

purposes of investigating and prosecuting these individuals. But we had no expectation of it taking more than several months to find suitable jurisdiction (particularly given the high-profile reality of Pol Pot finally in custody and our hope that having him in custody would spur Security Council interest in finding a means to prosecute him).

As it turned out, not a single senior Khmer Rouge leader was ever captured with the assistance of U.S. authorities. The cooperation of the Cambodian Government for detention of suspects at Palau collapsed by early 1999. The plan would have been activated if our efforts to capture Pol Pot had not been scuttled by his sudden death in late March 1998. Our vigorous efforts to capture Ta Mok (or secure his surrender) during the rest of 1998 and into early 1999 finally were overtaken when he was captured by Cambodian forces and detained in Phnom Penh. Other senior Khmer Rouge leaders surrendered under arrangements that kept them out of prison in Cambodia, with the exception of Kang Kek Ieu (alias Comrade Duch), the chief of the notorious Tuol Sleng prison, who remains imprisoned on this day by Cambodian authorities in Phnom Penh. So the habeas corpus concerns never were tested even under the remote circumstances that would have been presented with a joint custody arrangement in Palau.

The other story in this saga concerns my efforts to find the alternative jurisdiction before which Pol Pot and his colleagues could be held until transferred to a newly established international criminal tribunal or prosecuted for genocide and other atrocity crimes. In all of these efforts, which I will describe briefly, the fact that the United States was incapable of prosecuting the crime of genocide against Pol Pot and the senior Khmer Rouge leaders was diplomatically crippling. It forced me to concede that the United States had not stepped up to the plate itself with some reasonable application of universal jurisdiction for genocide. How could I credibly persuade other governments to stretch their domestic law to prosecute Pol Pot et al. when the United States was not prepared to do so (and had as much if not more reason to try to do so in the case of Cambodia than, say, Sweden, Denmark, Norway, or Spain). If the United States had had the legal tools with which to prosecute Pol Pot, but was hampered for some political or logistical reason, at least then I could have argued with credibility that a foreign government also has the responsibility to step forward and bring this man to justice. So I was dealt a very weak hand.

I pursued two tracks of diplomatic strategy to find a jurisdiction willing and able to prosecute Pol Pot and the senior Khmer Rouge leaders. Both tracks were launched immediately in June 1997 when the first opportunity arose to apprehend Pol Pot. The first track was to approach countries either with some capability in their domestic criminal codes to exercise a form of universal jurisdiction over genocide and/or crimes against humanity or (we thought) might be willing to find an innovative way to prosecute Pol Pot. These countries at first included Canada and Denmark and later, in April 1998, expanded to include Germany, Spain, Norway, Sweden, Australia, and Israel. Each one of them declined the opportunity I presented to receive Pol Pot for trial in the event the United States Government arranged for his capture and then transport to such country. Each one also declined the opportunity to hold Pol Pot temporarily until a suitable national court or international criminal tribunal could be found or created for the purpose of prosecuting Pol Pot and other senior Khmer Rouge leaders.

The second track of diplomatic strategy was to persuade U.N. Security Council members to join us in approving the establishment of an international criminal tribunal to investigate and prosecute the senior Khmer Rouge leaders (including Pol Pot while he was still alive). This proposal went through various stages of evolution, and included plans for sharing certain functions, such as the prosecutor and the appeals chamber, with the International Criminal Tribunal for the Former Yugoslavia (ICTY). In late April and early May of 1998 I worked closely with the U.S. Mission to the United Nations to formally present a draft resolution, with a draft statute for the tribunal appended, to other Security Council members for their consideration. Concerns by other members arose as to germaneness for the Council (i.e., whether there still existed a threat to international peace and security in Cambodia that would trigger Security Council jurisdiction), whether the ICTY's jurisdiction (or perhaps that of the International Criminal Tribunal for Rwanda) should be expanded, whether the Government of Cambodia would formally request such a tribunal (which one permanent member considered essential), and how the cost would be borne. China and Russia, in particular, balked at the proposal and refused to indicate any support whatsoever. Tribunal fatigue on the Security Council also took hold to slow down the Cambodia option. Another key factor was the advent of the permanent International Criminal Court and concerns that an initiative on Cambodia would shift attention and resources away from that key priority for many of the Security Council members (permanent and non-permanent).

Without any leverage to threaten U.S. prosecution in the absence of an international criminal tribunal, I could only press the merits of the issue as hard as possible, knowing that achieving international justice for the atrocity crimes of the Pol Pot regime was not a high priority for most other governments. Indeed, for some it may have been viewed as a threat to their own national interests. I would have benefited, however, if at key junctures in the negotiations over an international criminal tribunal I could have asked whether our colleagues on the Security Council would be more comfortable with a U.S. federal court examining the evidence or would they find more palatable a tribunal of international composition investigating Pol Pot's deeds. I never had the opportunity to offer that choice in my talks.

By August 1999 I had exhausted my final efforts to achieve a Security Council international criminal tribunal with both the Government of Cambodia and with other Security Council members. At that point the Clinton Administration shifted its focus to creating a hybrid court in Cambodia and intensive efforts led by late 2000 to what became the Extraordinary Chambers in the Courts of Cambodia, approved initially by the Cambodian National Assembly in early 2001. But by August 1999 the prospect of looking to the United States as a plausible jurisdiction for prosecution of genocide in Cambodia already had become a distant memory.

In conclusion, I would stress that the inability of U.S. courts to prosecute Pol Pot and the senior Khmer Rouge leaders contributed to significant delays in bringing these individuals to justice, delays that reverberate to this day as the Extraordinary Chambers in the Courts of Cambodia struggle to overcome one obstacle after another before proceeding to indictments and trials. Several key suspects died before they could be brought to trial, including Pol Pot, Ke Pauk, and Ta Mok. Their fates—dead before justice could be rendered—did not necessarily have to become the historical

record. We could have moved much faster and more decisively in 1997 and 1998 to secure their custody, ensure proper medical care, and bring them before a court of either national or international jurisdiction if the reality of U.S. jurisdiction for at least the crime of genocide had existed. If we seek to influence others to prosecute the crime of genocide, and if we aspire to arming our diplomats with the arguments they need to influence other governments to accept their responsibilities for international justice, we must be able to demonstrate that our courts have, within reasonable parameters, the jurisdiction to prosecute the crime of genocide. Even if such jurisdiction may rest upon the discretion of, say, the Attorney General under certain extreme circumstances, we must be able to use it for the worthy purpose of credible justice.

During the final negotiations for the Rome Statute of the International Criminal Court in July 1998, I presented the U.S. position that with respect to the crime of genocide, the International Criminal Court should exercise universal jurisdiction. That U.S. position in the negotiations was partly influenced by our unfortunate experience with Pol Pot months earlier.

I would hope that given all of this experience—stretching back to the Holocaust and even earlier, and given the logic that must apply to ending the crime of genocide, U.S. law at long last could reflect the illegality of genocide committed by anyone anywhere in the world and the ability of our courts to prosecute the perpetrators of genocide, including when they are non-citizens who stand on U.S. soil.

Respectfully,

DAVID SCHEFFER,

Mayer, Brown, Rowe & Maw/Robert A. Helman Professor of Law, Director, Center for International Human Rights, Northwestern University School of Law.

HONORING OUR ARMED FORCES

PRIVATE FIRST CLASS BRIAN BOTELLO

Mr. GRASSLEY. Mr. President, it is with sadness that I pay tribute today to a young man from Iowa who gave his life in service to his country. PFC Brian A. Botello was killed on April 29, 2007, while serving in Iraq as part of the 3rd Squadron, 61st Cavalry Regiment, 2nd Infantry Division. My prayers go out to his mother Karyn, in Alta, IA, and his father Tony in Michigan. They can be proud of their son's honorable service and the tremendous sacrifice he made for his country. All Americans owe a debt of gratitude to Brian Botello. His memory will live on along those other patriots who have laid down their lives for the cause of freedom.

I know that Brian's loss will be felt particularly deeply in the small town of Alta where he grew up. I know that flags have been flown at half mast and everyone from his neighbors to classmates from high school to members of his church are sharing stories and grieving as they remember Brian. I hope that they are able to take comfort in the fact that Brian Botello died honorably as an American patriot and he is now in a better place.

GOOD FRIDAY AGREEMENT

Mrs. CLINTON. Mr. President, today marks a historic moment for Northern