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Human Security Through Formal Trials: Some Evidence from Southeast Asia

By Sorpong Peou

Synopsis

When the United Nations declared the 1990s to be “Decade of International Law”, optimism spread about the future of world peace. Another chapter of international law also began to open. Formal trials were what it would take to help promote human security. But evidence from Southeast Asia remains inconclusive.

Commentary

AFTER A series of mass atrocities committed in the former Yugoslavia and Rwanda early in the 1990s, the United Nations led the way with innovative ideas about human security and the responsibility to protect people from the most serious crimes: namely, war crimes, genocide and crimes against humanity.

Several international criminal tribunals have been established to prosecute those who committed the most serious crimes. In 2002, the International Criminal Court (ICC) was finally established. A number of alleged criminal leaders have been brought to justice. For proponents of international criminal justice, this development marked a new positive step in the right direction. Their optimism rests on the assumption that international criminal tribunals and courts would help terminate and deter armed conflicts and mass atrocity crimes that threaten the security of individual human beings.

Three UN-backed Propositions

At least three theoretical propositions have been formulated. First, the pursuit of retributive justice through formal trials helps promote human security, especially when alleged criminals are prosecuted and can no longer wage war causing human

suffering. For instance, the International Criminal Tribunal for the former Yugoslavia was meant to end the brutal war launched by the nationalist Serb government.

Second, the pursuit of retributive justice helps build lasting peace: reconciliation between hostile groups can be promoted, democracy can be advanced, and human rights can be protected. The third proposition is that formal trials can help post-war countries build and strengthen rule-of-law institutions.

But critics and skeptics cast doubt on the promise of human security through formal trials largely based on the logic of appropriateness. They do not argue that armed conflict and the most serious crimes should be ignored or that the perpetrators should be let go unpunished or should bear no consequences for their actions. Their arguments rest on the logic of consequences: the pursuit of retributive justice in post-war countries is ineffective, at best, and counter-productive, at worst.

In fact, they make the case that judicial punishment or its threat may not be the most effective way to end armed conflict. Or deter mass atrocities in countries where institutions are extremely weak and when alleged criminals are still in positions of power or more powerful than liberal reformers. When threatened with judicial punishment, alleged criminals may refuse to disarm or give up power and may seek to achieve victory by force.

Some Evidence from Southeast Asia & Elsewhere

Who has won the debate? Although it is still too early to declare who the winner is, empirical evidence now casts more doubt on the three optimistic theoretical propositions.

When we look at what the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the Special Panels for Serious Crimes in East Timor (SPSC) have done, it is difficult to argue that the three theoretical propositions receive strong empirical support. These two countries are different in terms of population size, culture, religion, language and so on, but they are similar in one respect: their hybrid tribunals were set up to prosecute those who were alleged to have committed the most serious crimes.

However, the outcomes of the trials in Cambodia and Timor-Leste were different. In Cambodia, a number of top Khmer Rouge leaders were arrested. Three have died: Ta Mok (Khmer Rouge military chief known as the “Butcher”); Ieng Sary (Khmer Rouge minister of foreign affairs), and his wife Ieng Thirith (Khmer Rouge minister of social affairs). Three surviving leaders received a life sentence. They are Nuon Chea (Khmer Rouge regime’s No.2 man); Khieu Samphan (Khmer Rouge head of state), and Duch the chief executioner of the notorious Khmer Rouge prison called Tuol Sleng.

In contrast, the SPSC succeeded in convicting only a small number of low-level defendants. None of the Indonesian generals (most notably General Wiranto), accused of committing crimes against humanity, has been brought to justice. Thus, the ECCC has been comparatively far more successful than the SPSC.

Democracy in Cambodia vs Timor Leste

Based on the above theoretical propositions, one would expect democracy in Cambodia to thrive better than democracy in either East Timor/Timor-Leste or Indonesia. The reality is that Cambodia has become less democratic than the other two countries. Freedom House has rated Cambodia as “unfree” and both Indonesia and Timor-Leste as “partly free” (with better scores than Cambodia’s on political rights and civil liberties).

According to The Economic Intelligence Unit’s *Democracy Index* 2015, Cambodia ranks 113th out of 167 countries, whereas Indonesia and Timor-Leste rank 49th and 44th, respectively. Timor-Leste and Indonesia have emerged as the most democratic countries in Southeast Asia.

On the rule of law, Cambodia appears to have done worse than Indonesia and Timor-Leste. The World Justice Project’s rule of law index (2016), for instance, puts Cambodia in 112th place among 113 countries. Among 15 countries in the East Asian and Pacific region, Cambodia has the worst score. Indonesia is in 61th place, better than Thailand (in 64th place) and the Philippines (in 74th place).

Word of Caution

On a general note, the ICC is going through a trying time. The international criminal justice system remains frail. African Union members have grown uneasy about the Court. African leaders have increasingly shown contempt for the Court, accusing the global judicial body of mainly targeting their continent and regarding its work as just another form of Western imperialism. Politicians in Kenya, Burundi and South Africa have sought to withdraw from the Court. Russia is also moving in the same direction.

Little evidence shows that the international pursuit of retributive justice through formal trials in war-torn or post-war states has made a positive impact. This does not mean that we should abandon the global attempt to advance human security through formal trials. But democratic and rule-of-law institution building may not always require the relentless pursuit of retributive justice.

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