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THE CAMBODIAN ROAD

A DISCUSSION PAPER
AN ANALYSIS OF THE CONTEMPORARY
CAMBODIAN SITUATION

by

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Observer

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INTRODUCTION

The recently announced Australian initiative for a resolution of the Cambodian impasse takes account of the most serious obstacle to an enduring peace in that country. The continued life of the Khmer Rouge threat to the peace and security of Cambodia must be dealt with in any serious proposal for a solution.

The statement of the Australian Minister for Foreign Affairs and Trade of 24th November, 1989 contains two essential proposals to deal with the Cambodian situation. The first, the declaring vacant of the United Nations seat of Cambodia, presently occupied by an alliance with the Khmer Rouge, reveals an acceptance by the Australian Government of the pivotal importance of recognition of the Khmer Rouge as an obstacle to peace within Cambodia. The second, the proposal for an interim United Nations Authority within Cambodia to conduct free elections, is already meeting with widespread support. As the Minister for Foreign Affairs and Trade put it "...as became very clear in the corridors of the Paris Conference there is very little, if any, dissent from the view that any international control mechanism to supervise the transition to peace in Cambodia should be under the authority of the United Nations..."

Although the Paris Peace Conference resulted in a highly visible failure by the world community to agree upon minimum terms for peace, the circumstances which led to the convening of the Conference continue to motivate the search for peace in Cambodia. The withdrawal of the Vietnamese forces from Cambodia has led to, and continues to lead to, significant but as yet unannounced, reappraisal of policy towards Cambodia within many nations. An historical analysis of

these changes may yet lead to the view that the main reason for the failure of the Paris Conference was that it was convened too early. Certainly, as time passes, the effect of the withdrawal of Vietnamese troops from Cambodia can be seen to have provided a real impetus for those nations willing to contribute proposals to effect a lasting Cambodian peace. The important initiative by the Australian Government is coming at precisely the same time as the Cambodian Government experiences real pressure from Vietnamese allies to accept an accommodation with the United Nations interim administration proposal.

As the prospects for peace appear, again, to brighten, the Australian Section of the International Commission of Jurists looks in some detail not only at the Cambodian past and present but at some of the significant international law questions which have so influenced the study of human rights in Cambodia.

The Australian Section of the International Commission of Jurists has long had an interest in the human rights consequences of the Cambodian genocide and it is hoped that this discussion paper will have a real part in a wider understanding of the effects of the genocide in Cambodia and the requirements of an enduring peace in that country.

This analysis was produced after a visit to Cambodia by Daniel Brezniak, a Sydney lawyer and a member of the Executive Committee of the Australian Section of the International Commission of Jurists.

After an examination of the geopolitical origins of the Cambodian situation the paper looks briefly at some aspects of the genocide and proceeds to an analysis of the legal effect of invasion by the Vietnamese troops at the end of 1978 of Cambodia. The paper argues that invasion and the use of force in international law can be justified in some

situations and that the Vietnamese invasion of Cambodia may be just such a situation. The paper then examines the Genocide Seminar which took place in Cambodia in July, 1989 and proceeds to an examination of the international law of recognition arguing that there are certain internationally wrongful acts of a state which entail an obligation for all other states not to recognise as legal the situation created by such acts. It is argued that peremptory rules of international law (and the doctrine of Jus Cogens) provide powerful justification for the non-recognition of the Khmer Rouge claim to power. The paper briefly examines the continuing human rights abuses by the Khmer Rouge and concludes with an examination of the future steps to be taken and the value of any action taken to discredit the Khmer Rouge leadership. It is in this context that the paper looks at international proposals for putting on trial before the International Court of Justice or some other properly constituted tribunal, those leaders of the Khmer Rouge who were responsible for the killing during the years of Khmer Rouge power in Cambodia.

ANTECEDENTS

The International Conference in Paris on the Cambodian situation will take its place in the history of the Cambodian people as another very significant example of international abandonment. From a hopeful expectation has followed profound disappointment, a disappointment which has led to a pessimism destructive of any real diplomatic initiative. The superpowers were there, represented by some of their most senior political figures as were all the Cambodian parties. The negotiations were conducted in public and every exchange was reported internationally. There was not the opportunity, at least in public, to come to arrangements or agreements because, with such a line up of senior political figures it was not possible to give detailed attention to every aspect.

Those with any knowledge of diplomacy assumed that understandings had been reached between the major powers with the result that such understandings would be formalised in agreements at the public sessions.

The diplomatic possibilities had never seemed so bright. The announced withdrawal of Vietnamese forces from Cambodia was enjoying an unquestioned political credibility. The highest political leaders of the Soviet Union and China, long the backers of the two most powerful contending Cambodian forces, had concluded a successful Summit meeting only months before in Beijing. There was a hope, even an expectation, that some understanding between those nations had been reached prior to the Paris International Conference.

Within China, the events in Tien-a-Min Square and the conservative reaction which followed involving the continued arrest, interrogation and execution of young people was leading to a strong reaction in the West with many observers predicting the decline and even the end of Chinese prestige within the United States of America. It was felt that the long support by the Chinese of the Khmer Rouge forces would find less continuing American acceptance or, alternatively, that the Chinese in the face of the Vietnamese withdrawal from Cambodia, would be seen to salvage some standing within the West by visibly diminishing its support for the Khmer Rouge.

The expectation of real progress at the International Conference was greatly boosted by the significant changes of policy in Thailand. Thailand, which provides the means by which Chinese arms are supplied to the Khmer Rouge; Thailand which houses most of the Cambodian refugee camps; Thailand which is a front line state which had long been advancing the view of a domino-effect of communist government in Indo-China, was, at last, opening to the Vietnam supported government in Phnom Penh. The meeting of the Prime Ministers

of Cambodia and Thailand in January 1989 was the most explicit demonstration of this new Thai approach. Upon one view the Thai government could see the real advantages and prospects of an independent Cambodia as a buffer between Thailand and Vietnam. Certainly, all the other ASEAN nations were becoming aware of the extent to which the Thai Prime Minister's promise, that his government intended turning the battlefield of Indo-China into a market place, was coming to pass. It was noted again, and again, in the international media that the Thai political approach was merely following the haste with which Thai military and commercial interests were seeking and obtaining concessions, contracts and quick profits from its economically disadvantaged neighbours, Cambodia and Burma. The International Herald Tribune, perhaps in something of an over-statement concerning the effect of these changes in Thailand, argued that: "The result has been total disarray on the common front on Cambodia that ASEAN has successfully maintained since the Vietnamese forces invaded in 1978".

Despite the spectre of bloody battle after the Vietnamese withdrawal it may have been that the risks of failure of the International Conference were not really properly understood either by those involved or by any interested observers. The belief that the Chinese would moderate support for the Khmer Rouge was high. If the main Chinese preoccupation, concerning the future of Cambodia, was the influence of a Soviet backed Vietnamese domination of Indo-China, then, with the withdrawal of all the Vietnamese forces, it seemed to follow that the Chinese would have little to lose in helping the peace process. The failure of the Chinese to moderate support for the Khmer Rouge and the unwillingness of the United States to obtain Chinese moderation either before or during the Paris Conference demonstrated clearly, and once again, the parallel Chinese and United States approach in Indo-China. This closeness in strategic outlook was first clearly discernable around May 1973 as the Chinese first

appreciated an Indo-China without the United States presence involving, as the Chinese saw it, the emergence of a powerful Vietnam controlling all of Indo-China and closely allied with the Soviet Union. As Henry Kissinger later described it "A unified communist Vietnam dominant in Indo-China was a strategic nightmare for China even if ideology prevented reality from being explicitly stated"* The American administration and the Chinese leadership, according to Kissinger, "Both sought to prevent a bloc which could support the hegemonial objectives of outside powers. In other words we did not want an Indo-China under Hanoi's tutelage aligned with the Soviet Union".**

It is probably fair to observe that International forebodings about Vietnamese intentions, in its own region, has been at the heart of an international inflexibility about Cambodia which has seen the Chinese "strategic nightmare" assume a continuing life of its own assisted, at every turn, by an unrelenting American drive to resist, at all costs, Soviet "hegemonial intentions" in the region.

An international response to the enduring effects of the catastrophe which took hold in Cambodia during the brief period of Khmer Rouge (Pol Pot) rule has, at every turn, been swept aside in favour of the perception that the invasion by Vietnam of Cambodia in December 1978 and its continuing occupation was, and continues to be, a threat to the whole region. Every effort was made by China, The United States of America, and the regional powers comprising ASEAN to take steps to make the Vietnamese presence, in Cambodia, an uncomfortable one. In the United Nations, for example, frequent resolutions called upon all "occupying forces" to withdraw from Cambodia and in the United Nations the Pol Pot

* H. Kissinger: Years of Upheaval Weidenfeld and Nicolson 1982 P57.

** H Kissinger ibid P.351

remnants still occupy the Cambodian seat. Even in the United Nations Commission on Human Rights where human rights violations by the Khmer Rouge were, very early, complained of by the International Commission of Jurists, Amnesty International and a number of nations including Australia, the Western demand for withdrawal of foreign forces from Cambodia continued to completely dominate the human rights debate.

On the Western border with Thailand the international community has been providing support for over a quarter of a million people in refugee camps all of whom are under the control of those opposed to the Cambodian government established after the Vietnamese invasion. Many of those camps provided the recruiting and training resources for the military attacks against the Vietnamese supported Cambodian forces and are now the reserves from which Khmer Rouge invasion is financed, armed and directed. Most significantly of all, the Khmer Rouge forces, still apparently led by those who, while in control in Cambodia, were responsible for the genocide, are kept fed, supplied and armed with the aim of making a come back within Cambodia at the earliest opportunity.

There are many other features of the attempt to pressure the Vietnamese to withdraw from Cambodia which have affected the international approach. These include the non-recognition of the Cambodian government, a refusal to accept that the government has widespread popular support and a continuing refusal by a majority of governments and the United Nations to provide development aid to Cambodia.

The convening of the Peace Conference in Paris during the withdrawal of the remaining Vietnamese troops from Cambodia was the strongest proof that a large part of the diplomatic underpinning, which had so paralysed the international community and fixed the approach of regional powers, had been

removed and a very real realignment of forces had become possible. In those circumstances, then, the failure to make some real progress towards agreement, despite the fact that the central international requirement of Vietnamese withdrawal was being satisfied has left the question to be answered - What further steps must be taken for peace to be achieved?

Any consideration about the future of Cambodia will inevitably have some reference to some of the horrifying facts of the Pol Pot years. Within Cambodia, today, those who dig the earth and the soil still discover human remains with, in some places, the discovery of large numbers of corpses and mass graves. In certain regions of Cambodia are to be seen quite horrible reminders. Although the Cambodians are poor and have a huge task in repairing their country so as to provide even basic necessities for the health, education, transport and welfare for the population the effort which has been made to create memorials upon some of these "killing fields" determinedly continues.

Much of the account of the killing which went on in the Khmer Rouge years is still to be told. The vitally important need for the accounts to be written, for the survivor testimony to be recorded and for the history to be understood continues to be adjourned in favour of the task of rebuilding and resettling. Essential resources are so scarce within Cambodia that the needs of the present inevitably dominate over the claims of the future.

However some very valuable study, research and recording has been undertaken to provide the world with an appreciation of the dimension of the catastrophe which so struck Cambodia. Firstly, we have the testimony of survivors. In her book The Stones Cry Out a young woman, Molyda Szymusiak, describes life as a little girl in a Cambodia indifferent to the life,

dreams and loves of a girl in the middle of it all. Molyda, in her book, in simple language, tells so much of the madness gripping her country as she watches the disease, despair and destruction take hold of each of her brothers and sisters and father and cousins, each giving into and being defeated by the rigour of the work, the hunger, the fear and the disease which were taking hold. She describes the endless relocations of whole communities with the need to rebuild without materials, the changing of names, the imposition of new languages and the dangers of sexual relations between unmarried men and women, the new class system and the all-consuming never-ending struggle for food.

Secondly, we have the work and writing of experts from other countries who have interviewed people, examined the evidence and written of what they have discovered. This was the means, for example, for the world to learn of the killing methods by which the Khmer Rouge sought to kill as many as possible of those Cambodians, in the Eastern zone, described as persons with "Khmer bodies with Vietnamese minds" by requiring them to wear blue scarfs so as to be readily identifiable for the approaching massacres.

Thirdly, we have the demographic experts who have sought to provide some measure of the genocide including numbers of the minorities within Cambodia who had become the tragic victims of the regime. The study of the numbers of Muslim Chams, Buddhist monks, Christians and other minorities eliminated during the Khmer Rouge years has been calculated and estimated at a figure exceeding one sixth of the population of the whole of the country.

Fourthly, the volume of evidence left behind, when the Khmer Rouge fled, after the Vietnamese entered the country, includes meticulous killing records, and at the Tuel Sleng killing centre, volumes of arrest forms, hand written confessions of over 5,000 of those executed and written reports of the torture of the prisoners.

Fifthly, the identification of many of the prison execution centres located within abandoned Buddhist monestaries where, when interrogation and confessions were complete, prisoners were taken to isolated regions where their arms were bound behind their backs, they were blind folded and made to stand at the edge of a prepared open pit and then clubbed on the back of the head and neck and dumped into an open grave.

Generally the forced uprooting, the dispersal of village populations, the destruction of traditional local social organisations, of religious groups and practises and family structures, the forced collectivisation of agriculture, the deliberate liquidation of the middle class as an obstacle to the "new society" were all part of a deliberate policy founded upon an ideological fanaticism. The features of this fanaticism included, as well, indoctrination, torture, hostility to the family, religion, and people living in urban areas and an open war against minority groups to give a nazi-like sense of racial supremacy.

Finally, it must be acknowledged that it is profoundly difficult to describe the extent of the horror by reciting facts and figures and the evidence. Something of those years may be comprehended by reading the literature some of which is of real significance. An understanding may also be obtained by speaking to and hearing those who survived to tell of their own experiences.

INVASION

The destruction of the Khmer Rouge regime was the direct result of the invasion by Vietnam of the whole of Cambodia at the end of 1978. History has recorded the immediate benefit to the Cambodians of the removal of the Khmer Rouge brutality. The task of rebuilding a Cambodian people who had been uprooted, terrorised, weakened and decimated proceeded

at the same time as the account of the Cambodian tragedy emerged, moving people from all over the world to contribute, during those first few months, enormous sums by public donation. Substantial contributions were also made by Western Governments as well as the Soviet bloc countries and Vietnam.

But the task of rebuilding was heavily compromised by the repeated international repudiation of the presence of Vietnamese forces in Cambodia and by the call for the withdrawal of those forces. Such has this call been the predominant theme in the international approach that it is vitally important to briefly examine the moral and legal basis of this call.

The result, in international law, of the invasion in 1978 of Cambodia by Vietnam has, until recently, received very scarce attention from the scholars. In a most valuable study of the invasion, in the light both of international law and practice, Gary Klintworth concludes, in part,

"As well as acting legitimately in self-defence, Vietnam can justify its intervention in Kampuchea on the grounds of humanitarianism.

The law of humanitarian intervention is controversial and not easy to define. Nonetheless it would appear that there are sometimes extraordinary situations that qualify for the remedy implicit in the concept of forceful humanitarian intervention. It is submitted that in certain extraordinary situations, the use of force by one State against another... may be excusable, even condonable. There may indeed even be a legal or moral obligation on neighbouring States to intervene, on the basis of a higher universal morality that transcends the boundaries of parochial State interests..."

Article 2(4) of the Charter of the United Nations, the international proscription against the use of force in international relations, provides:

"All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."*

The clear words of this provision have led to a keen debate among international lawyers as to the extent and the effect of the restriction upon the threat or the use of force between nations. The debate has had, at its foundation, the continuing dilemma - Are there, in international law, resorts to coercion between nations which may be lawful? A most effectively argued analysis in support of the view that there are on occasions situations which justify lawful unilateral resort to coercion is to be found in an editorial of the American Journal of International Law in which Professor Reisman argues that Article 2(4), being part and parcel of a complex security system to be found in the United Nations Charter "was never an independent ethical imperative of pacifism. In the instrument in which it appears there is a full acknowledgement of the indispensability of the use of force to maintain community order". Professor Reisman, after examining the failure of collective security arrangements envisioned in the Charter and the fact that some unilateral coercions were treated as legitimate, proposed:

"A sine qua non for any action - coercive or otherwise - I submit, is the maintenance of minimum order in a precarious international system. Will a particular use of force enhance or undermine world order? When this requirement is met, attention may be directed to the fundamental principle of political legitimacy in contemporary international politics: the enhancement of the ongoing right of peoples to determine their own political destinies. That obvious point bears renewed emphasis for it is the main purpose of contemporary international law: Article 2(4) is the means. The basic policy of

* G Klintworth: Vietnam's Intervention in Cambodia in International Law Australian Government Publishing Service 1989 at p.110

contemporary international law has been to maintain the political independence of territorial communities so that they can continue to express their desire for political community in a form appropriate to them.

Article 2(4), like so much in the Charter and in contemporary international politics, rests on and must be interpreted in terms of this key postulate of political legitimacy in the 20th Century. Each application of Article 2(4) must enhance opportunities for ongoing self-determination. Though all interventions are lamentable, the fact is that some may serve, in terms of aggregate consequences, to increase the probability of the free choice of people about their government and political structure. Others have the manifest objective and consequence of doing exactly the opposite. There is neither need nor justification for treating in a mechanically equal fashion Tanzania's intervention in Uganda to overthrow Amin's despotism, on the one hand, and the Soviet intervention in Hungary in 1956 or Czechoslovakia in 1966 to overthrow popular governments and to impose an undesired regime on the coerced population, on the other. Here, as in all other areas of law, it is important to remember that norms are instruments devised by human beings to precipitate desired social consequences. One should not seek point-for-point conformity to a rule without constant regard for the policy or principle that animated its prescription, and with appropriate regard for the factual constellation in the minds of the drafters".*

Professor Reisman also argues that a further problem with a mechanical application of Article 2(4) is that it directs itself only against outside intervention and is oblivious to an externally inspired, encouraged or financed putch by military officers who do not enjoy popular support and who,

* W. Michael Reisman "Coercion and Self-Determination": 78 ASIL P642 at 643

upon the successful seizure of power, may "request assistance" from abroad to a government which, upon intervening to support the "military officers", is not regarded as acting in breach of Article 2(4). As Professor Reisman continues:

"The net effect of a mechanical interpretation of Article 2(4) may be to superimpose on an unwilling polity an elite, an ideology and an external alignment alien to its wishes. This may entail far-reaching social and economic changes and grave deprivations of human rights for substantial numbers and strata of the population. Recall that all of this occurs in a century whose politics are marked by relentless mass mobilization, with frequent, radical and far-reaching intervention by the apparatus of the state.

In consequential terms, the scenarios we have rehearsed are as destructive of the political independence of the community concerned as would be a massive invasion by the armed forces of another state. To characterize the second form of intervention as unlawful and the first as lawful or at least not cognizable by international law violates the basic policy that international law seeks to achieve and rapes common sense. No international theory of interpretation worthy of the name can do this. Plainly, it is necessary to keep in the forefront the basic policy that animates Article 2(4) and in each case in which its invocation is appropriate to try to secure an outcome as consistent as possible with it."*

It is salutary to ask whether the breaking of the Khmer Rouge brutality was not an indispensable prerequisite to the political independence of the Cambodian people enabling them "to express their desire for political community in a form appropriate to them" Does not the breaking of the Khmer Rouge control satisfy Reisman's criteria of the fundamental principle of the political legitimacy in contemporary international politics: the enhancement of the ongoing rights of peoples to determine their own political destinies? Or to

* W Michael Reisman ibid P 645

put it more directly: The Vietnamese invasion ensured the end of one of the most barbarous regimes this century. Who can argue with the magnitude of this achievement?

The analysis provided by Reisman is not without criticism. To be found among the contrary views advanced is the argument that "it would introduce a new normative basis for recourse to war that would give powerful states an almost unlimited right to overthrow governments alleged to be unresponsive to the popular will or to the goal of self-determination"* and "that invasion may at times serve democratic values must be weighed against the dangerous consequences of legitimising armed attacks against peaceful governments"** and further "in the absence of an effective international mechanism to restrain force individual governments would have wide latitude to decide of the reality of democracy and self determination in various countries.... this is surely not the time for international lawyers to weaken the principle of normative restraint against the use of force."***

Although the debate is one which has two sides the important point is that each view draws it's support from an argument in favour of desirable objectives for humankind. In the circumstances of the Vietnamese invasion, and having regard to whatever other objectives may have motivated the Vietnamese, the removal of the Khmer Rouge regime has satisfied an arguable human and moral imperative.

Another argument, advanced in justification of the Vietnamese invasion, is that upon which Vietnam has principally relied in explaining and seeking to justify its action. The inherent right of a nation to defend itself from armed attack

* Oscar Schachter Vol.78 ASIL P649

** Schachter ibid p649

*** Schachter ibid p659

was explicitly preserved in the United Nations Charter, which in Article 51 provides:

"Nothing in the present Charter shall impair the inherent right of individual or collective self defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."

The justification for Vietnamese reliance upon self defence is arguable. There is little dispute that the Khmer Rouge undertook attacks upon Vietnamese villagers in the border regions and inflicted heavy casualties upon the Vietnamese with the intention of capturing large areas of South Vietnam including the Mekong Delta region. Whether, in response to the military attacks upon Vietnam, its full scale war and invasion of Cambodia were justified upon this ground is elsewhere argued.*

As the International conference in Paris was about to begin, another quite different event was taking place in Phnom Penh. The Cambodian government had issued invitations, world wide, to human rights organisations, Cambodian emigres and aid workers to attend what was called an "International Seminar on the Phenomenon of Genocide and the Prevention of its Return".

The seminar proved to be an extraordinary event. Well attended by human rights lawyers from Western nations including Western Germany, France, Italy, Belgium and the Netherlands there was also, in attendance, Senior Vietnamese officials, a Swedish member of Parliament, a Delegation from Japan, representatives from Italy and diplomatic representatives from Eastern Countries including Cuba, Bulgaria, the German Democratic Republic and the Soviet Union.

* G Klintworth op cit at Chapter 2.

Despite the predictable lengthy talks from senior Cambodian public servants there were moments of quite extraordinary effect. The leading Cambodian emigre in the United States, and a spokesman in Washington for the Cambodians who had fled the country before the Khmer Rouge takeover, spoke movingly of the need to allow the present Cambodian government to continue its task. Speaking in highly personal terms, Chhang Song, a man whose anti-communist credentials cannot be challenged, spoke of his trust for the present Prime Minister of Cambodia, Hun Sen, and his belief that Cambodia is recovering to the extent that many Cambodians would return home to help in the rebuilding of their own country. Chhang Song spoke of "the resurrection of my people and how difficult it has been for me to reconcile my emotions from the present to the past... in a sense my heart stopped to beat".

Another speaker, Im Tam, a Prime Minister in the Sihanouk years, and until recently a Commander-in-Chief in Thailand, spoke about the real danger of a return of the Khmer Rouge with their genocidal policies. The conference was also addressed by a leading Cambodian non-communist intellectual and cultural identity, Vandy Kaom, and by an American lawyer, Gregory Stanton, director of the Cambodian Genocide Project, who has, since 1981, most vigorously promoted both in his writing and speeches, the international value of putting Pol Pot and other remaining Khmer Rouge leaders on trial before the International Court of Justice for crimes against humanity. Australia was represented by Dr William Oats, the Acting Chairman of Quakers Service Australia, representing the non government aid providers, and Daniel Brezniak from the Australian Section of the International Commission of Jurists. Dr Oats, in his important address to the delegates, made a significant and forthright call for Australia and other countries "to knock loudly at the front door" of international responsibility for the Cambodian people.

Another significant speaker, Eva Mysliwiec, a widely recognised leader in arguing the imperatives of international development and humanitarian aid in the region, and the author of the book Punishing the Poor, attended, and spoke of the results to Cambodia of the years of international isolation and the overwhelming fear of all Cambodians of the return of the Khmer Rouge.

The invited guests at the seminar were taken to some of the most important memorials to the genocide and, significantly, were able to discern the depth of anxiety about the continuing Khmer Rouge activities and the extent of the apparent support of the people for the Cambodian government. Although much of the infra-structure within Cambodia is still rudimentary, the markets are full to overflowing and the city of Phom Penh is well populated with busy looking people.

Despite the assertions of those spokespersons who advocate a particular point of view there is no doubt in the observations of those who approach Cambodia without preconceptions or prejudices that the Cambodian government enjoys popular support and approval. Despite having its origin and development with the Vietnamese intervention and support, the Cambodian Government is so confident of its own domestic support that it has distributed firearms to the people in those areas of Cambodia where Khmer Rouge activity had been most expected after the withdrawal of the Vietnamese forces.

RECOGNITION

The question which is so often struggling for an answer is why is not this apparently well-supported government not recognized as a proper government to occupy the seat of the State of Cambodia within the United Nations. Since the overthrow, by the Vietnamese forces, of the Khmer Rouge regime the Khmer Rouge representatives have been permitted to

occupy the Cambodian seat in the United Nations supported by ASEAN and those Western nations who were behind the successful move to have the forces loyal to Prince Sihanouk and the non communist forces of Son Sann join with Pol Pot in a "Coalition Government" dominated by the Khmer Rouge.

Sir Hersch Lauterpacht, one of the worlds greatest theorists in the study of the International Law of Recognition, whilst pointing very firmly to the similarity of the questions which arise in international law as between the recognition of States and the recognition of Governments explained:

"Although, for obvious reasons, the controversy as to the declarative or constitutive effect of recognition is not relevant to the question of recognition of Governments, the essential problems and the principles governing this matter are the same as the recognition of States. The question whether recognition is governed by law or politics is essentially the same in both spheres; and the same applies to the conditions of recognition".*

The important theoretical debates between international lawyers concerning the meaning of recognition and the applicable principles have a particular and striking application to the contemporary Cambodian situation for although the State of Cambodia satisfies the traditional essential characteristics as described in the Montevideo Convention of 1933 i.e. permanent population, defined territory, a government and capacity to enter into relations with other states, the continued occupation of the seat of the State of Cambodia in the United Nations by the Khmer Rouge led "coalition" stands in sharp conflict with the clear principle as discerned by Professor Lauterpacht:

* H.Lauterpacht International Law - Collected papers edited by E. Lauterpacht. Cambridge Univerity Press 1970 P323.

"Undoubtedly, notwithstanding that absence of uniformity and notwithstanding the introduction of tests extraneous to the purpose of recognition, the matter may be regarded, on the whole, as governed by one clear principle, which is: a government enjoying the habitual - although not necessarily willing - obedience of the bulk of the population must be regarded as representing the state in question and as such to be entitled to recognition".*

In an interesting study, Credentials of Delegations and Representation of Member States at the United Nations, published in the International and Comparative Law Quarterly in 1976, Don Ciobanu has illuminated the extent to which the United Nations, after its experience with the two China contest, has taken upon itself the role of deciding which government may act on behalf of any member state. The detailed study by Ciobanu, whilst pointing out that there has always been a minority view denying the power of the General Assembly and its Credentials Committee to enquire into the matter of representation of Member States, examines, in detail, the practice and voting patterns at the Credentials Committee. Accordingly to Ciobanu "generally speaking Member States have adopted one stand or the other according to the circumstances of individual cases, and it seems that in making their decisions they were motivated by political, rather than legal considerations".

The applicable criteria to be applied in the matter of representation has also been a matter of some real debate in the United Nations. Apart from the very generalised Resolution 396U which provides that in exercising their power the political organs of the United Nations should proceed "in the light of the purposes and principles of the Charter and circumstances of each case" the Legal Counsel of the United Nations in a memorandum Legal Aspects of Problems of Representation in the United Nations succeeds in addressing,

* Lauterpacht ibid P324

more directly, the problem of two rival governments. The Memorandum explains:

"In essence this means an enquiry as to whether the new government exercises effective authority within the territory of the State and is habitually obeyed by the bulk of the population".

This view, according to Ciobanu, not only accords with the opinion of most international lawyers but is in conformity with the Estrada Doctrine under which states establish diplomatic relations with those governments which exercise control and enjoy the popular assent of its people and is close, also, to the theory of compulsory recognition first advanced by Lauterpacht and discussed so continuously ever since.

There is another, more important, argument which deserves consideration in any attention which may be given to the continued occupation by the Khmer Rouge dominated "coalition" of the Cambodian Seat in the United Nations.

Although, in its more modern form, the principle of Jus Cogens has been most closely associated with development of content and meaning of treaty obligations, the principle of Jus Cogens has acquired an expanded meaning. In the Barcelona Traction Light and Power Case* the International Court of Justice held that:

"An essential distinction should be drawn between the obligation of a State towards the international community as a whole, and those arising vis-a-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection, they are obligations erga omnes."

"Such obligations derive, for example, in contemporary international law, from the outlawing of

* 1970 ICJ Reports 3,32,

acts of aggression, and of genocide as also from the principles and rules governing the basic rights of the human person including protection from slavery and racial discrimination".

Similarly Alfred Vedross, a member of the International Law Commission, asserted in 1966:

"In the field of general international law there are rules having the character of Jus Cogens. The criterion for these rules consists in the fact that they do not exist to satisfy the needs of individual states but the higher interest of the whole international community. Hence these rules are absolute".*

Although there is a reticence among some jurists to see an extension of the doctrine of Jus Cogens, the International Law Commission, after a study of State practice, judicial decisions and opinions of writers concluded:

"There is a growing tendency to distinguish between two different categories of internationally wrongful act of the state; a limited category comprising particularly serious wrongs, generally called international "crimes" and a much broader category covering the whole range of less serious wrongs"**

Of the consequences attaching to an international crime the International Law Commission proposed that:

"An internationally wrongful act of a State, which constitutes an international crime, entails an obligation for every other State:

- (a) not to recognize as legal the situation created by such act; and
- (b) not to render aid or assistance to the author State in maintaining the situation created by such act; and
- (c) to join other States in affording mutual assistance in carrying out the obligations under (a) and (b)".

* Jus Dispositivum and Jus Cogens in International Law (1966) 60ASIL 55,58.

** 1976 Yearbook Vol. 2II 97

In a most sensitive analysis of the current State practise in relation to non-recognition, John Dugard in his book Recognition And the United Nations* concludes: "The development of a two-tier system of legal rules, with higher status rules that are to be enforced by invalidity and non-recognition, provides the jurisprudential basis for the contemporary doctrine of non-recognition". Dugard, after examining the doctrine of Jus Cogens in the prohibition of systematic racial discrimination, the suppression of human rights, Apartheid and the prohibition of the denial of self determination adds:

"The principle function of recognition - the acknowledgement of the existence of a State - still falls within the competence of the individual sovereign State acting unilaterally... the main thesis of the present study is that in practice this function is largely exercised by the political organs of the United Nations in the course of admitting a State to membership in the world body. This is a natural consequence of the near universality of membership of States in the United Nations.... its near universality of membership ensures that in most instances membership of the United Nations determines the existence of a State, irrespective of any additional unilateral acts of recognition on the part of States".**

It is not and has not been an issue that there exists an international interest in the presence of the State of Cambodia in the United Nations. But all considerations applicable to non-recognition of States apply with at least the same force to those permitted to represent the State of Cambodia in the deliberations of the United Nations. The United Nations is entitled to apply to those who occupy the seat of Cambodia in the United Nations, the considerations of morality which have been enunciated in the discussion concerning the rule of Jus Cogens or the peremptory rules of international law. The atrocities by the Khmer Rouge during its period of power within Cambodia have already been referred to. Any consideration of international and legal

* Cambridge Grotius Publications Limited 1987 at P145.

** Dugard ibid P67

morality requires the non-recognition of those persons or those forces responsible for the atrocities.

THE PRESENT

The question has arisen as to the current orientation of the Khmer Rouge and whether this matter has a bearing upon its continued occupation of the seat of Cambodia within the United Nations.

In a report prepared by The Asia Watch Committee entitled "Khmer Rouge Abuses Along Thai-Cambodian Border"* repeated reference is made to the extraordinary difficulty of obtaining access to the Khmer Rouge controlled border camps by those interested observers, aid workers and others seeking an insight into the contemporary Khmer Rouge condition. Those who have had a glimpse inside the camps provide a wholly negative view. The Asia Watch Report speaks of human rights abuses to be regular occurrences inside the refugee camps administered by the Khmer Rouge "forced labour, denial of medical care, denial of food as a means of coercion, use of civilians against their will for military purposes and harsh penalties including execution for those who disobey orders." The Report refers to an account given by the director of the United Nations Border Relief Organisation (UMBRO) Y Kim "as regards the camps under (Khmer Rouge) management we are regularly in receipt of first hand reports of bizarre violations of human rights". The Report identifies cases of summary executions and describes forced labour and portering where escaped refugees have told of being forced to carry arms and ammunition through heavily mined areas along the border, no distinction being made between military personnel and civilians. These reports are carefully documented in The Asia Watch Report which continues:

* Asia Watch Report February 1989 New York

"There are thousands in the Khmer Rouge camps who are there against their will. Even in Site 8, where conditions are relatively better than in other Khmer Rouge camps, Cambodians have told aid workers that the vast majority of refugees there would prefer to be in a non-Khmer Rouge camp if given the chance... Khmer Rouge camps have a tight system of social and political control according to refugees who have escaped from them... "You can't sneak away because wherever you'd go outside of your own section you would clearly be out of place... and there are no secrets within each section. Everyone knows everyone, everyone watches everyone. Look around a Khmer Rouge camp and you will probably see a lot of people sitting around looking lethargic. Its because they're afraid to do much because there is so much they could do wrong. Marriage, listening to radio broadcasts, talking with foreigners are all forbidden or at times highly regulated".

The Asia Watch Report, within its conclusions and recommendations, states:

"Conditions in the Khmer Rouge controlled camps and the forced displacements of refugees in late 1988 underscore the need to prevent those Khmer Rouge leaders most responsible for the Cambodian genocide from playing a further role in Cambodian political life....

The forced removals took place from camps that were hundreds of kilometres apart indicating that they were part of a central policy. Such a transfer would not have been attempted without the authorisation of leaders like Pol Pot and Ieng Sary who, observers believe, continue to be the primary decision makers.

Pressure must be exerted in the international community to bring those responsible for crimes against humanity to justice".

The campaign to bring to justice those most responsible for the Cambodian horror has been running for some years, with the leadership coming from both the Cambodian Genocide Project, under the direction of Professor Stanton of the Washington and Lee University and the Cambodian Documentation

Commission under David Hawk. The legal mechanisms and arguments which are available to the world community have been well outlined as both the Cambodian Genocide Project and the Cambodian Documentation Centre have organised, in the form of a legal brief, the overwhelming evidence available for action in the International Court of Justice to bring to Justice, under the Genocide Convention, those most responsible.

Although those most responsible for the atrocities could well be dealt with by an appropriate tribunal under general and customary international law the Convention for the Prevention and Punishment of the Crime of Genocide has been available to the world community since it was adopted by the United Nations General Assembly on 9th December, 1948. Cambodia is a signatory to the convention as are many other nations. The Genocide Convention provides that "persons charged with genocide shall be tried by a competent tribunal of the State in the territory of which 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 failure, by any nation, to take the lead under the Genocide Convention and file, as a State party to the Convention, a "dispute" is attributable, completely to the international paralysis described earlier. There is a reluctance, on the part of all nations, to move in a diplomatically unpopular direction with the likelihood of upsetting allies and creating possible disadvantages in other areas. In any event, the continued presence by Vietnamese forces in Cambodia became harder and harder to justify to the opponents as year followed year and the Khmer Rouge were apparently relegated to the border regions. The unpopularity of Soviet foreign policy, particularly after its entry into Afghanistan, was given a new life in the West, China and the non-aligned nations. This climate did not assist at all

those seeking to promote views or put arguments antithetical to the interests of the only significant military force capable of standing against the Soviet-backed Vietnamese presence in Cambodia.

The real value of putting the Khmer Rouge leadership on trial before a widely accepted international tribunal always was, and continues to be, the resultant damage or destruction to the credibility of that very same force which inflicted such a nightmare upon its own people. The military support by the Chinese of the Khmer Rouge and the Americans and ASEAN of the Khmer Rouge allies would have become more difficult to justify as would have the ability of the Khmer Rouge leaders to characterise themselves as a Cambodian "party" to any diplomatic solution.

The last twelve months have seen the removal of the greatest obstacles in the path of a resolution to the Cambodian impasse. The withdrawal of Vietnamese forces has removed the substance from the arguments of that majority of nations which had advanced the Vietnamese presence as the justification for support for Khmer Rouge resistance. The withdrawal of Soviet forces from Afghanistan and the decline of the Soviet will (or ability) to sustain its hold upon regional allies is still drastically affecting the international outlook. As well, much of the enchantment by which the Chinese attracted a following in the West has been dissipated as a result of the internal events in that country.

These changes do not make any more pressing the need to discredit the Khmer Rouge leadership and the anomaly of its continued hold of the Cambodian seat in the United Nations. The changes do, however, create the vital opportunity for those steps to be taken. The march towards peace will take a large jump forward if obvious

action is taken now before the Khmer Rouge forces are allowed to weaken the confident assertive and popularly supported government of Cambodia.

Most significantly, the diplomatic risks to the smaller powers, in taking decisive action must, as a result of the important changes, be less than ever before. In the area of direct bilateral recognition, in the United Nations and under the Genocide Convention the opportunities are manifest.

There is, just outside Phnom Penh, at a place called Cheung Ek, a memorial, a structure with four triangular glass sides reaching high into the sky with, inside it, layer upon layer of ordered skulls looking outward and as the glass, each day, reflects the sun in changing ways, certain of the human heads are illuminated while others fade away. If the grim acts by which so many human beings became, each of them, one of so many remains, are to be avenged or even again avoided, the task is in the hands of those governments and those living people who contemplate, once again, the questions which confront us. Arch Puddington in Commentary* asks: "what is the future role of the Khmer Rouge in a Cambodian society they nearly succeeded in destroying. Will Khmer Rouge soldiers, conditioned to be revile every aspect of the old society, be allowed to serve in a reconstituted army? Will Pol Pot and his lieutenants, those directly responsible for mass murder, be permitted to enjoy full civil and political rights?"

*April 1987 P.49 at P.51

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