The Cambodian Amnesties: Beneficiaries and the Temporal Reach of Amnesties for Gross Violation of Human Rights

Ronald C. Slye[1]

The Cambodian government passed two successive amnesties in the last decade in response to the lingering question of how to respond to the legacy of the Khmer Rouge. While negotiations aimed at creating a judicial mechanism for holding individuals accountable for atrocities committed by the Khmer Rouge have lurched forward and backward, and while international criminal trials for gross violations of human rights have become more common in the last decade, until recently the Cambodian government's primary official response to those responsible for one of the worst acts of violence in human history has been the passage of these two amnesties. The result has been a consistent official policy of impunity and amnesia.

Cambodia is not alone in preferring amnesty in response to a legacy of hatred and violence. Virtually every country that has emerged from a history of widespread violations of the fundamental rights of its peoples has preferred amnesty to prosecutions and other forms of accountability. While state preference for amnesty is common, there is a large variation among states with respect to the type of amnesty promulgated. The self-amnesty passed by the Chilean military dictator Pinochet in 1978 is fundamentally different from the amnesty administered by the Truth and Reconciliation Commission in South Africa from 1996 to 2001. The Chilean amnesty was a blanket one, promulgated by the government to shield its members from any form of accountability. The South African amnesty was much more sophisticated, promulgated by a newly elected and

[1] Ronald C. Slye is an Associate Professor of Law at Seattle University School of Law.

democratic Parliament for the purpose of providing a minimal level of truth and accountability for crimes committed during the apartheid era. South Africa required full disclosure as a condition for amnesty, thus transforming amnesty from a truth-hiding to truth-revealing mechanism. Along the continuum represented by the Chilean and South African amnesties, the Cambodian amnesties fall closer to the Chilean end of the spectrum; they are designed to entrench impunity and discourage even the most minimally-required investigation and accountability. Thus they discourage, rather than further, justice.

What makes the Cambodian amnesties unjust? Typically an amnesty has two consequences: 1) it prevents the criminal prosecution and punishment of perpetrators, and 2) it prevents victims from seeking damages, truth, and other forms of accountability from those responsible for the violation of their rights. There is some debate over whether international law obliges, or even should oblige, the prosecution and punishment of those responsible for gross violations of human rights. There is general agreement, however, that international law requires something more than the typical amnesty provides. At a minimum, justice requires some form of accountability and some form of recognition of the harm suffered by victims. The Cambodian amnesties provide neither.

Rather than discussing what international law and morality require with respect to accountability,[2] I will discuss two important choices facing drafters of an amnesty: 1) *who* should be protected by an amnesty; and 2) *how long* such an amnesty should last. The first question concerns amnesty beneficiaries, and is a relatively common one raised

[2] For a good discussion of what international law requires with respect to amnesties, see Naomi Roht-Arriaza & Lauren Gibson, *The Developing Jurisprudence of Amnesty*, 20 Hum. Rts. Q. 843 (1998); Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 Yale L.J. 2537 (1991); Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 Cal. L. Rev. 449 (1990).

by those who draft and study amnesties. The second question concerns the temporal nature of the amnesty. It is rarely, if ever, raised by either drafters or observers because drafters invariably intend their amnesties to be immediate and permanent. The beneficiary question is directly raised by the content of the Cambodian amnesties; the temporal question is raised by the history of accountability and amnesty in Cambodia and other transitional societies. Both have important implications for determining the legitimacy of an amnesty.

The Cambodian Amnesties

In 1994, the Cambodian government passed legislation banning the Khmer Rouge and providing amnesty to Khmer Rouge guerrillas who defected to the government between July 7, 1994 to January 7, 1995.[3] The amnesty provision states:

> This law shall allow for an amnesty period of six months after coming into effect to permit the people who are members of the political organization or military forces of the "democratic Kampuchea Group" [i.e. the Khmer Rouge] to return to live under the authority in the Royal Government of the Kingdom of Cambodia, without facing punishment for crimes which they have committed.[4]

The 1994 amnesty does not apply to "leaders" of the Khmer Rouge,[5] and appears to give some discretion to the King, Norodom Sihanouk, in determining who is granted amnesty and whether the individual amnesty grant is a full or partial one.[6] In addition to providing amnesty for any crimes they may have committed, members of the Khmer

[3] Anette Marcher, "Rin Verdict Leads to KR Tribunal Doubts," Phnom Penh Post, vol. 9, number 15 (July 21 – August 3, 2000). An estimated 6,600 members of the Khmer Rouge took advantage of the amnesty provision and defected to the government. *Id*.

[4] The Law on Outlawing the Group of Democratic Kampuchea, Article 5 (7 July 1994), reprinted in the Phnom Penh Post (21 – 28 July 1994). Some have argued that the 1994 law was not passed in compliance with the Cambodian Constitution. *See* Jan ven der Grinten, "The Law on the Outlawing the Group of Democratic Kampuchea" (on file with author). At least one Cambodian court implicitly disagrees, finding the law applicable to a criminal defendant who was accused of murdering foreign tourists in 1994. *See* AP, "Ex-Khmer Rouge Acquitted of Murder of Tourists," N.Y. Times, 19 July 2000.

[5] Article 6 ("For leaders of the 'Democratic Kampuchea' group the amnesty described above does not apply.")

[6] Article 7 ("The King shall have the right to give partial or complete amnesty as stated in Article 27 of the Constitution.")

Rouge are subjected to new liabilities under the 1994 legislation based solely on their membership in the Khmer Rouge.

Two years after this first amnesty, on 14 September 1996, the King issued a royal decree granting amnesty to the former Deputy Prime Minister of the Khmer Rouge government, Ieng Sary. The two Prime Ministers, Norodom Ranaridh (the King's son) and Hun Sen (who himself was a former official in the Khmer Rouge government) requested the Sary amnesty. The amnesty was granted in return for Sary's defection from the Khmer Rouge, referred to in the decree as "the Democratic Kampuchea Group." The relevant passage of the royal decree reads as follows:

> Amnesty is granted to Mr. Ieng Sary, former Deputy Prime Minister responsible for Foreign Affairs in the Government of Democratic Kampuchea, who was sentenced to death and confiscation of all property by order of the People's Revolutionary Court of Phnom Penh dated 19 August 1979 and with regard to penalties stipulated by the Law on the Outlawing of the Democratic Kampuchea Group which was promulgated by Royal Proclamation no. 01 BM 94 dated 15 July 1994.[7]

The amnesty protects Sary from his conviction *in absentia* for gross violations of human rights committed while he was Deputy Prime Minister for foreign affairs from 1975 to 1979. The court that convicted Ieng Sary (along with Pol Pot) was created by the newly formed Cambodian government that came to power after the Vietnamese invasion of 1979.[8]

Although the royal decree speaks of an amnesty, it appears to grant both an amnesty and a pardon. Pardons provide protection from liability *after* a finding of guilt, while amnesties provide protection prior to any such determination. Assuming that the

[7] Translation of decree on file with author.

[8] The trial and conviction of Ieng Sary has been criticized by some as a show trial. For an excellent discussion, and defense, of the 1979 trial, see the introductory essay by John Quigley in Howard J. De Nike, John Quigley, and Kenneth J. Robinson, Genocide in Cambodia: Documents from the Trial of Pol Pot and Ieng Sary (University of Pennsylvania Press, 2000) 19.

reference to the 1979 trial is more than descriptive, the decree *pardons* Sary for that conviction. In addition, the decree provides Sary with an *amnesty* for his liability arising from membership in the outlawed Democratic Kampuchea Group–liability created by the 1994 amnesty legislation. Significantly, the amnesty does not appear to provide any protection to Sary for any criminal acts he may have committed or ordered after his 1979 trial and before his defection from the Khmer Rouge in 1996.

The 1994 and 1996 Cambodian amnesties are designed to entice defections from, and thus weaken, an insurgent army. Such use of amnesties is relatively common historically. President Lincoln, for example, issued such an amnesty during the US civil war in the hope of encouraging defections from the Confederate army.[9] The broad use of amnesties during an armed conflict is often justified as a necessary condition for bringing about peace and preventing additional gross violations of human rights. That such amnesties may facilitate the immediate end of an armed conflict is clear; whether they

[9] In fact Protocol II of the Geneva Conventions encourages the use of amnesties at the end of an armed conflict to protect combatants from being prosecuted domestically for acts of violence that are lawful under international law. Article 6(5) of Protocol II states: "At the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained." One could interpret this encouragement of amnesty to permit amnesties for any acts, including grave breaches of the Geneva Conventions. The overwhelming majority of commentators rightly conclude that the Protocol's drafters did not intend with this section to undercut the numerous other provisions providing for the prosecution of those responsible for grave breaches of the Geneva Conventions. *See* Margaret Popkin and Nehal Bhuta, "Latin American Amnesties in Comparative Perspective," Ethics and International Affairs, vol. 13, page 99, 103 (1999) (citing letter to Margaret Popkin from Toni Pfanner, Head of Legal Division, International Committee of the Red Cross Headquarters, Geneva, Apr. 5, 1997 to the effect that Article 6(5) was not meant to apply to grave breaches under the Geneva Conventions). The Inter-American Commission on Human Rights quotes a letter from the ICRC to the Prosecutor of the International Criminal Tribunal for Yugoslavia supporting this interpretation. The letter states in relevant part:

> The preparatory work for Article 6(5) indicates that the purpose of this precept is to encourage amnesty, . . . as a type of liberation at the end of hostilities for those who were detained or punished merely for having participated in the hostilities. It does not seek to be an amnesty for those who have violated international humanitarian law.

Parada Cea v. El Salvador, Inter-Am. C.H.R. 1, OEA/ser. L./V./II.102, doc. 6 (1999); *see also* Naomi Roht-Arriaza & Lauren Gibson, *The Developing Jurisprudence of Amnesty*, 20 HUM. RTS. Q. 843, 863–66 (1998) (providing strong arguments for a narrow interpretation of Article 6(5) based on text, intent, and policy).

contribute to the development and protection of human rights depends on the type of amnesty granted. Some amnesties provide some measure of accountability, and thus contribute to the creation of a peaceful and just society. Other amnesties–in fact the vast majority of them–purposefully hinder accountability and entrench a culture of impunity, thus leading to a superficially peaceful order precariously built on a foundation of injustice. The Cambodian amnesties are of the latter type.

Choice of Beneficiaries

One of the most important decisions facing an amnesty drafter is the choice of beneficiaries. There exists a continuum of choices, ranging from an amnesty that applies to every individual for all time, to an amnesty that applies to one individual for one specific event. The first end of this continuum provides no collective system for holding individuals accountable for their acts. Near this end of the continuum is an amnesty that applies to all individuals for all acts committed prior to a certain date. A number of amnesties have taken this approach.[10] Moving further along this continuum are amnesties that are limited not only temporally but also by beneficiary qualifications. Thus, some amnesties protect a *class* of individuals for any act committed prior to a cut-off date – for example all members of a military force, or all members of a government, or all individuals involved in a particular conflict.[11] Some amnesties protect all

[10] For example, Nicaragua passed on amnesty in 1990 providing an amnesty to "[a]ll Nicaraguans" who committed crimes against the public order and security of the State. Law No. 81 on General Amnesty and National Reconciliation (1990), Art. 1(2), *reprinted in* 3T RANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES 591–92 (Neil J. Kritz ed., 1995) [hereinafter "3 TRANSITIONAL JUSTICE"]

[11] The 1995 Peruvian amnesty, for example, applies only to members of the military, police, and civilian agents of the state. *See* Human Rights Committee, Comments on Peru, UN Doc. CCPR/C/79/Add.67, para. 9 (1996). The 1986 Uruguayan law only applies to police and military officials. It was passed, however, to supplement an earlier amnesty that applied to all persons except for members of the police or military accused of the commission of certain criminal acts. Law No. 15, 848 (Law Nullifying the State's Claim to Punish Certain Crimes) (December 22, 1986), Art. 1, *reproduced in* 3 TRANSITIONAL JUSTICE at 598.

individuals for a limited set of acts–thus all those who committed a politically-motivated act, or all those who tortured or killed.[12] The focus in this Section is on the choice of amnesty beneficiaries, and specifically whether there is a difference between granting amnesty to political or military *leaders*, and granting amnesty to *followers* or *"foot-soldiers."* In particular, what are the consequences of such a choice on the effectiveness and justness of an amnesty?

International law provides some basis for distinguishing between superiors and subordinates in a chain of command. As a general rule, superiors cannot evade responsibility for violations of international law committed by their subordinates, and subordinates cannot evade responsibility for their own violations by hiding behind superior orders. In both cases liability is not absolute. Superiors can be held responsible for the wrongful acts of their subordinates,[13] echoing the general agency principle of respondent superior. The easy case is when the superior orders a wrongful act; the superior is then held liable for the resulting unlawful act caused by the implementation of that order. Further, a superior may be liable for wrongful conduct that he did not order if it can be shown that the superior knew or should have known about the wrongful conduct and did nothing to prevent it.[14] At the same time, subordinates who commit wrongful

---

[12] The 1995 South African amnesty is limited to "acts associated with a political objective." The Promotion of National Unity and Reconciliation Act (No. 34 of 1995) (South Africa) § 20 (setting forth the requirement that an act be associated with a political objective and that the applicant make full disclosure of all relevant facts in order to qualify for amnesty). Likewise, kidnapping, extortion, and drug-related crimes are specifically excluded from eligibility under the 1993 El Salvadoran amnesty. *See* Law on General Amnesty for the Consolidation of Peace (Decree No. 486) (March 26, 1993), Art. 3(b) *reproduced in* 3 TRANSITIONAL JUSTICE at 547.

[13] *See* Protocol I to the Geneva Conventions *reprinted in* Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict, Protocols I & II to the Geneva Conventions, 16 I.L.M. 1391 (1977); Draft Code of Crimes Against the Peace and Security of Mankind, art. 6, *Report of the International Law Commission on the work of its forty-eigth session*, at 34–39, U.N. GAOR, 51st Sess., Supp. No. 10, U.N. Doc. A/51/10 (1996). *See also* Statute of the ICC, Article 28.

[14] *See* Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998), *reprinted in* 37 I.L.M. 999, 1017 (1998), Article 28; Statute of the International Tribunal for the Former Yugoslavia, S. C.

acts that cause harm are liable even if the act was committed pursuant to the order of a superior so long as it can be shown that the order or act were manifestly illegal.[15] Although following orders thus does not provide an absolute defense to liability, it may be used to mitigate the subordinate's punishment.

Argentina is one of the few countries that passed a general amnesty distinguishing between superiors and subordinates.[16] The Argentinean "Due Obedience" law establishes an irrebuttable presumption that a subordinate who committed a violation acted under orders without any ability to resist or to assess the orders' lawfulness.[17] In other words, subordinates are not liable for their wrongful acts. The presumption does not apply to the most senior military officials. The Argentinean amnesty thus focuses on the culpability of the most senior leaders and not the followers.[18] Similarly, the 1994 Cambodian amnesty excludes "leaders," thus nominally making a distinction between superiors and subordinates. (The 1994 amnesty does not, however, define "leader.") The 1996 amnesty, on the other hand, singles out one particular superior, Ieng Sary.

Res. 827, U.N. SCOR, 48th Sess. 3217th mtg., at 1-2, U.N. Doc. 5/Res/827 (1993), *reprinted in* 32 I.L.M. 1159, 1175, Art. 7(3); Statute of the International Tribunal of Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., at 1, U.N. Doc. S/Res/955 (1994), *reprinted in* 33 I.L.M. 1598, 1604-5, Art. 6(3).

[15] Article 33 of the Statute of the ICC provides that following orders is a valid defense only if 1) the person was under a legal obligation to obey, *and* 2) the person did not know the order was unlawful, *and* 3) the order was not to commit genocide, crimes against humanity, or other manifestly unlawful acts. Rome Statute of the International Criminal Court, *supra* note 14, 33 ILM at 1019.

[16] The 1863 amnesty passed by President Lincoln during the US civil war is one of the few other amnesties that distinguished between superiors and subordinates, applying its benefit only to "military leaders." Jonathan Truman Dorris, PARDON AND AMNESTY UNDER LINCOLN AND JOHNSON (1953) 35 (noting that the 1863 amnesty does not apply to military leaders over the rank of colonel in the army or lieutenant in the navy).

[17] Law No. 23,521 (4 June 1987) (the "Due Obedience Law"), *reproduced in* Kritz, vol. III at 507. The protection of the Due Obedience law does not apply, however, "to crimes of rape, kidnapping and hiding of minors, change of civil status, and appropriation of immovables through extortion." Id. at Article 2. The Due Obedience law was upheld by the Argentinean Supreme Court shortly after its passage. *See* "Constitutionality of the Law of 'Due Obedience' and Dissenting Opinion (Supreme Court of Argentina, Buenos Aires)," in 8 Human Rights L. J. no. 2-4 (1987). In 2001, the Argentinean Supreme Court reversed this earlier decision and struck down the due obedience law. *See* infra note 23.

[18] Less than fifty officers were left unprotected by the law. *See* Naomi Roht-Arriaza, "State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law," 78 Cal. L. Rev. 451, 459 – 60 (1990).

Does it matter whether an amnesty focuses on subordinates or superiors? To answer this question requires reference to two different approaches to the legitimacy of amnesties: a "rights-based" approach and a "social order" approach. The rights-based approach depends on our collective sense of justice and morality. The social order approach, while certainly not unconcerned with justice and morality, depends much more than the first on empirical arguments concerning stability and social peace. The rights-based approach focuses on the rights of individual victims and asserts that there are certain fundamental rights that must be protected by the state, including the right to truth, accountability, acknowledgment, participation, and reparations. The rights-based approach focuses on an amnesty's contribution to the fulfillment of these rights. The social order response focuses on the empirical question of whether an amnesty results in a substantial lessening of violence and violations and the creation of a peaceful social order. The social order approach assumes that "peace" is defined relatively thinly as an absence of conflict, and not defined more thickly as including an absence of conflict based on a minimum requirement of social justice.

Defenders of the rights-based approach argue that states have a primary obligation to protect and further the fundamental rights of individuals, and that peace and stability will only be achieved if the rights of victims are recognized, vindicated, and protected. Defenders of the social order approach argue that too great a focus on the rights of victims–in particular on the accountability of perpetrators–will undermine efforts to create a stable social order. Whether truth, accountability, acknowledgment, participation, and reparations contribute to genuine social peace presents an empirical question, and the anecdotal evidence we have so far is inconclusive. A similar inquiry

asks whether the rule of law and individual accountability more generally contribute to a just and stable society–the overwhelming consensus is that they do. The case of amnesties for human rights abuses presents a narrower question: whether creating an exception from the normal application of individual accountability when the powerful abuse their power is necessary for, compatible with, or detrimental to, a stable and just society. The example most cited to support the assertion that forced amnesia, whether through a formal amnesty or an informal system of impunity, provides a stable peace is that of post-Franco Spain. Spain responded to the death of Franco not by engaging in inquiries and prosecutions for clear violations that occurred under the dictator; rather, the government and the overwhelming majority of the population refused to even acknowledge that violations had occurred. Spain did not descend into civil conflict, but instead has developed into a relatively stable and peaceful democracy. Post-Vichy France, post-Civil War United States, and even post-Khmer Rouge Cambodia also provide examples of impunity coupled with relative peace and security.

The rights-based and social order approaches differ in the importance they place on deterrence. The effectiveness of accountability in preventing future violations is an important consideration for defenders of the rights-based approach. Conversely, defenders of the social order approach place less faith in the effectiveness of deterrence. This analysis of the importance of deterrence to the two approaches is somewhat simplified; a full understanding of the role and importance of deterrence must take into account the different effects of immunizing subordinates or superiors.

An amnesty that focuses on subordinates, or foot soldiers, provides a benefit to those most immediately responsible for a violation–the torturer for example. Such an

amnesty, if coupled with a truth requirement like the South African amnesty, provides detailed forensic information about specific violations: who did what to whom; how, where, and when a victim died; where a victim's body might be found. While most victims are interested in these sorts of details, they are also interested in *why* certain violations were committed, and why they, or their loved ones, were the targets of such acts. Subordinates can provide some answer to these questions. At the most basic level, they might be able to provide information about why an individual was chosen as a target; who chose; and if the subordinate chose, why this particular individual was targeted. They may also be able to point the finger across and up the chain of command, and thus increase the number of people who are publicly identified with a particular atrocity, and reveal the system of repression–the formal policies and orders–that resulted in such violations.

An amnesty limited to subordinates may provide a great deal of specific forensic information about a particular atrocity. However, it will also result in those who were most immediately responsible for torture and other atrocities walking free with minimal accountability and no punishment. Such an amnesty offends our collective sense of justice and morality embodied in the rights-based approach. A system of impunity for subordinates has two important consequences. First, it means that the individual torturer may mingle among his victims–for example by shopping in the same market–leading to the possibility of victims experiencing additional trauma and fear, and tempting them to exact personal retribution. Second, providing amnesty to the torturer undercuts specific and general deterrence. With respect to specific deterrence, immunizing the torturer allows an individual who has demonstrated the capacity to inflict the most horrendous

pain on another human being to continue to operate freely in society. Such an individual may be prone to other acts of violence and may be susceptible to playing a similarly violent role on behalf of another political movement or even for non-political ends. With respect to general deterrence, immunizing a torturer as part of a political compromise sends a message that acts of extreme violence will result in accountability only if they are not part of a successful political movement, thus creating an incentive for wrongdoers to lessen the prospect of punishment by causing the most amount of disruption possible. The person who tortures alone will rarely if ever be the subject of amnesty, while the torturer who acts on behalf of a political movement that successfully challenges or supplants the government may benefit from a negotiated amnesty.

That said, limiting an amnesty to subordinates may further justice in an important way: it may facilitate the prosecution and accountability of superiors and leaders, those most responsible for creating the conditions–including the issuance of direct orders–that resulted in gross violations of human rights. An amnesty for subordinates may facilitate such accountability in two ways. First, by pointedly omitting superiors, it focuses public attention on responsible individuals left unprotected by the amnesty. Secondly, such an amnesty may result in testimony and other information from subordinates that can be used to hold superiors accountable. With the threat of prosecution removed, subordinates will be more willing to come forward and testify.

Holding superiors accountable provides important benefits to a transitional society. Superiors are closely identified with the reign of terror they created or oversaw: they are the Pinochets, the Hitlers, the Pol Pots, and those just below them, the Contreras's, the Eichmanns, and the Sarys. They are thus highly symbolic figures whose

prosecution and accountability act as an important proxy for holding their governments and associates accountable for their collective acts of wrongdoing. Moreover, holding superiors accountable furthers in an important way special and general deterrence. Accountability for superiors furthers special deterrence by decreasing the possibility that they and their associates will regain power and oversee a similar reign of terror and violations. Accountability for superiors furthers general deterrence by discouraging others with political ambitions from pursuing policies that result in gross violations of human rights.

In addition to furthering these instrumental deterrence-based goals, holding superiors and leaders accountable also corresponds to our collective moral sense that those most responsible for systematic violations should be held accountable. Agnes Heller famously distinguished between "evil" and "bad" individuals.[19] Evil individuals are those who promote, order, and create the environment that results in or encourages gross violations of human rights. They are subject to a high level of moral responsibility for they are the ones who exercise the most choice. Bad individuals are those who carry out the policies of evil individuals. They have less, although certainly still some, choice with respect to their actions. They are the ones who agree to commit atrocities because they are so ordered, because they are seduced by political ideology, because they want to increase their standard of living, because they want to feed their family, because they want to avoid harm to their family or themselves. They are thus appropriately subjected to a lower level of moral responsibility than evil individuals. Holding leaders accountable therefore satisfies a basic idea of justice – that of just desert. That is, those

[19] Agnes Heller, *The Natural Limits to Natural Law and the Paradox of Evil*, *in* On Human Rights 149 (Stephen Shute & Susan Hurley eds., 1993).

who are most culpable, and who commit the most heinous acts, are most deserving of being brought to justice.

International law reflects this heightened sense of a superior's responsibility for both his own acts and some acts of his subordinates. The legal doctrine of command responsibility in both the military and civilian contexts supports the general idea that leaders are more culpable and blameworthy than followers. We do not hold a subordinate responsible for the acts of his superiors.[20] We do, however, hold a superior responsible for the acts of subordinates *even if* the superior did not have actual knowledge of the acts of his subordinates if, given all the circumstances, he should have known of the abuses.

There are, however, strong arguments against shielding subordinates from accountability if superiors are pursued. Absent formal immunity, superiors are not always the defendant of choice for state prosecutors bringing criminal claims and victims bringing private civil claims. Other issues besides moral culpability affect the decision of who to pursue, including the availability of evidence, the obscenity of the wrongful acts performed by the immediate violator, and the legal and political resistance an individual can mount to deflect efforts to hold him accountable. Ironically, sensitivity to such considerations usually results in an accountability strategy that focuses on subordinates and not leaders. This is because evidence regarding the culpability of the immediate perpetrator is more easily discovered than evidence linking someone higher up the chain of command. A torture victim, for example, is more likely to be able to identify her

[20] Although we do alter our evaluation of the gravity of the crime committed by a subordinate based upon the aggregate actions of superiors and others. Thus a simple act of torture may constitute a crime against humanity if it is found to be a part of a larger campaign of persecution and the individual torturer has some knowledge of that larger campaign.

immediate torturer than the individual who ordered or encouraged the violation. The horrendous acts committed by the immediate perpetrator are more likely to stir the passions of the public and result in a demand for justice than the more distant, although crucial, role of their superiors. Such sentiments argue for an amnesty that is limited to superiors and allows for the use of prosecution and other forms of accountability against the individual torturers and killers. By allowing victims to hold subordinates accountable, amnesties limited to superiors satisfy the important goals of justice and morality noted above that are frustrated by a subordinate-only amnesty. By the same token, they frustrate the important justice goals that are satisfied by holding superiors accountable.

Providing amnesty to superiors is often justified as necessary to facilitate a transition to a more human rights friendly society, and thus necessary to establish a peaceful social order. This is the primary argument of defenders of the social order approach to amnesties. Without a promise of amnesty, those who hold the reins of power and terror will not willingly step aside. Providing amnesty to such superiors thus furthers human rights by preventing further violations and creating an opportunity for the creation of a more stable, just, and peaceful society. Not providing such an amnesty, in turn, perpetuates injustice and may lead to the creation of more victims.

The Cambodian amnesties illustrate the distinction between granting amnesty for subordinates and superiors. The 1994 amnesty explicitly excludes "leaders" of the Khmer Rouge, thus limiting itself to subordinates. All of the benefits identified earlier with respect to such amnesties are thus available to support the work of the proposed tribunal. Subordinates who were important eye witnesses to both the violations that

occurred, as well as to the chain of command that resulted in such violations, should be able and willing to provide evidence to the tribunal. This may facilitate the successful prosecution of those high profile leaders most associated with the crimes of the Khmer Rouge.

The singling out of Ieng Sary by the 1996 amnesty provides the only possible exception to this window of opportunity to hold leaders accountable. As noted above, amnesties to superiors are often cited by defenders of the social order approach as crucial to preventing future violations. The Cambodian government cited such an argument to defend the amnesty provided to Ieng Sary, noting that it was necessary to weaken and eventually eliminate the military threat and the threat to human rights posed by the insurgent Khmer Rouge. Today, with the benefit of hindsight, it is not clear this concession to Ieng Sary was necessary to defend against the threat posed by the Khmer Rouge. On the other hand, the amnesty is limited to one individual, leaving open the possibility that other high level officials of the Khmer Rouge might be open to prosecution or other forms of accountability. In addition, the draft of the Statute for the Tribunal prohibits the government from granting any amnesty beyond that granted to Ieng Sary, and even suggests that the tribunal may curtail the effect of that amnesty. The possible erosion of Sary's amnesty after the dissipation of the threat posed by the Khmer Rouge underscores the relationship between the rights based and social order approaches to amnesty.

The decision whether to grant an amnesty to superiors is often a decision between providing accountability for existing victims of violations, and preventing further violations; this dilemma is often presented as a choice between peace and justice. Peace

and justice, however, are not unrelated; each is dependent on the other. Injustice undermines peace, and conflict hinders accountability. Thus, efforts to further the development and protection of rights must involve both justice and conflict resolution. While these two goals are often held up as antagonists, they are in fact each necessary for the other. In other words, the rights-based and social order approaches are more intimately intertwined than many commentators are willing to admit. How, then, to further the goals of both rather than pitting the one against the other? A brief examination of the recent history of amnesty and accountability in transitional societies suggests an answer. This leads to the second issue concerning amnesties: how long should such an amnesty last?

Peace and Justice: The Temporal Reach of Amnesties

Amnesties are not meant to be temporary. Some amnesties are only available for a limited period of time, but once granted they are almost always meant to be permanent.[21] Recently, however, governments that inherited amnesties clearly meant to be permanent have been placed under increasing pressure to restrict and even annul such amnesties. Initially, such challenges were brought within the domestic courts of the country that promulgated the amnesty and, until recently, all such challenges have failed. By contrast, the few international courts that have addressed amnesties granted for gross violations of human rights have all found such amnesties illegal. Domestic pressure by victim's groups and human rights advocates, along with the advent of Pinochet-style

[21] In 1980, Iran granted amnesty to those who were imprisoned for certain non-violent crimes conditional on them not committing the same or similar crime. While this amnesty is meant to be permanent, it is one of the few that provide conditions for its revocation. See the message of Imam Khomeyni announcing the amnesty, reproduced in BBC, "Khomeyni's Declaration of a General Amnesty," March 20, 1980. Algeria passed an amnesty in 1999 that provided both for a general permanent amnesty as well as a probationary period of from 3 to 10 years during which an individual's conduct is monitored, and during which amnesty may be revoked. *See* Law of Civil Harmony, Law No. 99-08, 13 July 1999 (www.ub.es/solidaritat/observatori/english/algeria/documents/law.htm).

transnational prosecutions that refused to defer to foreign amnesties, emboldened domestic courts to question the legitimacy of their own government's amnesties.[22] Argentinean judges, for example, began to challenge that country's amnesty laws,[23] culminating in the formal repeal of those laws by the Argentinean Congress. Similar moves have been made by Chilean judges to hold individuals accountable for gross violations of human rights committed during the Pinochet dictatorship.[24]

At the same time that courts have begun to challenge amnesties both foreign and domestic, *de facto* grants of impunity resulting from the failure to prosecute or otherwise address historical crimes have also been under challenge. The large number of cases arising out of human rights violations committed during and in connection with World War II–including claims arising from Nazi gold and art seizures, from Italian and German insurance policies that were never paid, and from the use of slave labor by the Japanese and German governments–illustrates a newfound zeal to pursue violations that have lain dormant in the public imagination for decades. The current efforts to create a tribunal for prosecuting crimes of the Khmer Rouge, now more than two decades after those events, is a more recent example of a revived determination to address such historical crimes.

---

[22] The most famous such example is the Spanish court's willingness in the late 1990s to entertain a criminal prosecution against the Chilean dictator Augusto Ugarte Pinochet despite the amnesty that his government granted to itself in 1978.

[23] *See* Human Rights Watch, "Argentina: Supreme Court Should Resist Army Pressure," available at http://hrw.org/press/2003/03/argentina031203.htm. The report notes that on March 7, 2003, a third judge struck down the applicability of the Argentinean amnesty laws to killings that took place during that country's Dirty War. The first such judgment, issued by Judge Cavallo on March 6, 2001, was upheld by the Federal Court of Buenos Aires in November 2001. That decision is currently pending before the Argentinean Supreme Court. For the original decision, see Resolución del Cavallo *at* http://www.derechos.org/nizkor/arg/ley/juezcavallo03mar.html. *See also* Human Rights Watch, "Argentina: Commitment on Prosecutions Welcomed," December 19, 2001, available at http://www.hrw.org/press/2001/12/arg1218.htm (applauding a government decree "ensuring courts consider for prosecution all future cases involving former military and police officers").

[24] The Chilean Supreme Court in July 1999, for example, declared that the country's 1978 amnesty law did not apply to cases of disappearances. *See* Gustavo Gonzalez, "Rights-Chile: 'Caravan of Death' Trial to Proceed Says High Court," Inter Press Service, July 20, 1999, available at http://www.oneworld.org/ips2/july99/00_14_001.html.

Post-Franco Spain, along with post-Vichy France, post-Civil War United States, and post-Khmer Rouge Cambodia are all examples of such delayed accountability. They illustrate a trend in state practice of granting immediate impunity which, after the passage of time, gives way to accountability. Of all of these societies, the United States appears to be the most delayed in providing any form of direct accountability for the violation of slavery. While reparations to victims of slavery were attempted shortly after the US Civil War, the descendants of US slaves had to wait until a century later for formal legal and political recognition of the right to be free of discrimination. In contrast, France waited only a few decades after the end of World War II to begin to identify and hold accountable individuals complicit in Nazi atrocities—although such efforts have been minimal. Less than three decades after the fall of Franco, Spain has begun to examine its violative past. Cambodia has been one of the most active of these four examples, publicly discussing the atrocities of the Khmer Rouge through debates over accountability and through the preservation and public exposure of Khmer Rouge atrocities through such institutions as the Genocide Museum at Tuol Sleng. Of course, in all four cases the amount of accountability has been minimal, and the social cost of waiting decades to begin to identify and hold individuals accountable is undoubtedly significant, although difficult to quantify.

These examples illustrate how the passage of time may increase the political will to hold individuals accountable for past atrocities. This should not come as a surprise, for the passage of time has always affected our sense of what justice requires. The most common manifestation of this phenomenon is statutes of limitation.[25] Immunities also

[25] There are others as well, including the equitable doctrine of laches. Most of the observations I make concerning statutes of limitations also apply to other similar legal mechanisms.

illustrate the relationship between the passage of time and accountability. The effect of statutes of limitation is the opposite of amnesties in that limitations periods initially allow claims to be brought and then bar such claims after the passage of the statutory amount of time. Immunities are more like amnesties in that they bar claims immediately upon the occurrence of a wrongful act. The policies underlying statutes of limitation, and head of state and diplomatic immunities, and current trends in the law with respect to all three, also provide insights into the contemporary treatment and legitimacy of amnesties.

Statutes of limitation establish the temporal point at which the pursuit of accountability risks injustice. Claims for wrongs committed in the distant past are viewed with trepidation for two major reasons: (1) they present high evidentiary barriers, and (2) they disrupt reasonable expectations of social stability and certainty. The ability to establish and corroborate evidence becomes more difficult with the passage of time – witnesses die, move, or become less sure in their recollections, and documents deteriorate or disappear. Statutes of limitation are thus designed to make sure that matters are raised and adjudicated before the onset of such evidentiary concerns. In addition, statutes of limitation protect reasonable expectations of stability and certainty by requiring that defendants be given timely notice of any claim against them. By establishing a time after which a claim may not be brought, statutes of limitations provide closure and certainty with respect to liability.[26] In fact, this latter justification, concerning notice to potential defendants, is probably stronger than the evidentiary concern, since legal systems

[26] *See* Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 US 342, 348-9 (1944) (**"**Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.").

regularly tolerate the passage of a fair amount of time between the filing of a complaint and the testing of evidence through the evidentiary rigors of a trial.

Concerns raised by stale evidence and the desire for closure are given less weight in cases involving the most extreme violations, or in cases where the delay in bringing a claim is caused by forces outside of the control of the claimant. Thus the more serious a violation, the longer the period of limitation. The crime of murder, for example, is not subject to any period of limitations in most US states.[27] Under international law, war crimes and crimes against humanity are not subject to any period of limitations.[28] The limitations period may be equitably tolled if, for example, the defendant fraudulently conceals the existence of a cause of action; the plaintiff is subject to a legal disability, such as infancy, insanity, or imprisonment; or the plaintiff is prevented from filing suit by force of law.[29]

The policies underlying an extended statute of limitation for the most serious crimes, and tolling in cases of fraud and other circumstances, provide a serious challenge to amnesties. While amnesties are like statutes of limitation in that they create a barrier to accountability, they are unlike statutes of limitation in that they usually provide no opportunity for such accountability. Amnesties usually apply to the most serious

---

[27] *See* MODEL PENAL CODE § 1.06, cmt 2(a) (noting that murder, treason, and other crimes of comparable magnitude often have no limitation period).

[28] *See* Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Nov. 26, 1968, 754 U.N.T.S. 73; European Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes, *opened for signature* Jan. 24, 1974, Europ. T.S. No. 82, *reprinted in* 13 I.L.M. 540. For an example of the application of this principle in practice, *see* Federation Nationale des Deportes et Internes Resistant et Patriotes and Others v. Barbie, Cass. Crim [Criminal Chamber], Dec. 20, 1985, *translated in* 78 I.L.R. 125 (French prosecution brought against individual for Nazi-era atrocities decades after the commission of the underlying acts).

[29] "Developments in the Law: Statutes of Limitations," 63 Harv. L. Rev. 1177, 1220-1237 (1950) (discussing postponement and suspension of statutes of limitation). Suspension of statutes of limitation when plaintiffs have been prevented from filing suit by force of law does not appear to refer to amnesties, but to statutes and injunctions that temporarily protect a defendant from being sued. The authors of this comprehensive survey cite as an example an Alabama statute that prohibits suit against a personal representative for a specified period after qualification. *Id.* at 1233 n. 466.

offences–those for which there is a long or no limitations period–and in fact create the sort of barrier to accountability that justifies extending, through tolling, the period during which a claim may be brought.

More like amnesties than statutes of limitations–and thus presenting a less serious challenge to an amnesty's legitimacy–are diplomatic and head of state immunities. Like amnesties, they bar claims for accountability immediately following a violation. Like some amnesties in practice, after a period of time such immunities fall away and open the door to accountability. Unlike amnesties, however, the life of immunities is not tied to the mere passage of time, but to the changing of the official status of the individual. Immunities generally attach to an office, and only derivatively to the individual who holds that office; the immunity usually does not remain with the individual after she leaves her official position. Despite these differences, immunities do share an important similarity with the emerging trend of amnesties in practice: they usually delay, rather than prohibit, accountability.

Defenders of head of state immunity justify it as protecting the nature and dignity of the office, comity, mutual respect among nations, and the stability of international relations and diplomacy.[30] Similarly, defenders of the more general practice of granting diplomatic immunity to state officials cite to the importance of preserving relations among states, and facilitating the official actions of state representatives. [31]

The ICJ recently issued a decision reaffirming the importance of diplomatic immunity because of the crucial functions performed by, in that case, a Minister of

[30] *See* Lafontant v. Aristide, 844 F. Supp. 128, 132 (EDNY 1994) (mentioning all of these justifications).
[31] *See* Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) ¶ 53-5, 41 ILM 536, 549-50 (2002) (affirming the functional arguments in favor of official immunities under international law).

Foreign Affairs.[32] The court's opinion was careful to note, however, that it was only pronouncing on the validity of diplomatic immunity from criminal jurisdiction asserted by a national court. The court specifically noted that its reasoning did not apply to assertions of jurisdiction by an international tribunal, and also that it did not apply to a former state official.

In fact prior to the ICJ decision, the ICTY reflected the modern trend concerning such immunities and approved the first international indictment against a sitting head of state, Solobodan Milosovic. The ICJ decision does not challenge that indictment, specifically noting that its reasoning does not apply to assertions of jurisdiction by an international criminal court. Assertions of accountability against sitting heads of state are limited and controversial. Assertions of jurisdiction against *former* heads of state and officials, however, are much more widely accepted. While this may mean that claims may not be allowed until many years, if not decades, after the underlying event, the policies that justify extending and tolling limitations periods can also be used to justify the delayed assertion of claims against a state official.

Statutes of limitations and immunities, therefore, allow accountability long after the occurrence of the underlying crime. The evolving practice of amnesties, whereby immunity attaches immediately and then is later lifted, is similar to the more formal practice of diplomatic immunity and tolling of limitations.[33] In both cases accountability is delayed, but not foreclosed.

---

[32] *Id.*

[33] A potentially significant difference between amnesties, on the one hand, and limitations and immunities on the other concerns the initial expectations of both. Recipients of amnesties assume that the amnesty is permanent, and may have acted accordingly by, for example, giving up power. The jurisdiction concerning immunities and the tolling of limitations make it less reasonable for a recipient to claim unfulfilled expectations upon the later assertion of accountability. A similar argument can probably be made for amnesties, especially those that apply to gross violations of human rights.

Accountability for the crimes of the Khmer Rouge follows this evolving practice of amnesties. With the exception of the Vietnamese-sponsored trial *in absentia* in 1979, there has been no mechanism for holding members of the Khmer Rouge accountable for their violations. It is only now, close to three decades after the event, that there is a serious effort to provide accountability.

This evolving practice of states with respect to amnesties suggests the creation of a limited amnesty that may continue to be attractive to its beneficiaries while at the same time providing some possibility of accountability. State practice with respect to amnesties approximates something like a reverse statute of limitations: a period of time during which accountability is initially barred, and then lifted after some period of time so that some form of accountability–sometimes as much as a criminal trial–can take place. This practice could be incorporated into a formal rule of international law that would allow the granting of an amnesty that would initially last for only five or ten years. At the end of that period, an evaluation could be made to determine if the beneficiary of the amnesty is entitled to a permanent amnesty or something less. Such a determination could be based upon the actions of the beneficiary during the "probationary" limited amnesty period. This would create an incentive for beneficiaries (1) to show through their words and deeds that they no longer pose a threat to society; (2) to provide personal reparations not only to their immediate victims but to the larger society; and (3) to model human rights positive behavior to similarly situated individuals who might otherwise commit or sponsor gross violations of human rights. It is important that the life span of the initial amnesty be at least five years, both to provide a sweet enough "carrot" to induce the recipient to give up power, as well as to provide enough time for the

beneficiary to demonstrate more than a superficial commitment to human rights and the rule of law. A permanent amnesty at the end of the probationary period might be rare, and could be conditioned on further demonstrations of support, such as participating in a truth commission, testifying at the trial of others, or otherwise assisting in investigations. If a permanent amnesty is not granted, the actions during the probationary period that were found not to be sufficient could be used in mitigation during any subsequent criminal or civil action.

The two Cambodian amnesties are now nine and seven years old. They were both justified as necessary to entice defections from the exiled Khmer Rouge. That function is no longer necessary today, and the emerging trend of the law of amnesties suggests that such amnesties should be weakened, if not reversed, by the tribunal. The drafters of the tribunal statute clearly have such a situation in mind. The statute explicitly prohibits the Cambodian government from granting, in the future, any amnesty or pardon to "any persons who may be investigated for or convicted of crimes" covered by the tribunal."[34] With respect to amnesties and pardons already granted by the Cambodian government, the statute makes specific reference to the 1996 pardon and amnesty to Ieng Sary. The drafters do not go so far as to reverse Sary's protection, instead delegating to the tribunal the power to review and determine the scope of that amnesty.[35]

There is no reference in the statute to the 1994 amnesty. As noted above the 1994 amnesty was limited to subordinates. The effect of this is that the more publicly identified leaders responsible for the atrocities of the Khmer Rouge are open to prosecution – potentially including Ieng Sary – while the more numerous subordinates

[34] Statute, Art. 11(1).
[35] *Id.*, Art. 11(2).

will continue to be free to circulate among their former victims with impunity. So long as the tribunal is empowered to revisit the 1996 amnesty, there is no reason to preclude a similar examination of the 1994 amnesty. Empowering the tribunal to review the 1994 amnesty would provide an opportunity for the tribunal to use its discretion in granting the "carrot" of preserving an individual's immunity to entice that subordinate to provide evidence concerning atrocities and those who ordered them. This would preserve the benefits resulting from an amnesty limited to subordinates, while at the same time extracting some accountability–through testimony and the provision of other evidence– from those individuals who performed most of the actual tortures and killings.

Conclusion

The answer to the "who" and "how long" questions influence the legitimacy of an amnesty but are not in themselves decisive of that question. While some argue that all amnesties by their nature are illegitimate, I have argued that some types of amnesties can qualify as legitimate. Amnesties can be divided into three broad categories: amnesic, compromise, and accountable.[36] The Cambodian amnesties are amnesic. Their primary purpose is to conceal and forget, rather than reveal and account. They provide no accountability, no benefits to victims, and no revelations concerning the violations of the amnesty's beneficiaries. They are thus illegitimate.

[36] An amnesty is "accountable" if it imposes some form of accountability on wrongdoers and provides some relief or reparations to victims. The 1995 South African amnesty is the only amnesty that currently qualifies as an accountable amnesty. Compromise amnesties fall between accountable and amnesic amnesties, and partially reveal and partially conceal. Amnesties passed in Guatemala and Honduras are good examples of compromise amnesties. For the Honduran amnesty *see* Vladimir Recinos, *Honduran Supreme Court Rules Against Military Officers' Petition*, F.B.I.S. LAT 96-015 (Jan. 23, 1996); Honduras, Corte Suprema de Justicia, Recurso de Amparo en Revision, No. 60-96, case Hernandez Santos y otros (Tegucigalpa Jan. 18, 1996). For the Guatemalan amnesty see Margaret Popkin, *Guatemala's National Reconciliation Law: Combating Impunity or Continuing it?*, 24 Revista IIDH173 (1996). I have discussed in more detail these three categories of amnesties in Ronald C. Slye, "The Legitimacy of Amnesties under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?" 43 Virg. J. Int'l L.173 (2002). There is a fourth category, corrective amnesties, that is not applicable to this discussion.

The substantive differences between the two Cambodian amnesties illustrate the important issues underlying choice of beneficiaries. Their implementation in light of the recent agreement to create a criminal tribunal to try members of the Khmer Rouge illustrates the contemporary ambiguity with respect to amnesties for such serious crimes and the contemporary pressure to limit the reach and strength of such amnesties. The recent agreement to create a tribunal to hold members of the Khmer Rouge accountable is a welcome development. It would be a shame to mar such a development by recognizing and giving legitimacy to the illegitimate Cambodian amnesties.

The current draft agreement between the UN and the Cambodian Government for the creation of a tribunal, which is still awaiting formal approval by the Cambodian Parliament, does not take a very strong stand against the recognition of amnesties. It forbids the future granting of amnesties by the Cambodian government to persons suspected of abuses during the Khmer Rouge period, but does not forbid the recognition of amnesties granted prior to the coming into force of the tribunal agreement.[37] As noted, the agreement makes a specific reference to the 1996 amnesty granted to Ieng Sary, but instead of clarifying its legitimacy, it leaves to the tribunal judges the decision of whether to review and limit Sary's amnesty.[38] While disappointing, this decision to defer to the judges opens the possibility that Sary could in effect be the recipient of a limited amnesty as described above. Sary has already enjoyed seven years of formal immunity from prosecution. If he were to be tried and convicted by the tribunal, his sentence could be mitigated if he has demonstrated adequate remorse and rehabilitation through acts of reconciliation and personal reparation. The current draft agreement would not preclude

[37] Draft Agreeement, Article 11(1).
[38] Draft Agreement, Article 11(2).

the judges from making such a decision. As recommended above, the tribunal should also be given the same power with respect to the 1994 amnesty. This would allow the tribunal to put pressure on subordinates to testify in return for continued immunity, and thus increase our knowledge of atrocities committed during the Khmer Rouge period and provide crucial evidence that can be used to prosecute those most responsible for such atrocities. If they are given the chance, and have the courage to do so, the tribunal judges might piece together a limited amnesty that contributes to both truth and justice, and thus make an important contribution to the creation of a rule of international law that recognizes the important political realities facing transitional societies without ignoring the importance of accountability for gross violations of human rights.