

Kampuchean Genocide and the World Court

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From 1975 to 1978 the government in Kampuchea, commonly called the Khmer Rouge or the Pol Pot regime, intentionally murdered at least half a million people and subjected a million others to forced labor, starvation, and refusal of medical treatment that resulted in death. Kampuchea was turned into a vast concentration camp. Extermination camps were established all across the country, in which the Khmer Rouge leaders ordered the murder of all intellectuals, all officials of previous governments, anyone who complained about the labor or lack of food, all “class enemies” and all of their spouses, children, and families. Amazingly enough, the Khmer Rouge, like the Nazis during the Holocaust, kept records of what they did—perhaps a sign of the genocidal mindset. The Tuol Sleng prison in Phnom Penh, for example, has records of 14,000 prisoners who were murdered. Photographs were taken of most of the victims. They include women and children. The evidence of genocide is strong.

The United Nations Commission on Human Rights [U.N. Commission] was apprised of human rights violations in Kampuchea as early as 1977, when Australia, the United Kingdom, United States, Canada and Norway brought charges before the U.N. Commission for massive violations of human rights and produced thousands of pages of testimony and documentation. (See, e.g., U.N. Doc. E/CN.4/Sub.2/414/Add. 1-10 (1978).) The Subcommittee for the Elimination of all Forms of Discrimination against Minorities appointed a rapporteur who concluded in the Boudhiba report that this was the worst case of human rights violations since the Nazi era. (U.N. Doc. E/CN.4/1335 (1979)) However, the Boudhiba report was buried—tabled—and the U.N. Commission did nothing with it. Given that the genocide has already occurred and that the U.N. Commission failed to act in a timely manner, what can be done now to bring international law to bear upon the state and the individuals responsible for genocide?

I lived in Kampuchea in 1980 and helped to set up the relief program there for the United States National Council of Churches and CARE. As a law student at the time, I was struck by the fact that Democratic Kampuchea (the Khmer Rouge) had committed massive human rights violations that had not been redressed through international law. These crimes were clearly ones to which international law should be applied and that international lawyers should do something about.

Even before I went to Kampuchea, from reading books like *Cambodia Year Zero* by Francois Ponchaud, I concluded that genocide had been committed and that the Khmer Rouge could be charged before the World Court with violating the Convention on the Prevention and Punishment of the Crime of Genocide [Genocide Convention]. (Jan. 12, 1951, 78 U.N.T.S. 277.) What was needed was an effort to document what had been done, and then to find parties to take the case to the World Court. I proposed the idea to my professors at Yale, Michael Reisman, Myres McDougal, Burke Marshall, and Harry Wellington, and they agreed that the idea was sound. When I worked in Phnom Penh in 1980, I discussed it with the Kampuchean government. (This was the Vietnamese-supported Heng Samrin government that overthrew the Pol Pot regime.) That government gave me permission to collect the evidence, and I approached several human rights experts and proposed putting together the case. One of them agreed to work on this, and I

obtained a visa for him and returned to Kampuchea with him in 1982. He has since organized a commission to document the crimes and a campaign to launch the case. I have also continued to work on the case through the Cambodian Genocide Project, Inc. which is sponsored by two committees of the American Bar Association. I have just returned from another evidence-gathering trip to Kampuchea this summer, and from trips to Australia and New Zealand to lobby those governments to take the case. I hope that the case will be brought sometime in the coming two years.

Democratic Kampuchea is a party without reservation to the Genocide Convention, and has been since 1950. In 1957 the Cambodian government also accepted the compulsory jurisdiction of the World Court in all matters under article 36 of the Statute of the Court. (Sept. 9, 1957, 277 U.N.T.S. 77.) So it is a country that could be brought before the International Court of Justice for violations of the Genocide Convention. The question is, what kind of charges could be brought before the World Court? Genocide is defined by the Genocide Convention as intentional destruction in whole or in part of a national, ethnic, racial or religious group, as such. (Genocide Convention, *supra*, at art. 2.) Any party that is a signatory to the Convention without reservation can bring a charge against any other party relating to the responsibility of the state for genocide. Article 9 of the Convention states:

“Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibilities of a State for genocide or any of the other acts enumerated in Article 3 [which includes conspiracy, incitement, attempt, or complicity to commit genocide] shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.” (Genocide Convention, *supra*, at art. 9.)

Who, then, would bring the charges? Who would take the evidence to the World Court? We began to look among states that are parties to article 9 of the Genocide Convention. In 1986 I spent a good part of the summer in Australia, and proposed that the Australian government take the initiative in this case. And it is very interested in it. In fact, about a week after I proposed the initiative, the Foreign Minister himself made a statement in Manila favoring the establishment of a tribunal to determine the culpability of the Khmer Rouge leaders. The political will has been engaged in Australia, which could eliminate the largest block to anything being done about the genocide in Kampuchea up to this point. Other governments have also been approached and more will be approached in the future.

Politically, the situation is very interesting. Asian politics are still Byzantine. The Democratic Kampuchea government continues to be the government recognized in the United Nations as representing Kampuchea. It is now a coalition of the Khmer Rouge—the people who committed the genocide—and two other groups, the groups that follow Sihanouk and the group that follows Son Sann, who is the non-Communist former prime minister of the country. It is a strange coalition—I liken it to a coalition between a Chihuahua, a poodle and a wolf. If they ever gain control of the country again, I don’t think there is much hope for the future of the Chihuahua and the poodle. But this coalition government continues to represent Kampuchea in the United Nations.

A country appears as a state in the World Court. The government which represents the country is the government as determined by the executive authority of the United Nations. If a party to the

Genocide Convention brought the case to the World Court against Democratic Kampuchea, the registrar of the World Court would refer the memorial (the brief) to the Democratic Kampuchean government recognized by the United Nations. The coalition that includes the Khmer Rouge would be presented with the charges. And yet, since they no longer control the territory of Kampuchea because there is now a Vietnamese-supported government, we have been able to gather the evidence against the Khmer Rouge. It is a historic opportunity.

The Genocide Convention has never been applied. There was one very short-lived attempt to apply it in the Bangladesh Case, (See 1972-1973 I.C.J.Y.B. 123 -24 (1973).) but that was withdrawn. For those of us who take seriously the views of the New Haven school of international law, law cannot really be called law unless there is authoritative decision. There have been as yet no authoritative decisions under the Genocide Convention. The efforts regarding Kampuchea may transform the Genocide Convention from a piece of paper to an applicable provision of international law.

People often ask whether what was done in Kampuchea was really genocide. Is it unlawful under the Genocide Convention? The answer to that question is yes. Students of international law know that political killings are not per se covered by the Convention unless their intent is to destroy in whole or in part a national, ethnic, racial or religious group. (L. Kuper, *International Action Against Genocide*, Minority rights Group Report No. 53, 1984 at 3, 4.) But now we have gathered the evidence that establishes beyond a reasonable doubt that the intent of the Khmer Rouge was to destroy large minority groups within the population. The Cham Muslims, the Christians, the Buddhist monks and the Vietnamese and Chinese minorities were among the ethnic, religious, and national groups marked for destruction. Along with them, of course, were “class enemies,” and the so-called, “new” people, that is, the people from the cities, people who were formerly of the Lon Nol regime, and so forth. These groups were also victims of genocide under customary international law, but they are less clearly covered by the Genocide Convention than are the Cham Muslims, the Buddhist monks, Christians and other ethnic and religious minorities.

The genocide in Kampuchea was intentionally ordered—we have several of those orders. One order, for example was this: “The Cham nation no longer exists on Kampuchean soil belonging to the Khmer. Accordingly, Cham nationality, language, customs and religious beliefs must be immediately abolished. Those who fail to obey this order will suffer all the consequences for their acts of opposition to Angkar [the Khmer Rouge high command].” (U.N. Doc. A/34/569, at 9 (1979)) We also have testimony as to how these orders were taken all the way from the top down to the local level. Much of the testimony is on videotape.

I spent three more weeks this summer in Kampuchea gathering devastating eyewitness testimony against the Khmer Rouge for the murder of the Cham Muslims and the Buddhist monks. Whole Cham villages were destroyed and entire families were murdered. Only about half of the Cham survived. Those who did survive have testified to us about the way their children were taken away from them to be raised as Khmers. Removal of an ethnic group’s children is one definition of genocide under the Genocide Convention. (Genocide Convention, *supra*, at art. 2(e).) Mental harm to members of minority groups is also specifically covered by the Genocide Convention.

Buddhist monks were disrobed and subjected to especially hard forced labor which killed over half of them. (Id. at art. 2(b).)

A number of technical legal issues must be addressed in this case. First, does the World Court have jurisdiction to hear the case? Under article 36 of the Statute of the Court, it clearly does. Article 36 gives the Court jurisdiction over all matters specially provided for by the conventions in force. Article 9 of the Convention specially provides for World Court jurisdiction under the Convention until 1991. In addition, Democratic Kampuchea has also accepted the general compulsory jurisdiction of the Court, as have Australia, New Zealand, and a number of other countries.

Second, what constitutes a dispute? Remember that the Convention says “disputes” concerning the application of the Convention. Case law indicates that a dispute can include any kind of disagreement between states concerning the application of a treaty to which both parties are bound. (See, e.g., *South West Africa (Eth. v. S. Afr.)*, Second Phase, 1966 I.C.J. 6 (Judgment of July 18); *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (Judgment of Nov. 26); *Nuclear Tests Cases (Austl. v. Fr.)* 1974 I.C.J. 253 (Judgment of Dec. 20).) In their 1978 case, Australia, Norway, Canada, the United Kingdom and the United States actually did bring charges against Democratic Kampuchea before the United Nations Commission on Human Rights, charges that were specifically rejected as “impudent interference in domestic affairs” by the Democratic Kampuchean government. (U.N. Doc. E/CN.4/Sub.2/414/Add. 1-10 (1978).) Clearly, those nations have a dispute.

Since the government is out of power, one could argue there is a mootness problem here, as there was in the Nuclear Tests case. (When the governments of Australia and New Zealand and Fiji brought charges against France for atmospheric nuclear testing the World Court avoided the issue, taking notice of the fact that France had announced that it was no longer going to conduct atmospheric nuclear tests, therefore making the issue moot.) The issue of Khmer Rouge genocide is not moot because the leaders of the Khmer Rouge have never been punished for their crimes. In fact, they still order killings. When I was in Kampuchea this summer, the Khmer Rouge rocketed a truckload of civilians. I talked to the Swedish doctor who treated some of the victims. The Khmer Rouge stop trains and kill everybody on board. They have not changed. In fact, one of the really frightening aspects of the current situation is that the force of anti-Vietnamese nationalism in Kampuchea favors the return of the Khmer Rouge. In the long run, peace in the region requires the removal of the Khmer Rouge as a force in the future history of Kampuchea. This is a case where justice is the first step toward peace. As long as the Khmer Rouge have 30,000 troops in Kampuchea, Vietnam has good reason to remain there.

How can the individuals responsible for the genocide be brought to justice? The Genocide Convention provides for punishments for genocide. Article 6 says: “Persons charged with genocide shall be tried by a competent tribunal of the state in the territory where the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction.”

The first recourse, therefore, would be trial in Kampuchea. Such a trial was held in 1979 when two members of the top Khmer Rouge leadership, Pol Pot and Ieng Sary, were convicted in absentia in Phnom Penh. But that was largely considered a show trial, and it did not exhaust the

charges against them or against many other members of the Communist Party leadership that ordered the genocide in Kampuchea.

The second recourse would be the establishment of an international penal tribunal to hear the case. The drafters of the Genocide Convention envisioned an international criminal court, but that has never been established. Perhaps an international tribunal could be established to hear the case under a limited charter. Such a tribunal could have jurisdiction in this case under the Genocide Convention. A special tribunal would require widespread international acceptance and legitimacy, and establishing it would demand very strong political will, but it could be established by international treaties.

Aside from the technical issues, a number of basic questions remain. So what if the case is brought to the World Court? What if Democratic Kampuchea neither appears nor answers the charges? Under article 53 of the World Court's statute, the Court could nevertheless hear the case. (Other instances where the Court has proceeded even without the cooperation of the charged party include the Nicaragua case, *supra*, the Nuclear Tests Cases, *supra*, and the Corfu Channel case (U.K. v. Alb.), 1949 I.C.J. 4 (Judgment of Apr. 9).) Since the Court has the authority to hear the case, the judgment will have legitimacy even if the Khmer Rouge do not appear.

What will a judgment accomplish in that event? First, an authoritative judgment of the World Court is historically significant. It is vital to establish that the Khmer Rouge committed genocide in Kampuchea, not merely "alleged" genocide.

Second, as part of its determination of state responsibility for genocide, the Court can declare who committed the genocide. Such a finding would call into effect the duty of all parties to the Genocide Convention to "provide effective penalties for persons guilty of genocide and to grant extradition in their courts through their laws and treaties." (Genocide Convention, *supra*, arts. 5 & 7.) This would in effect make the Khmer Rouge leaders international outlaws. If there were an international adjudication, there would be very little doubt that they were extraditable on charges of genocide. And a judgment might in fact also reduce their support politically. In this sense, law and politics are a part of the same continuum. It would make it difficult, more difficult at least, for some states to support these people who committed international crimes. Our express purpose, however, is not political. We do not aim to legitimate any government. In this case, the current Kampuchean government's self interest happens to coincide with human rights—a situation that we should definitely use to promote human rights in the world.

Finally, an adjudication in the World Court may help prevent future genocide, not only in Kampuchea (perhaps through the reduction of support for the Khmer Rouge) but also in other countries. Leaders who are planning to commit genocide may be deterred if they know they will have to answer for their actions before a tribunal, or the World Court, that will hear the charges against them.

Many people are now involved in the effort to try the Khmer Rouge for their crimes of genocide. I have worked on this since 1980 when I first proposed that Democratic Kampuchea should be tried for genocide before the World Court. We have gathered massive evidence for a trial. We

also hope to make a documentary film about what took place there. Once you have been there and talked with people—and every person there has lost someone—the cries of the victims will be with you for the rest of your life. I hope the Australian government, and other governments, will take the case to the World Court. The Khmer Rouge must be brought to justice.

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