Large-Scale Victimisation as a Potential Source of Terrorist Activities
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Genocide's Orphan: The 1979 Trial of Pol Pot and Ieng Sary

by Howard J. DE NIKE*

Abstract: Though the world largely ignored the proceedings, an *in absentia* trial of Khmer Rouge leaders was held in Phnom Penh in 1979. Cold War politics thwarted international recognition of the tribunal then and subsequently. This shortcoming is consistent with failure to give primacy to victims' interests in the development of international human rights law. Finally, "disproportionate revenge" as a Cambodian cultural model fails to explain adequately the nature and scale of Khmer Rouge killing.

Introduction

In 1998, following a year with a law and democracy project in Cambodia, I was invited to edit a volume containing the record of proceedings held in 1979 in Phnom Penh, in which Pol Pot and Ieng Sary, two principal leaders of the Khmer Rouge, were charged with "acts of genocide."

Subsequently, the book appeared as part of the University of Pennsylvania Press series: *Studies in Human Rights* (2000).

The 1979 case mounted against Pol Pot and Ieng Sary has always been the bastard child of the International Human Rights Movement. Most of the world ignored it, while many legal scholars, including Kathryn Railsback, dismissed it casually as a "show trial" (Railsback 1990: 460). There are several reasons for this, reasons which also help explain why some may not know of its existence, let alone its details. Thus, permit me to spend a few moments setting the scene.

In 1975, as the U.S. folded its tents in Vietnam, Congress cut off the funds for further bombing in Cambodia. The immediate consequence in April of that year was the triumphal emergence of Khmer Rouge forces, which promptly evacuated all major Cambodian cities. An increasingly repressive regime prevailed for a period of almost four years, during which the Khmer Rouge sought to transform forcibly all of Cambodia into an exclusively agrarian-based society. Estimates are that a million people perished from execution, being worked to death, malnutrition, and denial of ordinary medical care.

In January of 1979, with support from Vietnam, a Cambodian faction, including some former Khmer Rouge members, rose up and ousted the KR from Phnom Penh, forcing Pol Pot to flee to the hinterlands, where the Khmer Rouge established remote military strongholds and launched armed attacks for nearly two decades.

1. The 1979 Proceedings

Within a few months of its military successes against the Khmer Rouge, on 7 July 1979 the People's Revolutionary Council of Kampuchea announced the formation of The People's Revolutionary Tribunal to try "the acts of genocide committed by the Pol Pot-Ieng Sary clique," including "planned massacres of groups of innocent people, expulsion of inhabitants of cities and villages in order to concentrate them and force them to do hard labour in

* J.D., Ph.D. San Francisco State University.

conditions leading to their physical and mental destruction, wiping out religion and destroying political, cultural and social structures and family and social relations."

In convening this tribunal, the fledgling Cambodian government, assisted by its Vietnamese allies, chose one of several alternatives which are available in these circumstances to enable victims to gain justice for the crime of genocide. Other possibilities exist such as, for example, internationally sanctioned prosecutions, state lustration procedures exposing perpetrators and banning them from public life temporarily or permanently, or truth commissions combined with forms of amnesty for those agreeing to testify. Obviously, determination of what course, or courses, to follow must be guided by specific circumstances, taking into account the nature and extent of the offences and future political consequences. The alternatives are not mutually exclusive.

In the instance of Cambodia in 1979, proceedings commenced at once against Pol Pot and Ieng Sary in Phnom Penh, beginning on August 15th and concluding 3 days later. Neither Pol Pot, nor Ieng Sary, were present, though steps had been taken to secure their attendance by public notification. (It may be noted that there was also a defendant at Nuremberg, namely Martin Bormann, Hitler's adjutant, who was tried *in absentia*.) A Cambodian jurist, Keo Chanda, was designated Presiding Judge, and a jury of ten People's Assessors, composed of one former judge and nine lay persons, were named to decide the case. Defence counsel was appointed.

The prosecutor presented evidence primarily in the form of sworn affidavits, as customary under civil law, which as former French colonials was the system most familiar to Cambodians. Additionally, a small percentage of the affiants appeared in person as witnesses. At the conclusion of the case, the People's Assessors returned a guilty verdict, together with sentences of death. Under civil law, however, in the absence of an accused, a death sentence cannot actually be carried out without a second, full trial.

2. Analysis of Proceedings

Since this gathering is considering the subject of large-scale victimization within the theoretical matrix of "victimization studies," I will examine the issues peculiar to the 1979 Phnom Penh trial from this perspective. Although they are fully applicable to the Cambodian situation, I will forgo generalized discussion of rationales which apply to genocide prosecutions, such as a means of providing "closure" for victims, the victims' demand for accountability, the creation of an historical record, and so forth. Rather, I will examine the topic in the historical circumstances peculiar to Cambodia at that moment in time.

Several salient factors stand out when examining the decision to convene the Pol Pot-Ieng Sary tribunal: 1) Barely seven months had passed between Pol Pot's ouster and August 1979; and 2) the proceedings were devoid of any genuine international recognition whatsoever. The first consideration has some advantages: for instance, the trial took place while Khmer Rouge horrors were still vivid. The second factor presents more complex elements. Without international support, the tribunal would lack credibility in the eyes of many; without the personal presence of Pol Pot, the tribunal could appear hasty and contrived. Yet, with regard to the latter so-called deficiency, history has proved the wisdom of moving promptly despite the absence of external sanctioning. Given the intervening 25 years in which no international proceeding of any sort directed against a Khmer Rouge figure has been initiated, the hope that by conducting their trial expeditiously, the full nature and extent of Khmer Rouge atrocities might be presented to a previously neglectful world, in however imperfect a manner, takes on increased importance. That the international community has to this day failed to build upon this groundwork should not be laid at the feet of the officials who organized the 1979 trial.

2.1 Perspective

Why, aside from Vietnam and some of its pro-soviet allies, was there a notable absence of international interest in the 1979 proceedings? The brief answer, which is what I am limited to here, is: Cold War politics. The United States was still reacting to its 1975 withdrawal from Vietnam. Rather than viewing the ousting of the Khmer Rouge as a liberation from tyranny, it saw only the spread of Vietnamese influence in Indo-China. The sad truth is that the U.S. officially supported the Khmer Rouge as the occupant of Cambodia's seat in the U.N. until 1983, and subsequently endorsed Khmer Rouge participation in the three-sided military coalition which held the U.N. seat for another five years, while at the same time, with U.S. assistance, the coalition waged war against the Vietnamese-supported People's Republic of Kampuchea. All of this highlights a factor relevant to the victims of genocide: the tendency of human rights law to be a creature of western, that is, politically dominant, powers, conducted to suit their interests. There is a serious flaw in international human rights when, in practice, rights prove less than fully "international". I have in mind, for instance, the faltering participation of the United States in the International Criminal Court.

If "international" is to be understood correctly as "universal", as I believe it must, then its corpus of law must be applicable to all. When a state excepts itself, in whole or part, from ICC jurisdiction, it contradicts this fundamental truth. Prosecutions, according to the contrary view, risk becoming no more than the imposition of the will of the powerful upon the weak or defeated, rather than the expression of justice.

What right would the police have in any ordinary community to prosecute a thief arrested by day, if its officers maintain a right to rob and plunder with impunity by night? Popular sentiment would insist that either the law enforcer submit to a rule of law, or forfeit all legitimate colour of authority. The answer rests in a difficulty which has affected the development of international human rights law from its inception, namely, the gap between legal academics and officials who have conceived, developed, and largely implemented human rights law, and the popular voice of those who are the real and potential victims of human rights violations. Instead of embracing international human rights as a means of guaranteeing their own citizens' protection from cruel abuses, governments have found justification for embracing this jurisprudence mostly as to "others." This perspective can overlook the need for, indeed at times the crucial primacy of, victims' interests with regard to forum, charges, evidence, and disposition.

2.2 Justice for genocide victims

The proceedings in Phnom Penh are the best contrary example I know of this tendency. In 1979, although the West was to a significant degree already aware of the nature and scale of Khmer Rouge atrocities, it chose to sacrifice the interests of victims and those goals so familiar to theoreticians of justice for human rights victims, namely closure, accountability, the historical record, and so forth, in favour of crass Cold War politics. Not only did the West not lend its support to the prosecution of the Khmer Rouge criminals in 1979, it has since then added insult to injury, finding fault with the procedures employed and ignoring the value of what was achieved despite overwhelming obstacles.

In summing up his thoughts on the Nuremberg proceedings, Chief Prosecutor Telford Taylor lamented that after the initial International Military Tribunal proceedings, the need to organize new structures, administration and staffing for the following trials delayed the war crimes program by almost a year. "The result of these and related developments," declared Taylor, "was a rapid decrease of political interest in war crimes matters and eventually a desire to put an end to trials and liberate war criminals still in captivity" (Taylor 1992: 640). Parenthetically, for those who are unfamiliar with the record of subsequent

prosecutions, the harm to which Taylor alludes was substantial indeed. In short, the public and the U.S. Congress quickly lost its enthusiasm for the post-war tribunals in Germany.

Taylor's regret applies with exponential force to the circumstances in Cambodia. Aside from the 1979 trial, to date no internationally supported proceeding of any sort has been undertaken against any Khmer Rouge figure, high or low. In 1997, the General Assembly of the United Nations adopted a resolution pledging to "respond positively to assist efforts to investigate Cambodia's tragic history including responsibility for past international crime, such as acts of genocide and crimes against humanity." (G.A. Res. 52/135, U.N. GAOR, 52nd Sess., Agenda Item 112 (b), at 2, U.N. Doc. A/Res/52/135 (1998).) Given the record of the United Nations' acceptance of the Khmer Rouge role as Cambodia's official representative to the international body, it is perhaps unsurprising that suspicion among Cambodian leaders about the good intentions behind such offers has so far thwarted productive co-operation.

In his 2001 review of *Genocide in Cambodia*, human rights law Professor William Schabas quarrels with the use of the word "trial" in the volume's subtitle (Schabas 2001: 475). He likewise carps over the editorial assertion that the Phnom Penh proceedings were "the first trial of a government leader, or anyone else, under the Genocide Convention" (Schabas 2001: 476). And, finally, he disputes the appropriateness of comparisons between Nuremberg and the 1979 trial of the two Khmer Rouge leaders (Schabas 2001: 476). What exactly emboldens a respected writer such as Schabas to be so dismissive of what, by any reasonable examination of the documentation developed by the Cambodians in 1979 and presented as evidence, was a sincere and competent effort?

Specifically, the proceedings which my fellow editors and I compiled for the 551-page text includes more than a hundred witness statements, with diagrams of common burials, scores of captured Khmer Rouge documents, and official reports of the chaos inflicted upon various segments of society by the Khmer Rouge. It is a compelling record of massive population dislocation, widespread political purges, virulent xenophobia, deliberate starvation, and the destruction of families, most in compelling, first-person narrative.

The answer I fear lies in a prevailing attitude among the architects of human rights law not to concern itself adequately with the interests of victims. As a member of the bar for thirty-seven years, I am conscious of the importance of due process. The manner in which a trial is conducted is what establishes its legitimacy. It is not enough that the "correct" verdict be reached. At least this is not enough for jurists to place their names and reputations alongside the outcome. What is at stake, as observed by U.S. Court of Appeals Judge, Richard Posner, is whether it is law that is applied in such proceedings, and whether, because it calls itself a court, the judgment of the tribunal is law (Posner 1990: 228). The first problem is: by whose authority does such a tribunal act. In the case of the court at Nuremberg, the answer stems from its status as a supranational body. In contrast, the proceedings in 1979 in Phnom Penh operated under a national "license" – from a government lacking universal recognition. As Posner quickly points out, however, law should be seen less as a "set of concepts" and more as an "activity." Referring to Nuremberg, he declares: "We should consider the pragmatic question of whether punishing the Nazi leaders using the *forms* of law was a sensible way to proceed" (emphasis in the original) (Posner 1990: 229). Posner concludes that it was: "It was unthinkable to let those monsters go free, so the question can be recast as whether they should have been killed summarily or after a trial" (Posner 1990: 229).

For practical reasons, namely that Pol Pot, Ieng Sary, and other known leaders of the Khmer Rouge remained "at large", the option of summary execution was unavailable. The question, nonetheless, persists: was a trial, to use Posner's words, a "sensible way to proceed"? Conceding some "deficiencies" of due process at Nuremberg (for example, "adequate warning of criminal liability, (and) an unbiased tribunal"), Posner nonetheless con-

cludes: "The value of the trial … was that it enabled a public record to be compiled … [A]s a result their moral guilt was established more convincingly in the eyes of the world than if they had been eliminated hugger-mugger" (Posner 1990:229). But more importantly for the Cambodian victimized by the Khmer Rouge, the 1979 proceedings were a vital step in achieving the goal of severing ties with the recent past and launching a new government free of the taint resting upon the previous wielders of power. In utilizing, however unsurely, a language of prosecution and precedents drawn from Nuremberg and the 1948 U.N. Convention on the Prevention and Punishment of the Crime of Genocide, the new Cambodian government signalled its willingness to do what Democratic Kampuchea under the Khmer Rouge resisted so fiercely, namely, to be embraced by the "community of nations."

Because of the peculiar circumstance that the Khmer Rouge were in August 1979 as yet unvanquished, another unusual factor made the initiation of a speedy prosecution of Pol Pot necessary: the goal of deterrence. For reasons which again I am afraid betray the consistent intellectualism of human rights law when it comes to identifying the interests of victims, deterrence is seldom considered. Despite the centrality of deterrence to almost every theory of criminal justice, little reflection has been devoted to it in the context of the crime of genocide. Is this because the perpetrators are usually in custody and thus unlikely to commit further crimes, or, as I suspect, because there is a widely held assumption that genocide, especially perpetrated by an "irrational" Other, is not deterrable in a conventional sense since its roots are beyond the reach of ordinary psychology, that is, the rational calculus of human decision making? In either event, the threat that Pol Pot would one day be able to reinstate his murderous rule over Cambodia was a crucial added incentive for an immediate trial.

It was, accordingly, important for the architects of the case against Pol Pot and Ieng Sary to assemble the evidence rapidly. The extent to which goals of thoroughness and clarity of legal articulation may have been compromised under this imperative must be kept in mind. If form and content were less than precise, the urgency of the matter helps to explain the shortcoming.

3. The anthropology of Cambodian genocide

Finally, I would like to comment briefly on theories of root causes for the monumental killing during the Democratic Kampuchea era. Anthropologist Alexander Hinton argues that there is a "Cambodian cultural model of disproportionate revenge (which) served as a template for part of the genocidal violence that occurred (under the Khmer Rouge)" (Hinton 2002: 275). He points to a widely told folk tale, *Tum Teav*, in which a Cambodian king takes vengeance against an insubordinate provincial official, executing the man's "family and relatives seven generations removed" by having them "buried up to their necks in the ground" and then having "their heads raked off by an iron plow and harrow" (Hinton 2002: 257). Hinton also identifies a Khmer vocabulary of extreme revenge, together with anecdotal accounts, of what he terms "a head for an eye" approach to retributive justice observed in Cambodian culture. Although there may be elements of an unacceptable determinism in his analysis, elements which Hinton himself hastens to disavow, this is not its major weakness. In my own reading of *Tum Teav*, the salient feature is the not vengeance to "the seventh generation" – an obviously impossible exaggeration typical of cautionary tales, but the tragic consequences to be expected from a failure to respect the natural hierarchy of king over subordinate and, down the social ladder, which all observers reckon to be the most central of traditional Cambodian virtues. Moreover, a large leap is required to move from the specific personal vengeance elaborated in the story *Tum Teav* and other accounts of "head for an eye" retribution in response to specific offences, to the generalized, class-based violence advocated by the Khmer Rouge. One should not discount the potential of

what Hinton refers to as "cultural models com(ing) to serve as templates for violence," and "implicit cultural knowledge … (providing) fodder for genocidal ideologies" (Hinton 2002: 275). But care must be taken when arguing that cultural interpretation swings from metaphor to action, otherwise the anthropologist attending his first American baseball game will waste a lot of time afterwards looking for dead umpires.

In this instance the million corpses are indeed real. It is also unarguable that Cambodian peasants were the victims of long-standing class exploitation, at times violent, in addition to years of rampant B-52 bombardment by the U.S. But does "head for an eye" folk rhetoric explain the "killing fields"? Not adequately, I'm afraid. Rather, more research is needed, in particular into the degree to which death in Cambodia between 1975 and 1979 produced a dystopic society, one utterly stripped of its ordering hierarchies, and thereby sent cascading into a vortex of brutality.

4. Conclusion

Hinton is absolutely correct to look into the Cambodian psyche and soul for explanations, for whatever analysis one applies must grapple with the awful reality that the killing during the forty months of Khmer Rouge power was mostly perpetrated by Cambodians against Cambodians, that is not by outside invaders or hostile ethnic groups.

Do the 1979 Phnom Penh proceedings offer a definitive causal explanation, one likely to satisfy the victims themselves? I am not so bold as to claim that it does. But the strength of the record represents an excellent beginning.

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