

## **THE CAMBODIAN GENOCIDE AND INTERNATIONAL LAW**

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Cambodia has been a party to the Genocide Convention since 1950. The mass killings committed in Democratic Kampuchea were in clear violation of all the major provisions of that Convention. Political killings are not covered by the Convention unless their intent is to destroy in whole or in part a national, ethnical, racial, or religious group, as such. The evidence has now been gathered that establishes beyond a reasonable doubt the Khmer Rouge intent to destroy Cham Muslims, Christians, Buddhist monks, and the Vietnamese and Chinese minorities.

The Khmer Rouge singled out certain religious and ethnic groups for elimination. A Khmer Rouge order stated that henceforth "The Cham nation no longer exists on Kampuchean soil belonging to the Khmers" (U.N. Doc. A.34/569 at 9). Whole Cham villages were destroyed and their inhabitants murdered. The half of the Cham who survived were forced to speak only Khmer, and their children were taken away to be raised collectively as Khmers (defined as genocide by the Convention's Article 2e). Buddhist monks were disrobed and subjected to especially harsh forced labor, killing over half of them. Christianity was abolished, and only one Christian pastor survived. Dr. Ben Kiernan has uncovered and translated a copy of the Central Committee's order to demolish the Phnom Penh cathedral, part of the Khmer Rouge plan to eradicate all religion. (Chandler, Kiernan, and Boua, Pol Pot Plans the Future, Monograph Series 33, Yale University Southeast Asia Studies, Yale Center for International and Areas Studies, 1988, at 4). His research demonstrates that the Vietnamese and Chinese minorities were especially hit hard (Ben Kiernan, "Kampuchea's Ethnic Chinese Under Pol Pot: A Case of Systematic Social Discrimination," *Journal of Contemporary Asia*, Vol. 16, No. 1 (1986) at 18). A crucial intent in the Eastern Zone massacres of 1978 was to eliminate all Eastern Zone people, because they had "Vietnamese minds" (Ben Kiernan, "Wild Chickens, Farm Chickens and Cormorants: Kampuchea's Eastern Zone Under Pol Pot," in Chandler and Kiernan, eds., Revolution and Its Aftermath in Kampuchea: Eight Essays, Yale University, Southeast Asia Studies Monograph No. 25, 1983). All Cambodian ethnic Vietnamese who did not flee into Vietnam were exterminated.

To be punishable under the Genocide Convention, the destruction of a group must be intentional. Intent can be established by a systematic pattern that could only be the result of orders from the top of a pyramid of command. But intent can be proven more definitely through written orders or through testimony by witnesses to oral orders. Such direct evidence has now been collected.

The most dramatic evidence of central government intent in the genocide was collected on my trip to Kampuchea in December 1986. I interviewed numerous eye witnesses with Ben Kiernan. (The interviews were recorded on videotape.) The witnesses told us that when the Eastern Zone was evacuated in 1978, every person was given a blue and white checked scarf by Khmer Rouge cadres from Phnom Penh. Every man, woman, and child from the Eastern Zone thenceforth was required to wear the blue

scarf. As numerous witnesses told me, it was “the killing sign.” The Eastern Zone people were worked to death or slaughtered. Those who survived were only saved by the Vietnamese invasion. The blue scarves were given out as the evacuees passed through Phnom Penh (at Chbar Ampeau), and were distributed by Khmer Rouge cadres acting on direct orders from the Communist Party Central Committee. The blue scarf in Kampuchea was the equivalent of the Nazi yellow star. It is the most dramatic proof that the genocide was ordered from the top by government leaders of Democratic Kampuchea.

The Genocide Convention sets forth three legal options for prosecution of those who commit genocide. Article 6 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” (78 U.N.T.S. 277, Jan. 12, 1951).

The first legal option under the Genocide Convention, therefore, is trial in Cambodia.

In 1979, two of the architects of the genocide, Pol Pot and Ieng Sary, were tried in absentia in Phnom Penh. The evidence against them was massive. But the trial was a show trial. The pathetic “defense” offered by Hope Stevens, an aged communist from the New York branch of the Association of Democratic Lawyers, was actually a confession and a lame attempt to shift blame to Vietnam’s current enemies, China and the U.S. The hearings departed far from standards of due process and objectivity. Although the verdict (guilty) was surely justified, it was pre-determined, as anyone who knows communist legal systems could have predicted.

This first option still remains open. Mok, Pauk, Deuch, Khieu Samphan, and Son Sen have never been tried. Pol Pot and Ieng Sary could be retried. Currently there are no plans to hold such a trial. When Prince Sihanouk spoke in favor of a trial in December 1991, he quickly added that it would not include the two Khmer Rouge on the Supreme National Council, Khieu Samphan and Son Sen.

If such a trial is held, and I hope it will be, it will only be after the Khmer Rouge have been politically defeated and removed from their seats on the Supreme National Council or a successor repository of Cambodian sovereignty. That is unlikely until elections are held in 1993.

A major defect of this option is that in the common law world, trials in absentia are not generally considered to fulfill the requirements of due process. Although one of the Nazis convicted at Nuremberg was tried in absentia, that trial was conducted under special rules. If objections of many common law lawyers to trials in absentia are to be met, the Khmer Rouge leaders must be captured. That task will not be easy, though it could be accomplished after the Khmer Rouge are defeated militarily. Even without full defeat of the Khmer Rouge, capture of their leaders might be achieved through use of sophisticated intelligence and surprise attack, but it would certainly require the use of armed force.

The second option is trial by an international tribunal. No permanent international criminal court has ever been established, as the drafters of the Genocide Convention originally had hoped. But a special tribunal could be established by treaty

between Cambodia and other nations. The treaty would have to include Cambodia, or the tribunal would lack jurisdiction under current international law. Many law professors have advocated making genocide a crime of universal jurisdiction, but the Genocide Convention itself does not do so. For the tribunal to have jurisdiction, therefore, Cambodia would have to be a party to such a tribunal-creating treaty. This option, too, awaits a Cambodian government that excludes the Khmer Rouge; it could be convened only after the 1993 elections.

Trial by international tribunal would require capture of the Khmer Rouge leaders if the trial is to accord with due process requirements. So this option also demands the military defeat of the Khmer Rouge, or at least armed capture of their leaders.

The third option is for a party to the Genocide Convention to submit a dispute with Cambodia to the International Court of Justice.

Article 9 of the Convention states:

“Disputes between the Contracting Parties relating to the interpretation, application, or fulfillment of the present Convention, including those relating to the responsibilities of a State for genocide or any of the other acts enumerated in Article 3 [which include conspiracy, incitement, attempt, or complicity to commit genocide] shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.”

Any state that is a party without reservation to the Convention (including the Article 9 jurisdiction of the ICJ) could submit the case to the World Court. The complaint would contend that Cambodia has violated the Convention by failing to punish those responsible for committing genocide. It could currently charge that two members of the Supreme National Council, the entity recognized by the United Nations as representative of Cambodia, are themselves responsible for genocide; and that they remain unpunished.

Under Article 36 of the Statute of the International Court of Justice, the Court would have jurisdiction to hear the case. Article 36(1) gives the Court jurisdiction over all matters specially provided for in treaties and conventions in force. Article 9 of the Genocide Convention specially provides for World Court jurisdiction. Cambodia is a party to the jurisdiction conferred by Article 9 of the Genocide Convention.

Article 36(2) also gives the Court jurisdiction over all legal disputes in which the parties have recognized the compulsory jurisdiction of the Court concerning the existence of any fact which, if established, would constitute a breach of an international obligation as well as the nature or extent of the reparation to be made for the breach of an international obligation. Cambodia has accepted the compulsory jurisdiction of the Court. The World Court thus has clear jurisdiction to hear the case.

Any state that is a party to the Genocide Convention has standing to bring a case against Cambodia under the Genocide Convention. The legal requirement of standing is essentially that a state have a particular stake in bringing a case, through injuries to it or through treaty obligations owed to it.

The Genocide Convention itself is the basis for standing to bring a case. Under the Convention, any contracting party that has a dispute with another contracting party relating to the application or fulfillment of the Convention has standing to submit the case

to the ICJ. This standing is based on the mutual obligations of the parties to fulfill the Convention.

Australia, Canada, Norway, and the U.K. have had a “dispute” with Cambodia as required by Article 9 since 1978. In 1978 those nations submitted statements to the U.N. Commission on Human Rights that violations of human rights in Democratic Kampuchea were continuing, including voluminous evidence submitted by the U.S.A., Canada, Norway, and the U.K. (U.N. Doc. E/CN.4/Sub. 2/414/Add. 8). This evidence contained the factual basis for a charge of genocide. Democratic Kampuchea rejected the sub-commission’s decision to appoint a member to analyze the materials submitted (U.N. Doc. E/CN.4/Sub. 2/414/Add.9), and it denied all allegations made in the years since. The dispute is ongoing. The Commission on Human Rights has voted each year to keep the situation in Cambodia on its agenda and has received evidence each year, including specific evidence of genocide.

The dispute is not moot, as it was in the Nuclear Tests case, because those persons guilty of genocide have never been punished by Cambodian authorities. In the Nuclear Tests case the problem was that the court held the dispute moot because France had ceased atmospheric nuclear tests. But in this case, the dispute over the responsibility of Cambodia for genocide continues. It will not be resolved without adjudication by an international court. The Khmer Rouge leadership remains free. They remain part of the Supreme National Council, which holds Cambodia’s U.N. seat. And they still order mass murders. Their troops carry out genocidal massacres of ethnic Vietnamese in Cambodia. Reports by human rights groups recount continuing abuses and murders in Khmer Rouge controlled camps and areas.

Determination of responsibility for genocide—including past genocide—is specifically within the jurisdiction of the World Court under Convention Article 9.

The World Court would be able to hear the evidence in this case and render its judgment even if Cambodia does not answer the charges or appear before the Court. Because of its acceptance of the jurisdiction of the World Court, Cambodia has a self-imposed obligation to appear. But if it does not, the Court is nevertheless authorized by Article 53 of its Statute to hear the evidence and render its judgment. The Court has exercised this authority numerous times, e.g., in the Corfu Channel and Iranian Hostages cases.

An advantage of taking the Cambodian genocide case to the World Court instead of to an ad hoc tribunal is that Cambodia has already accepted the World Court’s jurisdiction. Failure to appear by Cambodia thus would have greater significance, amounting to a confirmation of its disrespect for its obligations under international law.

A World Court case has the major advantage that it would not require capture of the Khmer Rouge leaders. The World Court is not a criminal court, and has no jurisdiction over individuals. The trial would not be of individuals, but rather of the Cambodian state, which in 1980 was still represented in the U.N. by the Khmer Rouge; in 1986 was represented by the Coalition Government of Democratic Kampuchea, which included the Khmer Rouge; and today is represented by the Supreme National Council, which includes two Khmer Rouge leaders, notably Son Sen, who was commander of the entire Khmer Rouge extermination prison system.

What would a World Court judgment accomplish?

The World Court's judgment would be significant historically, but in addition it would have a direct legal impact on the people who ordered the genocide.

As part of its determination of state responsibility for genocide, it is possible for the court to declare who committed the genocide. Such a finding would call into effect the duty of all parties of the Genocide Convention to "provide effective penalties for persons guilty of genocide" and to grant extradition in accordance with their laws and treaties. It would thereby make the Khmer Rouge leaders into international outlaws, no longer able to roam much of the world from Bangkok and Beijing.

It would quite possibly reduce the support of the Khmer Rouge from other nations and thereby hasten their elimination as an obstacle to peace in Cambodia.

It would establish for all time what happened in Cambodia through a finding by an objective international court. By such a finding and through better understanding of the causes and process of genocide, perhaps future genocides might be prevented. For the people of Cambodia, the criminals who slaughtered their relatives, their religious leaders, and their children would be judged; not individually brought to justice, perhaps, but judged nevertheless.

I first proposed that a case be brought to the World Court in 1980, when I founded the Cambodian Genocide Project. Then the government that would have been served with the charges was the Khmer Rouge's Democratic Kampuchea itself, which still represented Cambodia in the U.N. I proposed that the evidence be gathered in a systematic way and the legal work be done to prepare the way for the case.

The Cambodian Genocide Project has since gathered evidence of the genocide committed in Democratic Kampuchea. That evidence and legal analysis and a draft complaint and memorial were made available to potential parties to a suit. But no government has ever been willing to take the case. It is doubtful that one will now, since a case might "upset the peace process." After elections in 1993, a new Cambodian government will be installed, probably without any Khmer Rouge, so that bringing a case to the World Court would be charging a successor regime, not the perpetrators. The time for a case in the World Court was in the 1980's, when the Khmer Rouge still represented Cambodia in the United Nations.

From the outset, I realized that submitting a case to the ICJ would take a resolute act of political will by a government. The legal issues would have to be resolved before any government would be likely to put its prestige and its money on the line as a plaintiff.

I proposed as a preliminary step that a distinguished group of jurists go to Cambodia to hold hearings, consider the evidence, apply international law, and issue an authoritative report on the Cambodian genocide. The commission would be composed of jurists who carry such personal authority that their conclusions would be accorded great weight by governments and legal experts around the world. They would serve the function of a grand jury, or—in the civil law system—of a *juge d'instruction*, who would take a preliminary look at the facts and the law and would issue the indictment on which the accused would be tried.

The main reason why that step is necessary is that it would provide the authority for a government to confidently undertake the case. Without such legal path-breaking, I thought it unlikely that a government would summon the political will to take action.

The project would be sandbagged by legal Pharisees and political cowards. (That judgment proved to be all too accurate.)

So I set about trying to find a legal group to sponsor such a commission. I realized that any commission sent in by the Cambodian Genocide Project would not have the authority of a commission sent by a large, established human rights organization. In May 1981, I approached the International Commission of Jurists, through the Chairman of its Board of Directors, Mr. William J. Butler, Esq. of New York. To my amazement, Mr. Butler consulted the United States State Department to ask what it thought about sending an International Commission of Jurists delegation to Cambodia. (I had naively thought the International Commission of Jurists an independent, non-governmental organization.)

Mr. Butler replied:

June 10, 1981

Dear Gregory:

I have just had a reaction to our meeting of May 5<sup>th</sup> concerning Cambodia. Although the reaction from the State Department was not enthusiastic, we think that we should take the matter a step further.

Accordingly, I wonder if it would be possible to contact the present Cambodian government in order to see if it would be willing to receive an ICJ fact-finding team for the purpose of inquiring into the present and past Human Rights conditions existing in Cambodia.

I plan to be here until July 31<sup>st</sup> should you think it possible to establish such a contact here in the United States either through direct contact with representatives of the Revolutionary Council or perhaps with representatives of the present Vietnamese government.

Let me hear from you soon.

Yours cordially,  
William J. Butler

I contacted the government in Phnom Penh and replied to Mr. Butler as follows:

Sept. 13, 1981

Dear Bill:

I just received a reply to the letter I sent into Kampuchea with David French, the current Church World Service representative there. As with all things connected with Kampuchea, it has taken some time. I enclose a copy.

It appears to me that we may get a favorable reply to our request to send a delegation in to investigate the human rights situation under Pol Pot and presently under the current regime.

What I suggested to the foreign ministry there was that a small preliminary delegation be granted visas to come into Kampuchea to speak to the responsible officials there. I think that we can now make plans to send an exploratory group in. I'd suggest just a few persons of your choosing, or even just yourself and one or two others. I'd be happy to go along. How much time we would spend depends on your schedule or the schedules of the people you designate. It is often difficult to see government officials in Kampuchea and I would recommend planning on a week. That will also allow the group

to fly in by commercial airline (Air France) from Paris to Ho Chi Minh City (Saigon) and thence into Phnom Penh by Air Vietnam. The Air France flight is just once a week via Bangkok. The only other routes in are through Hanoi and by World Vision flights from Singapore. The latter are rather undependable planes that sometimes break down for weeks at a time.

If you would designate a few persons who would be willing to go into Kampuchea for a week, I will write another letter to the Kampuchean foreign ministry requesting visas for them. If you can get passport numbers, dates of issue, birthdates, birthplaces, and dates of expiry of passport that would be helpful, but names alone would be good enough for the first letter. Some information about the people you choose would also help.

I will contact Paul McCleary of Church World Service about possible funding for this trip.

Sincerely,  
Gregory Stanton

I contacted Paul McCleary about funding as promised, and in March, 1982 traveled to Phnom Penh with Mr. David Hawk, for whom I obtained a visa after the initial refusal of the Phnom Penh government to allow Hawk entry. I reported the results of the trip to Butler:

May 4, 1982

Dear Bill:

I vividly remember the meeting we had in your office one year ago—I have just been reviewing the notes I took then. At that time we discussed my idea to systematically document the genocide under Pol Pot in Cambodia. I pointed out the urgency of the need for a “grand jury” to investigate the crimes of 1975-1978 and sought the sponsorship of the International Commission of Jurists for that effort.

Last year you said that the ICJ does not generally take on investigations of past violations without also reviewing current human rights in a country. You suggested that the ICJ might undertake the work as a “country report.” Although I expressed skepticism that the Heng Samrin government would accept investigation of the current human rights situation in Kampuchea, I agreed to contact the foreign ministry in Kampuchea to see if they would be open to an inquiry into both the Pol Pot era and the present situation. As you know I wrote a letter July 11, 1981 to ask if they would receive a delegation from the ICJ.

I have returned from another trip to Kampuchea in March in order to set up the investigation of the Pol Pot genocide by human rights groups and legal experts. I went in with David Hawk, former executive director for Amnesty International, U.S.A.

In my talks with representatives of the Foreign Ministry, it became clear to me that investigation of the current human rights situation in Kampuchea is unacceptable to the present government, as I had suspected. But if the inquiry is limited to the genocide committed from 1975 through 1978, the government will give us full cooperation.

Do you think the International Commission of Jurists would be willing to co-sponsor the Kampuchean Genocide Project or to send its own delegation to Kampuchea to investigate some aspect of the genocide committed there? I think it is quite possible that if a delegation from the International Commission of Jurists went to Kampuchea,

they would be able to talk to people about the current situation on an informal basis once they got there. And in any case, the investigation of the 1975-1978 genocide has quite current relevance because of the clear and present danger that it will happen again.

In addition to the I.C.J.'s participation, I would very much like your personal assistance. Would you be willing to serve as a member of the board of advisors for the Kampuchean Genocide Project? It would be a great contribution to give us your time and advice.

I look forward to hearing from you.

Faithfully,

Gregory H. Stanton

Mr. Butler replied:

May 6, 1982

Dear Greg,

I am sorry to say that the ICJ still would insist, if it were to undertake such a mission, not only to review the current human rights situation in Kampuchea, but also to seek the explanations and/or positions of the Pol Pot people.

Incidentally, there is some reservation among international people as to whether the word, "genocide" should be employed at all regarding Kampuchea. Genocide has been defined as the systematic extinction of a particular race. The Pol Pot atrocities do not quite fit in to this definition.

In any event, I would love to see you if you could drop by some time when you are in New York.

Warmest personal regards,

William J. Butler

The issue became whether the ICJ would send in a delegation to investigate only the Khmer Rouge genocide, or whether it would only send a delegation if it could also investigate current human rights in Cambodia. As I said in subsequent letters, the Heng Samrin government refused to permit investigation of its current human rights practices. The result was that the International Commission of Jurists refused to carry out an investigation of the Khmer Rouge genocide.

Sponsorship of a commission of inquiry by the American Bar Association was blocked in 1986 by opposition from Mr. David Hawk, who had set up his own group, the Cambodia Documentation Commission. But the Cambodia Documentation Commission never did send in a commission of jurists to lend authoritative weight to the legal case. Instead it directly approached governments to take the case to the ICJ, without success. Michael Posner of the Lawyer's Committee for Human Rights used his influence as chairman of the ABA's Section on Individual Rights and Responsibilities Human Rights Committee to block any attempt to get the ABA to sponsor the delegation of jurists. LAWASIA also refused to sponsor the effort, despite a long courtship.



The position that an organization will not investigate the Khmer Rouge genocide until it can also investigate current human rights violations in Cambodia is the all-or-none approach to human rights. It is similar to arguing that the Nuremberg tribunal shouldn't have been held because one of its sponsors was Stalin's Soviet Union; that the Nazi genocide shouldn't have been investigated because Soviet East Germany wouldn't permit investigation of its current violations of human rights. For human rights groups, it is a self-defeating position.

It was also a position that happened to fit neatly into the real politik of the Reagan administration's covert support for the formation and arming of the Coalition Government of Democratic Kampuchea, which included the Khmer Rouge.

We are still looking for a recognized human rights or legal group to sponsor a systematic investigation and report on the Khmer Rouge genocide.

Why not just do it? Why worry about what organization sponsors the commission of inquiry?

Because without sponsorship by an already recognized human rights or legal organization (or by a government or the U.N.), the report will lack the authority it would have if it came from the International Commission of Jurists or a similarly respected source. That would vitiate its purpose—which is to convince governments to act, to engage their political will to prosecute the Khmer Rouge mass murderers and to block them from ever gaining power again.

The second reason for sponsorship is money. It costs money to send a delegation to Cambodia, pay their hotel bills, and pay for the time they will devote. And you can't raise money from the foundations that support human rights work without established organizational sponsorship. Human rights funding is controlled by an interlocking directorate in which directors of the major human rights organizations also sit on the advisory boards of the foundations that fund them. In some spheres, it would be called conflict of interest. In human rights, it's just good contacts.

In 1986, I approached the government of Australia to sponsor the inquiry and take the case to the ICJ. Australia decided not to take the case to the World Court in 1986, because lawyers for the Australian Department of Foreign Affairs said it would require that Australia grant *de facto* recognition to the Coalition Government of Democratic Kampuchea, which included the Khmer Rouge. That argument was not legally correct, as I pointed out in a memorandum to the Australian government in July, 1986. It included the following points:

Cases brought to the World Court are brought against states, not against governments. The state bringing the case would not have to recognize the Coalition Government of Democratic Kampuchea or any other government in order to file a case against Cambodia in the World Court. Article 34 of the Statute for the Court says, "Only States may be parties in cases before the Court." The parties to the Genocide Convention are States. The submission to the World Court would be as a state, though submitted by an agent of the state's government. The Registrar of the Court would then refer the application and memorial to the government or legal entity recognized by the United Nations as representing the state of Cambodia. If the complaining state does not bilaterally recognize a particular Cambodian government, that fact is immaterial, because the World Court exercises jurisdiction over states, not governments.

The domestic law rule that unrecognized states may not use or be sued in domestic courts is irrelevant here. The United Nations has never ceased to recognize Cambodia as a state. The domestic law rule as stated in *Gur Corp. v. Trust Bank of Africa Ltd.*, *Carl Zeiss Stiftung v. Rayner & Keeler Ltd.* (No. 2) (1967) 1 AC 853, 954), and *Hesperides Hotels Ltd. v. Aegean Turkish Holidays, Ltd.* (1978) QB 207, 218 follows from the deference of domestic courts to the recognition power of their own domestic governments. (Even that deference, incidentally, is not absolute. In *Hesperides Hotels*, Lord Denning declared that “the courts may, in the interests of justice, . . . give recognition to the actual facts or realities.” American courts have carved out a similar policy exception to the no recognition-no effects rule, e.g., in *Salimoff v. Standard Oil Co.*, 262 N.Y. 220.)

In this case, the United Nations is the executive entity whose recognition will determine what government would represent the state of Cambodia in the International Court of Justice, the United Nations’ judicial organ (U.N. Charter, Article 92). Australia’s non-recognition of the Coalition Government of Democratic Kampuchea would therefore have had no effect on the acceptance of jurisdiction by the World Court, because the *states* of Cambodia and Australia are both recognized parties to the Genocide Convention, which confers jurisdiction over a case where the *government* of a state does not recognize the *government* of the respondent state. The situation is analogous to the U.N. General Assembly, where member states are all parties to the same multilateral treaty (U.N. Charter) and therefore may participate in all proceedings, even though many of the governments of the member states do not recognize each other.

Submission of the case would not constitute recognition by Australia of the Coalition Government of Democratic Kampuchea (CGDK). Recognition in modern international law is entirely declaratory and must be intentional. The nineteenth century constitutive rather than declaratory theory and the doctrines of *de facto* recognition are no longer law. Modern practice includes many kinds of relations between governments short of recognition. Recognition today can only be made by the intentional declaration of a government. The distinction between recognition of a state and of a government is important. (See Crawford, The Criteria for Statehood in International Law (1976-77) 48 Brit. Y.B. Int. L. 308.) As the Canadian government has put it, “Once granted, state recognition survives changes in governments, unless it is explicitly withdrawn” (10 Can. Y.B. Int. L. 308).

If the CGDK answers Australia’s memorial with a counter-memorial, it would do so on behalf of the state of Cambodia. When the Registrar conveys documents to Australia, by accepting them, Australia would not be recognizing the CGDK; Australia would only be continuing its recognition of the State of Cambodia. Recognition of the Coalition Government of Democratic Kampuchea could only occur by intentional declaration of recognition by the government of Australia.

Would there be a political as opposed to a legal problem caused by receiving documents produced by the CGDK? In the case of an accusation of genocide, I doubt it. Receiving the response in court hardly implies recognition of the legitimacy of the respondent.

In fact, this case presents a unique opportunity, because the very persons who committed the crimes remain part of the government that will have to answer the charges. Yet they no longer control the territory of Cambodia, so it has been possible to gather the

evidence against them. Few cases of genocide provide such an ideal opportunity to confront those who committed the crimes with the charges. I seriously doubt that public opinion will characterize the bringing of charges of genocide in the World Court as some kind of approval or re-recognition of the Coalition Government of Democratic Kampuchea, which is widely known to include the Khmer Rouge. Legally it would not constitute that, and politically it would not either.

Australia has standing to bring the case because Australia has been injured by the effects of the Cambodian genocide through the influx of refugees it caused and the relief programs it made necessary. Australia has accepted more Cambodian refugees per capita than any other country except Thailand. Australia also was directly injured by the Khmer Rouge mass murder of foreign groups. At least two Australian citizens were among the 20,000 murdered at Tuol Sleng prison.

Standing in this case is therefore firm. This case is not like the *Southwest Africa* case, where Ethiopia and Liberia were held to lack standing because they were not parties to the treaty granting the South African mandate and because they had suffered no injury. Here standing is grounded on clear treaty obligations.

The real problem, though was absence of the political will to prosecute the case. Mr. William Hayden, Foreign Minister of Australia, took the initiative with his call in Manila on June 26, 1986 for an international tribunal to try the Khmer Rouge leaders (Sydney Morning Herald, June 27, 1986). But the Australian government was never willing to go forward with a case in the World Court, and it has never taken any steps to establish the international tribunal called for by Mr. Hayden.

A Commission of Inquiry should still be sent to Cambodia to investigate the genocide committed by the Khmer Rouge. In 1989 and in 1992, I again contacted the International Commission of Jurists and asked them to appoint an international commission of highly eminent jurists to go to Cambodia to look at and hear the evidence, and upon the evidence to issue an indictment. Leading jurists could be chosen from nations in the region (e.g., Australia, the Philippines, India) and around the world.

Among those whom I have contacted and who have agreed to serve are the Hon. Judge Roma Mitchell, former Chief Human Rights Commissioner of Australia, Justice Florentino Feliciano of the Supreme Court of the Philippines, His Excellency Justice Bhagwati, former Chief Justice of the Supreme Court of India, and the Hon. Thomas Buergenthal, former Chief Judge of the Inter-American Court of Human Rights.

A commission of inquiry sent by a respected human rights organization could still have an impact.

Its findings could form the basis of criminal indictments inside Cambodia to try the Khmer Rouge leaders after the 1993 elections.

Its hearings, if conducted publicly, as they should be, could have a political impact inside Cambodia, especially if they are conducted before the 1993 elections. They could become a forum in which the truth about the Khmer Rouge genocide is publicized both inside Cambodia and to the world, through press coverage. They could thus have a healthy impact on the elections and on naiveté about the nature of the Khmer Rouge.

The Khmer Rouge are not just another Cambodian faction. The Supreme National Council is a council of a poodle (Sihanouk), a terrier (the KPLNF), a bulldog (the State of Cambodia), and a wolf (the Khmer Rouge). It remains to be seen whether the proposed U.N. peacekeeping force can cage the wolf. I doubt it.

The Khmer Rouge have not changed and they cannot be trusted. They will not honor the Paris Accords except when they can gain legitimacy or power by doing so. The Khmer Rouge will refuse to disarm, refuse to participate in elections, and refuse to give up control of the areas they now dominate. The result, after elections in 1993, will be the partition of Cambodia and ongoing civil war. The Khmer Rouge will return to their genocidal ways, first in mass murder of ethnic Vietnamese settlers in Cambodia, then in assassinations of rural government officials. The hope that they can be brought “inside the tent” by the UN peace plan is naïve.

The U.N. peace plan is worth implementing because if elections can be held, they will result in a government recognized widely and able to enlist international assistance to defeat the Khmer Rouge. But we should have no illusions about Khmer Rouge willingness to disarm and become law-abiding members of a new coalition government. Eventually, the Khmer Rouge must be militarily defeated and brought to trial.

There are other legal options for action against the Khmer Rouge.

The first is to submit the case to a less authoritative body than the International Court of Justice or a human rights organization like the International Commission of Jurists.

The obvious candidate is the Permanent Peoples’ Tribunal, the successor to the Russell Tribunal of the Vietnam War era. This was the approach taken by the Armenians in 1984. Hearings were held during four days in Paris in April 1984, and a tribunal made up of world-renowned human rights leaders Sean McBride and Adolfo Perez Esquivel, professors, and other experts on international affairs found the Young Turk regime guilty of committing genocide in Armenia from 1915 through 1917.

A similar hearing could be held on the Khmer Rouge genocide. It should be held. All venues for exposing the Khmer Rouge should be used. But there are several drawbacks to the Permanent Peoples’ Tribunal:

Its trials are generally considered to be show trials like the original Russell Tribunal’s and their verdicts are heavily discounted because of the perceived ideological biases of the judges. The Tribunal’s verdicts have no legal effect. They create no law. And that is one purpose of trying the Khmer Rouge—to convert the Genocide Convention from a piece of paper into real international law. That takes authoritative decision. The Permanent Peoples’ Tribunal isn’t considered authoritative by most policy makers or jurists. Its judgments may have historical utility; historians may value them. But the Permanent Peoples’ Tribunal will have no effect in making international law.

Nevertheless, the publicity and political influence of a Peoples’ Tribunal hearing would be useful. If the hearings are to have their maximum impact, however, the members of the tribunal should be chosen to include only the finest international jurists. The evidence against the Khmer Rouge must stand on its own and not be helped along by biased judges.

Finally, domestic courts in countries besides Cambodia could be used to unleash a barrage of civil lawsuits against individual Khmer Rouge leaders and against the Party of Democratic Kampuchea.

Many countries, including the U.S., permit tort suits by families of victims of crimes, including violations of international criminal law. In the U.S., the Alien Tort statute was used in this way to grant damages to the family of Joselito Filartiga against his torturer and murderer Peña-Irala. That case was possible because the U.S. court could assert personal jurisdiction due to the physical presence of both the plaintiff (Dr. Filartiga) and the defendant (Peña-Irala) in the U.S.

A similar suit in Washington, D.C., the Tel-Oren case, failed because former Judge Bork held that the Alien Tort statute only covered crimes against the law of nations as of 1793. That would rule out an action based on genocide in the District of Columbia. The conflict between the Tel-Oren decision and the Filartiga opinion of Judge Kaufman has never been resolved by the Supreme Court, and human rights groups (with good reason) have been reluctant to take the conflict between the circuits to the Supreme Court for resolution.

But meanwhile, a tort suit remains possible in the Second Circuit. The problem would be that such a suit would require the plaintiffs to serve process on an individual member of the Khmer Rouge leadership (like Khieu Samphan, Ieng Sary, or Son Sen) when he comes to New York. There are numerous potential plaintiffs—families of Khmer Rouge victims who now reside in the U.S. The pro bono assistance of U.S. law firms in New York (or perhaps here at Yale) could be sought to prepare such a case. It must be ready to go the next time a Khmer Rouge leader sets foot in New York.

Mr. Alan Keesee has suggested that similar tort suits could be brought in Thailand, where there are also many families of Khmer Rouge victims. The Khmer Rouge leaders have visited Thailand frequently for the past 13 years. It might be possible to track them down and file suit against them for wrongful death and other torts in Thai courts. The Thai government might try to put political obstacles in the way of such lawsuits, but it is worth exploring this option. The trials would be public and would attract considerable press coverage. Serving process on the Khmer Rouge leaders might be difficult and dangerous, especially because they mostly live inside Cambodia and only visit Thailand under armed guard. In addition, the Thai government is not a party to the Genocide Convention and has not made genocide a crime in Thailand. Khieu Samphan and Son Sen could, as members of the S.N.C., claim diplomatic immunity in Thailand for ordinary torts, including wrongful death. But others, like Deuch or Mok could not.

How can future genocide in Cambodia be prevented?

First we should analyze why the world's nations took no action to stop the Khmer Rouge genocide from 1975 through 1978. Why did the great military powers of the world and the United Nations do nothing to stop the Khmer Rouge genocide?

The reason is that the forces that could have acted were paralyzed:

1) The United Nations was paralyzed by the likelihood of Security Council vetoes by the Communist powers; at first by the Soviet Union and then by China.

In 1978, the best of the human rights organizations (Amnesty International and the International Commission of Jurists) and five governments did bring charges of massive human rights violations (but not explicitly genocide) to the U.N. Commission on

Human Rights. A report by the Chairman of the Subcommittee, Mr. Bouhdiba of Algeria, was then buried. The cynical claims by Cambodia that its sovereignty allowed it to carry out whatever domestic policies it found necessary fell on sympathetic ears among the third world states in the U.N. The U.N. did nothing.

2) The United States and the Western powers stood back, paralyzed by their defeat in Vietnam from involvement in another ground war in Southeast Asia. Humanitarian intervention did not occur until Vietnam, under attack by Democratic Kampuchea, finally intervened and overthrew the Khmer Rouge in early 1979. The West's response was to condemn the Vietnamese invasion in U.N. resolutions and through embargo on Vietnam. Indeed the West continued to vote to seat the Khmer Rouge in the Cambodian seat at the U.N. for years after they were out of power.

3) Much of the old anti-war movement was paralyzed by liberal paralysis. During the genocide, deniers like Chomsky questioned the validity of refugee accounts (despite their consistency), nitpicking at the massive evidence compiled by Ponchaud and Barron and Paul (Chomsky, in The Nation, June 25, 1977), casting just enough doubt to cloud the truth—that the Khmer Rouge were committing a massive genocide—so that those who opposed the Vietnam War and the bombing of Cambodia and Laos did not mobilize. (To his great credit, Senator George McGovern called for humanitarian intervention in Cambodia in early 1978. But he was ignored by the Carter administration, whose National Security Advisor encouraged China to help the Khmer Rouge in 1979 after they were overthrown.) Besides, the anti-war movement was anti-interventionist, unlikely to support another armed intervention into Cambodia.

Much of the paralysis was the result of uncertainty about what was happening in Cambodia. The Khmer Rouge sealed off Cambodia and permitted no Western reporters in until late 1978, when they let in three, one of whom (Malcolm Caldwell) they murdered the night after he had interviewed Pol Pot. (Perhaps he had learned too much.) But the paralysis was also caused by unwillingness to believe the cognitively dissonant news that the revolutionaries whose victory many anti-war activists had cheered were now committing mass murder on a scale unmatched since Hitler and Stalin.

The Cambodian Peace Plan has shown that the Security Council is no longer paralyzed. As the intervention to repel Iraqi aggression against Kuwait demonstrates, the United Nations can now be mobilized to defeat flagrant aggression by a tyrant who had already committed genocide against his own Kurdish population and who had declared his intention to destroy Israel, undoubtedly including genocide of Israel's Jewish population.

The processes of world order have moved beyond the paralysis caused by a paralyzed U.N. The U.N.'s involvement in Cambodia is one of the most powerful deterrents to future genocide in Cambodia.

But it can only work if the Security Council is willing to use force to block Khmer Rouge attempts to subvert it.

It must never be forgotten that as my teacher W. Michael Reisman has recently written: "Law is not the antithesis of force. Legal systems and the political systems of which they are a part and which they seek to regulate are based upon the authoritative use of force. The question for jurists, then, is not 'the non-use of force,' but the assignment of the competence to use force to appropriate agencies in the community and the determination of the contingencies, purposes, and procedures for use of authoritative

force” (Reisman, “Allocating Competences To Use Coercion in the Post Cold War World—Practices, Conditions and Prospects” in Damrosch and Scheffer, eds., Law and Force in the New International Order, at 26, 1991).

Within Cambodia, a U.N. force must be put in place to prevent the Khmer Rouge from filling a power vacuum and seizing power by force. The State of Cambodia’s army must not be disarmed until the Khmer Rouge have disarmed. They will not do so, and elections will have to be held without the disarmament called for by the Paris Accords. Elections will not be able to be held in Khmer Rouge controlled areas. And the State of Cambodia will probably use its police and armed forces to intimidate other parties.

In the future Cambodian government, the best way to prevent future genocide is to install the rule of law and to enforce it by effective government, including an armed security force that can defend Cambodians from the return of the Khmer Rouge. That will require immediate military assistance to the new government, as well as massive aid to rebuild the shattered infrastructure (particularly road-building and de-mining).

Cambodia should also have strong, independent human rights organizations that can monitor the Cambodian government and protest human rights violations. Such organizations could also put pressure on the new Cambodian government to try the Khmer Rouge leaders for genocide.

In the end, the true significance of the case against the Khmer Rouge will be its impact on the future of the people of Cambodia, on efforts to prevent future genocides, and on the advancement of international law. The Genocide Convention can hardly be said to be law if it is never applied. Law is made through authoritative decision. A decision in this case may give pause to future leaders who are contemplating genocide. A failure to act will surely result in future cynics like Adolf Hitler who, when asked if the Final Solution would violate international law replied, “Who ever heard of the extermination of the Armenians?”