

SPEECH – HUMAN RIGHTS DAY 2020

UNAA, NT Chapter
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Human Rights Day is observed every year on 10 December which is the day the United Nations General Assembly adopted, in 1948, the Universal Declaration of Human Rights (UDHR). The UDHR is a milestone document that proclaims the inalienable rights which everyone is entitled to as a human being - regardless of race, colour, religion, sex, language, political or other opinion, national or social origin, property, birth or other status. It is the most translated document in the world.

Come along and hear from our fantastic Key Note Speaker, Ms Lyma Nguyen who practises as a barrister both internationally and domestically, primarily in the area of criminal law and human rights. Ms Nguyen will discuss her role as International Counsel at the Extraordinary Chambers in the Courts of Cambodia, where she has, alongside Cambodian co-lawyers, represented victims of Cambodia's genocidal Khmer Rouge regime. Ms Nguyen was recently announced as the overall 2020 winner of the 40 under 40 Most Influential Asian-Australian - Leadership Awards (presented 29 October 2020).

Article 1 of the Universal Declaration of Human Rights proclaims, “All Human Beings are born, free and equal in dignity and rights”. What a powerful statement!

These words convey a moral, philosophical and normative principle – being that a fundamental quality that we all possess – simply by virtue of being human – is that each of us is *equal to the other* – equal in our worthiness of honour and respect – and in our entitlement to be treated as such, in society, and before the law.

My work over the last decade, as an International Counsel at the Extraordinary Chambers in the Courts of Cambodia, has earned me the privilege of standing before you, to share with you, a part of my journey, in representing the human rights of victims of serious, mass and historical, atrocity crimes. We are talking about large scale and serious deprivations of human rights amounting to genocide, crimes against humanity, and war crimes, committed over the period between 1975 to 1979 by the Senior Leaders of the Democratic Kampuchea, known as the Khmer Rouge.

I have provided *pro bono* legal services for victims and civil parties at the ECCC across three different case files (known as Cases 002, 003 and 004). In doing so, I have worked closely with various local NGOs, human rights organisations and partnered with Legal Aid of Cambodia. I will share with you today what the *reality* has been, both for myself and for the victims in this setting.

Human rights work – at least for me – hasn't been as glamorous as it might be depicted in some circles. It's certainly not as glamorous as Amal Clooney might make it look! To the contrary, representing victims of human rights abuses is intense, gruelling work, which requires stamina. When I started back in 2008, I certainly didn't think the trial would still be continuing 10 years on.

Human rights work certainly does not pay very well – or at all. Most victims of atrocity crimes do not have the means to pay for legal representation. But it is extremely rewarding in different ways. Dealing with historical crimes and the victims who experienced them first hand, *does* bring you face to face with cold hard realities – life and death realities – which is thrilling if you are one to get a thrill from confrontations with humanity.

My journey on this path started on my first trip to Cambodia in August 2008. I joined some Singaporean colleagues with a mission to scope the scene for victims representation in a country where almost everyone who was over the age of 30 was a victim of the Khmer Rouge Regime. That regime was in power between 1975 to 1979 – and it aimed to set a socialist Marxist-Leninist social foundation to achieve *exact equality* for all – but it did the very opposite.

The regime hoped to bring society back to “Year Zero”, by implementing the idea that all culture and traditions within society is to be completely destroyed, to enable a new *revolutionary* culture to replace it. In this ideology, intellectuals, professionals, land owners, business owners and city dwellers, were singled out and “re-educated” or *purged*, so that society could start from scratch, with a level playing field, where all civilians were equal in their peasantry and their labour outputs.

The Khmer Rouge’s methodology to achieve this dystopia included to forcibly transfer all residents from the capital city of Phnom Penh, to the countryside, where people were forced to engage in agricultural labour, in conditions of over-work and starvation.

Uprooted from their homes, the city-dwellers were forced to leave their belongings, their family homes, their livelihoods. All social structures that sustained their way of living, was destroyed – money and banking; shops and markets; schools and universities, temples and places of worship – were eradicated. The people were then expected to “refashion themselves” to adapt to the country environment.

Their deprivation of fundamental rights was based on their *perceived* political affiliations and values. They were classified as “capitalists”, “feudalists”, and “imperialists” – terms designated to “enemies of the regime”, and on this basis, they were deprived of all their human rights and freedoms.

The Khmer Rouge’s policies relating to the forced transfers *set in motion* 3 years 8 months and 20 days of *enslavement*. These policies created a situation in which the regime had *absolute control* over its population. This absolute control entailed the *absolute deprivation* of people’s freedom of movement, freedom of speech, privacy, right to human dignity, and every other right and freedom, inherent to being human – freedom to have aspirations, to love, and to have religious faith.

The regime monitored, supervised and determined how every single person behaved, spoke and conducted themselves, at all times. It determined how every minute of their days were spent, from when they woke up, their hours of work, their eating routine, who they married, when they slept.

This control was exercised through the creation of an overarching system of forced collective labour, starvation, fear, apprehension, distrust and terror. Under this system, the victims *belonged* to the state, the regime possessed their bodies and minds, treating them as cogs in a machine, as chattel, to be moved around, to be worked, and to be gotten rid of, when it suited the regime.

During the regime, approximately 2 million people died. Most died of starvation, overwork, arbitrary executions, and lack of medical care. Minority groups – such as the Cham Muslim, ethnic Vietnamese were targeted to be eliminated. Buddhist followers were also persecuted as religious tradition was abolished. The regime forcibly married couples in order to control the populous and create new generations of followers.

30 years after the fall of the regime, the international community, through the United Nations, together with the Cambodian government, established the Extraordinary Chambers in the Courts of Cambodia – a hybrid internationalised court in Cambodia’s domestic setting, operating in the Khmer, English and French languages, with jurisdiction to try Senior Leaders of the Democratic Kampuchea for crimes committed between 1975 and 1979.

At the ECCC, victims who are admitted as Civil Parties – in common law terms, plaintiffs – are entitled to assist the prosecution by filing complaints providing a factual basis for charges

against the Accused persons – and to seek moral and collective reparations for the direct and personal harm that they suffered.

In Case 002 – the largest and most important case file – four senior leaders of the regime were charged on the basis of a joint criminal enterprise to commit genocide, war crimes, crimes against humanity as well as crimes under Cambodia’s domestic Criminal Code, such as torture.

Together with national lawyers, I have represented the civil claims of 127 civil party applicants. These include victims of the Cambodian diaspora now residing in the United States and Australia, and the family members of foreign nationals who lost their loved ones at the hands of the Khmer Rouge regime.

One of my high-profile Western clients was a New Zealand Olympian rower by the name of Rob Hamill. Rob’s brother, Kerry, was, in 1978, sailing a yacht called “The Foxy Lady” with some of his friends, including a Canadian and an Englishman. He actually stopped in Darwin at one stage, but he journeyed on, and strayed into the wrong place, at the wrong time. Kerry was captured off the coast of Cambodia while sailing there in 1978. One of his mates was shot at sea, and he and the other were captured by the Khmer Rouge and sent to the S-21 security centre in Phnom Penh, where they were detained, tortured and forced to sign a confession before being finally executed.

The human spirit, however, is strong – and Kerry managed to choose his attitude to the horrific predicament he found himself in – by playing to the forced confessions in *his own way*. When asked who his superior was, he nominated Colonel Sanders, which we all know as being associated with Kentucky Fried Chicken. He used his family telephone number as his CIA operative number and said his training instructor was an S. TARR, that being his mother’s name – Esther.

During my 2008 and subsequent visits to Cambodia, the local human rights NGOs put me into contact with survivors belonging to the ethnic Vietnamese minority group, who had resided in Cambodia for generations. These clients lived on the floating villages of the Tonle Sap River.

They were a vulnerable group that had suffered much discrimination throughout various regimes in Cambodia, and initially they were extremely reluctant to involve themselves in the tribunal’s proceedings. Many feared repercussions, and most simply did not feel that they had a voice, or any standing to speak. Building trust with these victims of genocide in order to access their stories, took time.

Genocide is not something that happens overnight. There is a state sponsored process of singling out members of the group, discrimination, scape-goating, dehumanising – escalating to state created policies, carried out with an intention to destroy the group in whole, or in part.

During my visits to Cambodia, I found that anti-Vietnamese sentiment in social and political discourse was burrowed deep – to the point that even local human rights advocates and some few national lawyers were open in stating a view that they did not consider any ethnic Vietnamese in Cambodia to be “victims” of the Khmer Rouge regime.

So genocide victims do not simply trust everybody. But the clients *trusted me*, firstly, because I was an independent *international* lawyer – but also because they were able to communicate directly with me in the Vietnamese language, without interpreters and intermediaries.

The first two years of my *pro bono* work focused on assisting my clients in the application process and representing their claims during the investigations phase in Case 002. The aim was simply to get the court to admit them as Civil Parties.

This involved multiple trips to Cambodia, to interview survivors who resided on the floating villages on the waters of the Tonle Sap River. Access to the clients was often difficult and required much pre-planning, with the assistance of the outreach staff the local NGOs and from Legal Aid of Cambodia. Flexibility and spontaneity had to also be factored in, as it was common to have broken down cars on the way to the villages; to take motorbikes through muddy fields; and to have to bail water out of motor boats on the way to client's floating houses. These became some of the fond memories I have of client outreach trips and conferences.

I was admitted to the Cambodian Bar in 2009, where I was able to represent clients in court.

The prosecution's Vietnamese genocide case was based on evidence of mass deportations of the group; discriminatory treatment amounting to persecution; incitement of anti-Vietnamese hatred and war propaganda; mixed marriage policies whereby Khmer individuals in mixed Khmer/Vietnamese couples were ordered to kill their Vietnamese spouse and children; and a pattern of systemic and widespread execution of members of the group.

An demographic expert report established that the Khmer Rouge regime achieved a 100% elimination of the ethnic Vietnamese from Cambodia by the time the regime collapsed in 1979.

I found that some of these survivors had not spoken, in over thirty years, about what they had experienced during the Khmer Rouge period. Mostly because they needed to move on, and focus on the daily challenges they faced, living in Cambodian society. I learnt that when they did speak – so horrific were some of their accounts that their own children did not always believe them.

Once trust was built, the victims poured out their stories to me, about mass deportation to Vietnam, torture, cannibalism, rape, the singling out of members of their group, mass executions of family members in the killing fields, and forcible killings of ethnic Vietnamese in mixed Cambodian-Vietnamese marriages.

These stories, I collected, and offered to the prosecution, ensuring that narratives with legal relevance were transformed into witness statements for the case 002 trial. In this way, the Civil Parties fulfilled their mandate of Civil Parties to "support the prosecution" under the tribunal's Internal Rules.

The court has since acknowledged, through the findings of guilt in Case 002/02, that genocide was committed against the ethnic Vietnamese – and that the Khmer Rouge leadership enacted policies aimed at destroying the group, in whole or in part. That Judgment is currently being appealed by the last surviving Senior Leader, Khieu Samphan. With 26 historical crime sites and crimes against minority groups across the country being prosecuted in three languages, the proceedings took so long that three of the accused Senior Leaders, one by one, passed. Many of my elderly clients also passed away in the process. However, it was important that their stories remained on the legal and historical record.

Once clients were admitted as Civil Parties, they had legal standing to seek "moral and collective reparations" within the tribunal's mandate.

This aspect of my work highlighted how victim participation in a criminal trial can shed light on contemporary human rights issues affecting a minority group that has been affected by genocide – including the generational impact of genocidal acts and intent.

Without elaborating on the details about the long and complicated historic tensions between Cambodia and Vietnam, the stories told to me by my ethnic Vietnamese clients demonstrated

that there was a larger political discourse around genocide charges, with many of them wanting to seek “Cambodian nationality” under moral and collective reparations.

The claim was too politically sensitive, and consideration was made as to whether it was in the clients’ best interests to pursue it. However, what became clear was that this was the *single most important* pursuit for the group, as many were deprived of basic human, economic and social rights in Cambodia for reason of a lack of identity in the country.

The reason they lived on the floating villages was because they were not allowed to own land or property, and a loophole in the law meant that water is not considered to be “land”. They were living on the margins of society, unable to find gainful employment, or to access health and education, or even open a bank account or borrow money. Without access to these basic social services, their futures, and the future of their children, were bleak.

These disadvantages existed because they did not have Cambodian nationality or any identification which could verify that they were long-term residents of Cambodia. Further, they also did *not* have any nationality under the operation of any state’s laws, including Vietnam. It appeared that the group was stateless under international statelessness laws and principles.

It was my assessment that my clients had a legitimate reparation claim before the tribunal, but the claim was a very unpopular one – particularly amongst the defence lawyers, who were, as part of their defence cases, blaming Vietnam for the atrocities that occurred in Cambodia.

To properly put the claim in its legal context, *it was necessary to articulate the crime*: Many of my clients had lost vital documentation during the forced deportation to Vietnam in 1975 and, upon returning to Cambodia in the 1980s, were unable to prove their previous civil status in Cambodia. In fact, upon their return to Cambodia, they were treated as “immigrants”, despite all of them having been born in Cambodia, resided in the country for generations, or having acquired Cambodian nationality by operation of past nationality laws, which were in effect during the years they were born.

It was necessary to properly articulate the harm: the loss of important documents rendered them unable to prove their identities, their birth in Cambodia, their ties to Cambodia, or any previous acquisition of Cambodian nationality. This harm was caused as a direct result of crimes committed against them by the Khmer Rouge – but most directly, their forcible relocations within Cambodia and ultimately, their deportation out of Cambodia.

Without the efforts of my legal team to bring up their cases at the tribunal, the ethnic Vietnamese would have been a forgotten minority at the ECCC. Many volunteer lawyers, interns, and students from all around the world, also put in pro bono time, and the efforts of local Cambodian lawyers, human rights activists and outreach staff cannot be forgotten.

Despite the many challenges and obstacles, working with victims has been extremely rewarding – because it is *real*. You *know* it’s *not* simply an academic exercise when you see victims speaking up for the first time in 30 years about the horrific and unspeakable crimes they suffered. And moreso, to see them becoming empowered in the process of filing a claim is very special. For me, it is also rewarding to step back and observe the placement of historical truths on the legal record and to observe how this might affect the future of a nation.

A long-standing memory in my mind was when the Village Chief of the floating communities that I represented, presented me with two *rare* fish from her floating village, which she had carefully dried, wrapped in newspaper, and transported to Phnom Penh. During a client conference, she instructed me to take the fish back to Australia for my parents, giving detailed instructions for how to cook the fish, what ingredients to use.

Of course, all I could think about was the airport quarantine regulations, and how this was never going to get past Australian Customs! Looking back, that scenario stands out as one of the greatest expressions of appreciation I have received from my clients. My Vietnamese clients depend on fishing for their livelihood. This was their way of saying “thankyou”.

Conclusion

Human rights awareness is assisted by legal instruments and principles – the Magna Carta; the Constitution; the principle of separation of powers; fair trial standards; anti-discrimination and fair work laws; equal opportunity, and equality before the law. But for me, human rights came first, before the law put a name to it.

At its philosophical centre, human rights is underpinned by two fundamental principles: human equality and human freedom. Non-discrimination and natural justice are critical components of the principle – and at its heart is the golden rule – of doing unto others, what you would wish to be done, unto you.

Whilst morally, we may be free and equal in dignity and rights – the truth, when we look at many scenarios around the world – including in our own country – is that not all humans are *treated* as free agents in their own right, or treated equally to others, by governments, institutions, workplaces – and by other human beings.

Mahatma Ghandi once said, “A nation’s greatness is measured by how it treats its weakest members”. But here, in Australia, we see asylum seekers who are punished by detention in offshore centres for their mode of arrival to Australia by boat. In terms of prisoners rights – whilst it is not visible to the mainstream population, as a lawyer who represents criminal cases in the Northern Territory, I have clients in prison who have been, and remain, in arbitrary solitary confinement for over six months, with loss of rights and privileges that amount of human rights abuses. In many developing countries – and even in some developed countries, such as America, you see poverty take away the dignity of those who are ill and unable to afford proper medical care. All over the world, we see laws that are discriminatory in effect. We see minority groups with no voice. We see human rights eroded.

Article 1 of the Declaration of Human Rights proclaims that human rights is a fundamental part of being *alive*, of being human. It is something *so close* to us we don’t always see it – like a shadow that is a part of us everywhere that there is light.

When you take away the legal frameworks around which human rights law operates, and there are only human faces and human experiences.

We are reminded that human rights is not simply a theory. For human rights to thrive, it needs to be *lived*. Living and breathing the principles of the Universal Declaration of Human Rights – to me – means looking beyond yourself, and seeing that those around you – the migrant worker who was unfairly dismissed; the asylum seeker who was turned back at sea before they could reach Australian waters; the man bound to a wheelchair who was not allowed access to a public facility; the indigenous person who was searched by police because of the colour of their skin – that all these people, by virtue of the qualities that make them human, are so fundamentally *like* you, that *you* could have been *any* one of *them*.

Today is a day to celebrate human rights movements around the world – and to reflect upon the human wrongs and inequalities that exist. It is a day to examine the duty of each and every one of us, to live out the message that *all Human Beings are born, free and equal in dignity and rights* – in all that we do.