, UN Secretary-General Ban Ki-moon urged the Government to provide full cooperation and fully respect the independence of the ECCC, but Hun Sen said he would not allow cases against other ex-Khmer Rouge officials. His foreign minister, Ho Namhong, also told US Secretary of State Hillary Clinton (during her first visit to Cambodia on 1

November 2010) that his Government wanted the Office of the UN High Commissioner for Human Rights in Cambodia closed or its special representative removed.

In addition to its efforts to consolidate political power by taking action to dominate the legislature, judiciary and armed forces, the CPP has since sought to protect his regime by moving closer and closer to other authoritarian states, most notably China. China has now become the biggest investor and probably the largest donor in Cambodia, as well as the strongest defender of the Hun Sen regime. Chinese influence over Cambodia has grown so deep that U.S. politicians could no longer afford ignore it. During her visit to Cambodia, for instance, US Secretary of State Hillary Clinton urged Cambodia to “look for partnerships that cut across geographic lines.” She urged the Cambodians not “to get too dependent on any one country” (making reference to China) and reminding them of the need to raise important issues with China, such as the Chinese dams on the upper Mekong River that could put Cambodia at risk.⁸⁰

Conclusion

The proposition that retributive justice in war-torn and post-war societies serves as one effective ways to help promoting human security by ensuring negative peace and promoting democracy and human rights does not receive strong empirical evidence. The cases of Timor-Leste and Cambodia show the severe limits of retributive justice. Peace in the two war-torn countries cannot be said to have resulted directly from the actions taken by the two hybrid tribunals. Formal trials were not only severely constrained but also regarded by political leaders of the two countries as politically destabilizing. Other factors, however, appear to matter more significantly, such as the peace agreements that were more inclusive and based on reconciliation through amnesty (formal and informal) and through peace negotiation, military intervention, and other forms of international assistance such as foreign aid. On democracy and human rights, the two country case studies show a big contrast: Timor-Leste has become comparatively more democratic and more respectful of human rights than Cambodia. The pursuit of retributive justice thus shows that it does not have the same uniform and significant impact on democracy and human rights. One explanation for the contrast is that none of East Timor’s political parties has been unable to consolidate power at the expense of the opponents, whereas the CPP leadership in Cambodia has been successful in monopolizing power. One could further argue that retributive justice has made CPP leaders nervous about their political future because of their past and thus encouraged them to consolidate power.

This does not suggest that retributive justice should never be pursued, but its proponents would be wise to note that this strategy could be pursued effectively if criminal leaders are no longer well armed and in the position to defend themselves. The East-Timor case shows that retributive justice proved difficult when perpetrators of crimes, most notably the Indonesian generals, remained undefeated and powerful. The Cambodia case, however, shows that retributive justice became possible only after peace negotiations among the former enemies had been struck, after the Khmer Rouge faction had been de-legitimized by the democratic process and the international community, and after its leadership imploded and disintegrated following both formal and informal

⁸⁰. John Pomfret, “Clinton urges Cambodia to strike balance with China,” *The Washington Post*, 2 November 2010, p.A12.

amnesties. Neither peace nor democracy was the real byproduct of retributive justice. Both country case studies show that peace and democracy through political reconciliation were possible when the real or perceived threat of formal trials can be minimized.

This paper does not argue that retributive justice should not be pursued at all, but only cautions against any premature attempts to bring alleged criminals to justice, especially when political institutions are extremely weak, when criminal leaders are well armed and dangerous, and when members of the international community are both unwilling and unable to take effective collective action. During transition from war to peace in war-torn societies and from authoritarian to democratic rule, more emphasis should be placed on the need to reform the armed forces that remain factionalized and institutionally fragile and on the need to promote free and fair as well as inclusive elections. As long as they remain extremely fragile, state institutions are likely to threaten the peace and democratic process, especially when the pursuit of retributive justice aims at prosecuting top military and political leaders. When threatened, leaders are likely to consolidate power by weakening democratic institutions, particularly the judicial and legal systems. When not under threat, they are more likely to go along with the peace process. Democratization thus seems better than retributive justice when it comes to the question of how to build an effective system of institutional checks and balances.

Whether a truth and reconciliation commission would have produced better outcomes for Cambodia (such as better peace, more respect for human rights, and more democracy) than the ECCC has is a matter of debate, but evidence suggests that it might. East Timor provides a good example, despite the various shortcomings. In Timor-Leste, political leaders adopted realist pragmatism, having realized that their country would need to co-exist alongside Indonesia, preferring to go down the road of reconciliation.⁸¹ Indonesia has rejected retributive justice in favor of a truth commission, and yet has become far more democratic than Cambodia. South Africa chose to go down this road and has since witnessed peace and stability through democratization. Some scholars observe that more than half of the relevant cases around the world, especially in Latin America and Eastern Europe have rejected retributive justice in favor of restorative justice, particularly reconciliation. While many leaders in war-torn countries may support retributive justice, they are not always in the position to go down this road, largely because they are more interested in promoting social and political unity.

⁸¹. Sorpong Peou, "The East-Asian Challenge for Collaborative Action on International Retributive justice"