

the Montreal Convention, the Court could have indicated such measures *proprio motu* on the basis of Article 75 of the Rules of Court.

NABIL ELARABY

Judge, International Court of Justice

John Crook replies:

My apologies to Judge Elaraby for the mis-description of his position in the sentence he points to. This partly resulted from attempting to describe thoughtful and subtle positions in a few words for purposes of a short survey. I had thought, incorrectly as Judge Elaraby now makes clear, that the sentence reflected a powerful current in his declaration, which begins by indicating that the Court should in principle order provisional measures whenever urgency and likelihood of irreparable damage are established, without referring to jurisdiction. Important parts of the ensuing analysis seemed to flow in the same direction, emphasizing (in paragraph 3) the Court's "wide scope of discretion," and stressing (in the same paragraph) that the Statute "does not attach additional conditions to the authority . . . to grant provisional measures. In point of fact, the jurisdiction of the Court need not be established at this early stage of the proceedings."

Judge Elaraby, of course, is the ultimate authority on the matter, and I am grateful to him for taking the time to read my survey of the Court's work and to correct the record.

TO THE EDITORS IN CHIEF:

David Marcus's piece, *Famine Crimes in International Law* (97 AJIL 245 (2003)), has much in it to command the attention of genocide scholars.

His proposition that there be a second degree of famine crimes has long been advocated by scholars of genocide for genocide itself. The senior scholar of genocide, Yehuda Bauer, has argued that there are two crimes of genocide: first, "genocide"—the planned destruction of a group by various means, including enslavement; second, "holocaust"—the planned physical annihilation of the group.¹

Helen Fein, one founder of the study of comparative genocide, detailed elements of the crime of genocide by attrition six years ago.² Unfortunately, famine crimes are only one of its components.

Genocide by attrition is proscribed by the United Nations Genocide Convention, yet its elements are nearly unknown and never enforced. Documentarians do not ask survivors about their menstrual periods or lice infestations. From my tiny corner of the very large body of evidence, I would like to describe elements of the crime in the genocide of attrition that took place in Cambodia between 1975 and 1979. Attrition entails, among other things, famine, birth control through famine, and the diseases of sewage, unburied bodies, and typhus-bearing lice. The forced removal of Cambodian children five years old and up to Khmer Rouge work groups, and the subsequent universal Khmer Rouge exhortation to betray their parents' class in "self-criticism" sessions, with fatal results, may arguably be construed as a violation of the UN proscription (Art. II(e) of the Convention) against the removal of children to destroy the group.

¹ FRANK CHALK & KURT JONASSOHN, *THE HISTORY AND SOCIOLOGY OF GENOCIDE: ANALYSES AND CASE STUDIES* 20 (1990).

² Helen Fein, *Genocide by Attrition 1939–1993—The Warsaw Ghetto, Cambodia, and Sudan: Links Between Human Rights, Health, and Mass Death*, in 2 HEALTH AND HUMAN RIGHTS 2, 10–45 (1997). Among elements of the crime of genocide by attrition, Fein notes forced relocation; deprivation of populations; epidemics of nutrition-related disease as well as malaria, tuberculosis, typhus, meningitis; rape, castration, prevention of marriage; coercive assimilation of children; contamination of water supply; withholding of fuel; overwork, and overcrowding. Fein notes that 700,000 Jews, or 13.7% of the dead, died of hunger and diseases attributable to conditions in Nazi ghettos, *id.* at 12; of the estimated 2.2 million Cambodian dead, an estimated one quarter died of starvation and one quarter of disease, *id.* at 19; of 1.3 million southern Sudanese dead, many died of famine or disease preventable by available medication. Some 75,000 Dinka children were sold into slavery in the north, as proscribed by the UN convention on genocide. *See Convention on the Prevention and Punishment of the Crime of Genocide*, Dec. 9, 1948, Art. 2(e), 78 UNTS 227 (entered into force Jan. 12, 1951).

Whether it was deliberately or recklessly imposed, first-degree genocide or second-degree, the removal and attempted brainwashing of the Cambodian children is genocide by attrition for which the Khmer Rouge should be held accountable—by history, if nowhere else.

Famine is, first of all, a form of birth control for those who survive it. Imposing birth control on a group is proscribed by the UN Convention in Article II(d). Starving women cease to menstruate. Starving adolescents do not reach puberty. Calculations of the dearth of births under the Pol Pot regime in Cambodia have been made, not specifically to document genocide by famine birth control, but to indicate the damage caused by genocides of attrition. Authoritative projections for the total numbers of Cambodians who were executed or starved are nearly the same—39.3 percent executed, 36.3 percent starved.³ In addition, a projected 570,000 births did *not* take place.⁴

As for the kinds of famine crimes Marcus details in his essay, there is evidence that Pol Pot exported his rice crops to China, Hong Kong, Madagascar, Yugoslavia, and possibly Japan. His people worked eighteen hours a day to grow it, and starved.⁵ The rest of the evidence of Pol Pot's faminogenic exports are the records of the Democratic Kampuchea Ministry of Commerce. They sit silently on the shelves of the National Archives in Phnom Penh, awaiting a generous, trilingual scholar with the money and the time to translate these famine crime documents from Khmer and Chinese into English, the language of international adjudication. Emerging testimony by Khmer Rouge survivors corroborates famine crime policy.⁶

Birth control through famine reduced the birth rate in Cambodia during the genocide by an estimated 570,000. Famine, and the diseases of genocide by attrition arguably claimed as many as 1.1 million lives in the Cambodian genocide, of an estimated 2.2 million dead. As Marcus notes, low-tech tyrants do not need war, elaborate railway systems, crematoria, or Zyklon B to achieve what lice alone can accomplish.

JEANNETTE SMYTH

³ MAREK SLIWINSKI, *LE GÉNOCIDE KHMER ROUGE: UNE ANALYSE DÉMOGRAPHIQUE* 82 (1995).

⁴ Judith Banister & Paige Johnson, *After the Nightmare: The Population of Cambodia*, in *GENOCIDE AND DEMOCRACY IN CAMBODIA: THE KHMER ROUGE, THE UNITED NATIONS, AND THE INTERNATIONAL COMMUNITY* 90 (Ben Kiernan ed., 1996).

⁵ BEN KIERNAN, *THE POL POT REGIME: RACE, POWER AND GENOCIDE IN CAMBODIA UNDER THE KHMER ROUGE, 1975–1979* 236, n. 40, 380–82 (1996).

⁶ CRAIG ETCHESON, *RETRIBUTION AND RECONCILIATION: HEALING WHAT AILS CAMBODIA* (unpublished project report to the U.S. Institute of Peace, 2002).