

SEEKING JUSTICE IN CAMBODIA: Realism, Idealism, and Pragmatism

By Dr. Gregory H. Stanton¹

When the Khmer Rouge regime took power in Cambodia in 1975, its leaders hoped to establish a utopian rural communist society without cities, private property or money. They declared a new beginning of history, Year Zero, and a new nation, Democratic Kampuchea. Although they modeled their revolution on the Soviet Union under Stalin and China under Mao Tse-Tung, they believed those regimes had not gone far enough, fast enough in killing class enemies. The Khmer Rouge also eschewed the cults of personality established by Stalin and Mao. Instead the secretive Khmer Rouge power elite named themselves the Angkar, the organization, and claimed absolute obedience from every Kampuchean. Religion and worship were abolished. Buddhist monks were disrobed and often killed. Muslim Chams and the few Christians were murdered at a rate much higher than ordinary Kampucheans. Vietnamese Cambodians were forced to flee to Vietnam until 1977, when the border was closed and the remaining Vietnamese were murdered. Minority ethnic groups were forced to live in Khmer-speaking communes, and forbidden to speak their languages and practice their customs.

The Khmer Rouge systematically stripped rural communes of the rice they produced in order to trade it to China for weapons and machines. They substituted traditional herbal treatments for scientific “foreign” medicine and neither manufactured nor imported modern antibiotics. “New people” originally from the cities were declared to be class enemies and were literally worked to death.

By 1977, the failures of the Kampuchean economy were blamed on enemies within the Communist party, and purges began all over the country. The Central Committee decided that Kampucheans living in the Eastern Zone, were “Khmer bodies with Vietnamese minds.” In 1978, cadres from other zones forcibly evacuated the Eastern Zone. As the evacuees passed through Chhbar Ampeu, near Phnom Penh, cadres from the Central Committee issued distinctive blue and white checked scarves to mark the evacuees. When Ben Kiernan and I later discovered this equivalent of the Nazi yellow star, the survivors told us, “It was the killing sign.”²

These were crimes against humanity. The targeting of Muslim Chams, Christians, and Vietnamese Cambodians also constituted genocide. But aggression against Kampuchea’s own people was not enough. The Democratic Kampuchean Communist Party decided to invade and reclaim the Mekong delta, which had long ago been part of the Khmer Empire, but was now part of Vietnam. The Khmer Rouge called it Kampuchea Krom, lower Kampuchea. They invaded border villages in Vietnam, massacring all of their inhabitants. The Khmer Rouge added aggression and war crimes to their thorough list of violations of international law.

The Vietnamese finally lost patience. Allied with Khmer Rouge cadres who had escaped from the Angkar’s purges, the Vietnamese Army invaded Democratic Kampuchea on Christmas day 1978, rolled into Phnom Penh on 7 January 1979, and took control of most of the rest of the country by April, 1979. What they discovered was a charnel house of killing fields, torture and killing prisons, mass graves, and starving survivors. Censuses and demographic studies indicate that from 1.7 to 2.2 million people perished in the three years, eight months, and twenty days of Democratic Kampuchea.³

Realism

The Khmer Rouge rulers of Democratic Kampuchea had renounced none of the international treaties to which Cambodia was a State-Party, including the Genocide Convention, since they considered international law nothing but a bourgeois fig leaf hiding domination by the world's ruling class.

In a cynical symmetry, a similar view of international law was held by "realists" like Dr. Henry Kissinger who made the U.S. decision to bomb Cambodia from 1969 to 1973 with one and a half times the bomb tonnage the Allies dropped on Japan in all of World War II. The bombing violated Cambodia's neutrality and killed tens of thousands of Cambodian civilians. The Marxist and "realist" view is that justice is simply the will of the stronger. It has been around since antiquity, and was expressed by Thrasymachus in *The Republic of Plato*⁴. Such "realism" has continued to guide the policies of the U.S., China, their allies, many other governments, and the United Nations, which have all opposed efforts to seek justice in Cambodia through trials of the leaders of the Khmer Rouge.

The first sign of such "realism" overcoming concern for morality or law in foreign policy was the Carter administration's 1979 decision to vote against seating the new Vietnamese-backed government in Cambodia's seat at the United Nations. In the U.N. General Assembly's Credentials Committee, the Congo proposed leaving the seat vacant. Instead, by a vote of six to three, the committee voted to continue to seat the Khmer Rouge regime's representative, Thiounn Prasit, even though the regime he represented no longer governed Cambodia. (Prasit spent his retirement in Westchester County, New York, in spite of many appeals by Cambodians to have him expelled from the U.S. for complicity in crimes against humanity.)

The Cambodian Genocide Project

In 1980, when I was still a student at Yale Law School, Church World Service called me to become Field Director of its relief program in Phnom Penh, Cambodia. I was one of the first legally trained foreigners to see the mass graves and talk with the survivors. I realized that the Khmer Rouge had violated every international human rights and humanitarian law on the books, including the Genocide Convention. I had studied with Professors Myres McDougal and Michael Reisman, and knew that law isn't law without authoritative decision, plus compliance or enforcement.

The Khmer Rouge had gotten away with mass murder. There was no political will to capture them in Thailand, and no international court to try them. Such impunity would only allow the Khmer Rouge to plague Cambodia for years to come. But there was a narrow opening for civil justice, the International Court of Justice. The Khmer Rouge no longer controlled Cambodia because of Vietnam's intervention, so evidence could be gathered against them. If a case were taken against Cambodia to the World Court for violation of the Genocide Convention, the Khmer Rouge would have to respond, because they still held Cambodia's seat in the United Nations. Even if they ignored the charges, Cambodia had accepted the compulsory jurisdiction of the World Court, and the case could go forward.

When I came back to Yale Law School in 1981, I founded the Cambodian Genocide Project, Inc. in order to gather the evidence to make that case possible. The Cambodian Genocide Project was incorporated in 1982 and was granted I.R.S. tax exempt status in 1984.

In the 1980's the Cambodian Genocide Project gathered documentary evidence and testimony of a multitude of eyewitnesses in Cambodia, including scores of hours of video-taped testimony funded by the U.S. Institute of Peace. A Memorial was prepared for a state-party to the Genocide Convention to take to the International Court of Justice, claiming violation of the Convention by

Cambodia, which was still represented in the United Nations by the Khmer Rouge regime. I took the case to Australia in 1986, and Bill Hayden, Minister of Foreign Affairs, announced his support for a trial of the Khmer Rouge. But the Australian Prime Minister, under U.S. State Department pressure, stopped that initiative. When it came to finding another government to take the case to the World Court, those of us working on the case struck out. We learned a crucial lesson: human rights are not lost because of the absence of law, but because of the lack of political will to enforce it. We needed to change the political will of crucial nations, notably the United States, which opposed pursuing the case because it might legitimize the Vietnamese-backed government in Phnom Penh.

A group of us set out to change the political will of the U.S. government. Professor Ben Kiernan, Dr Craig Etcheson, Sally Benson and a number of others concerned with Cambodia, formed a coalition called the Campaign to Oppose the Return of the Khmer Rouge. I co-chaired its Justice Committee.

Etcheson became CORKR's Executive Director. He worked with the staff of Senator Charles Robb, who wrote the Cambodian Genocide Justice Act. Although the bill was opposed by the State Department because it earmarked funds to establish an Office of Cambodian Genocide Investigations in the State Department and declared that it was U.S. policy to prosecute the leaders of the Khmer Rouge, the bill finally passed the United States Congress in 1994 and was signed by President Clinton. The Cambodian Genocide Justice Act earmarked \$500,000 for the investigation of the crimes of the Khmer Rouge.

By 1992, I had taken the Foreign Service examination and joined the State Department. I was assigned to the steering committee for the Office of Cambodian Genocide Investigations. The State Department held an open competition, and in a decision from which I recused myself, the Office of Cambodian Genocide Investigations unanimously chose to fund the Cambodian Genocide Program at Yale University, founded by Ben Kiernan and Craig Etcheson. After its initial grant of \$500,000, such good progress had been made, that Catherine Delpino and I convinced Assistant Secretary of State John Shattuck to give the Cambodian Genocide Program another \$1 million from the discretionary funds of the Bureau of Democracy, Human Rights, and Labor. The funds supported establishment of the Yale Cambodian Genocide Program and its Cambodian counterpart, the Documentation Center of Cambodia in Phnom Penh. The research and documentation have since produced hundreds of thousands of pages of evidence of the atrocities committed by the Khmer Rouge in Democratic Kampuchea.

In July 1997, I wrote the State Department options paper on how to try the Khmer Rouge. Ambassador for War Crimes Issues David Scheffer put U.S. pressure on the United Nations to assist Cambodia in trying the Khmer Rouge.

As a result of the declaration of U.S. policy favouring a tribunal in the Cambodian Genocide Justice Act, the evidence collected by the Cambodian Genocide Program and the Documentation Center of Cambodia, and pressure applied within the U.S. State Department by Ambassador David Scheffer, Ambassador Charles Twining, Ambassador Al LaPorta, Deputy Assistant Secretary Charles Kartman, myself, and others, U.S. policy had finally been changed to support creation of a tribunal to try the Khmer Rouge.

In 1997, at the suggestion of the U.N. Special Representative of the Secretary General to Cambodia, Thomas Hammarberg, the co-Prime Ministers of Cambodia requested assistance from the U.N. in establishing a tribunal. David Scheffer went to Cambodia to design a proposal acceptable to the Cambodian government. The U.N. appointed a Commission of Experts which in 1999 recommended establishment of an international tribunal outside Cambodia.

Years of negotiations followed. The U.N. Office of Legal Affairs tried to impose a U.N.-run tribunal. Cambodia insisted that the tribunal be majority Cambodian, under Cambodian law. At the suggestion of U.S. Senator John Kerry, who went to Cambodia, agreement was reached in 2001 on a mixed tribunal with a Cambodian majority, but requiring super-majority agreement by international judges for all decisions. Administration would be shared by Cambodian and U.N. officials, prosecutors, and investigating judges. The maximum penalty would be life in prison. The Cambodian National Assembly passed a law to establish the tribunal on those terms.

If the grip of the “realists” had finally been broken, it was soon replaced by a deadlock between nationalists and international idealists.

Idealism

The devil, who has evidently been protecting the Khmer Rouge leaders for 24 years and is well represented by lawyers, rose again in the details. The U.N. Office of Legal Affairs, led by Hans Corell and Ralph Zacklin, withdrew from negotiations in February 2002, citing concerns about the impartiality of the so-called “Extraordinary Chambers” proposed in the Cambodian law.

Enter the idealists. Amnesty International and Human Rights Watch publicly supported the U.N.’s withdrawal. Their opposition to re-opening negotiations arose primarily from their complete distrust of the Hun Sen government -- they claimed that any Cambodian judges appointed would be puppets of Hun Sen. They coupled this distrust with a strong idealist preference for purely international tribunals run by international judges and personnel. They claimed that despite its super-majority requirement for decisions, the Cambodian law could not create a tribunal that would meet international standards.

A number of Amnesty International and Human Rights Watch’s objections were simply legally wrong and I answered them in an Op-ed published in the Phnom Penh Post and Bangkok Post.⁵ Amnesty International claimed that “the proposed mixture of Cambodian and international judges and complicated decision making process has no precedent in any domestic or international court,”⁶ ignoring the Sierra Leone tribunal and courts in East Timor and Kosovo, which are also mixed courts.

Amnesty International said that “nothing in the Agreement prevents the accused from successfully claiming superior orders as a defense,” ignoring Article 29 of the Cambodian law, which says, “The fact that a Suspect acted pursuant to an order of the Government of Democratic Kampuchea or of a superior shall not relieve the Suspect of individual criminal responsibility.”⁷

Amnesty International complained that there “is scant provision for victim and witness protection,”⁸ ignoring Article 23 of the Agreement and Article 33 of the Cambodian law, which both say that the court “shall provide for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of *in camera* proceedings and the protection of the identity of a victim or witness.”

Amnesty International criticized the Agreement because it does not include provisions for reparations, calling this a “major retreat from the Rome Statute”⁹ of the International Criminal Court even though such provisions are not part of most systems of justice. The Cambodia tribunal will try only a few top leaders of the Khmer Rouge. Ten old men will not have the means to give restitution or compensation to 1.7 million victims. UN Trust Funds connected to tribunals have been notably unsuccessful at raising funds for such purposes. Amnesty International wanted “rehabilitation, satisfaction, and guarantees of non-repetition”¹⁰ as well. Surely the only satisfaction and guarantees of non-repetition of mass murder that the tribunal can offer are trial and punishment of the perpetrators.

Finally, Amnesty International complained that “There is virtually nothing in the present draft agreement that will help address the longer-term deficiencies and weakness of the present Cambodian judicial system.”¹¹ By setting an example of fair trials in a well-managed court, it will do so. It is also a reason for making the tribunal a special part of the Cambodian court system and locating it in Phnom Penh, contrary to Amnesty International and HRW’s preference for an international court. One of the shortcomings of the Yugoslav and Rwandan tribunals has been their lack of relationship with national legal systems. The Cambodian tribunal will be part of the Cambodian legal system, but with both Cambodian and international judges who must approve its procedures and decisions.

To reject the Agreement because the court could not do everything was equivalent to saying that because all law-breakers cannot be captured and tried, none should be.

This all-or-none approach to justice for Cambodia has been characteristic of human rights groups from the beginning. In 1981, when I asked the International Commission of Jurists to undertake investigations of the atrocities of the Khmer Rouge, the Chairman of the Board refused. He said that the International Commission of Jurists would not investigate the Khmer Rouge regime unless it could simultaneously investigate violations by the Vietnamese-backed government that drove the Khmer Rouge from power. It turned out he had consulted the State Department.¹² All-or-none standards are self-defeating.

Pragmatism

The Cambodian Genocide Project offered to assist in breaking the legal logjam, and with funding from the Open Society Institute, provided legal advice to the Cambodian government. The Coalition for International Justice convened a group of legal advisors to key missions to the U.N., who drafted a General Assembly Resolution that ordered the U.N.’s Office of Legal Affairs back into negotiations based on the Cambodian law. The resolution passed in December 2002, despite Amnesty International and Human Rights Watch opposition.

In the ensuing negotiations, the Cambodian government met three demands of the U.N. It agreed to amend the Cambodian law to simplify the tribunal’s appeals process. It agreed to amend the law so it refers specifically to the rights of the accused enshrined in Articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR) -- to which Cambodia is already a State-Party. And it agreed to amend the law to explicitly affirm that the Vienna Convention on the Law of Treaties prohibits invocation of national law to escape international treaty obligations. On 17 March 2003, the Cambodian government and U.N. Office of Legal Affairs signed an agreement to set up the tribunal. The agreement was approved by the U.N. General Assembly in 2003, and by the National Assembly of Cambodia in 2004.

Since then the United Nations and the Royal Cambodian Government (RCG) have come a long way toward establishment of a tribunal to try the leaders of the Khmer Rouge. Australian Dr Helen Jarvis, who moved to Cambodia to oversee data preservation for the Cambodian Genocide Program, now directs the Secretariat of the Cambodian government’s Task Force, which is preparing for the tribunal.

On 28 March 2005 at a pledging conference at the U.N. in New York, the \$57 million budget over three years was finally promised. The United Nations continued to drag its feet to the last. The Secretary General stated that until the first year’s contributions are in the bank (at least a third of the total), the U.N. would name no personnel and begin no work on the tribunal. On 30 March 2005 Japan transferred its \$21.5 million contribution (half of the tribunal’s U.N. costs) to the U.N. On 28 April 2005, when the European Commission made its \$1.3 million pledge, U.N. Secretary General Kofi Annan declared that the agreement establishing the tribunal entered into force.

Cambodia must now raise its \$13.3 million share of the costs. It has appealed for bilateral assistance. The U.S. is unlikely to contribute. The U.S. Congress passed a foreign assistance appropriations bill imposing the condition that in order for the U.S. to contribute, the Secretary of State must certify that: "Cambodia's judiciary is competent, independent, free from widespread corruption, and its decisions are free from interference by the executive branch."¹³

Judging the Khmer Rouge Tribunal by judging the entire Cambodian judiciary is like judging the quality of the U.S. Supreme Court by judging the competence and independence of judges in Kentucky or Chicago. Since tribunal judges will be appointed by Cambodia's Supreme Council of the Magistracy and many candidates may even be members of the Cambodian People's Party, the tribunal is unlikely to meet the U.S. requirement that it be "free from interference by the executive branch." The fact that in the U.S., appointment of judges is usually based on their affiliation with the ruling political party was not, apparently, seen as hypocrisy.

The Cambodian Genocide Project is currently working with other organizations in the U.S. and Cambodia to assist the Cambodian government in doing the planning and making the practical arrangements necessary to get the tribunal up and running. The Cambodian Genocide Project has, in particular, been assisting the Secretariat of the Cambodian government's Task Force in preparing draft rules of procedure and evidence that will provide the highest international standards for the tribunal. We have benefited from the expertise and advice of some of the finest international lawyers in the world.

My experience with the Cambodian Genocide Project has taught me a number of lessons:

1. As Rudy Rummel consistently points out, the key to addressing the problem of genocide is confronting power. Forces with the power to commit genocide must be overcome by forces with the power to prevent it. Engaging those forces means mobilizing the world's democracies to take action. There are ways to do that, such as getting legislation passed to overrule a recalcitrant State Department bureaucracy. But they take a lot of work by committed people.
2. Organizing a human rights group or movement is full-time work. It cannot be done part-time. That is why the Campaign to Oppose the Return of the Khmer Rouge hired Craig Etcheson, who played a large role in the passage of the Cambodian Genocide Justice Act. It is why Yale's Cambodian Genocide Program needed a founder, Ben Kiernan, and a director, Susan Cook. It is why the Documentation Center of Cambodia, led by Youk Chhang, has been so successful in gathering the evidence for a trial of the remaining Khmer Rouge leaders.
3. Effective human rights work costs money, lots of money. The big human rights groups like Human Rights Watch, Amnesty International, and the International Crisis Group have big foundation funders like Soros, Ford, and MacArthur connected to them by interlocking directorates. Large donors often sit on the boards of directors or are advisors to the human rights organizations to which they contribute. That's just good grantsmanship. But it means to get money you have to have money to pay professionals to get it. Government money can be raised through legislation. But the bureaucracy will fight earmarks that limit its control over the money, as the State Department did vociferously in opposing the Cambodian Genocide Justice Act.

Conclusion

Realism lacks moral vision. Idealism is often ineffective because of perfectionism. Perfection is the enemy of justice. Pragmatism, combining idealistic ends with realistic means, is the only way to do justice in this imperfect world.

The Cambodian people have waited twenty-five years for justice. In this era of trillion dollar wars, let us hope that the nations of the world will finally donate the small amount of money required to finance the Khmer Rouge Tribunal.

Endnotes

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² Stanton, Gregory, "Blue Scarves and Yellow Stars," The 1987 Faulds Lecture, Warren Wilson College, Swannanoa, NC, published at <http://www.genocidewatch.org/bluescarves.htm>

³ Kiernan, Ben (2003) "The demography of genocide in Southeast Asia," *Critical Asian Studies*, vol.35, no.4, 585–597.

⁴ "What I say is that 'just' or 'right' means nothing but what is to the interest of the stronger party." *The Republic of Plato*, translated by Francis M Cornford (1945) Oxford,18.

⁵ Online at <http://www.genocidewatch.org/PerfectionIsTheEnemyofJusticerevised.htm>

⁶ Amnesty International–index: ASA 23/003/2003 21/03/2003

⁷ Ibid.

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

¹² The text of his letter to me is published in "The Cambodian Genocide and International Law" in *Genocide and Democracy in Cambodia* (1993) Yale U. Press, 158. Also available on the internet at <http://www.genocidewatch.org/THE%20CAMBODIAN%20GENOCIDE%20AND%20INTERNATIONAL%20LAW.htm>

¹³ Foreign Operations, Export Financing, and Related Programs- Appropriations Act 2005, Title V, Section 554, paragraph 2 (e), available at http://thomas.loc.gov/cgi-bin/cpquery/?&db_id=cp108&sid=cp108zyoWf&r_n=hr792.108&item=&sel=TOC_684615&