PROVING GENOCIDAL INTENT: INTERNATIONAL PRECEDENT AND ECCC CASE 002

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I. CAMBODIA AND THE KHMER ROUGE

The mass murder perpetrated by the Khmer Rouge regime is popularly conceptualized as "genocide." It has been so labeled by sources as disparate as the United States Congress,[1] United Nations General Assembly,[2] countless media and scholarly publications,[3] and domestic Cambodian efforts to memorialize and document the horror of the period.[4] Even a Sudanese government commission, in the course of denying that the atrocities committed in Darfur legally constitute genocide, contrasted the genocidal "precedent" of Cambodia during the Khmer Rouge.[5]

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1. Cambodian Genocide Justice Act, 22 U.S.C. § 2656 (1994). This Act established the "Office of Cambodian Genocide Investigation" at the State Department, and funded Yale University "Cambodian Genocide Program."

2. G.A. Res. 57/228, U.N. Doc. A/RES/57/228, at 2 (Feb. 27, 2003) (noting the General Assembly's desire to "assist[ ] efforts to investigate the tragic history of Cambodia, including responsibility for past international crimes such as acts of genocide . . . committed during the regime of Democratic Kampuchea").

3. *See, e.g.*, TOM FAWTHROP & HELEN JARVIS, GETTING AWAY WITH GENOCIDE? ELUSIVE JUSTICE AND THE KHMER ROUGE TRIBUNAL 4 (2004).

4. *See id.* at 9, 71. Note, for example, the names of the government-administered "Tuol Sleng Genocide Museum" and the "Choeung Ek Genocidal Center," memorializing, respectively, the infamous Khmer Rouge prison camp and torture center and the "Killing Field" closest to Phnom Penh, where more than 17,000 were killed and buried in mass graves.

5. Rep. of the Int'l Comm'n of Inquiry on Darfur to the U.N. Secretary-General, ¶¶ 456, 459 (Jan. 25, 2005) (hereinafter "U.N. Darfur Comm'n Rep.") (discussing a separate, Sudanese National Commission of Inquiry established by the President Bashir to investigate claims of human rights, and dismissing its report as "attempt[ing] to justify the violations rather than seeking effective measures to address them"). *Id.* ¶ 462.

At the same time, legal commentators have long recognized that the disconnect between the term's broad social meaning and its strict legal definition might severely complicate any effort to criminally prosecute Khmer Rouge leaders for the crime of genocide.[6] For despite genocide's symbolic—even emotional—resonance among international lawyers and the Western public as identifying and condemning mass killings of the worst kind, it has a relatively circumscribed and concrete legal definition.[7] According to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention"),[8] which has over 140 state parties and is generally recognized as representing customary international law,[9] "genocide" is limited to persecution of national, ethnic, racial or religious groups.[10] Thus, it is widely accepted that "most crimes committed by the Khmer Rouge" might not legally constitute genocide because "they were intended to destroy [the regime's perceived] political enemies."[11]

On December 28, 2009, the Co-Investigating Judges at the Extraordinary Chambers in the Courts of Cambodia ("ECCC") announced charges of genocide in Case 002 against defendants Nuon Chea, Khieu Samphan, Ieng Sary and Ieng Thirith—the most senior surviving members of the Khmer Rouge—for their role in the regime's persecution of the Cham Muslim and ethnic Vietnamese minorities.[12] Due to a procedural misstep on the part of the Co-Prosecutors, however, on January 13, 2010, the Co-Investigative Judges ruled that these charges would not be extended to separately

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6. *See, e.g.*, EDWARD KISSI, REVOLUTION AND GENOCIDE IN ETHIOPIA AND CAMBODIA 110 (2006).

7. *See generally* COLIN TATZ, WITH INTENT TO DESTROY 68-73 (2003) (outlining distinctions between the legal, social science and "common" approach to defining genocide).

8. *See generally* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

9. *See* Lori Bruun, *Beyond the 1948 Convention—Emerging Principles of Genocide in Customary International Law*, 17 MD. J. OF INT'L L. & TRADE 193, 216–17 (1993).

10. Genocide Convention, *supra* note 8, art. 3. This restriction was imposed in order to get Chinese and Soviet Union support for the Genocide Convention. *See* Michael J. Kelly, *"Genocide" – The Power of a Label*, 40 CASE W. RES. J. INT'L L. 147, 158 (2007).

11. Anne Heindel, *Overview of the Extraordinary Chambers*, *in* ON TRIAL: THE KHMER ROUGE ACCOUNTABILITY PROCESS 90, 90 (John D. Ciorciari & Anne Heindel eds., 2009) (also noting that "despite . . . recent efforts . . . to include social, political, and economic groups" in the legal definition of genocide, "[i]t is extremely unlikely that the ECCC will find that any other protected groups fall within the definition of genocide as it existed from 1975-79," the temporal jurisdiction of the Court).

12. *See* Prosecutor v. Chea, Case No. 002/19-09-2007-ECCC-OCIJ, Order on Request for Investigative Action on the Applicability of the Crime of Genocide at the ECCC, ¶ 5 (Office of the Co-Investigating Judges Dec. 28, 2009).

include the alleged genocide against the Khmer Khrom, ethnic Khmers from the Mekong Delta region of Vietnam.[13] On September 15, 2010, the ECCC Co-Investigating Judges issued their Closing Order in Case 002, in which they indicted all defendants on charges of genocide with respect to the Cham Muslim and Vietnamese minorities, but not the Khmer and Buddhist majorities.[14] As of November 7, 2010, ECCC Co-Prosecutors had yet to announce whether they intended to file an appeal of the Closing Order, as is their right under ECCC Internal Rules.[15]

This Article evaluates international legal precedent on an issue that is likely to be critical to the ECCC's examination of these genocide charges: establishing a criminal defendant's genocidal mens rea by inference from the surrounding factual circumstances. In so doing, it identifies and explores four key factors that international tribunals have found relevant to determining whether genocidal intent is properly inferable: (1) statements of the accused and his or her associates; (2) the scale of atrocities in question; (3) systematic targeting of the victim group; and (4) evidence that atrocities were planned. The Article also seeks to assess and offer preliminary observations on the relative applicability of international precedent to the Cambodian context, specifically with regard to the breadth of atrocities ECCC Co-Prosecutors should seek to encompass under the rubric of genocide in Case No. 002, should they seek to appeal the Co-Investigating Judges' Closing Order.

The structure of this Article is as follows: Part I provides an overview of the current state of genocide jurisprudence and situates this Article within the literature. Part II provides a brief background on the facts relevant to genocide charges at the ECCC. Part III and IV—the core of the Article—lay out the applicable legal doctrine, on genocide generally and on inferring genocidal intent in particular. Part V offers a preliminary assessment of the doctrinal obstacles facing ECCC prosecutors in proving genocide. Part VI concludes with a brief discussion of the practical considerations attendant to

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13. *See* Prosecutor v. Chea, Case No. 002/19-09-2007-ECCC-OCIJ, Combined Order on Co-Prosecutors' Two Requests for Investigative Action Regarding Khmer Krom and Mass Executions in Bakan, ¶¶ 9-10 (Office of the Co-Investigating Judges Jan. 14, 2010); *see also* James O'Toole, *No Charges of Genocide of K Krom*, PHNOM PENH POST, at A1, Jan. 19, 2010 (noting that the decision "was made for procedural reasons"). The Co-Investigating Judges did not rule out the possibility, however, that some Khmer Khrom victims would be encompassed within the charge relating to genocide of the "Vietnamese."

14. *See* Prosecutor v. Chea, Case No. 002/19-09-2007-ECCC-OCIJ, Closing Order, ¶¶ 1336-49 (Office of Co-Investigating Judges Sept. 15, 2010) [hereinafter Closing Order].

15. *See* ECCC INTERNAL RULES (REV. 5), rules 67, 74 (Feb. 9, 2010), *available at* http://www.eccc.gov.kh/english/internal_rules.aspx.

deciding whether, and to what extent, to bring genocide charges at the ECCC.

II. GENOCIDE JURISPRUDENCE

The jurisprudence of genocide is unsettled, uncertain, and in flux. Though genocide's legal definition, as codified in the Genocide Convention, enjoys near-universal acceptance as the legal standard to which genocide prosecutions must conform, international courts have only recently begun considering genocide cases,[16] and thereby untangling the various jurisprudential and context-specific doctrinal puzzles that the Convention leaves open to interpretation.[17] In particular, the Genocide Convention includes two wrinkles in the legal definition of genocide, the interpretation of which are crucial to the scope of genocide liability. First, the Convention specifies that a perpetrator must have sought to destroy the targeted group, in whole or part.[18] Second, the Convention restricts the relevant groups, the targeting of which may constitute genocide, to those constituted along ethnic, racial, national, or religious lines.[19]

A. Debate on the Scope of Genocide

The term genocide has in many ways transcended the legal realm and been absorbed into our popular consciousness.[20]

16. On May 25, 1993, the United Nations passed Resolution No. 827, establishing the International Criminal Tribunal for the Former Yugoslavia (ICTY) to prosecute "persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia" since 1991. S.C. Res. 827, ¶ 2, U.N. Doc. S/RES/827 (May 25, 1993). The ICTY was the first international tribunal with express jurisdiction to prosecute individuals for the crime of genocide, which was defined in language mirroring the Genocide Convention. Since that time, a multitude of international tribunals have been established under United Nations auspices to investigate, prosecute and punish international crimes such as genocide, crimes against humanity and violations of the Geneva Conventions. In addition to the International Criminal Tribunal for Rwanda and the several "ad hoc" tribunals currently in operation, the Rome Statute established the International Criminal Court (ICC), which has permanent jurisdiction to independently identify and prosecute international criminal violations without specific approval from the United Nations member states. *See* Rome Statute of the International Criminal Court, U.N. Doc. A/CONF/183/9 (July 17, 1998).

17. *See generally* GEORGE WILLIAM MUGWANYA, THE CRIME OF GENOCIDE IN INTERNATIONAL LAW: APPRAISING THE CONTRIBUTION OF THE UN TRIBUNAL FOR RWANDA 134-36 (2007).

18. Genocide Convention, *supra* note 8, art. 2.

19. *Id.*

20. Though originally a purely legal term, one formulated by Raphael Lemkin, a Jewish American law professor, after World War II to affix a criminal definition to the horrors of the Holocaust, the concept of genocide has evolved dramatically over the past half century. SAMANTHA POWER, A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE 40-45 (2002).

Genocide's powerful symbolic resonance has led to the proliferation of scholarly commentary on the term over the past half century, with entire research centers, scholarly journals, and university departments focused on the phenomenon's political, sociological, historical and psychological underpinnings.[21] Such institutional pressures have led to a predictable tension between the relatively strict governing legal framework established by the Genocide Convention and genocide's much broader social meaning as re-constituted by the academy and subsequently absorbed into lay perceptions.[22] Serious commentators, for example, urge that—rightly understood—the term equally encompasses the estimated one thousand deaths occurring amidst religious tension between Hindus and Muslims in the Indian state of Gujurat in 2002, the roughly thousand "desaparecidos" (i.e., victims of forced disappearances) left in the wake of Pinochet's seventeen year regime in Chile, and the Nazi persecution and murder of six million Jews during and prior to World War II.[23]

Within the academic literature urging an expansive conception of genocide's legal definition are several jurisprudential proposals for achieving that end—many of which could be plausibly reconciled with the language and purpose of the Genocide Convention.[24] For

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21. For example, The Strassler Center at Clark University offers a doctorate in "Holocaust and Genocide Studies" which seeks to "train[ ] students, educators, and activists to develop a sophisticated understanding of genocide." *Strassler Center for Holocaust and Gender Studies*, CLARK UNIVERSITY (2010), http://www.clarku.edu/departments/holocaust/. The University of Minnesota, Yale University, and many others also have centers, research institutes, and degree programs in genocide studies. *See generally* HOLOCAUST AND GENOCIDE STUDIES (a peer-reviewed Oxford Journal); PIONEERS OF GENOCIDE STUDIES (Steven L. Jacobs & Samuel Totten eds., 2002).

22. Indeed, scholars in other disciplines often insist that lawyers have an unduly crabbed conception of genocide, formalistically tethered to the political compromises embodied in the language of the Genocide Convention. *Cf.* TOVE SKUTNABB-KANGAS, LINGUISTIC GENOCIDE IN EDUCATION 316-17 (2000) (discussing how early drafts of the Convention included targeting of languages within the subsequently discarded provision on "cultural genocide").

23. *See* Robert Petit et. al., *Exploring Critical Issues in Religious Genocide: Case Studies of Violence in Tibet, Iraq and Gujarat*, 40 CASE W. RES. J. INT'L L. 163, 199-211 (2007) (discussing the 2002 religiously motivated violence in Gujarat and concluding that it likely constituted genocide); Richard J. Wilson, *Prosecuting Pinochet in Spain*, 6 HUM. RTS. BRIEF 3 (1999) (noting that the indictment issued by Judge Garzón against Augusto Pinochet, which sought his extradition to Spain under the principle of universal jurisdiction, included charges of genocide).

24. Also within the literature are "more or less incessant calls" for a reformulation of the Genocide Convention itself. William A. Schabas, *Genocide Law in a Time of Transition*, 61 RUTGERS L. REV. 161, 161 (2008); *see id.* at 190 (noting that the debate over revising the legal definition of genocide has largely focused on whether to include "political" groups); Beth Van Schaack, *The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot*, 106 YALE L.J. 2259, 2261-62, 2272-74 (1997)

example, historian Ben Kiernan proposes the concept of "auto-genocide" to encompass instances in which the perpetrators and victims of an alleged genocide share the relevant national, ethnic, racial and/or religious characteristic, yet the perpetrators target the victims for, in their eyes, not sufficiently exhibiting the essentialized characteristics of the group in question (i.e., the urban, educated elite not being "true" Khmers, according to the Khmer Rouge).[25] However, with the relative paucity of cases involving genocide in international tribunals, and with the vast majority of such prosecutions involving relatively low-level officials, prosecutors have not yet had the occasion to test most such theories in an actual court of law.

B. Settling the Scope of Genocide

Over the coming years, however, international tribunals are poised to adjudicate three landmark cases of alleged genocide—each of which has the potential to dramatically define, refine and/or reshape the current landscape of genocide jurisprudence.[26] They are: (1) the International Criminal Court's (ICC) pending indictment of Omar al-Bashir, current President of Sudan, for his role in perpetrating the ongoing atrocities in Darfur; (2) the ECCC's trial of the most senior surviving Khmer Rouge leaders, set to begin in late 2010 or early 2011; and (3) the International Criminal Tribunal for the former Yugoslavia's (ICTY) trial of Radovan Karadžić, former President of Republikia Srpska and the most senior Serbian leader tried by the ICTY besides Slobodan Milosovic, which broke ground in early 2010.[27]

(calling for treatment of "political genocide" as a *jus cogens* norm, a peremptory norm from which derogation is not permissible, thus granting international tribunals jurisdiction to prosecute individuals for the offense, even though it is not included in their constitutive statutes or the Genocide Convention).

25. *See* BEN KIERNAN, THE POL POT REGIME 3 (2002).

26. *But see* Schabas, *supra* note 24, at 190 (arguing that "the definition of genocide is unlikely to change or evolve much in the foreseeable future"). With due regard for Mr. Schabas vast expertise in the field, I respectfully disagree with his assessment that genocide jurisprudence has reached a point of jurisprudential homeostasis after its "unprecedented dynamism" over the past two decades. *Id.* at 163. This Article submits, on the contrary, that the extent to which genocide jurisprudence will continue to develop is an open, contestable question. At minimum, while genocide's broad doctrinal contours may or may not remain stable, there is significant ambiguity remaining, even within areas of consensus, that the law's continued refinement is inevitable. For example, while the Genocide Convention clearly states that "[d]irect and public incitement to commit genocide" constitutes a genocidal act, it was not until the ICTR began prosecutions under this provision that we could understand how it would be applied. *See* Genocide Convention, *supra* note 8, art. III(c).

27. *See* Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Second Decision on the Prosecution's Application for a Warrant of Arrest (July 10, 2010); Order on Request for Investigative Action on the Applicability of the Crime of

Prosecutors in each of these cases face unique jurisprudential challenges to proving genocide. The legal theories they employ in overcoming these obstacles, and the courts' reactions thereto, will do much to determine the legal scope of genocide liability for generations to come. For example, ICC prosecutors will likely need to convince the court that the Genocide Convention should be construed so as to include "subjective" conceptions of race (i.e., situations in which racial differences are not objectively discernable to outsiders).[28] In so doing, they will have to wrestle with the implications of the intervening scholarly consensus that race is, in large part, a social and legal construct rather than an immutable biological fact,[29] and whether recognition of such subtleties would and should extend the Genocide Convention to encompass certain disputes that heretofore might have been considered "tribal" rather than "racial." Further, despite the diversity of doctrinal obstacles these cases present, prosecutors in all three cases share a fundamentally similar strategic choice regarding the relative breadth of genocide charges to pursue. In part, this choice merely involves determining whether to focus narrowly on a discrete instance of alleged wrongdoing, or alternatively, whether to seek to hold the relevant officials responsible for the full range of the regime's crimes.[30] More broadly, however, prosecutors in these genocide cases must also choose whether to adopt an expansive, untested conception of genocide liability—one that, in their estimation, captures this historic opportunity to move the jurisprudential ball forward—or whether to hold back and instead seek limited prosecutions rooted in existing doctrine.

Given the intimate relationship between the legal academy and

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Genocide at the ECCC, *supra* note 12; Prosecutor v. Karadžić, Case No. IT-5/18-PT, Prosecution's Marked Up Indictment (Int'l Crim. Trib. for the Former Yugoslavia Oct. 19, 2009).

28. Prosecutors concede in their indictment that the two groups in question cannot be "objectively" distinguished based on race, ethnicity, nationality or religion, but instead contend that the groups' subjective perception of racial differences is sufficient for purposes of satisfying the Genocide Convention's requirement that one of these distinctions be at play. While both the ICTR and ICTY have confronted the objective/subjective issue, concluding that both perspectives are relevant to the existence of a "group," neither court confronted a situation like Darfur, which relies entirely on subjective perceptions. *See* MUGWANYA, *supra* note 17, at 86-110.

29. *See* Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 7 (1994).

30. This choice is present in any case involving high-level officials who served in a regime which perpetrated mass atrocities. After the fall of Saddam Hussein, for example, the Iraqi Government split the difference, deciding to pursue multiple trials with each focusing on a discrete instance of wrongdoing. *See* Jennifer Trahan, *A Critical Guide to the Iraqi High Tribunal's Anfal Judgment: Genocide Against the Kurds*, 30 MICH. J. INT'L L. 305, 308 (2009).

the international criminal bar, prosecutors choosing to pursue the former course will likely draw extensively on academic literature which asserts that genocide jurisprudence should be stretched so as to include the conduct at issue in their particular case. For example, if ECCC prosecutors desire to encompass the Khmer Rouge's persecution of the ethnic Khmer majority within the rubric of genocide, they will presumably rely heavily on Professor Kiernan's notion of auto-genocide. Thus, despite social scientists' protestations that our understanding of genocide as a phenomenon can no longer be confined to its legal meaning, international criminal tribunals are poised to firmly seize the reins over the term's real-world applicability.

From an Olympian perspective, these choices embody and actualize one of the fundamental controversies embroiling modern international law. On one end sits the passionate advocate of expanding the international system's protection for human rights who believes that marshalling the condemnatory power of "genocide" to the widest possible extent is critical to achieving reconciliation, healing, and stability in the wake of mass atrocity.[31] On the other resides the strict legalist who, despite sharing in the internationalist aspirations of her more strident counterparts, frets that unmitigated expansion of genocide's legal ambit might undermine the rule of law in affected nations and validate skepticism of international law abroad.[32] Given international law's much maligned and tenuous mandate, and the fact that international criminal law is most often deployed in the aftermath of regimes that had used law as a tool of oppression and caprice, the legalist insists that international courts utilize the customary judicial tools of interpretation in such a way that inspires confidence in law as independent from politics.[33] Thus, the legalist insists, interpretation of the Genocide Convention must be tightly tethered to its text, the specific intent of its drafters, and its subsequent interpretation by international courts, thereby steering clear of broadly purposive, deontological reasoning.[34]

In between these (admittedly artificial) poles, however, sits the utilitarian internationalist, who expresses concern that any extension of genocide's legal scope necessarily engenders a

31. *See, e.g.*, Beth Van Shaack, *The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot*, 106 YALE L.J. 2259, 2261-62 (1997).

32. *Cf.* JUDITH SHKLAR, LEGALISM: LAW, MORALS, AND POLITICS 145 (1964) (resolving a similar quandary implicated by the Nuremberg Trials by conceding the political nature of the trials, but concluding that certain "political trials may actually serve liberal ends, where they promote legalistic values in such a way as to contribute to constitutional politics and a decent legal system.").

33. *See id.* at 146.

34. *See id.*

concomitant diminution of the term's symbolic and moral cache. While recognizing the merits of condemning grave injustices like the religiously motivated riots in Gujarat in the strongest possible terms, the utilitarian internationalist worries that adoption of too-cavalier an attitude to the characterization of a situation as "genocide" risks cheapening and weakening the designation. This Article, to the extent it contains prescriptive insights, is offered in this cautious yet aspirational utilitarian internationalist tradition.

C. Setting the Terms of the Debate

Precipitated by the ICC's ongoing dance with Omar al-Bashir, the ICTY's prosecution of Karadžić, and the ECCC's trial of the most senior surviving leaders of the Khmer Rouge, the debate over the appropriate outer contours of genocide is poised to graduate from the secluded realm of academic discourse and enter the courtroom.[35] The modest aim of this Article is to help establish the parameters of this momentous impeding discussion on the scope and legal meaning of genocide by offering an objective doctrinal synthesis of the central jurisprudential issue in any genocide prosecution: proving that an accused acted with genocidal mens rea, or the "special intent," to destroy a protected group as such. Establishing intent of this nature almost inevitably requires courts to make inferences from the context in which perpetrators acted, as—absent a confession—direct evidence of mental state is generally lacking.[36] Thus, this Article primarily deals with the question: What factual circumstances lead international courts to draw an inference of genocidal intent? The Article then filters its analysis through the particular circumstances facing the ECCC's imminent consideration of genocide charges against senior Khmer Rouge leaders for their role in the atrocities committed during their brief rule in Cambodia from 1975 to 1979.

A disciplined and objective distillation of existing case law on this question is a useful contribution to the literature for two principal reasons. The first lies in pragmatics: the doctrine on inferring genocidal intent, though still in the early stages of formation, is confusing and complex. And as with any doctrinal synthesis, litigants, courts, and interested observers benefit from receiving descriptive guidance expressly divorced from any normative project.[37] Second, and more fundamentally, only by first coming to a

35. *See infra* text accompanying notes 235-36 for an overview of recent developments in the ICC case against al-Bashir.

36. *See* Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 523 (Sept. 2, 1998). Similar evidentiary difficulties are found with respect to proving intent in other contexts, such as "first degree" murder in most American jurisdictions.

37. This is not to suggest that my interpretation of the case law is necessarily more "correct" than similar efforts, or even that it is immune from subconscious personal

clear and settled understanding of existing doctrine can one engage in an informed and rigorous analysis of how that doctrine might grow and develop as applied to new situations.

Thus, in practical terms, an examination of existing doctrine illuminates the gravity of, and risks associated with, the impending choice facing ECCC prosecutors vis-à-vis the breadth of charges to pursue in Case No. 002. This Article concludes that, according to an objective reading of existing international precedent, genocide charges are relatively likely to succeed with respect to the Khmer Rouge's persecution of the Cham Muslim and ethnic Vietnamese minorities, but that the ECCC would struggle mightily to situate the broader social upheaval wrought by the Khmer Rouge, involving persecution of the Khmer and Buddhist majorities, within the terms of existing genocide jurisprudence. For the ECCC to rule that persecution of these latter groups by the Khmer Rouge legally constituted genocide, therefore, it will have to accept novel extensions of existing doctrine.

This Article is in no position to predict the relative likelihood that the ECCC, if pressed, would embrace such claims. Nor does the Article take a position on the relative normative desirability of expanding the scope of genocide liability, though it does register ambivalence with the conventional wisdom that such would necessarily further the objectives of international criminal law. Instead, the Article is intended merely as a counterpoint to the "advocate's perspective" adopted in the existing doctrinal literature on genocide,[38] which tends to obscure the complex and uncertain nature of currently prevailing international genocide jurisprudence.[39] In seeking to be faithful to larger normative commitments, which generally entail considering any expansion in genocide's legal scope as an unqualified good, advocates in this debate tend to present the doctrinal issues as far more clear-cut than the case law warrants, and thus fail to examine the practical and jurisprudential tradeoffs

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bias. But it is to contend that I approach my project as an attempt to objectively discern the content of the law.

38. While there are certainly treatise-like treatments of the issue which do not adopting an advocate's perspective, they generally deal with it summarily, without engaging in an extended discussion of the doctrinal nuances. *See, e.g.*, MUGWANYA, *supra* note 17, at 134-36 (dealing with the issue in a footnote); ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 137 (2d ed. 2008) (dealing with the issue in three paragraphs).

39. *See, e.g.*, Jennifer Trahan, *Why the Killing in Darfur is Genocide*, 31 FORDHAM INT'L L.J. 990, 993-94 (2008) (article by a human rights advocate concluding that Al Bashir is guilty of genocide under current law); Andrew T. Cayley, *The Prosecutor's Strategy in Seeking the Arrest of Sudanese President Al Bashir on Charges of Genocide*, 6 J. INT'L CRIM. JUST. 829, 840 (2008) (article by international criminal prosecutor concluding the same).

associated with trying to prove genocide in court.[40]

This is not to criticize advocates for urging international criminal tribunals to adopt expansive genocide liability based on their belief as to the normative desirability thereof. The fact that the literature on genocide is largely generated by advocates, however, does have one crucial drawback: it is often exceedingly difficult for an interested observer to receive an unbiased statement of the law through review of academic commentary. This in turn distorts the policy debate and can lead to confusion and unrealistic expectations on the part of victim communities. With regard to the Khmer Rouge in particular, the certainty with which many advocates speak might fool the interested observer into thinking that—based on a neutral appraisal of prevailing international criminal legal doctrine—the genocide charges in Case 002 are a "slam dunk."[41] It is important to recognize, however, that the law of genocide is far from firmly settled, and that the ECCC, however it rules, will inevitably break new ground.

III. CAMBODIA, THE KHMER ROUGE, AND THE ECCC

The sheer gravity of the atrocities committed by the Khmer Rouge is staggering. Less than four years in power left an estimated 1.7 to 3.3 million of the nation's population of 7.1 million dead.[42] As an outsider, translating these numbers into a coherent historical narrative, not to mention a tangible reality, is a near-impossible task. Months of immersion in the personal stories of suffering that occurred under the Khmer Rouge does little to quiet one's shock and disturbance at the barbarity and repulsiveness of the regime. It was a time of

> unimaginable suffering and cruelty. Khmer Rouge cadres sometimes required villagers to watch as their loved ones faced firing squads for arbitrary or trivial offenses, such as stealing rice or vegetables to avoid starvation. Some pregnant women, accused of ill-defined "anti-revolutionary" behavior, were strung up and disemboweled for all to see .... In makeshift prisons, Khmer Rouge interrogators tested baseless accusations of espionage or subversion by strapping their victims to metal bed frames, burning

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40. *See infra* Part VII.

41. *See* Kiernan, *supra* note 25, at xii ("The existing literature presents a strong *prima facia* case that the Khmer Rouge committed acts of genocide . . . .").

42. ROBERT D. KAPLAN, THE ENDS OF THE EARTH: A JOURNEY AT THE DAWN OF THE 21ST CENTURY 401 (1996). A precise determination of the death toll is impossible, and each expert seems to arrive at a different number, ranging from 800,000 to several million. In one notable effort, a scholar arrived at a statistical estimate of 1.17 to 3.42 million excess deaths in Cambodia from 1970 to 1979. *See* Patrick Heuveline, *'Between One and Three Million': Towards the Demographic Reconstruction of a Decade of Cambodian History (1970-79)*, 52 POPULATION STUD. 49, 59-65 (1998).

> them with embers, and ripping off their fingernails. Without ever facing trials, many thousands of prisoners were taken to mass burial pits, where Khmer Rouge executioners were often instructed to kill them with axe-handles or other agricultural equipment.[43]

Anything resembling a full exposition of the historical predicate over which the ECCC retains jurisdiction—namely, the crimes of "senior leaders of Democratic Kampuchea[44] . . . that were committed during the period from 17 April 1975 to 6 January 1979"[45]—is far beyond the scope of this Article. The horrors of the Khmer Rouge regime, not to mention the tragedies of modern Cambodian history more generally, transcend the comprehension of even the most studied reflection. The modest aim of this Section is to offer a rough primer on the Khmer Rouge for the generalist reader, with a targeted emphasis on those aspects of the regime's operations that are relevant to assessing whether its leaders possessed genocidal intent.[46]

A. Cambodia

Cambodia—or Kampuchea, as it is known by Cambodians—is a nation in Southeast Asia about the size of Missouri with a population of fifteen million people, roughly 90% of whom are ethnic Khmer.[47] The nation is also home to significant populations of ethnic

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43. JOHN D. CIORCIARI, ON TRIAL: THE KHMER ROUGE ACCOUNTABILITY PROCESS 14-15 (John D. Ciorciari & Anne Heindel eds. 2009).

44. "Democratic Kampuchea" was the official name for the Khmer Rouge regime. *See id.* at 13.

45. Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, NS/RKM/1004/006, U.N. – Cambodia, art. 1, Oct. 27, 2004 [hereinafter ECCC Law].

46. For background reading on modern Cambodian history and the Khmer Rouge in particular, see, for example, KIERNAN, *supra* note 25; KARL D. JACKSON, CAMBODIA, 1975-1978: RENDEZVOUS WITH DEATH (1989). For an anthropological account of life under the Khmer Rouge see, for example, ALEXANDER L. HINTON, WHY DID THEY KILL?: CAMBODIA IN THE SHADOW OF GENOCIDE (2005). For a history of Tuol Sleng, or S-21, the infamous Khmer Rouge torture center that was the focus of ECCC Case No. 1, see DAVID CHANDLER, VOICES FROM S-21 (1999). For a history and legal analysis of the ECCC itself, see, for example, CIORCIARI, *supra* note 43, at 14-15. For a summary of the documents used in the 1979 Cambodian trial of Pol Pot and Ieng Sary in abstentia, see GENOCIDE IN CAMBODIA: DOCUMENTS FROM THE TRIAL OF POL POT AND IENG SARY (Howard de Nike, John Quigley, & Kenneth J. Robinson eds., 2000). For gripping first-hand survivor accounts of life under the Khmer Rouge, see CHANRITHY HIM, WHEN BROKEN GLASS FLOATS: GROWING UP UNDER THE KHMER ROUGE (2000); LOUNG UNG, FIRST THEY KILLED MY FATHER (2000); CHILENG PA, ESCAPING THE KHMER ROUGE: A CAMBODIAN MEMOIR (Carol A. Nortland ed. 2008).

47. FEDERAL RESEARCH DIVISION, LIBRARY OF CONGRESS, CAMBODIA: A COUNTRY STUDY (Russel R. Ross ed., 1987), *available at* http://countrystudies.us/cambodia/40.htm.

minorities, including the Muslim Cham, ethnic Vietnamese ("Khmer Krom"), non-Khmer highland tribes ("Khmer Loeu") and ethnic Chinese.[48] According to the United Nation's Human Development Index, which measures national life expectancy, literacy, education, and general standards of living, Cambodia is the second least developed nation in Asia, just above Myanmar.[49] Moreover, by some measures, Cambodia is the most aid-dependent nation in the world after Afghanistan.[50] Driven by strong growth in the textile industry, however, the nation has experienced a sustained period of economic growth since the late 1990s,[51] leaving annual per capita income at roughly USD 1,900—up from USD 220 in 1994.[52]

Sandwiched between Thailand and Vietnam—two much larger, more developed, and more militarily powerful nations—Cambodia's modern history is of a geopolitically weak nation struggling to maintain its independence in the face of ever-present foreign threats.[53] A protectorate of France for nearly a century until 1953, briefly interrupted by Japanese rule from 1941-1945, the country experienced nearly constant chaos, conflict, and political turmoil for much of the twentieth century.[54] This includes two years of intense American aerial bombardment and a shorter ground invasion in the early 1970s, action which displaced nearly two million people and which many blame for causing much of the population to support the Khmer Rouge.[55] In merely one example of the hardship endured by recent generations of Cambodians, landmines leftover from various conflicts have killed over 60,000 people (and maimed many more) since 1979.[56] In the midst of such suffering, by far the most devastating period in modern Cambodian history—as measured by

48. *Id.*

49. Human Development Index (HDI) – 2010 Rankings, UNITED NATIONS HUMAN DEVELOPMENT REPORT, *available at* http://hdr.undp.org/en/statistics/.

50. *See* DEVELOPMENT ECONOMICS VICE PRESIDENCY'S DEVELOPMENT DATA GROUP, WORLD BANK, WORLD DEVELOPMENT INDICATORS 348-51 (2007) (reporting that, of the countries for which statistics were available, Cambodia had the highest ratio of aid to central government expenditures of any nation besides Afghanistan).

51. *See* Sandra Polaski, *Cambodia Blazes a New Path to Economic Growth and Job Creation*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE 4 (2004).

52. *The World Factbook, Country Comparisons: GDP Per Capita*, CENTRAL INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/rankorder/2004rank.html (last visited Nov. 11, 2010).

53. *See* Gareth Porter, *Cambodia: Sihanouk's Initiative*, 66 FOREIGN AFFAIRS 809, 809-10 (1988).

54. *See generally*, JOHN A. TULLY, A SHORT HISTORY OF CAMBODIA: FROM EMPIRE TO SURVIVAL (2005) (detailing the country's turbulent history).

55. *See* DAVID CHANDLER, A HISTORY OF CAMBODIA 252 (Westview Press, 4th ed. 2007).

56. *Cambodia Land Mines*, PUB. BROADCAST SERVICE (July 25, 2003), http://www.pbs.org/wnet/religionandethics/week647/cover.html.

the human toll as well as the damage to the nation's culture, society, and collective identity—was the brief rule of the Khmer Rouge from 1975 to 1979.[57]

B. Targeting Under the Khmer Rouge

Shortly after taking over the capital city of Phnom Penh, Khmer Rouge forces under Pol Pot began a radical campaign of economic and social reform aimed at creating a purely agrarian socialist society.[58] The regime targeted for destruction anyone and anything exhibiting Western or "bourgeois" tendencies on the one hand, and anyone and anything representative of traditional Cambodian culture on the other.[59] Books were burned en masse, perceived intellectuals and professionals were either murdered outright or sent to reeducation camps, where most died, and money, markets, and existing educational institutions were eliminated.[60] Moreover, Buddhism and other traditional practices were prohibited.[61] In one emblematic example of how deeply the Khmer Rouge sought to displace the existing social order, the regime eliminated the traditional family unit by forcing young people to marry strangers selected at random by the state in mass weddings.[62] In addition, the regime separated children from their parents to be raised by the state and harshly "educated" them in the socialist ethos of the regime—a process that at times involved hardening children by forcing them to torture animals.[63]

Seeking to eradicate and reverse existing hierarchies, the Khmer Rouge reconstituted Cambodian society along a formal, complex, and government-administered caste system with "social class [as] the essential criterion of classification."[64] City-dwellers, who were immediately evacuated to the countryside to work as forced labor in the rice fields, were labeled "new people" or "deportees" and were disfavored relative to the "base people," a group which generally

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57. *See generally* CHANDLER, *supra* note 46 (describing the terror of the Khmer Rouge rule in graphic detail).

58. Society was re-oriented to such a dramatic extent that by the end of the regime, over ninety-five percent of the population lived on collective farms. KAMPUCHEA: DECADE OF THE GENOCIDE, REPORT OF A FINNISH INQUIRY COMMISSION 15 (Kimmo Kiljunen ed., the Pitman Press, 1984).

59. *Id.* at 15-17.

60. KIERNAN, *supra* note 25, at 39, 99, 190-91.

61. *See, e.g., id.* at 100, 263.

62. *See* Natalae Anderson, *Forced Marriage as a Crime Against Humanity* (Documentation Center of Cambodia 2010).

63. *See* KARL D. JACKSON, CAMBODIA, 1975-1978: RENDEZVOUS WITH DEATH 237-38 (1992).

64. ERIC C. WEITZ, A CENTURY OF GENOCIDE 161 (2003).

consisted of the rural poor.[65] The regime further segmented the population based on one's perceived ideological loyalty and diligence, with base people subdivided into "candidates" and those with "full rights."[66] While new people and base people worked side by side in the agrarian communes, base people enjoyed certain privileges such as superior food rations[67]—a particularly notable distinction given that "even the most conservative estimates place the number of starvation-related deaths in Cambodia from 1975-79 in the hundreds of thousands".[68] Full rights people also received certain benefits over candidates, with the former receiving "fancier clothes" for example.[69] To characterize the Khmer Rouge as upturning an existing hierarchy and replacing it with a new set of well-ordered and rationally calculated classifications, however, is far too charitable. An individual's placement within a given category often reflected an "arbitrary mix of social, national, and political criteria" determined according to "an ideological and political process by which the regime identified its supporters and enemies, real or imagined . . . in a confused jumble."[70] Moreover the segmentation of the population was far from uniform across time or geographic location, and in some instances went nine categories deep.[71]

The relevant factual inquiry for the purposes of this Article, as it bears on whether Khmer Rouge leaders possessed genocidal intent, is whether Khmer Rouge categorization and targeting mechanisms tracked "racial, ethnical, national, or religious" group characteristics. The primary aim of the Khmer Rouge was to entirely reconstitute society along an agrarian collectivist ideal. A central aspect of achieving this objective was to imagine away racial, ethnic and religious difference under a single national Khmer identity.[72] It is clear, moreover, that—although the vast majority of Khmer Rouge victims were ethnic Khmer—members of minority populations suffered disproportionately under the regime's rule.[73] Much of this was merely incidental to the targeting of urban centers, as a large percentage of pre-Khmer Rouge urban residents were Chinese and

65. *See id.* at 150-51, 159-61.

66. *See id.* at 160. Base people could also be demoted further to "depositee"—a category whose status was equivalent to those of new people. *See id.*

67. *Id.*

68. Randle C. DeFalco, *Accounting for Famine at the Extraordinary Chambers in the Courts of Cambodia*, Oxford Int'l J. Trans. Just. (forthcoming) (on file with author).

69. KIERNAN, *supra* note 25, at 194.

70. WEITZ, *supra* note 64, at 161.

71. *See id.* at 160.

72. *See id.* at 170.

73. *See id.* at 172-73.

Vietnamese ethnic minorities.[74] In addition, much of their targeting appeared to emanate from ethnic minorities' disproportionate resistance to the regime's political and social agenda—and not obviously from deliberate Khmer Rouge targeting on the basis of race or ethnicity.[75] For example, according to many accounts, "there was no noticeable racialist vendetta against people of Chinese origin."[76] As such, despite their disproportionate targeting by the Khmer Rouge,[77] ECCC prosecutors are not expected to level charges of genocide in Case 002 based on atrocities perpetuated against ethnic Chinese.

Nevertheless, there is ample evidence that other ethnic minorities, especially ethnic Vietnamese and Cham, were subject to deliberate targeting by Khmer Rouge forces. Throughout the Khmer Rouge's rule, it engaged in an ever-escalating military conflict with its Vietnamese neighbor, rendering that nation "the prime national enemy for the Khmer Rouge."[78] In the initial period of its rule, the regime expelled hundreds of thousands of ethnic Vietnamese who lived along the nation's eastern border with Vietnam and engaged in selective purges of anyone suspected of having ties with or sympathy for the nation.[79] As the conflict with Vietnam escalated, however, so did the regime's targeting of ethnic Vietnamese—often accompanied by statements manifesting increasingly racialized animus.[80] This culminated in "Directive from 870" issued in April of 1977, which called for "local officials to arrest all ethnic Vietnamese, and all Khmer who spoke Vietnamese or had Vietnamese" relatives.[81] Survivors report, moreover, that entire families were killed on the justification that "they could speak Vietnamese."[82]

Further, Khmer Rouge vilified religion in all its forms.[83] Religious practice was banned, along with any of its accompanying customs and traditions.[84] The overwhelming majority of Cambodians

74. *Id.* at 172.

75. KIERNAN, *supra* note 25, at 295.

76. *Id.*

77. *Id.* at 292.

78. WEITZ, *supra* note 64, at 172.

79. For example, in one instance, Khmer Rouge cadres asked people "if they 'liked the Vietnamese,' so that 'they too could be sent back to Vietnam;'" all those answering in the affirmative were killed. KIERNAN, *supra* note 25, at 292.

80. WEITZ, *supra* note 64, at 173.

81. KIERNAN, *supra* note 25, at 297 (internal quotation marks omitted).

82. *Id.* at 299.

83. While the Khmer Rouge's public stance was that there was to be "only one religion—Khmer religion," in reality "no religion at all was permitted." *Id.* at 269 (internal quotation marks omitted).

84. *Id.*

were Buddhist,[85] and thus the regime sought to destroy Buddhism by targeting its leadership, the monkhood, rather than its adherents.[86] Elimination of the monkhood was an early and pressing priority for the regime; among its initial decrees was that cadres should "defrock all Buddhist monks and put them to work growing rice" and that all Buddhist Wats (temples) were to be shuttered.[87] Buddhist leaders and "recalcitrant monks" were then forcibly defrocked or killed.[88] Throughout its rule, the Khmer Rouge struggled to contain and repress Buddhism, and achieved this primarily through persecution of its religious figures.[89]

Perhaps the most heavily persecuted ethnic or religious group under the Khmer Rouge, however, was the Cham Muslim minority. Predominantly nestled in villages along the Mekong River near Phnom Penh, for centuries the Cham retained a distinct language, culture, and religion from their Khmer and Vietnamese neighbors.[90] The Cham therefore posed unique difficulties for the Khmer Rouge's efforts to reconstitute society along a homogenized agrarian ideal: "With their distinct language and culture, large villages, and independent national organizational networks, the Chams probably seemed a threat to the atomized, closely supervised society that the [Khmer Rouge leadership] planned."[91] The Khmer Rouge imposed exploitative economic measures on the Cham early in their rule, such as expropriation of their fishing yield.[92] These measures—along with tightening restrictions on Cham religious practice of their Muslim faith—led to the first of a series of Cham rebellions against the repressive central authority of the Khmer Rouge.[93] Partially in response, the Khmer Rouge executed Cham leaders and dispersed Cham villages throughout Cambodia.[94] Moreover, the Khmer Rouge took affirmative steps to destroy the Cham sense of a distinctive identity—banning Cham language, religious practices, and cultural traditions (such as the long hair that the women would wear).[95] In one particularly gripping example, the Khmer Rouge forced the

85. *Id.* at 6.

86. *Id.* at xii.

87. *Id.* at 55, 57.

88. *Id.* at xii, 291.

89. *Id.* at 100, 446.

90. *Id.* at 254.

91. *Id.* at 260. There is some indication that a disproportionate number of Cham were not accorded "full rights" status according to the aforementioned Khmer Rouge hierarchy. *Id.* at 275.

92. *Id.* at 260.

93. *Id.* at 260-61.

94. *Id.* at 260-67.

95. *Id.* at 267, 269.

Cham to raise pigs and eat pork in violation of their faith.[96] Those who resisted had their rations reduced or were sent to reeducation camps as punishment, and in some instances were publicly executed.[97] As a result of such persecution, the Cham suffered disproportionately under Khmer Rouge rule, with estimates that over a third of the approximately 250,000 pre-Khmer Rouge Cham lost their lives from 1975 to 1979.[98]

C. *Fall of the Khmer Rouge*

Like so many events in Cambodian history, Khmer Rouge rule ended through foreign intervention. Throughout their time in power, Khmer Rouge forces engaged in sporadic fighting with Vietnamese forces along their Eastern border.[99] After years of festering conflict between the two nations, in April of 1978, Vietnam commenced a full-scale invasion of Cambodia.[100] Fresh from their victory over the United States in the Vietnam War, the well-trained Vietnamese military easily routed their Khmer Rouge adversaries. On January 7, 1979—less than fourteen days after crossing the border into Cambodia—Vietnamese forces occupied Phnom Penh and Khmer Rouge leaders fled into exile.[101]

D. *The ECCC*

Despite the enormity of the Khmer Rouge's abuses, efforts at accountability were hampered for three decades by political impasse.[102] This was caused by both domestic and foreign factors: domestically, the Khmer Rouge was never fully defeated on the battlefield but merely pushed back into a western corner of the nation where they enjoyed local support.[103] Not until 1999, twenty years after the fall of Phnom Penh to Vietnam, did the Khmer Rouge

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96. *Id.* at 269.

97. *Id.* at 275; WEITZ, *supra* note 64, at 172.

98. *See* Ben Kiernan, *The Demography of Genocide in Southeast Asia: The Death Tolls in Cambodia, 1975-79, and East Timor, 1975-80*, 35 CRITICAL ASIAN STUD. 585 (2003).

99. *See* KIERNAN, *supra* note 25, at 359-400.

100. For a concise historical overview of the factors leading up to the Vietnamese invasion, see Chandler, *supra* note 55, at 272-76.

101. *See* KIERNAN, *supra* note 25, at 463.

102. *See generally* John D. Ciorciari, *History & Politics Behind the Khmer Rouge Trials*, *in* ON TRIAL, *supra* note 11, at 33. ("explain[ing] why [the] accountability process was so slow to come to fruition."). In the world's first genocide trial, the new government tried Pol Pot and Ieng Sary for genocide in abstentia in 1979. *See* Helen Jarvis, *A Personal View of the Documents of the People's Revolutionary Tribunal*, *in* GENOCIDE IN CAMBODIA, *supra* note 46, at vii; John Quigley, *Introduction*, *in* GENOCIDE IN CAMBODIA, *supra* note 46, at 1-2.

103. *See* KIERNAN, *supra* note 25, at ix-xii.

finally give up their resistance to Cambodia's new central government. Throughout this time, due to Cold War politics (the United States viewed the subsequent Vietnamese-influenced regime in Phnom Penh as illegitimate) the Khmer Rouge's guerrilla forces had the full support of the West.[104] Khmer Rouge representatives even sat in Cambodia's United Nations seat in New York City.[105]

Against this background, Cambodian officials predictably bristled at post-Cold War calls from Western capitals for an international tribunal to prosecute the surviving Khmer Rouge leaders (Pol Pot died in 1998).[106] In addition, the perceived failures of the International Criminal Tribunal for Rwanda ("ICTR") and the International Criminal Tribunal for the Former Yugoslavia ("ICTY") engendered skepticism of international tribunals as an effective mechanism for achieving transitional justice.[107] After five years of testy negotiations with the United Nations, the Cambodian government agreed in 2004 to a novel "hybrid" structure[108] (that has since been replicated in Sierra Leone and East Timor) in which the court's "institutional apparatus and the applicable law consist of a blend of the international and the domestic."[109] Specifically, "[f]oreign judges sit alongside their domestic counterparts to try cases prosecuted and defended by teams of local lawyers working with those from other countries,"[110] and the Court has jurisdiction to apply both Cambodian and international law.[111] Among the crimes falling under the Court's jurisdiction is genocide.[112]

IV. GENOCIDE: THE ECCC'S LEGAL DEFINITION

ECCC Law Article 4 defines an act of genocide as "any . . .

104. *See* EVAN GOTTESMAN, CAMBODIA AFTER THE KHMER ROUGE xiv (2003).

105. Ben Kiernan, *Cambodia's Twisted Path to Justice,* THE HISTORY PLACE (1999), http://www.historyplace.com/pointsofview/kiernan.htm.

106. For a comprehensive overview of the politics and history behind the formation of the ECCC, see Ciorciari, *supra* note 102, at 43, 62-64. Note that it has been widely speculated that Pol Pot may have committed suicide to avoid capture by the United States. *See* KIERNAN, *supra* note 25, at xii.

107. Ciorciari, *supra* note 102, at 70.

108. *Id.* at 77; In a sidenote that followers of U.S. domestic politics might find interesting, it is not an exaggeration to say that the ECCC was "saved" by key personal interventions by U.S. Senator John Kerry, whose unique profile offered credibility to both sides as a neutral arbiter and who several times stepped into negotiations between the United Nations and the Cambodian government to resolve disagreements and offer solutions to impasses. *See id.* at 69.

109. Laura Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295, 295 (2003).

110. *Id.*

111. *See* ECCC Law, *supra* note 45, art. 1.

112. *See id.* art. 4.

committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group."[113] International courts have interpreted identical language in their respective constitutive statutes as imposing a requirement of "special" or "specific intent."[114] Thus, establishing liability for a principle perpetrator of genocide "requires proof of intent to commit the underlying act" as well as "proof of intent to destroy the targeted group."[115] And as genocide is a "mass crime," the intent to destroy a protected group "in part" must encompass "at least a substantial part of the group."[116] Measuring the substantiality of the targeted part involves examination of, *inter alia*, its numeric size (in both absolute terms and "in relation to the overall size of the entire group"); the "prominence" or importance of the targeted part to the overall group; and the "area of the perpetrators' activity and control."[117]

A. Motive versus Intent

International tribunals have repeatedly emphasized the importance of "distinguish[ing] between motive and intent," as "in genocide cases, the reason why the accused sought to destroy the victim group has no bearing on guilt."[118] Thus, while a perpetrator

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113. *Id.* art. 4. The ICTY statute's definition of genocide includes the phrase "as such," which that court found to mean that "the group [must have] been targeted, and not merely specific individuals within that group". Prosecutor v. Sikirica, Case No. IT-95-8-T, Judgment on Defense Motions to Acquit, ¶ 89 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 3, 2001).

114. *See* Prosecutor v. Kayishema & Ruzindana, Case No. ICTR–95–1–T, Judgment, ¶ 89 (May 21, 1999); *see also* Prosecutor v. Jelisić, Case No. IT-95-10-A, Judgment, ¶ 45 (Int'l Crim. Trib. for the Former Yugoslavia July 5, 2001) (noting that "[t]his intent has been referred to as . . . special intent, specific intent, *dolus specialis*, particular intent and genocidal intent.").

115. Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, ¶ 20 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004) (also noting that "proof of the mental state with respect to the commission of the underlying act can serve as evidence from which [to infer] the specific intent to destroy.").

116. Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgment, ¶ 82 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 14, 1999) (citing Report of the International Law Commission on the Work of its Forty-Eighth Session, 6 May – 26 July 1996, G.A.O.R., 51st session, Supp. No. 10 (A/51/10) (1996)).

117. *Krstić*, IT-98-33-A, Judgment, ¶ 12-14 (noting that: "[t]hese considerations . . . are neither exhaustive nor dispositive. They are only useful guidelines. The applicability of these factors, as well as their relative weight, will vary depending on the circumstances of a particular case."); *see also* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzogovina v. Serbia & Montenegro), 2007 I.C.J. 91, ¶¶ 197-201, (Feb. 26) (pointing to "substantiality," the geographic "area of the perpetrator's activity and control," and the "prominence" of the part).

118. Prosecutor v. Stakić, Case No. IT-97-24-A, Judgment, ¶ 45 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006); *see also, e.g., Jelisić*, IT-95-10-A, Judgment, ¶

may be motivated by any number of unrelated objectives—such as personal economic gain, tactical military advantage, or the desire to expel a group from a given territory—this does nothing to neuter the specific intent to achieve these objectives through genocidal means.[119] At the same time, commentators recognize that the "prototypical case[ ] of genocide" is one in which genocidal intent aligns with the motive of "hatred of the targeted groups."[120]

B. Secondary Liability: Aiding and Abetting[121]

In order to be held liable for aiding and abetting genocide before an international court, an accomplice need not possess the "specific intent to destroy" a protected group."[122] Instead, the requisite mens rea is "the intent . . . to knowingly aid or abet one or more persons to commit the crime of genocide."[123] The mens rea element for aiding and abetting genocide can therefore be broken down into two distinct 'knowledge' requirements. First, one must knowingly aid and abet the primary perpetrator in the commission of the genocidal actus reus (e.g., assist someone in murdering members of a protected group).[124] Second, one must do so with knowledge (or with reason to know) of the principal's specific genocidal intent.[125]

Note that under this standard an individual may be liable for aiding and abetting genocide even if she does not share the primary

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49 (noting the "irrelevance" of motive to criminal intent); Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶ 269 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999); Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-A, Judgment (Reasons), ¶ 161 (June 1, 2001).

119. *See Krstić*, IT-98-33-T, Judgment, ¶ 572 (noting that "an armed force could decide to destroy a protected group during a military operation whose primary objective was totally unrelated to the fate of the group").

120. Cayley, *supra* note 39, at 837 (quoting W. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 255 (2000)).

121. Some argue that "specific intent always has to be shown" to prove genocide. *See id.* at 839 (quoting Prosecutor v. Brdjanin, Case No. ICTY-99-36-A, Decision on Interlocutory Appeal (Shahabuddeen, J. dissenting), ¶ 4 (March 19, 2004)). Others, however, urge that genocide can be established via indirect modes of liability, such as Joint Criminal Enterprise and Command Responsibility. *See id.* at 838 (citing Prosecutor v. Brdjanin, Case No. ICTY-99-36-T, Judgment, ¶ 711-12 (Sept. 1, 2004)).

122. *See Brdjanin*, ICTY-99-36-T, Judgment, ¶ 730.

123. Prosecutor v. Akayesu, Case No. ICTR–96–4–T, Judgment, ¶ 540 (Sept. 2, 1998).

124. *Id.* ¶ 545.

125. *Id.* (finding that "an accused is liable as an accomplice to genocide if he knowingly aided or abetted . . . one or more persons in the commission of genocide, while knowing that such a person or persons were committing genocide, even though the accused himself did not have the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such").

perpetrator's genocidal intent.[126] As this Article is primarily interested in flushing out the legal standard for inferring genocidal intent, however, it does not fully explore the various modes of secondary liability—such as aiding and abetting and Joint Criminal Enterprise—by which a defendant can be prosecuted for genocide absent a showing of such intent.

V. INFERRING GENOCIDAL INTENT

In *Akayesu*, the first-ever genocide prosecution in an international tribunal,[127] the ICTR Trial Chamber noted "that intent is a mental factor which is difficult, even impossible, to determine" directly, at least absent a confession.[128] The Court further determined, however, that "the genocidal intent inherent in a particular act" may "be inferred . . . from the general context" in which the act occurred.[129] In other words, the ICTR recognized that—since, absent extraordinary circumstances or a confession, direct evidence of genocidal intent will very rarely if ever be available—courts must rely on inferences from the surrounding factual circumstances in order to determine whether a defendant acted with the requisite genocidal intent.[130]

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126. *See* Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶ 637 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001) *aff'd* by Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, ¶ 539 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2001) (noting that liability attaches for aiding and abetting "even if that intent is not shared").

127. SAMUEL TOTTEN & PAUL R. BARTROP, DICTIONARY OF GENOCIDE: A-L 6 (2008). Note that, at the very outset of the ICTR's existence, Rwandan interim Prime Minister Jean Kambanda pled guilty to charges of genocide (though he later attempted to rescind the plea). Prosecutor v. Kambanda, Case No. ICTR-97-23-S, Judgment and Sentence, ¶ 3 (Sept. 4 1998). As the Rwandan head of state during the atrocities, Kambanda's early guilty plea was symbolically powerful. And one could accordingly argue that it framed the parameters of debate at the ICTR in terms of how deep into the military and political hierarchy individual liability for the genocide would extend, not whether genocide had occurred or whether individuals were properly liable for its perpetration.

128. *Akayesu*, ICTR-96-4-T, Judgment, ¶ 523; *see also* Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-T, Judgment, ¶ 527 (May 21, 1999) (noting that "evidence, in the present case, is considered in light of [the] reality" of "the difficulty in finding explicit manifestations of a perpetrator's intent").

129. *Akayesu*, ICTR-96-4-T, Judgment, ¶ 523. Akayesu's formulation for inferring genocidal intent was widely adopted and followed in subsequent ICTR decisions; *see, e.g.*, Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment, ¶ 61 (Dec. 6, 1999).

130. The necessity of demonstrating intent by inference is by no means limited to proving genocide. *See* MICHAEL J. ALLEN, TEXTBOOK ON CRIMINAL LAW 57 (9th ed. 2007) (noting that "[t]he state of a person's mind ... is not an easy fact to prove" and therefore courts are generally "left to use their collective common sense to draw inferences from the circumstances and . . . the accused's conduct in those circumstances").

The ICTR's observation has proven prescient. As of August 2010, every successful genocide prosecution in an international forum has relied on inferences of genocidal intent from the factual context in which the accused acted.[131] A review of the applicable case law has identified four key factors, which will now be examined in turn, that courts look to when engaging in this highly-contextual analysis: (1) statements indicating genocidal intent; (2) the scale of the atrocities committed; (3) systematic targeting of the protected group; and (4) evidence suggesting that commission of the genocidal actus reus was consciously planned.

It must be emphasized, however, that inferring genocidal intent is not a mechanical inquiry. Though these four factors have thus far proven to hold the most sway with international tribunals, nothing precludes a future court from identifying additional factors. Nor does it prevent a court from disclaiming the relevance of those previously identified. Moreover, no particular combination of factors can be identified as necessary or sufficient to prove genocidal intent. And as relevant as the *existence* of a factor is the *degree* with which it is demonstrated. In other words, it is critical to examine, for example, the clarity with which a statement indicates genocidal intent, or the extent to which a group had been systematically targeted.

In addition, it should be observed that inferring specific genocidal intent requires considerably more than merely demonstrating the accused's "extreme racial and ethnical hatred" of the targeted group.[132] As the ICTY Appeals Chamber noted in *Jelisić*, even seemingly "smoking-gun" verbal expressions of genocidal intent,[133] combined with dozens of murders targeting a protected

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131. What has perhaps emerged as the prevailing legal formulation for inferring genocidal intent states that:

> specific intent . . . may, in the absence of direct explicit evidence, be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts.

Prosecutor v. Jelisić, Case No. IT-95-10-A, Judgment, ¶ 47 (Int'l Crim. Trib. for the Former Yugoslavia July 5, 2001) (cited by U.N. Darfur Comm'n Rep., *supra* note 5, ¶ 502).

132. *See* Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgment, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 14, 1999).

133. *Jelisić* involved the de facto head of a Serbian prison camp who described himself as the "Serbian Adolf"—even at the ICTY; he asserted that his reason for going to the camp was "to kill Muslims;" told the detainees that he "held their lives in his hands and that only between 5 to 10% of them would" survive; that he "hated Muslims and wanted to kill them all" and that Muslims "had proliferated too much and that he had to rid the world of them." *Id.* ¶ 102.

group,[134] is not necessarily sufficient contextual evidence from which to infer genocidal intent.[135] Instead, courts conduct a holistic inquiry into whether the overall factual context constitutes "the physical expression of an affirmed resolve to destroy . . . a group as such."[136] That the defendant committed acts satisfying the actus reus of genocide while motivated by racial, ethnic, national, or religious animus is therefore insufficient.[137] The relevant mens rea is the "intent to destroy" a protected group and nothing less.[138] Finally, at least one international court has suggested that prosecutors should be held to an elevated burden of proof with respect to genocidal intent, stating that in order to infer genocidal intent from the surrounding factual circumstances, such must be "the *only* reasonable inference available on the evidence," and thus, the factual predicate must not be susceptible to any competing interpretations.[139]

A. The General Existence of Genocide

Prior to assessing the question of a defendant's individual liability, international criminal tribunals first seek to establish that the situation in question generally constitutes genocide.[140] While genocide, by legal definition, requires individual human agency (in the form of an individual who holds the "intent to destroy"), in initially assessing mens rea, international tribunals have held that "[t]he inference that a particular atrocity was motivated by genocidal intent may be drawn . . . even where the individuals to whom the intent is attributable are not precisely identified."[141] In other words, courts do not require in this first inquiry that the factual circumstances point to any particular individual; they merely seek to

134. Jelisić "reputedly said to one witness that . . . he had killed one hundred and fifty persons." *Id.* ¶ 103.

135. *See Jelisić*, IT-95-10-A, Judgment, ¶ 65-68.

136. *Id.* ¶ 65. Though Jelisić personally murdered dozens of Muslims, the Tribunal founded that he had acted "arbitrarily rather than with the clear intention to destroy a group." *Id.* ¶ 108.

137. *See id.* ¶¶ 61-64 (finding genocidal intent not proven despite the accused's demonstrated murderous hatred of Muslims).

138. ECCC Law, *supra* note 45, art. 4.

139. Prosecutor v. Brdjanin, Case No. IT-99-36-T, Judgment, ¶ 353 (Int'l. Crim. Trib. for the Former Yugoslavisa Sept. 1, 2004) (emphasis added).

140. *See* Prosecutor v. Kayishema & Ruzindana, Case No. ICTR–95–1–T, Judgment, ¶ 273 (May 21, 1999) (finding the question of "whether genocide took place in Rwanda in 1994 . . . so fundamental to the case against the accused that the Trial Chamber feels obliged to make a finding of fact on this issue" prior to addressing issues of individual liability).

141. Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, ¶ 34 (Int'l. Crim. Trib. for the Former Yugoslavisa Apr. 19, 2004).

establish whether the broader atmospherics suggest that *someone* acted with genocidal intent. Accordingly, in determining the general existence of genocidal actus reus, courts do not dwell on "whether [the] acts [in question] were committed by the [accused] or by others."[142]

If the tribunal makes a general finding of genocide, it then investigates whether the individual in question participated in the genocidal actus reus while possessing the requisite mens rea.[143] While this entails a distinct second inquiry into factual circumstances particular to the accused, courts necessarily draw to some extent on their earlier observations and findings. "[A]lthough not itself sufficient to support a genocide conviction," the larger atmosphere in which an individual acted is "relevant to the context in which individual crimes are charged."[144] In other words, while courts must of course determine whether or not the accused him or herself possessed the requisite genocidal intent,[145] they draw on factual circumstances with which the accused is not directly connected in order to inform their interpretation of the individual's actions.[146]

Some criticize international tribunals for relying on general evidence of genocide in assigning individual liability for the crime, suggesting that to do so is tantamount to guilt by association. One commentator suggests, for example, that using "the existence of a nationwide campaign of genocide" to infer genocidal intent is illegitimate, as the only possible relevance of such a determination is that it "counsels skepticism toward defendants' claims that they did not commit genocide" or "that there are a significant number of genocidal acts for which the defendant could be responsible."[147] This analysis oversimplifies the logical relationship between the two inferential calculi, however, and ignores that certain factors are only

142. Prosecutor v. Akayesu, Case No. ICTR–96–4–T, Judgment, ¶ 523 (Sept. 2, 1998).

143. After several cases in which the ICTR Appeals Chamber investigated anew each time whether genocide had taken place in Rwanda, it took judicial notice of this "fact of common knowledge." *See* Prosecutor v. Karemera, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, ¶ 3 (June 16, 2006).

144. *Id.* ¶ 34.

145. *Kayishema*, ICTR–95–1–T, Judgment, ¶ 273 (emphasizing that "a finding that genocide took place in Rwanda is not dispositive of the question of the accused's innocence or guilt" and that it must "make a finding of the possible responsibility of each person" accused of genocide).

146. *See id.* (finding the question of "whether genocide took place in Rwanda in 1994" to be "of general importance" to a determination of individual liability).

147. *See* Kevin Heller, *International Decision: Prosecutor v. Karemera, Ngirumpatse, & Nzirorera*, 101 AM. J. INT'L L 157, 161 (2007).

revealed to be suggestive of individual genocidal intent when first situated amongst the broader context of society-wide genocide. Take the case of *Kayishema*, for example, where the ICTR found it relevant to its general finding of genocide that machetes had been widely distributed to the Hutu civilian population throughout Rwanda.[148] The Court then found that such machete distribution had occurred in Kibuye Province, where the accused was the Prefect (akin to a governor of a state of the United States), which supported its finding of genocidal intent amongst at least some individuals in Kibuye.[149] And with respect to inferring Kayisehma's personal genocidal mens rea, the Tribunal noted that at particular massacres of Tutsi—where Kayishema, in his role as Prefect, had been "leading and directing" the people—many of his followers hacked their victims "to death [with] machetes."[150] In this manner, the Tribunal implicitly found that that the distribution of machetes in Rwanda and Kibuye Province, actions to which no evidence linked the accused, supported an inference of Kayishema's individual genocidal intent.[151] This example illustrates the manner in which factors suggestive of the "general existence" of genocide can be highly relevant to an individual's personal mens rea. Considered in isolation, widespread possession of machetes among Kayishema's followers does little to suggest that he possessed genocidal intent. For all the Court knows, most Rwandans might already have had machetes in their personal possession. But the observation takes on new meaning when situated alongside the fact that government leaders had distributed those machetes widely among the population in furtherance of a genocidal plan, and that Kayishema—seeing his followers armed with those machetes—directed them to attack the Tutsi.

Likewise, in order to understand the context in which the accused acted, the ICTR has often pointed to incriminating statements made by persons with whom no direct association to the accused could be shown and that therefore do not bear directly on the accused's mens rea. For example, the ICTR has made several references to statements made in radio broadcasts, pamphlets, and at public meetings by Leon Mesera, a professor and propagandist, declaring, among other things, that assailants "had to cut the legs" off "babies who were still suckling . . . so that they would not be able to walk;" that "we will not make the . . . mistake where we let the younger [Tutsis] escape;" and urging listeners to "throw [Tutsi] into

148. *Kayishema*, ICTR–95–1–T, Judgment, ¶¶ 284, 298.
149. *Id.* ¶¶ 297-98.
150. *Id.* ¶¶ 536-37.
151. *See id.* ¶ 312.

the river so they can go out of the country."[152] The court found such statements relevant, if indirectly, to discerning whether the accused in question also possessed the requisite genocidal intent.[153]

Note finally that an initial finding that genocide generally occurred in a given situation can be independently relevant to a case's disposition even if the tribunal finds that the accused did not personally possess genocidal intent. This is because the existence of genocide is a predicate finding for assigning indirect liability for genocide, which, as discussed *supra*, does not require proof of specific genocidal intent. The ICTY Appeals Chamber in *Krstić*, for example, found that the factual circumstances in that case supported an inference that some unidentified party possessed genocidal intent, but found evidence of Krstić's personal genocidal intent lacking.[154] Nevertheless, the Court found that Krstić had knowingly aided and abetted others' commission of genocide, and was therefore held indirectly liable for genocide.[155]

B. Statements Manifesting Individual Genocidal Intent

The most direct evidence by which one might infer genocidal mens rea is through examination of an individual's verbal and written statements seemingly manifesting the intent to destroy a protected group.[156] Accordingly, in the course of determining whether an accused possessed the requisite genocidal intent, the ICTR has closely examined the accused's public statements which arguably evidence his or her intent to destroy the Tutsi as a group. For example, in *Akayesu* the Tribunal found relevant a witness's testimony that the accused had publicly declared that "if a Hutu woman were impregnated by a Tutsi man, the Hutu woman had to be found in order 'for the pregnancy to be aborted.'"[157] Similarly, in *Kayishema*, the ICTR found that the accused had "encourag[ed] the extermination of the Tutsis" on the basis of witness testimony that he had exhorted his followers to "go to work" or "get down to work" just prior to a massacre of Tutsis.[158] In another example, in

152. *Id.* ¶ 280; *see* Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 100 (Sept. 2, 1998).

153. *Kayishema*, ICTR–95–1–T, Judgment, ¶¶ 280, 312; *see Akayesu*, ICTR–96–4–T, Judgment, ¶ 100.

154. *See* Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, ¶ 140-44 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004).

155. *See id.* ¶¶ 137-39.

156. *See* Cayley, *supra* note 39, at 837 (finding that, in his experience as an ICC and ICTY prosecutor, "[g]enocidal intent is most easily established through unambiguous statements, such as public speeches or declarations").

157. *Akayesu*, ICTR-96-4-T, Judgment, ¶ 121.

158. *Kayishema*, ICTR-95-1-T, Judgment, ¶ 539.

Muhimana, the ICTR found evidence that the accused had stated "that he was going to hold a meeting to encourage the Hutu population to go out and kill Tutsi," combined with evidence that a massacre of Tutsi followed a meeting at the accused's residence, to be highly probative of his genocidal intent.[159]

Moreover, while the inference of genocidal intent might logically be strongest when the defendant himself utters the incriminatory statement, the ICTR has often relied on statements manifesting genocidal intent made by those associated with the defendant.[160] Sometimes the association has legal significance in itself, as in *Kayishema*, where the ICTR pointed to "songs about exterminating the Tutsi" sung by those for whom the defendant had command responsibility.[161] Similarly, in their application for the arrest of Omar al-Bashir, President of Sudan, ICC prosecutors pointed to statements issued by those allegedly under his command responsibility such as "[t]he power of Al BASHIR belong to the Arabs and we will kill you until the end;" "we will kill all the black," and "we are here to eradicate blacks."[162] In other instances, however, the association in question merely supports a factual inference that the accused agreed with the statements made by the other person. In the course of finding that Jean Paul Akayesu acted with genocidal intent, for example, the ICTR pointed to the testimony of two witnesses indicating that the accused had "chaired . . . a public meeting" at which others had stated, respectively, "that all the Tutsi had to be killed so that someday Hutu children would not know what a Tutsi looked like," and that the speaker "would rest only when no single Tutsi is left in Rwanda."[163]

i. Statements Not Sufficient

While statements urging listeners to engage in genocidal acts can themselves constitute the actus reus of genocide if they amount to "incitement,"[164] even clear outward manifestations of genocidal mens rea still require courts to make inferences regarding the speaker's intent. For example, one cannot conclude that the

159. Prosecutor v. Muhimana, Case No. ICTR-95-1B-T, Judgment and Sentence, ¶¶ 81, 496 (Apr. 28, 2005).

160. *See, e.g., Akayesu*, ICTR-96-4-T, Judgment ¶ 118.

161. *Kayishema*, ICTR-95-1-T, Judgment, ¶ 539. The lyrics of the song "urge[ ] attackers not to spare [Tutsi] elderly and even [Tutsi] babies" because some members of the Tutsi militia had left Rwanda as a child. *Id.*

162. Prosecutor's Application for Warrant of Arrest under Article 58 Against Omar Hassan Ahmad AL BASHIR, International Criminal Court, 9 [hereinafter "ICC Bashir Arrest Warrant Application"].

163. *Akayesu*, ICTR-96-4-T, Judgment, ¶¶ 118-19.

164. *See id.* ¶ 481.

statement "I specifically intend to destroy all Tutsi" manifests genocidal intent without also finding, at minimum, that the speaker meant what she said. Accordingly, the ICTY Trial Chamber noted in *Krajisnik* that "[w]hen reviewing speeches and statements . . . in search of evidence of genocidal intent, utterances must be understood in their proper context."[165] Thus, in determining the probative weight to attach to a given statement, courts closely parse its content as well as the context in which it is made. For example, the ICTR in *Ntagerura* found that one Hutu politician's statements at a public meeting "ask[ing] the people [in attendance] if they could accept 'Inyenzis' [cockroaches] . . . running the country" and "urg[ing] the crowd to . . . mobilise itself, and take up arms to return [the Tutsis] to the place from where they came" was not a sufficiently clear manifestation of his desire for the destruction of Tutsis as a group to support an inference of his genocidal intent.[166] Buttressing this conclusion was the fact that the prosecution had, in the Court's eyes, "failed to prove that the purpose of the meeting was to organize, prepare, and encourage genocide."[167] In other words, international tribunals do not examine statements arguably manifesting genocidal intent in isolation. When confronted with an ambiguous statement, one which could possibly support an inference of genocidal mens rea but could also suggest any number of other mental states (such as mere racial animus, or the desire for military victory), tribunals examine the circumstances surrounding the utterance to discern its true meaning.[168]

Recognizing that statements alone, no matter how incendiary, are likely insufficient to independently support an inference of genocidal intent, international tribunals uniformly supplement such evidence by pointing to other underlying factual circumstances, explored *infra*.[169]

ii. Distinguish: Mere Derogatory Statements

International tribunals have disagreed over whether "the use of derogatory language toward members of the targeted group"[170] that

165. Prosecutor v. Krajisnik, Case No. IT-00-39-T, Judgment, ¶ 1092 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 27, 2006).

166. Prosecutor v. Ntagerura, Case No. ICTR-99-46-T, Judgment and Sentence, ¶¶ 97-103 (Feb. 25, 2004). Due to the prosecution's failure to demonstrate that genocidal intent could be inferred from the factual circumstances of the case, Ntagerura was acquitted of all charges. *Id.* ¶ 804.

167. *Id.* ¶ 145.

168. *Krajisnik*, IT-00-39-T, Judgment, ¶¶ 1092-93.

169. *See* discussion *infra* Parts V.B-D.

170. Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-T, Judgment, ¶ 93 (May 21, 1999).

stops short of calling or suggesting support for the group's physical destruction is probative of genocidal intent. The best reading of prevailing doctrine, however, is that an accused's mere use of derogatory language with respect to a protected group can supplement a finding of genocidal intent, but is, in isolation, of minimal probative weight. In *Kayishema*, for example, the defendant's use of "hostile language when referring to Tutsis," was one of several factual circumstances through which the Tribunal inferred that he acted with genocidal intent.[171] The Tribunal specifically put weight on the fact that the accused had referred to Tutsi as "filth," "dirt," "dogs," "sons of bitches," and "cockroaches."[172] Similarly, in their application for al-Bashir's arrest, ICC prosecutors urged that al-Bashir's subordinates' use of general derogatory language to describe the targeted group should support an inference of al-Bashir's genocidal intent.[173]

Nevertheless, courts do not rely strongly on general derogatory language to prove genocidal intent. In *Ntagerura*, for example, the ICTR did not find the fact that the accused had publicly labeled Tutsi "cockroaches" to have significant probative weight in assessing whether he possessed genocidal mens rea.[174] Unlike the defendant in *Kayishema*, Ntagerura's derogatory statements were among the only pieces of evidence indicating his specific intent to destroy the Tutsi.[175] More broadly, in *Krstić* the ICTY ruled that "no weight can be placed upon . . . Krstić's use of derogatory language [against Bosnian Muslims] in establishing his genocidal intent," as "charged language is commonplace amongst military personnel during war."[176] Whether the ICTY would extend this reasoning outside of the military context, however, is unclear.

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171. *Id.* ¶ 311.

172. *Id.* ¶ 538; *see also* Prosecutor v. Muhimana, Case No. ICTR-95-1B-T, Judgment, ¶ 496 (Apr. 28, 2005).

173. *See* ICC Bashir Arrest Warrant Application, *supra* note 162, at 9 (pointing to statements such as "You are Zaghawa tribes, you are slaves" and "You are Masalit. Why do you come here, why do you take our grass?").

174. *See* Prosecutor v. Ntagerura, Case No. ICTR-99-46-T, Judgment, ¶¶ 96-103 (Feb. 25, 2004).

175. *Id.* Note that the ICTR's reasoning in *Ntagerura* is not necessarily incompatible with its earlier reliance on derogatory statements to infer genocidal intent in *Kayishema*. In the latter case, Kayishema's derogatory statements were accompanied by several other factual circumstances through which the Tribunal evinced his genocidal intent. *See Kayishema*, ICTR-95-1-T, Judgment, ¶¶ 292-313, 531-40. As such, in contrast to the ICTY's ruling in *Krstić*, ICTR jurisprudence can logically be interpreted as finding derogatory statements to have some–if minimal–probative value. *Compare id.*, *with* Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, ¶ 130 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004) (finding that no weight can be given to derogatory language).

176. *Krstić*, IT-98-33-A, Judgment, ¶ 130.

iii. Rwanda: Sui Generis?

Notwithstanding the previous discussion, it is clear that the evidentiary burden of proving genocidal intent at the ICTR has been significantly alleviated by the ease with which prosecutors have been able to point to most defendants' incriminating public statements at public meetings, boisterous political rallies, and via the media. In Rwanda, the public itself was enlisted into the perpetrators' genocidal plans, and as such, many Hutu leaders issued highly public exhortations for their followers to exterminate the Tutsi, thus betraying their genocidal objectives.[177] The existence of such blatantly incriminating statements seems linked to the underlying character of the Hutu Power movement—namely, its grassroots structure.[178]

Given the distinctive nature of the Rwandan genocide, one might rightly caution against assuming that evidence of such statements is required to prove genocidal mens rea. Indeed, the ICTY—which itself enjoyed the evidentiary benefit of access to perpetrators' intercepted telephone conversations made during the course of the Balkans conflict[179]—expressly recognized that evidence that an accused made incriminating statements is not a necessary predicate to inferring his genocidal intent.[180]

C. Scale of the Atrocities Committed

It appears that in every instance in which an international tribunal has contemplated the factors bearing on an inference of genocidal intent, it has emphasized the importance of assessing the "scale . . . of the atrocities."[181] The scale on which the genocidal actus

177. *See, e.g.*, Prosecutor v. Nahimana, Case No. ICTR-99-52-T, Judgment, ¶¶ 397-98 (Dec. 3, 2003).

178. *See generally* TOTTEN & BARTROP, *supra* note 127, at 292 (describing the organizational framework of Rwandan political parties); *see also* Rene Lemarchand, *The 1994 Rwanda Genocide*, *in* A CENTURY OF GENOCIDE 483, 485-86 (Samuel Totten & William S. Parsons eds., 2008).

179. *See, e.g.*, *Krstić*, IT-98-33-A, Judgment, ¶¶ 52-53, 55-58, 66, 72-76.

180. *Id.* ¶ 34 ("[T]he record contains no statements by members of the VRS Main Staff indicating that the killing of the Bosnian Muslim men was motivated by genocidal intent to destroy the Bosnian Muslims of Srebrenica. The absence of such statements is not determinative."); *cf.* Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v. Serbia), 2007 I.C.J. 91, ¶¶ 287-97 (Feb. 26) (endorsing the ICTY's finding in *Krstić*).

181. *See, e.g.*, Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 118 (Sept. 2, 1998); *Krstić*, IT-98-33-A, Judgment,¶ 10-12, 34; Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v. Serbia), 2007 I.C.J. 91 ¶ 438; Prosecutor v. Semanza, Case No. ICTR-97-20, Judgment, ¶ 313 (May 15, 2003); *see also* Prosecutor v. Ntagerura, Case No. ICTR-99-46-T, Judgment, ¶ 663.

reus was committed is relevant from both an absolute perspective ("the [total] number of victims from the group" affected) and a relative perspective ("the relative proportionate scale of the actual or attempted destruction of a group").[182] Inferring genocidal intent from the scale of atrocities appears to derive from the legal presumption—present in many domestic jurisdictions—that people intend the foreseeable consequences of their deliberate acts.[183] On this logic, the fact that one takes action (e.g., killing large amounts of people) "with full knowledge of the detrimental consequences it would have for the physical survival of [a particular] community" is highly probative on the question of whether the actor specifically intended to achieve this result.[184]

Yet, engaging in this analysis begs the question: what constitutes "large scale" atrocities? Again, the Rwandan genocide seems to offer the paradigmatic modern example. Though definitive findings on the absolute number and relative proportion of the population of Tutsi killed during the genocide will likely never emerge, experts estimate that, in less than four months of bloodshed, anywhere from five hundred thousand to two million Tutsi were killed, constituting seventy-five to eighty-five percent of the total Tutsi population living in Rwanda at that time.[185] Subsequent jurisprudence makes clear, however, that killing of this staggering magnitude is not necessary for atrocities to be considered sufficiently 'large-scale' so as to support an inference of genocidal intent. In *Krstić*, for example, the ICTY found that the murder of 7,000 to 8,000 Bosnian Muslim men at Srebrenica—of a geographically limited target population of at least four times that number[186]—constituted a large enough "scale of killing" to support an inference of Krstić's genocidal intent.[187] *Krstić* demonstrates how measuring the relative scale of atrocities interacts critically with the level of generality by which one defines the targeted group. Had the ICTY defined the relevant group as "all Muslims within the territory of the former

182. Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Judgment, ¶ 93 (May 21, 1999).

183. *See, e.g.*, JOHN STUART MILL, ANALYSIS OF THE PHENOMENA OF THE HUMAN MIND, Vol 2. 401 (1869); Raymond Lyons, *Intention and Foresight in Law*, 85 MIND 84, 84 (1976).

184. *Krstić*, IT-98-33-A, Judgment, ¶ 29.

185. Alan J. Kuperman, *Rwanda in Retrospect*, FOREIGN AFFAIRS, Jan./Feb. 2000, at 101; *see also Kayishema*, ICTR-95-1-T, Judgment, ¶ 291 (estimating the dead at between 800,000 and 1,000,000—one seventh of Rwanda's population at the time); Edwin Musoni, *Report Claims 2 Million Killed in 1994 Genocide*, THE NEW TIMES (KIGALI), Oct. 4, 2008.

186. Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶ 572 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001).

187. *Krstić*, IT–98–33–A, Judgment, ¶¶ 2, 35.

Yugoslavia" rather than "all Bosnian Muslim men at Srebrenica," the relative scale of killings at issue may not have supported an inference of genocidal intent. Note that this flexibility in determining the "denominator" by which one measures the scale of atrocities accords with the Genocide Convention's dictate that genocidal mens rea constitutes "intent to destroy . . . [a protected group] in whole or in part."[188]

Despite being highly probative, however, the existence of "large scale" atrocities committed at the hands of the perpetrator and/or his associates is not strictly necessary to an inference of genocidal intent. Indeed, in ratifying the theoretical possibility of a "lone génocidaire scenario," whereby a single perpetrator is "capable of committing genocide" on the basis of a relatively small number of discrete killings, the Appeals Chamber of the ICTY implicitly recognized that the scale of atrocities in question is not a dispositive factor in the calculus of inferring genocidal intent.[189] In other words, "[t]here is no numeric threshold of victims necessary to establish genocide."[190]

D. Systematic Targeting

Genocidal intent to destroy a group may also be inferred from "the perpetration of other culpable acts systematically directed against the same group."[191] For example, in *Akayesu*, the ICTR found it highly relevant that Tutsis nationwide had been singled out for persecution and condemnation, even if the particular defendant in question did not directly participate in the actions or utter the statements in question.[192] The Court found that systematic targeting of Tutsi during the Rwandan genocide occurred through three principle means. *First*, the setting up of roadblocks, at which "soldiers, troops of the Presidential Guard and/or militiamen . . . systematic[ally] check[ed] identity cards indicating the ethnic group of their holders."[193] Anyone listed as a Tutsi on their identity card

188. Genocide Convention, *supra* note 8, art. II.

189. Prosecutor v. Jelisić, Case No. IT-95-10-A, Judgment, ¶¶ 61-65 (Int'l Crim. Trib. for the Former Yugoslavia July 5, 2001) (recounting the Trial Chambers' finding on the basis of other factual circumstances, that the individual in question did not have the requisite genocidal intent); *see also id.* (Wald J., dissenting in part) (citing W. SCHABAS, GENOCIDE IN INTERNATIONAL LAW 9 (2000)) (endorsing the idea that "the currency of [genocide,] this 'crime of all crimes' should not be diminished by use in other than large scale state-sponsored campaigns to destroy minority groups, even if the detailed definition of genocide in our Statute would allow broader coverage").

190. Prosecutor v. Muhimana, Case No. ICTR-95-1B-T, Judgment, ¶ 498 (Apr. 28, 2005).

191. *Jelisić*, IT-95-10-A, Judgment, ¶ 47.

192. Prosecutor v. Akayesu, Case No. ICTR–96–4–T, Judgment, ¶ 123 (Sept. 2, 1998).

193. *Id.* In the 1930s, while governing Rwanda as a colony, the Belgians formally

was then "immediately apprehended and killed, sometimes on the spot."[194] *Second*, the distribution of "execution lists" composed largely of the names of Tutsis and perceived Tutsi sympathizers, with substantial evidence linking the use of such lists to the actual killing of individual Tutsi and the sparing of others.[195] *Third*, "a propaganda campaign conducted before and during the tragedy" via the audio, visual and print media which involved the widespread dissemination of messages "overtly call[ing] for the killing of Tutsi" as a group.[196] In some instances, moreover, this propaganda campaign extended beyond the media, with the Tribunal pointing to a letter "intended for the widest possible dissemination" from a regional "staff headquarters" and signed by a military colonel.[197] This letter defined the term "enemy" as "the extremist Tutsi within the country or abroad who are nostalgic for power and who have NEVER acknowledged and STILL DO NOT acknowledge the realities of the Social Revolution of 1959 [which led to the overthrow of Tutsi political leadership in Rwanda]" as well as "anyone who lent support in whatever form to the primary enemy."[198]

Similarly, despite vigorous ongoing debate as to whether the atrocities occurring in the Darfur region of Sudan legally constitute genocide,[199] all relevant parties seem to agree that the exclusive targeting of so-called "African" villages[200]—with "[t]he attackers [going] out of their way to spare from attack so-called 'Arab' villages, even where they were located very near [to the] target[ed towns]"—is strong, though not dispositive,[201] evidence of the attackers' genocidal

established a system of government-tracked racial classification whereby an individual's ethnicity is listed on his or her national identification card. *Id.* ¶ 83.

194. *Akayesu*, ICTR-96-4-T, Judgment, ¶ 123.

195. In one instance, "patients and nurses [were] killed in a hospital because a soldier had a list including their names." *Id.* ¶ 126; *see also* Prosecutor v. Kayishema, Case No. ICTR–95–1–T, Judgment, ¶ 278 (May 21, 1999).

196. *Akayesu*, ICTR-96-4-T, Judgment, ¶ 123.

197. *Id.*

198. *Id.*

199. *See infra* Part III.D.iii.

200. U.N. Darfur Comm'n Rep., *supra* note 5, ¶¶ 1, 498-99. The distinction between "African" and "Arab" tribes in Darfur is largely illusory, at least in terms of its connection to ethnic, national, or racial identity. All speak Arabic, practice Islam, live in Africa, and extensive intermarriage has rendered any physical differences very difficult to detect, even amongst members of the two 'groups.' Nevertheless, the UN Darfur Commission found that 'African' Darfur tribes (including the Fur, Zaghawa, Massalit, Jebel, and Aranga) subjectively constitute a "group" within the meaning of the Genocide Convention, as they "are perceived and in fact treated as belonging to one of the protected groups, and . . . consider themselves as belonging to one of such groups" (noting further that "collective identities, and in particular ethnicity, are by their very nature social constructs"). *Id.*

201. Situation in Darfur, The Sudan, Case No. ICC-02/05, Summary of Prosecutor's

intent.[202] Further, the ICC prosecutor alleges that, in addition to their targeting of predominantly "African" villages for military attack, Sudanese forces and their allies have targeted "Africans" for "massive forced displacement," and "African" women and children for rape.[203]

i. Distinguishing Intent from Genocidal Actus Reus

Though the systematic targeting of Tutsis was part and parcel to the actus reus of the Rwandan genocide—i.e., the murdering of Tutsi—it is not necessary for the targeting of a group to be in furtherance of the genocidal actus reus to be fairly interpreted as manifesting genocidal intent. In *Krstić*, for example, the ICTY found that the forcible transfer of certain segments of the Bosnian Muslim population at Srebrenica—when viewed in light of the near simultaneous mass killing of other segments of that population—supported an inference of genocidal intent, even though forcible transfer is not a genocidal act under the ICTY Statute.[204] *Krstić* involved the Serbian Army's simultaneous mass murder of Bosnian Muslim men at, and forced removal of Bosnian Muslim women and children from, Srebrenica. Rejecting Krstić's argument that the perpetrators' decision to bifurcate the targeted group based on their age and gender suggested a lack of genocidal intent, the ICTY noted that, in a patrilineal society, "Bosnian Serb forces [must have known] that the combination of killing [the men] with the forcible transfer of the women, children and elderly would inevitably result in the physical disappearance of the [entire targeted group]."[205]

Moreover, the ICTY in *Krstić* ascribed inferential weight to forms of targeting with even less direct relation to the genocidal act than forcible transfer, such as "destroying homes" of Bosnian

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Application under Art. 58, ¶ 13 (July 14, 2008), *available at* http://www.icc-cpi.int/iccdocs/doc/doc529671.pdf. The U.N. Darfur Commission found that the systematic targeting of 'Africans' in Darfur for forcible migration did not manifest genocidal intent but a desire "to vacate the villages and prevent rebels from hiding among, or getting support from, the local population." It further found other forms of systematic targeting (*e.g.*, attacks on 'African' villages) were relevant to proving crimes against humanity, but could not independently sustain an inference of genocidal intent. U.N. Darfur Comm'n Rep., *supra* note 5, ¶ 514.

202. ICC Bashir Arrest Warrant Application, *supra* note 162, at 3.

203. *Id.* at 4-5.

204. Note that forcible transfer could constitute a genocidal act according to the term's applicable ECCC definition. *See* ECCC Law, *supra* note 45, art. 4 (defining "acts of genocide" as "any acts committed" with genocidal intent). Note also that according to both the Genocide Convention and ECCC law, "forcibly transferring children of the group to another group" satisfies the actus reus of genocide. *Id.*; Genocide Convention, *supra* note 8, art. II.

205. Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶ 595 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001.).

Muslims, destroying the city's "principal mosque," and "preventing any decent burial [of the dead] in accord with religious and ethnic customs."[206] While such offenses are clearly not acts of genocide,[207] the Tribunal found "evidence relating to acts that involved cultural and other non-physical forms of group destruction" highly relevant to discerning the genocidal intent of their perpetrators.[208]

Note that the "physical targeting of the group['s] . . . property"[209] can be interpreted in a number of ways according to the context in which it arises and the manner in which it occurs. In *Krstić*, for example, the ICTY seemed to view attacks on property in a similar light as attacks on culture: as manifesting animus for, and attempting to ensure the destruction of, the targeted group.[210] In *Kayishema*, by contrast, the ICTR considered the looting of Tutsi property as evidentiary support for the proposition that "authorities [had] guaranteed [the Hutu masses] impunity to kill the Tutsis."[211] Nevertheless, in both cases the targeting of the protected group for "non-physical or non-biological"[212] destruction ultimately buttressed the court's inference of the perpetrators' genocidal intent—despite the fact that the acts by which the targeting occurred did not satisfy the actus reus element of genocide under the Genocide Convention.[213]

ii. Systematic Targeting: No Requirement of Exclusivity

No international tribunal that has considered evidence of systematic targeting of a protected group for its bearing on genocidal intent has suggested that such targeting must be exclusively directed

206. *Id.* ¶¶ 595-96.

207. "Cultural genocide" has been repeatedly rejected as a form of genocide. *See id.* ¶ 576 (citing ILC Draft Code of Crimes against the Peace and Security of Mankind, Rep. of the Int'l Law Comm'n, 48th Sess. May 6 – July 26, 1996, U.N. Doc. 9/51/10; GAOR, 51st Sess., Supp. No. 10 (1996), pp. 90-91 (noting that "[a]s clearly shown by the preparatory work for the [Genocide] Convention, the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group").

208. *Id.* ¶ 577; *see also* Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, ¶ 53 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004) (Shahabudden J., dissenting in part) (noting that while not constituting the actus reus of genocide, "the destruction of culture . . . [i]n this case, the razing of the principle mosque . . . confirm[s] an intent to destroy the Srebrenica part of the Bosnian Muslim group.").

209. Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-T, Judgment, ¶ 93 (May 21, 1999).

210. *See Krstić*, IT-98-33-T, Judgment, ¶ 595.

211. *Kayishema*, ICTR-95-1-T, Judgment, ¶ 290.

212. *Krstić*, IT-98-33-A, Judgment, ¶ 49 (Shahabudden J., dissenting in part).

213. *See Krstić*, IT-98-33-T, Judgment ¶¶ 653; *Kayishema*, ICTR-95-1-T, Judgment, ¶ 93.

at the protected group in order to be probative.[214] In Rwanda, for example, the aforementioned military-issued public letter defining "the enemy" listed several non-Tutsi social and ethnic groups, including "Hutu dissatisfied with the current regime," "foreigners married to Tutsi women," and the "Nilotic-hamitic tribes in the region."[215] The fact that the letter did not exclusively target the Tutsi, however, did not negate its circumstantial weight with respect to determining the perpetrators' specific genocidal intent to destroy the Tutsi. Similarly, in Darfur the targeting of "African" tribes and individuals has not been fully exclusive.[216] Accordingly, the Prosecutor's application for an arrest warrant on charges of genocide carefully qualifies every allegation of targeting by noting that only "most" of those targeted are members of a protected group.[217]

Though the ICTR has not dwelled on the import of non-exclusivity in its targeting analysis, three factors have probably led the Tribunal to discount its significance. First, the vast majority of those targeted were Tutsi.[218] Second, a huge number of Tutsi—both in absolute terms and relative to their total population—were targeted.[219] Lastly, many of the non-Tutsi targeted were singled-out precisely for their alleged sympathy to the Tutsi.[220]

More generally, two universally applicable considerations counsel against requiring exclusivity for targeting of a protected group to bear on an inference of genocidal intent. First, even if one *intends* to exclusively target a particular group, that targeting is highly unlikely to be exclusive in execution.[221] Hutu names will inadvertently be included on lists intended to be exclusively composed of Tutsi, "Arabs" will be mistaken for "Africans" and so on.[222] Second, recall that genocidal intent is not necessarily motivated by racial, ethnic, national, or religious animus. A perpetrator's genocidal intent can be driven by, for example, the desire to expel "outsiders" from a territorial region or a belief that elimination of the group will strategically assist the achievement of a

214. *See, e.g.*, Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998); *Krstić*, IT-98-33-A, Judgment; *Kayishema*, ICTR-95-1-T, Judgment.

215. *Akayesu*, ICTR-96-4-T, Judgment, ¶ 123.

216. *See* ICC Bashir Arrest Warrant Application, *supra* note 162, at 3.

217. *Id.* at 4-7.

218. *See supra* text accompanying note 192-196.

219. *See supra* text accompanying note 185.

220. Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-T, Judgment, ¶ 302 (May 21, 1999) (noting that those helping Tutsi refugees had their houses burned down).

221. *See, e.g.*, Prosecutor v. Muhimana, Case No. ICTR-95-1B-T, Judgment and Sentence, ¶ 552 (Apr. 28, 2005) (noting that the accused apologized to a girl he raped when he found out she was a Hutu not a Tutsi).

222. *See id.* ¶ 561.

military victory. Under either circumstance, a perpetrator would logically target any and all groups posing an obstacle to the achievement of its ultimate objective.[223] The fact that the intended destruction of some such groups (e.g., Hutus sympathetic to the Tutsi) does not legally constitute genocide because they are not of a sort contemplated by the Genocide Convention is of no consequence to possible inferences of genocidal intent with respect to groups that are so protected.

Nevertheless, the ICTR has found that the relative probative weight of targeting is increased if the perpetrators "exclud[e] the members of other groups," and is presumably concomitantly reduced to the extent that other groups are targeted as well.[224]

iii. Comprehensiveness of Targeting: The Existence of an Armed Conflict

Most instances of alleged genocide in the modern era have occurred amidst an armed conflict in which a military force perpetrated mass killings against a population sharing racial, ethnic, or national characteristics with an opposing military force.[225] In this context, defendants have often responded to accusations of genocide by contending that any targeting of the protected group was driven by tactical military considerations rather than the desire for the group's destruction.[226]

International tribunals, however, have universally rejected the contention that the existence of a military conflict between forces largely comprised of two ethnic, national, or racial groups necessarily negates an inference of genocidal intent from one group's targeting of the other.[227] As an initial matter, any targeting of civilian persons has been held up as near-definitive proof that the motive for such targeting was not primarily pursuant to military ends.[228] The ICTR in *Akayesu*, for example, emphasized that Tutsi women and children were targeted as well as men, and that these women and children

223. *See, e.g.*, ICC Bashir Arrest Warrant Application, *supra* note 162, at 3 (explaining Bashir's intent to remove political and perceived military threats from regions in which he was in power by engaging in various genocidal crimes against groups he viewed as threats).

224. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 523 (Sept. 2, 1998).

225. The obvious counterexample to this, of course, is the Holocaust.

226. *See, e.g.*, Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, ¶ 26 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004).

227. Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶¶ 564-65 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001).

228. *See* U.N. Darfur Comm'n Rep., *supra* note 5, at 3 (rejecting the Sudanese government's assertion that any killings were for "counter-insurgency purposes and were conducted on the basis of military imperatives," due to its finding that "most attacks were deliberately and indiscriminately directed against civilians").

were not generally combatants in the civil war between Hutu and Tutsi factions.[229] Similarly, even though Serbian forces explicitly spared Muslim women and children from murder at Srebrenica—thereby enhancing the credibility of Serbian claims of harboring purely military motives—the ICTY in *Krstić* refused to hold this factor dispositive.[230] Instead, the court noted that Serbian forces did not distinguish between different types of men, killing almost all members of this sub-group (including the handicapped and "many boys well below . . . and elderly men several years above [military] age") regardless of whether or not they could be reasonably expected to serve as combatants in the military conflict.[231]

To the extent it is possible at this preliminary stage to discern the contours of deliberations within the ICC regarding the propriety of charging al-Bashir with genocide, the debate seems largely focused on the relative import of the fact that when attacking a village predominantly populated by the protected group, "both militias and Government forces . . . refrain[ ] from exterminating the whole population . . . but instead selectively kill[ ] groups of young men."[232] According to the UN Darfur Commission, this observation "clearly shows that the intent of the attackers was not to destroy an ethnic group as such," but "to murder all those men they considered as rebels."[233] In seeming retort to this argument, ICC prosecutors point

229. *Akayesu*, ICTR-96-4-T, Judgment, ¶¶ 111, 121 (also emphasizing that the accused had publicly declared that "even newborn [Tutsi] babies were not spared" from violence and that "pregnant women, including those of Hutu origin, were killed on the grounds that the foetuses in their wombs were fathered by Tutsi men").

230. Instead, the ICTY speculated that the decision to spare women and children was driven by Serbian susceptibility to international pressure, suggesting that the perpetrators of the genocide had used selective targeting of Bosnian men in a conscious attempt to obscure their genocidal intent. *Krstić*, IT-98-33-A, Judgment, ¶¶ 88-91.

231. *Krstić*, IT-98-33-T, Judgment, ¶¶ 85-86. As the Defense pointed out, however, Serb forces did spare the wounded. *Id.* ¶ 86. In reaction, the Trial Chamber again pointed to "international pressure" as an explanation. *See supra* note 230.

232. U.N. Darfur Comm'n Rep., *supra* note 5, ¶ 513.

> A telling example is the attack of 22 January 2004 on Wadi Saleh . . . after occupying the villages . . . the leader of the Arab militias . . . gathered all those who had survived or had not managed to escape into a large area. . . . They then sent all elderly men, all boys, many men and all women to a nearby village, where they held them for some time, whereas they executed 205 young villagers, who they asserted were rebels.

Id.

233. *Id.* ¶ 514. Note that the Commission did not examine the individual culpability of a particular defendant, but whether the Sudanese Government as a whole manifested a genocidal plan. As such, the Commission explicitly left open the possibility that "single individuals, including Government officials, may entertain a genocidal intent," and if so, "it would be for a competent court to make such a determination on a case by case basis." *Id.* ¶ 520.

to the attackers' "deliberate failure to differentiate between civilians and persons of military status."[234]

While the ICC Pre-Trial Chamber has issued an arrest warrant against al-Bashir which includes charges of genocide,[235] al-Bashir remains at large and it is unclear when (if ever) the warrant will be executed and a trial held.[236] The uncertain and preliminary status of the ICC's prosecution of al-Bashir makes it difficult to extract concrete lessons from the Sudanese example. But the debate does tell us that this question of the relationship between military conflict and the specific targeting of a group protected by the Genocide Convention within that conflict remains unresolved. In an effort to deflect accusations of genocidal intent, perpetrators of allegedly genocidal abuses will almost invariably allege that their actions were taken pursuant to an ongoing military conflict. The ICTY in *Krstić* determined that killing every man within a protected group—even if rationally related to tactical military objectives of winning the territory—strongly supports an inference of genocidal intent.[237] Whether systematic targeting of narrower classes of alleged potential combatants, as seems to occur in Darfur, can support a similar inference remains an open question.

Again, note how the distinction between motive and intent dovetails with the preceding analysis. As discussed *supra*, a perpetrator's motivation for destroying a protected group in whole or part could very well be to gain tactical military advantage.[238] Highlighting the motive/intent distinction suggests that the extended

234. ICC Bashir Arrest Warrant Application, *supra* note 162, at 9.

235. In July 2009 prosecutors at the ICC appealed a 2-1 decision by the Pre-Trial Chamber to refrain from charging the President of Sudan, Omar Hassan Ahmad al-Bashir with genocide for his role in the violence occurring in Darfur since March 2003. *See Appeal on Bashir Genocide Charges*, BBC NEWS (July 7, 2009), http://news.bbc.co.uk/2/hi/8138554.stm. *See also* Robert Cryer, *The Definitions of International Crimes in the Al Bashir Arrest Warrant Decision*, 7 J.I.C.J. 283, 284 (2009). In February 2010 the Appeals Chamber reversed and remanded, finding that the Pre-Trial Chamber applied a too-stringent evidentiary standard given the preliminary nature of the initial proceeding, and without ruling on the merits of the genocide charges, ordering the Pre-Trial Chamber to reconsider the Prosecutor's genocide petition. *See Darfur: Bashir Genocide Charges to Be Reconsidered*, BBC NEWS (Feb. 3, 2010), http://news.bbc.co.uk/2/hi/8494759.stm. In July 2010 the Pre-Trial Chamber revised its arrest warrant for al-Bashir to include genocide charges. *See* Prosecutor v. Al-Bashir, Case No. ICC-02/05-01/09, Second Decision on the Prosecution's Application for a Warrant of Arrest (July 10, 2010).

236. *See* Rebecca Hamilton, *Omar al-Bashir, Fresh Off Press Crackdown in Sudan, Defies ICC in Visit to Chad*, C.S. MONITOR, July 21, 2010.

237. Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, ¶ 20 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004).

238. Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶ 572 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001).

discussion in *Krstić* regarding the relative veracity of the Serbian Force's alleged military motives for committing the Srebrenica massacre may (or should) be irrelevant. Even a highly circumscribed plan of mass murder, narrowly tailored to only encompass those individuals of a group exhibiting characteristics of the opposition military force (e.g., men of a certain age and physical vigor), could arguably both constitute the actus reus of genocide and support an inference of genocidal intent.

Notably, the ICTR has recognized that mass murder and military conflict follow no necessary causal pattern. Genocide may be a means for achieving military objectives just as readily as military conflict may be a means for instigating a genocidal plan.[239] In fact, the ICTR expressly recognized that the Rwandan "genocide was probably facilitated by the conflict, in the sense that the fighting . . . was used a pretext for the propaganda inciting genocide against the Tutsi, by branding [opposition] fighters and Tutsi civilians together."[240] As such, while genocide may often go hand-in-hand with an armed conflict between the perpetrator and victim groups, the causal direction of such a relationship is anything but clear.

E. Evidence of Planning

International tribunals consider evidence suggesting that commission of the crime's actus reus was the result of conscious planning to be probative of genocidal intent. As the ICTR remarked in *Kayishema*, "Although a specific plan to destroy does not constitute an element of genocide, it would appear that it is not easy to carry out a genocide without such a plan, or organisation."[241] As such, while "the existence of a plan [is] not a legal ingredient of the crime of genocide," it can "be of evidential assistance to prove the intent of the authors of the criminal act(s)."[242] International courts thus tend to treat any evidence that commission of the actus reus resulted from a conscious "methodical way of planning"[243] or "a

239. A recent report by a Rwandan government commission charged with investigating the assassination of President Juvénal Habyarimana, for example, found that the assassination was directly linked to Hutu extremists' opposition to Habyarimana's decision to make peace with Tutsi rebel forces. REPUBLIC OF RWANDA INDEP. COMM. OF EXPERTS, REPORT OF THE INVESTIGATION INTO THE CAUSES AND CIRCUMSTANCES OF AND RESPONSIBILITY FOR THE ATTACK OF 06/04/1994 AGAINST THE FALCON 50 RWANDAN PRESIDENTAL AEROPLANE, Registration No. 9XR-NN 14 (2009), *available at* http://mutsinzireport.com/wp-content/uploads/2010/01/Falcon-Report-english.pdf.

240. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 127 (Sept. 2, 1998).

241. Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-T, Judgment, ¶ 94 (May 21, 1999).

242. *Krstić*, IT-98-33-T, Judgment, ¶ 572.

243. *Kayishema*, ICTR-95-1-T, Judgment, ¶ 93.

pattern of purposeful action"[244] to be indicative of the actor's genocidal intent. For example, the ICTY found evidence that the massacre at Srebrenica was planned from "the number and nature of [Serbian military] forces involved, the standardised coded language used by the units in communicating information about the killings, the scale of the executions, [and] the invariability of the killing methods applied."[245] Similarly, the ICTR found the "consistent and methodical pattern" by which attacks against Tutsi took place to be "compelling" evidence of planning.[246]

Courts have found it difficult, however, to distinguish between the types of factual circumstances that constitute evidence of planning and those that serve as direct evidence of genocidal intent itself. Instead, they tend to presume that "evidence . . . reveal[ing] the existence of a plan" to commit the genocidal actus reus is also illustrative of genocidal intent,[247] and then immediately proceed to investigate whether evidence of planning is fairly inferable from the facts of the case.[248] Accordingly, determining the sorts of acts which indicate that atrocities were "pre-arranged" is a contextual, fact-intensive process, one that is difficult to distill into broad generalizations.

i. Scale, Targeting, and Statements

In many instances, the factual circumstances from which courts infer genocidal intent are also susceptible to an inference that the genocidal actus reus was planned, where the latter finding presumably serves to circle-back and reinforce the core inference of genocidal intent. The ICTY, for example, pointed to "the scale of the executions" at Srebrenica as both evidence of planning and evidence of genocidal mens rea.[249] Similarly, the ICTR has found several factors that facilitated the targeting of Tutsi in Rwanda to suggest atrocities were planned, including the existence of "arms caches in Kigali,"[250] the Rwandan capital; the rapid "distribution of [machetes] to the civilian population;"[251] "the training of militiamen by the Rwandan Armed Forces;"[252] "the proximity of the distribution of

244. *Id.*

245. *Krstić*, Case No. IT-98-33-T, Judgment, ¶ 572.

246. *Kayishema*, ICTR-95-1-T, Judgment, ¶ 535.

247. *Id.* ¶¶ 308-311.

248. *See id.* ¶ 308 (presuming the equivalence of "evidence that reveals the existence of a plan to destroy the [Tutsi]" and "evidence relative to the acts demonstrating the intent to commit genocide").

249. *Krstić*, IT-98-33-T, Judgment, ¶ 572; *see supra* Part IV.B.

250. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 126 (Sept. 2, 1998).

251. *Kayishema*, ICTR-95-1-T, Judgment, ¶ 275.

252. *Akayesu*, ICTR-96-4-T, Judgment, ¶ 126.

weapons to the massacres of Tutsi civilians;"[253] the existence of lists of Tutsi to be eliminated,[254] which were in some cases prepared months before the violence began;[255] the media propaganda campaign condemning Tutsis, which it described as "psychological preparation of the population to attack the Tutsi;"[256] and the roadblocks—"which were erected with great speed after the downing of the President's Plane" precipitated the crisis in which the violence occurred—at which Tutsi were screened out and killed.[257]

Courts have also often pointed to an accused's written and verbal statements which arguably presuppose the execution of a genocidal plan, though they have differed in their interpretation of such statements. In the course of finding that the atrocities in question were planned, for example, the ICTR in *Kayishema* pointed to "written communications . . . [to] Kayishema . . . that contain language regarding whether 'work has begun' and whether more 'workers' were needed" as well as a "letter sent by Kayishema . . . request[ing] . . . reinforcement to undertake clean-up efforts" at the site of a Tutsi massacre.[258] The ICTY Appeals Chamber in *Krstić*, however, found that analogous communications, one of which "urgently requested the assistance of Krstić in the distribution of '3,500 parcels'" (i.e., captured civilians), did not support a finding that Krstić was a party to his superiors' genocidal plan.[259] Similarly, the ICTY deemed a conversation between Krstić and a subordinate occurring two hours after the subordinate oversaw the massacre of 1,000 to 1,500 Bosnian Muslims (where Krstić asked "How's it going" and the subordinate replied "It's going well," to which Krstić responded, "Don't tell me you have problems"[260]) to be "too oblique"[261] to support a finding that the subordinate was reporting on the successful execution of their common genocidal plan.[262]

ii. Intensity

In addition, the intensity with which perpetrators commit the genocidal actus reus is relevant to a finding of planning and thus indicative of genocidal intent. For example, the ICTR in *Kayishema*

253. *Kayishema,* ICTR-95-1-T, Judgment ¶ 298.

254. *Id.* ¶ 309.

255. *See Akayesu*, ICTR-96-4-T, Judgment, ¶ 126.

256. *Id.*

257. *Kayishema*, ICTR-95-1-T, Judgment, ¶ 275.

258. *Id.* ¶ 309.

259. Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, ¶ 74-77 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004).

260. *Id.* ¶ 27 (Shahabuddeen J., dissenting in part).

261. *Id.* ¶ 25 (Shahabuddeen J., dissenting in part).

262. *Id.* ¶ 119.

pointed to the rapid temporal duration within which the Rwandan genocide unfolded—with an estimated 800,000 to 1,000,000 Tutsi killed over a mere one hundred days—as evidence that it was planned.[263] Further, the Tribunal emphasized the fact that atrocities immediately followed a precipitating event, "the crash of the President's plane," in determining the existence of a genocidal plan.[264] Note, however, that the ICTY made clear in *Krstić* that intensity is merely probative, and not determinative, evidence of planning. An incomplete or inefficient genocidal plan is still a genocidal plan.[265]

As these examples illustrate, evidence of planning—absent extraordinary circumstances—is necessarily circumstantial. Like inferring genocidal intent itself, and in logic reminiscent of the common law doctrine of *res ipsa loquitur*,[266] determining whether atrocities were planned is likely to rest on highly fact- and context-sensitive presumptions of what circumstances the Tribunal believes are unlikely to have arisen absent a pre-established arrangement. Because of this, unlike the factors described above (scale, targeting, statements), it is difficult to essentialize how exactly this factor will be applied in any given instance.

F. Other Factors

In wrestling with whether an individual's genocidal intent is fairly discernable from the factual context in which he or she acted, international courts have repeatedly invoked the four factors examined above. Of course, nothing prevents subsequent courts from disclaiming the relevance of these factors or pointing to different considerations; but these are the elements that have been expressly and consistently relied upon by previous courts. While courts have on occasion pointed to additional factors, further investigation reveals that they are merely alternate verbal formulations for the considerations discussed above. Two such factors—the "general

263. *Kayishema*, ICTR-95-1-T, Judgment, ¶¶ 289, 291 (finding that "the massacres of the Tutsi population indeed were 'meticulously planned and systematically co-ordinated' by top level Hutu extremists . . . . The widespread nature of the attacks and the sheer number of those who perished within just three months is compelling evidence of this fact.").

264. *See id.* ¶ 293.

265. *Krstić*, IT-98-33-A, Judgment, ¶ 32 ("[G]enocide does not require proof that the perpetrator chose the most efficient method to accomplish his objective of destroying the targeted part. Even where the method selected will not implement the perpetrator's intent to the fullest, leaving that destruction incomplete, this ineffectiveness alone does not preclude a finding of genocidal intent.").

266. *See* RESTATEMENT (SECOND) OF TORTS § 328D (1986) ("It may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when . . . the event is of a kind which ordinarily does not occur in the absence of negligence . . . .").

nature" of the genocidal actus reus and the perpetration of "destructive and discriminatory acts"—are illustrative in this respect.

i. The General Nature of Atrocities

The ICTR has found that a perpetrator's genocidal intent can be partially inferred from the "general nature of the atrocities" committed.[267] This in itself, however, offers little more specificity in terms of substantive content than drawing inferences from "context" or "circumstances." In *Muhimana*, the ICTR noted that relevant aspects of the atrocities' "general nature" "includ[e] their scale and geographic location, [the types of] weapons employed in an attack, and the extent of bodily injuries."[268] This suggests that the "general nature of the atrocities" factor—like invocations of their "general context"—is really a catch-all for any factual circumstance the court finds relevant to an inference of genocidal intent rather than an independent basis by which one can discern a perpetrator's respective mens rea. As such, some factors identified in *Muhimana* as within this "general nature" aphorism (such as the scale of the crime) are now regularly cited, while others merely remain in the grab-bag of background considerations that international courts may or may not invoke depending on whether they seem particularly relevant to the case at hand (e.g., the type of weapons employed in an attack).[269] Perhaps in recognition that inquiries into the crime's "general context" and "general nature" are devoid of substantive content, later iterations of the formulation for inferring genocidal intent omit any reference thereto.[270]

ii. Destructive and Discriminatory Acts

In *Jelisić*, the ICTY Appeals Chamber distinguished between systematic targeting of a protected group, articulated as "the perpetration of other culpable acts systematically directed against the same group" and "the repetition of destructive and discriminatory acts" against that group.[271] While it found both factors to support an

267. *See* Prosecutor v. Muhimana, Case No. ICTR-95-1B-T, Judgment, ¶ 496 (Apr. 28, 2005); *see also* Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 523 (Sep. 2, 1998).

268. *Muhimana*, ICTR-95-1B-T, Judgment, ¶ 496; *see also Akayesu*, ICTR-96-4-T, Judgment, ¶ 118 (emphasizing the "atrociousness" with which Tutsi massacres occurred in its finding of genocidal intent).

269. *See, e.g.*, U.N. Darfur Comm'n Rep., *supra* note 5, at 128 n.185.

270. *See, e.g.*, Prosecutor v. Jelisić, Case No. IT-95-10-A, Judgment, ¶ 47 (Int'l Crim. Trib. for the Former Yugoslavia July 5, 2001); *see also* U.N. Darfur Comm'n Rep., *supra* note 5, ¶ 502.

271. *Jelisić*, IT-95-10-A, Judgment, ¶ 47.

inference of genocidal intent, the Tribunal focused most of its discussion on systematic targeting, leaving the import of the "destructive and discriminatory acts" factor in doubt.[272] It is unclear from existing jurisprudence whether or how the two factors differ from one another, as no case has offered occasion for an international tribunal to elaborate on the supposed distinction. Indeed, subsequent ICTY cases—while continuing to explore "systematic targeting"—make no mention of the "destructive and discriminatory acts" factor.[273]

VI. APPLYING INTERNATIONAL PRECEDENT TO CAMBODIA

The following is intended as a rudimentary overview of the ways in which the preceding legal analysis might be applied by the ECCC in addressing the charges of genocide in Case 002. In a debate that precedes the establishment of the ECCC, commentators have long disagreed over whether the atrocities perpetrated in Cambodia by the Khmer Rouge legally constitute genocide, and if so, which ones.[274] As done by the ICTR and ICTY in the cases of Rwanda and Srebrenica, therefore, the ECCC will first have to engage in a threshold inquiry as to whether genocide was committed in Cambodia before addressing the narrower question of whether the particular defendants before the Court can be held individually liable for its commission.

A. Statements

Given the secretive nature of the Khmer Rouge regime,[275] there are unlikely to be many public statements made directly by high-level officials which manifest their individual genocidal intent. As such, ECCC prosecutors may adopt an approach similar to that being pursued by prosecutors at the ICC and instead point to statements by lower-level Khmer Rouge agents which are arguably attributable to the senior officials on trial, based on the principle of command responsibility, as well as documentary evidence demonstrating

272. *See id.* ¶¶ 47, 64-71.

273. *See id.* ¶ 47.

274. *See, e.g.*, William A. Schabas, *Problems of International Codification – Were the Atrocities in Cambodia and Kosovo Genocide?*, 35 NEW ENG. L. REV. 287 (2001); Jason Abrams, *The Atrocities in Cambodia and Kosovo: Observations on the Codification of Genocide*, 35 NEW ENG. L. REV. 303 (2001); Ben Kiernan, *The Cambodian Genocide: Issues and Responses*, *in* GENOCIDE: CONCEPTUAL AND HISTORICAL DIMENSIONS 191, 197-98 (George J. Andreopoulos ed., 1994).

275. *See* Alex Alvarez, *The Prevention and Intervention of Genocide During the Cold War Years in* THE PREVENTION AND INTERVENTION OF GENOCIDE 16 (Samuel Totten ed., 2008) (noting that "the Khmer Rouge ran a very secretive and insular society," and as a result, "refugee reports of widespread killing and brutality were largely unconfirmed" while the atrocities were taking place).

regular communication between the senior Khmer Rouge leadership and ground level cadres.[276] It is unclear, as of yet, whether this strategy will prove viable.

Written documentation, however, may prove a more promising source of incriminating statements by which the Court might infer genocidal intent. The Documentation Center of Cambodia has collected and catalogued "hundreds of thousands of pages" of documents from the Khmer Rouge era, including: "official Khmer Rouge correspondence, biographies of Party members and arrested persons, prisoner confessions, notebooks of Khmer Rouge cadres, photos of Party cadres, films, tape recordings, Party magazines, other publications, and maps of Democratic Kampuchea."[277] Observers believe this documentary repository to contain many strong indications of the regime's genocidal intent.[278] For example, ECCC prosecutors will likely point to incriminating statements present in Khmer Rouge propaganda, including incendiary language contained in the *Revolutionary Flag* magazine and various radio broadcasts, which they will argue reflected official State policy.[279] While this Article does not seek to delve deeply into the weeds of interpreting and analyzing individual documents, the foundation of the prosecutor's case will likely depend critically on references to written statements contained in the documentary evidence.

B. Scale

The atrocities committed by the Khmer Rouge were of undeniable scale, and at least with respect to the Cham Muslim minority, this factor should point clearly towards an inference of genocidal intent. Though exact numbers are difficult to precisely ascertain, Youk Chhang of the Documentation Center of Cambodia estimates that between 100,000 and 400,000 Cham died during the Khmer Rouge regime.[280] The staggering absolute number of Cham casualties is even more devastating when one considers that a mere 240,000 Cham are estimated to be alive today.[281] Others estimate that around 100,000 of a total 1975 population of 250,000 were killed

276. *See, e.g.*, Closing Order, *supra* note 14, ¶¶ 761, 765.

277. DC-CAM KHMER ROUGE HISTORY DATABASE, http://www.dccam.org/Database/Index1.htm (last visited Nov. 12, 2010).

278. *See* KIERNAN, *supra* note 25, at xxix (asserting that documents discussing the "repression and forced dispersal of the Chams . . . [i]n legal terms . . . constituted destruction of an ethnic group 'as such'—genocide").

279. *See* Closing Order, *supra* note 14, ¶¶ 814, 821-24.

280. Suy Se, *Genocide Charge for Cambodia's KRouge Ex-Head of State*, AGENCE FRANCE-PRESS, Dec. 18, 2009.

281. *Id.*

over the four years of Khmer Rouge rule.[282] The Co-Investigating Judges relied on an expert demographic report, which concluded that 36% of Cham died during Khmer Rouge rule, as opposed to 18.7% of ethnic Khmer.[283]

Evidence with respect to ethnic Vietnamese and Buddhists is less definitive in this respect. The historical evidence suggests that a large proportion of ethnic Vietnamese were subject to forcible removal, with the Khmer Rouge "killing those who remained behind."[284] The above-mentioned demographic report concluded that between 150,000 and 200,000 ethnic Vietnamese immediately fled Cambodia when the Khmer Rouge took power in April, 1975.[285] Of the 20,000 that remained, the report estimates that "all . . . died from the hands of the Khmer Rouge during the years from April 1975 to January 1979."[286] With respect to Buddhists, the scope of the alleged genocidal actus reus was limited to religious figures (i.e., monks and nuns), which necessarily limits its scale.

C. Systematic Targeting

In many respects, the systematic targeting factor militates towards a finding of genocidal intent in the context of the Khmer Rouge. It has been widely observed that the Cham "suffered immensely" under Khmer Rouge rule, "as the regime broke up their families, banned their language and customs, and killed their leaders."[287] Moreover, while the evidence is somewhat ambiguous on this front,[288] the Co-Investigating Judges have unearthed testimonial evidence that, at least in certain instances, Khmer Rouge cadres would separate villages (or detainee populations) according to whether the individuals were Cham, Khmer, or "mixed race," and immediately kill all those who were confirmed to be Cham.[289] Moreover, both Muslims and Buddhists suffered ongoing onslaughts on their religion.[290]

With respect to the ethnic Vietnamese minority, there is

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282. KISSI, *supra* note 6, at 116.

283. Closing Order, *supra* note 14, ¶ 747.

284. Abrams, *supra* note 274, at 306.

285. Closing Order, *supra* note 14, ¶ 792 (quoting DR. EWA TABEUA & THEY KHEAM, DEMOGRAPHIC EXPERTISE REPORT 49).

286. *Id.*

287. Abrams, *supra* note 274, at 306. In addition, Cham were forced to dress like the Khmer majority and work together with them in collectives, which involved raising pigs against their religion. KISSI, *supra* note 6, at 65.

288. *See* Closing Order, *supra* note 14, ¶ 762 (noting that some witnesses report that "Cham were treated much the same as everybody else").

289. *See id.* ¶¶ 779-89, 1337.

290. *See supra* text accompanying notes 83-98.

widespread evidence that they were systematically subject to forcible removal.[291] More damningly, evidence points to Khmer Rouge attempts to systematically register ethnic Vietnamese in certain provinces, with cadres then using "[p]repared lists of Vietnamese" when making arrests.[292] At least one witness reports, moreover, an incident in which a Khmer Rouge cadre asked villagers to self-identify as either ethnic Vietnamese or Chinese, with those declaring themselves Vietnamese killed and those declaring themselves Chinese released from custody.[293] These are all specific contextual elements that the ICTY and ICTR have found highly probative to an inference of genocidal intent in the past.[294]

But while ICTR and ICTY jurisprudence demonstrates that strict exclusivity in targeting is not required for this element to have probative force,[295] the lack of exclusivity with which Khmer Rouge leaders targeted the Cham Muslims, ethnic Vietnamese and Buddhists will pose significant difficulties for ECCC prosecutors in their efforts to establish that Khmer Rouge leaders specifically intended to destroy those groups. Broad targeting of many sectors of society—leading to the deaths of between 20% and 40% of the overall Cambodian population[296]—suggests that the Khmer Rouge may not have been singling out groups protected by the Genocide Convention for destruction, but rather targeting the regime's perceived political enemies. While ethnic Vietnamese and Cham Muslims were disproportionately targeted by the Khmer Rouge,[297] the strength of any inference drawn from their disproportionate targeting is necessarily far weaker than that involved in situations like Rwanda, Darfur, and Srebrenica, where the protected group in question was the near exclusive target of persecution.[298]

Notice, however, how ICTY prosecutors in *Krstić* also faced targeting difficulties: the population allegedly targeted was limited to the small geographic area of Srebrenica, which had a population of roughly 40,000 prior to the massacre[299] and an area of only 527 square kilometers.[300] Prosecutors overcame this difficulty by

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291. *See* Closing Order, *supra* note 14, ¶ 794.

292. *See id.* ¶¶ 798-801.

293. *Id.* ¶ 802.

294. *See supra* text accompanying notes 191-198.

295. *See supra* Part IV.D.ii.

296. *See* CIORCIARI, *supra* note 43, at 14-15.

297. *See* KIERNAN, *supra* note 25, at 250-310, 458.

298. *See supra* text accompanying notes 172, 186-89, 192.

299. Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, ¶ 15 n.25 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004).

300. *Geographic Features, Natural and Economic Resources of the Bijeljina Region*, CHAMBER OF COMMERCE AND INDUSTRY OF THE REPUBLIC OF SRPSKA, *available at*

creatively re-framing the relevant group as only those Bosnian Muslims residing within that limited geographic area, a categorization that the ICTY Appeals Chamber accepted.[301] Following this precedent, the task of ECCC prosecutors might be substantially advanced if they could identify and isolate smaller geographic regions within Cambodia where the targeting of Cham and Vietnamese was relatively more concentrated. In their Closing Order, the Co-Investigating Judges seem to have endeavored to do just that.[302] The specific analogy to *Krstić* is somewhat faulty, however, in that the ICTY suggested that the relevant geographic area should be defined in reference to the area within the perpetrators' effective control,[303] and the Khmer Rouge controlled nearly all of Cambodian territory.

With respect to the targeting of Buddhists, prosecutors cannot allege that the Khmer Rouge intended to kill all Buddhists, but could instead focus on the fact that the regime "drove Buddhist priests and monks from their religious practice . . . killing those who resisted."[304] Relying on a dissenting opinion by Judge Shahabuddeen in *Krstić*, prosecutors could potentially urge that these killings, combined with the Khmer Rouge's express desire to destroy the practice of Buddhism in the areas under their control, manifest a genocidal intent to "destroy" Buddhists "as such" (as in, destroying people's character as Buddhists)[305] These semantic gymnastics, however, would go well beyond existing jurisprudence.[306] To be successful, such a theory would therefore seem to require the ECCC to accept a reformulation of the relevant group (i.e., to constitute Buddhist religious figures rather than all followers of the religion) or a reformulation of genocidal intent away from its traditional conception as physical/biological destruction (and perhaps creeping towards the red herring of "cultural genocide").[307]

Finally, ECCC prosecutors will likely need to overcome contentions that any targeting of protected groups was merely

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http:www.komorars.ba/komora/pkregija_files/BijeljinaEN.pdf.

301. *Krstić*, IT-98-33-A, Judgment, ¶ 17; *see supra* text accompanying note 117.

302. *See* Closing Order, *supra* note 14, ¶¶ 763-70 (discussing targeting of the Cham in certain regions of Cambodia); *id.* ¶¶ 797-804 (same regarding ethnic Vietnamese).

303. *Krstić*, IT-98-33-A, Judgment, ¶ 17 (noting that "[f]rom the perspective of the Bosnian Serb forces alleged to have had genocidal intent in this case, the Muslims of Srebrenica were the only part of the Bosnian Muslim group within their area of control").

304. Abrams, *supra* note 274, at 306.

305. *Cf. Krstić*, IT-98-33-A, Judgment, ¶¶ 23-41 (Shahabudden J., dissenting in part).

306. *See generally* Petit, *supra* note 23 (discussing recent instances of religious persecution and violence and analyzing whether they legally constitute genocide).

307. *See supra* note 207.

incidental to the Khmer Rouge's broader military and ideological objectives. In particular, they are likely to face objections that any disproportionate targeting of the Cham was merely the result of that group's greater intransigence in resisting the regime's political reforms.[308] Defense lawyers will surely point to the Cham insurgency as evidence that the Cham's greater proportionate suffering was logically related to Khmer Rouge military objectives in an attempt to neuter any claim of the accuseds' specific intent to destroy the Cham. To rebut this contention, prosecutors will likely point to the Khmer Rouge's targeting of combatants and non-combatants (such as women, the elderly and children) alike—a line of argumentation persuasive to the ICTY in *Krstić*.[309]

D. Pattern of Purposeful Conduct

Prosecutors are almost certain to assert that the Case 002 defendants' specific genocidal intent may be inferred from evidence that the genocidal actus reas was planned.[310] In particular, ECCC prosecutors will likely point to evidence of coordination and communication between the different echelons of the tightly-organized Khmer Rouge hierarchy in an effort to demonstrate that the various genocidal acts committed by ground-level cadres emanated from a common, and centrally-organized, plan.[311] Moreover, prosecutors are likely to urge the Court adopt *res ipsa*-like logical reasoning to conclude that, absent a genocidal plan originating in and executed by the central Khmer Rouge leadership, it is highly unlikely that we would observe the widespread pattern of purposeful conduct engaged in by ground level cadres, seemingly directed toward those ends.

E. Individual Liability

Note that rigorous external examination of whether it would accord with international practice and precedent to infer genocidal intent in Case 002 is infeasible at this time, as the Co-Prosecutors' charging documents and the specific evidence relied upon in those documents, are—as of November 2010—not yet publicly available.[312] In any case, resolving this question in its entirety is beyond the scope of this Article. Instead, this sub-section merely hopes to flag potential issues and offer a very preliminary assessment of how they might be resolved by the ECCC.

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308. *See* Closing Order, *supra* note 14, ¶¶ 758, 767.

309. *See Krstić*, IT-98-33-A, Judgment, ¶¶ 15, 21.

310. *See* Closing Order, *supra* note 14, ¶ 1339 (alleging that the Khmer Rouge had a "plan to destroy the Cham").

311. *See id.* ¶¶ 757, 761, 764.

312. *Cf.* ECCC INTERNAL RULES, *supra* note 15, rules 54, 56.

Further, note that this sub-section engages with the initial, global question of whether the Khmer Rouge—writ large—committed genocide, and does not delve into the weeds of whether, and if so how, the specific defendants in Case 002 individually manifested genocidal intent. A few preliminary observations on individual liability in the Cambodian context, however, can be made.

Most notably, differences in the internal mechanisms by which the Khmer Rouge and Hutu Power regimes achieved their murderous objectives, explored *supra*, suggest that it will be considerably more difficult to attribute individual atrocities to senior Khmer Rouge leaders than their Rwandan counterparts. The undisciplined, chaotic, and grassroots nature of the Rwandan genocide was such that the senior Hutu leaders at the helm of the genocidal effort were directly involved in perpetrating the genocidal actus reas or exhorted their followers to do the same. This allowed the ICTR to either rely on incitement as the genocidal actus reus, or point to specific evidence that the accused directly participated in acts of genocide (such as killing, rape, and distribution of weapons to those with clear genocidal objectives).[313] There is little evidence, however, that the Khmer Rouge senior leadership bloodied its own hands through direct participation in the killings of targeted groups. By contrast, somewhat like the Serbian military officials prosecuted at the ICTY, the Khmer Rouge leaders in Case 002 by and large stood atop a tightly disciplined military and civilian hierarchy.[314] The ECCC may well find this type of institutional framework amenable to inferring genocidal intent on the part of high-level officials, even though many of the specific factual circumstances at issue were largely dictated by ground-level cadres. But note the novelty of the situation facing the ECCC. With the partial exception of the ICTY's failed trial of Slobodan Milošević, no international tribunal has been tasked with adjudicating genocide charges directed at officials of equivalently senior stature as the defendants in Case 002 in the absence of evidence linking the accused with the actual commission of the genocidal actus reus by her subordinates. In fact, the only successful genocide prosecution thus far at the ICTY involved a relatively low-level military official who was determined to have aided and abetted—not directly perpetrated—genocide.[315] Aiding and abetting

313. *See, e.g.*, Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 549 (Sept. 2, 1998); Prosecutor v. Muhimana, Case No. ICTR-95-1B-T, Judgment, ¶ 571 (Apr. 28, 2005).

314. *See* KIERNAN, *supra* note 25, at 200.

315. *See* Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, ¶¶ 600-55 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001). In July 2010, the Trial Chamber of the ICTY found two former Serbian military officers guilty of genocide for their involvement in the Srebrenica massacre. Prosecutor v. Popović, Case No. IT-05-88-T,

has a relaxed intent requirement,[316] but is conceptually less palatable as a backup to direct liability the higher in the chain of command one goes. Conceptually, the ECCC defendants' attenuated links with the actual acts of genocide allegedly committed under their direction does not bar their prosecution—after all, similar circumstances accompany the paradigmatic (if unprosecuted) case of genocide, the Holocaust. Yet it will very likely pose significant practical problems of proof for ECCC prosecutors, who will be forced to urge broad inferential leaps of logic to establish that the Case 002 defendants possessed the requisite genocidal intent.

VII. THE FUTURE OF GENOCIDE JURISPRUDENCE

This paper has sought to offer an objective doctrinal distillation of international criminal precedent with respect to proving genocidal mens rea in an effort to clarify the terms of the coming debate over expanding the scope of genocide liability. Though international courts will, of course, be the ultimate arbiters of the breadth of genocide's legal ambit, international prosecutors wield nearly equivalent influence in this debate, as their charging decisions establish the agenda on which courts must ultimately act. Conventional wisdom supports extending the legal definition of genocide to encompass larger and larger swaths of the universe that international criminal law seeks to punish, prevent, and condemn. On these terms, international prosecutors should be encouraged to interpret the Genocide Convention broadly and seek its widest possible application.

Yet, careful consideration of pragmatic factors—a process that is hopefully facilitated by doctrinal analyses such as that provided in this Article—suggests a more complex picture. Prior to bringing charges, of course, prosecutors must determine whether the legal arguments and evidence they have assembled is sufficient to persuade the court. When evidence is ambiguous or contradictory—or, even more ominously, when the fate of a broader prosecution is critically dependent on novel, untested legal theories—there is the obvious possibility that the prosecution will simply fail to persuade the court to adopt its position. More broadly, prior to examining the jurisprudential and evidentiary bases on which an expansive definition of genocide would lie, prosecutors must engage the

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Judgment, ¶ 2104-05 (Int'l Crim. Trib. for the Former Yugoslavia June 10, 2010). The case is currently on appeal. If the ruling is upheld, it will be the first time the ICTY has found an accused directly liable for genocide. *See also* Linawati Sidarto, *Seven Convicted over Srebrenica Genocide*, 108 INT'L JUST. TRIB., June 6, 2010 at 2, *available at* http://www.rnw.nl/international-justice/article/srebrenica-genocide-perpetrators-get-life-sentences.

316. *See supra* Part IV.B.

predicate question of whether expanding the jurisprudential bounds of genocide would accord with the objectives and functions of international criminal law. While external factors (i.e., the interests of relevant political actors) are likely to be at play in such a monumental debate, the internal metrics for assessing the choice are likely to boil down to the first principles of transitional justice: justice and truth.[317]

At first glance, an expansive prosecution seems to offer large advantages with respect to both the truth-telling and justice-furthering aspirations of international criminal law.[318] First and foremost, a broad-ranging prosecution—encompassing the full range of crimes attributable to the accused—potentially allows for a fuller accounting of the truth, as it enables trials to serve as vehicles for settling broader swaths of contested history. Moreover, with respect to furthering justice—defined simply in this context as punishing perpetrators for their crimes—broader charges entail punishment and vindication of victims' rights.[319] Similarly, selective prosecution

317. On the most fundamental level, the two basic "purposes animating societal responses to collective violence [are] justice and truth." MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS 9-10 (1998) (identifying and exploring a less intuitively obvious, "perhaps implicit pair of goals" for societal responses to collective violence: vengeance and forgiveness). Minow also advances "twelve overlapping aspirations" for collective responses to violence, which are worth repeating here. They are to:

> 1. . . . gain public acknowledgement;
> 2. obtain the facts . . . to meet victims' need to know, to build a record for history, and to ensure minimal accountability and visibility of perpetrators;
> 3. end and prevent violence . . . ;
> 4. forge the basis for a domestic democratic order that respects and enforces human rights;
> 5. support the legitimacy and stability of the new regime . . . ;
> 6. promote reconciliation [and] reconstruct [damaged moral and social systems . . . ;
> 7. promote psycholoical healing . . . ;
> 8. restore dignity to victims;
> 9. punish . . . offenders . . . ;
> 10. [prevent and deter similar violence];
> 11. build an international order to try to prevent and also to respond to aggression, torture and atrocities;
> 12. accomplish . . . these goals in ways that are compatible with the other[s].

Id. at 88.

318. This assumes, of course, that the decision to adopt a prosecutorial mode has already been made. *See id.* at 52-90 (discussing potential advantages and drawbacks of truth commissions as an alternative route to transitional justice).

319. Critics would be right to point out the distortions attendant to defining justice in rigidly retributive terms. Specifically relevant in the context of responding to mass trauma through international criminal law, sophisticated commentators have urged broadening our conception of justice to include both its restorative and deterrent potential. *See generally* JOHANNES ANDENEAES, PUNISHMENT AND DETERRENCE (1974); GERRY JOHNSTONE, RESTORATIVE JUSTICE: IDEAS, VALUES, DEBATES (2002). While

risks alienating local affected communities and international audiences alike, thus harming the credibility of international criminal tribunals.

A notable illustration of this legitimacy tradeoff occurred in the aftermath of the ICC prosecutor's decision in 2006 to bring narrow charges in the Lubanga case, the first before the newly-formed Court.[320] The inclusion of only one charge—emanating from the Union of Congolese Patriots' (UCP)[321] recruitment and enlistment of child soldiers in a conflict where the UCP allegedly perpetuated many other human rights violations—was widely decried by both international and local human rights organizations.[322] After the decision was announced, for example, the president of the DRC Association for the Defense of Human Rights stated that "all the Congolese people are disappointed by the [feeble] charges against Lubanga . . . Many Congolese are waiting and hoping that the ICC will broaden the charges by taking account of other crimes such as massacres and arson of whole villages."[323] Touching on similar themes, a coalition of prominent Western human rights organizations issued a public letter expressing their "disappoint[ment] that . . . a broader range of charges against Mr. Lubanga" had not been pursued and urging the ICC prosecutor to broaden the indictment.[324]

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valuing these perspectives, several considerations counsel toward putting them aside for purposes of this Article's analysis. First, expressions of international criminal law's deterrent or restorative effect inevitably engender skepticism on both theoretical and empirical levels. *See, e.g.*, David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 FORDHAM INT'L L.J. 473-76 (1999). *But see* Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7 (2001). Second is the relative simplicity of measuring retributive successes vis-à-vis deterrence or restoration. Finally, a retributive perspective is that which is most likely to align with the values and judgments of the victim population, ensuring respect for the views of those whom international criminal law seeks to benefit. *See* Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1701 (noting that "retribution require[s] a legal institution . . . to strive to implement a moral world in which people are treated with the respect their value requires"); Kuong Ly, *Justice Denied for Cambodians*, N.Y. TIMES, Aug. 2, 2010 (expressing the anger of many Cambodians at the light sentence given in ECCC Case 001).

320. *DRC: ICC Begins Hearings in Case Against Militia Leader*, IRIN (Nov. 9, 2006), http://www.irinnews.org/report.aspx?reportid=61518.

321. A militia, subsequently organized as a political party, founded and led by Lubanga in DRC's northeastern region of Ituru—where the conflict from which the indictment emanates took place. *Id.*

322. *Id.*

323. *Id.*

324. Joint Letter from Avocats Sans Frontières et. al., to Luis Moreno Camp, Chief Prosecutor of the International Criminal Court (July 31, 2006), *available at* http://www.vrwg.org/Publications/02/DRC%20joint%20letter%20english%201-8-2006.pdf

Even more strikingly, the ICC's attempted prosecution of Lubanga also reinforces the common sense observation that bringing narrow charges—and thereby putting all your eggs in one basket—magnifies the risks of failure should those charges not succeed. In July 2010, citing the ICC Prosecutor's refusal to disclose the identity of a witness despite a court order to do so, the ICC Trial Chamber ordered the release of Mr. Lubanga and imposed an unconditional stay of proceedings in the case.[325] While the Trial Chamber's order has been overturned on appeal,[326] it remains highly possible that the Prosecutor's case against Lubanga will flounder—inevitably inviting criticism and second-guessing of the decision to pursue such narrow charges against him.

Yet there are equally powerful countervailing considerations counseling against wide-ranging genocide prosecutions. From a pragmatic perspective, given the difficulty of proving genocide, pursuit of broad charges can lead to longer, costlier, and messier trials.[327] This drawback transcends the cosmetic. As evidenced by the ICTY's trial of Slobodon Milošević—widely considered an unqualified debacle—length, cost and controversy can sap international tribunals of their symbolic resonance and institutional legitimacy.[328] Such results strike at the core of international criminal law itself, a project whose success and failure, for better or worse, is often measured more in terms of symbolic impact than practical administration of the law.[329] More broadly, experience has demonstrated that international criminal justice is costly and very time-consuming.[330]

(also stating that "the failure to include additional charges . . . could undercut the credibility of the ICC in the DRC").

325. *See* Michael Steen, *War Crimes Court Set to Free Congo Warlord*, FINANCIAL TIMES, July 15, 2010.

326. *See* Wairagala Wakabi, *Lubanga Defence Continue to Focus on Intermediaries*, INSTITUTE FOR WAR AND PEACE REPORTING, Nov. 1, 2010, *available at* http://iwpr.net/report-news/lubanga-defence-continue-focus-intermediaries.

327. *Cf.* Alex Whiting, *In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered*, 50 HARV. INT'L L.J. 323, 348-58 (2009).

328. *See, e.g.*, GIDEON BOAS, THE MILOSEVIC TRIAL: LESSONS FOR THE CONDUCT OF COMPLEX INTERNATIONAL CRIMINAL PROCEEDINGS 1 (2007) (noting that after the trial "many feared—and some hoped—that international criminal justice was experiencing some sort of death itself"); *see also* JOHN LAUGHLAND, TRAVESTY: THE TRIAL OF SLOBODAN MILOSEVIC AND THE CORRUPTION OF INTERNATIONAL JUSTICE 4 (2007) (noting that despite an initial outburst of media and public interest in the trial at its outset, "the media quickly lost interest" and by the time of the trial's anticlimactic dissolution, much of "the public had forgotten that Milosovic was even still on trial").

329. *Cf.* Bronwyn Leebaw, *The Irreconcilable Goals of Transitional Justice*, 30 HUM. RTS. Q. 95, 96-97 (2009) (discussing the major goals of transitional justice among its promoters within the policymaking community: national reconciliation, institutional legitimacy, and stability).

330. *See* Whiting, *supra* note 327, at 348-58.

For example, over its fifteen-year lifetime, the ICTY has spent over $1.2 billion to indict 161 individuals, 50 of whom have been tried and 46 convicted.[331] The enormity of such costs is magnified when one considers the extreme poverty persisting in many victim communities. In a stark illustration of the disparities at stake, the ICTR has an annual budget ten times larger than the entire Rwandan justice system.[332] International tribunals are funded via annual grants from interested donor states; longer, more expensive trials threaten to exhaust the international community's interest, not to mention its goodwill.[333] Amidst charges of corruption and inefficiency, the ECCC in particular has been plagued by donor fatigue among its international sponsors, with—as of August 2010—the tribunal still projecting a $50 million shortfall from its 2010-2011 operating expenses.[334] Given that broad-ranging prosecutions inevitably require more time, money, and resources, ECCC prosecutors would be remiss not to consider the Court's precarious financial situation when making strategic decisions regarding the breadth of charges to pursue.

While such pragmatic factors are routinely incorporated into the exercise of domestic prosecutorial discretion, it may initially seem crass to import them into the international sphere. Further inspection, however, illuminates the interaction between such pragmatic considerations and the pursuit of truth and justice. As demonstrated by the death of Slobodan Milosovic while in his fifth year of trial at the ICTY—having never been successfully prosecuted for anything—justice delayed is often justice denied.[335] In a similar vein, lengthy trials can numb their symbolic resonance amongst victim populations while simultaneously impeding those populations' ability to 'move on' and achieve justice of the restorative variety.[336]

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331. *See* David Wippman, *The Costs of International Justice*, 100 AM. J. INT'L L. 861, 861-63 (2006) (responding to criticisms of the ICTY and ICTR that they are too costly); *see also The Cases*, ICTY, http://www.icty.org/action/cases/4.

332. Richard Sezibera (Rwandan Ambassador to the United States), *The Only Way to Bring Justice to Rwanda*, WASH. POST, Apr. 7, 2002, at B01.

333. *See* Patrick Barta, *Decades After Cambodia Genocide, a Verdict*, WALL ST. J., July 24, 2010, at A14.

334. *Id.* (noting additionally that "[i]n April [2010, the Tribunal] suspended salary payments to Cambodian staff when money ran out, though staff got their back pay after Japanese donors provided $2.2 million in early July."). *See also* Ciorciari, *supra* note 43, at 198-99.

335. *But see* Whiting, *supra* note 327, at 326 (describing and disputing the conventional wisdom that lengthy trials restrain international criminal law from achieving its goals, and arguing that delay is often essential for justice in the international criminal context).

336. *Cf.* MINOW, *supra* note 317, at 134 (but also noting that "there are foreseeable openings for renewed attention to [collective responses to historical trauma] when a second or third generation comes of age and wants to know").

Furthermore, it is crucial to calm the frayed nerves and histrionics often attendant to this debate by emphasizing the limited, legalistic nature of its stakes. In other words, the debate over charging genocide in ECCC Case 002 is not one that pits platonic truth against historical revisionism, but is rather about the dispassionate legal categorization of concededly horrific conduct, as genocide or as crimes against humanity, based on the respective mens rea of the relevant perpetrators.[337] Moreover, despite academic protestations to the contrary, it is fairly clear that as a matter of formal law, these two crimes are of equivalent gravity—with international tribunals repeatedly affirming that genocide does not sit atop an imagined hierarchy of international crimes.[338] As such, international tribunals have pointedly refused to give harsher sentences for genocide than crimes against humanity and other grave violations of international law.[339] And, from a practical perspective, due to the advanced age of the defendants in Case 002, any sentence is likely to be for life.[340]

Given the lack of evidence that the supposed distinction between crimes against humanity and genocide is regarded as meaningful, or even known, amongst the vast majority of the Cambodian people,[341] the preoccupation amongst international advocates with prosecuting genocide raises serious questions regarding whose sense of justice such advocates seek to serve.[342] By no means do I mean to denigrate

337. Schabas, *supra* note 274, at 288-89 (noting that "[t]his debate is not about whether the crimes [of the Khmer Rouge . . . actually took place; it is only about whether they are more properly described as crimes against humanity, rather than genocide").

338. Notably, the Appeals Chambers of both the ICTY and ICTR have confirmed that genocide and crimes against humanity are offenses of equal gravity. *See* Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-A, Reasons for Judgment, ¶ 367 (June 1, 2001) (declaring that "there is no hierarchy of crimes under the Statute, and that all of the crimes . . . are 'serious violations of international humanitarian law,' capable of attracting the same sentence."); Prosecutor v. Krstić, Case No. IT–98–33–T, Judgment, ¶ 699-700 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001).

339. *See* Ryan Y. Park, *Exploring the Curious Lenience of International Criminal Law: Case Comment, Extraordinary Chambers in the Courts of Cambodia (ECCC), Case 001*, 52 HARV. INT'L L.J. ONLINE (2010).

340. *See* Jennifer J. Clark, *Zero to Life: Sentencing Appeals at the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 96 GEO. L. J. 1685, 1697 (2008) (calling for international tribunals to adopt such a hierarchy in their sentencing decisions).

341. *Cf.* SARAH J. DICKENS, DOCUMENTATION CTR. OF CAMBODIA, PROVINCIAL TRAINING REPORT 38, 78, 151 (Keo Dacil et al. eds., 2010) (outlining DC-Cam's efforts to educate Cambodian teachers on the meaning of genocide, a term for which a new word had to be invented in the local Khmer language).

342. Concerns of "lawyer domination" have been long voiced amongst legal aid lawyers in the United States, who face similar accusations of privileging legal abstractions over the interests and welfare of the communities they purport to serve.

the motives or contributions of the (largely Western) community of human rights advocates for whom charging crimes against humanity in lieu of genocide in the face of mass atrocity feels viscerally "like getting the Mafia Don for tax evasion."[343] But I do hope to suggest that—assuming such sentiments are not shared by the victim populations which international criminal law purportedly seeks to benefit, as seems to be the case for the overwhelming majority of Cambodians—external observers (myself included) must remain forever vigilant against assuming the universality of their own culturally-determined values and prejudices.[344] A travesty of justice to an international lawyer may very well be an empty, confusing, and ultimately meaningless distinction to the population on whose behalf she seeks to toil.[345]

Finally, proponents of broad prosecutions often seem to exaggerate the ability of courts to provide a definitive accounting of contested history and thereby get to the "truth."[346] Indeed, there are inevitable evidentiary difficulties associated with international criminal justice, as it often entails gathering witness testimony and obtaining documents hidden underneath the fog of war. As such, many commentators question whether alternative institutional mechanisms—such as truth and reconciliation commissions—are better calibrated toward discovering truth than adversarial criminal processes that arguably incentivize obfuscation on the part of criminal defendants—who, not incidentally, might be expected to have access to the most information regarding their crimes.[347] These

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See William H. Simon, *The Dark Secret of Progressive Lawyering*, 48 U. MIAMI L. REV. 1099, 1101-02 (1994) (noting that "power and oppression [are] pervasive and diffuse in the professional interaction[ ]" between the lawyer and the poor client, which inevitably and "systematically . . . conspire to 'silence' the [latter]").

343. *See* Clark, *supra* note 340.

344. Of course, the interests, values, and judgments of a local community are fluid and subject to the influence of their international counterparts—a process described by Harold Hongju Koh as "norm internalization." *See* Harold H. Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 199, 203-06 (1996). This process is predicated on the interaction among transnational actors, as a result of which norms "percolate[ ] up and down," as opposed to a one-way imposition of values. *Id.* at 184. The ECCC, with its hybrid structure, seems institutionally structured to foster such interactions.

345. Gary Bellow has argued that, while "[i]t is no simple matter to reconcile commitment to both clients and a larger social vision," this divide can be partially bridged by creation of an "honestly mutual relationship" between the lawyer and client, which fosters a sense of "alliance" between the two. *See* Gary Bellow, *Steady Work: A Practitioner's Reflections on Political Lawyering*, 31 HARV. C.R.-C.L. L. REV. 297, 303-05 (1996).

346. *See* MINOW, *supra* note 317, at 25-51, 58 (identifying and exploring the manner in which "trial processes [are] wanting against the aspiration of truly dealing with the complex past").

347. *See id.* at 59-61 (noting, in discussion of the South African Truth and

evidentiary difficulties, combined with strict evidentiary standards regarding the prosecution's burden of proof, counsel caution in relying on international criminal trials as expositors of truth.[348] And, of course, pursuing broad charges not supported by sufficient admissible evidence or adequately supported by existing doctrine risks a negative finding by the court. Though as a formal legal matter, given the prosecution's burden of proof, this merely signifies evidentiary ambiguity, victim populations could interpret, and perpetrators could trumpet, such a result as an affirmative finding *against* the contested proposition (i.e., that genocide did not occur), thereby subverting efforts at revealing the truth and settling history.

Even with respect to facts affirmatively found by a court, moreover, sensible observers generally recognize a distinction between general and specific findings of fact, with only the latter within a court's core competency and therefore amenable to judicial "settling." Trials can further the discovery of truth by finding specific facts—via engaging in rigorous distillation of complex documentary evidence, or providing a forum for the airing of witness testimony in open court. But it betrays a misguided faith in legal institutions to believe that judicial invocation and discussion of an extant factual narrative of immense historical significance could definitively settle disputes regarding that narrative, at least absent cooperation from individuals whose perspectives and experiences had been heretofore excluded from the historical record.[349] For example, the ICTR's estimation of the death toll in the Rwandan genocide—a hotly contested subject, to which there are many conflicting answers—did little to stem the still-continuing stream of academic and activist commentary on the subject.[350] And with good reason: judicial fact-finding as to such empirical questions is inherently limited, and inferior in many respects to alternative mechanisms for seeking the truth.

It is also important to note that the ability of international criminal tribunals to settle history and establish the truth is critically dependent on subjective perceptions of their

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Reconciliation Commission, that sometimes "the full story [can] never be known, absent grants of immunity to those who can tell it").

348. *See* NANCY A. COMBS, FACT-FINDING WITHOUT FACTS: THE UNCERTAIN EVIDENTIARY FOUNDATIONS OF INTERNATIONAL CRIMINAL LAW 5 (2010) (noting that "the testimony of international witnesses often is vague, unclear, and lacking in the information necessary for fact finders to make reasoned factual assessments").

349. The truth telling ability of the ECCC in Case 001, for example, was greatly enhanced by the defendant's extensive cooperation with prosecutors and general willingness to admit responsibility for his crimes. *See* Co-Prosecutor v. Kaing Guek Eav *alias* Duch, Case No. 001/18-07-2007-ECCC-TC, Judgment, ¶¶ 47, 570. There is no indication, however, that the defendants in Case 002 will be similarly cooperative.

350. *See supra* text accompanying note 185.

credibility/legitimacy among relevant populations. Yet the legal acrobatics necessary to ensure a broader prosecution may undermine the credibility of the tribunal in question. A robust literature in behavioral psychology, for example, demonstrates that—when evaluating authorities and institutions—people often privilege procedural justice (i.e., fairness in the processes by which law is created and enforced) over their perception of just substantive outcomes.[351] At minimum, this research suggests that stretching the legal scope of genocide to encompass novel legal theories or ambiguous factual situations could undermine people's faith in international criminal law, reinforcing views that it is merely "victor's justice" or "politics by other means."

Applying the preceding discussion to what we know about the atrocities perpetuated by the Khmer Rouge from 1975 to 1979 in Cambodia reveals the strategic choice facing ECCC prosecutors with respect to the breadth of genocide charges to pursue. Narrow charges of genocide—focusing on Khmer Rouge persecution of the ethnic Vietnamese and Cham Muslim minorities—appear to have a relatively high likelihood of resulting in successful convictions. Yet such charges would not encompass the vast majority of the Khmer Rouge's crimes, which predominantly entailed the persecution of ethnic Khmer based on their perceived social class. Broader charges of genocide based on persecution of the Khmer majority under Ben Kiernan's "auto-genocide" theory[352] or Khmer Rouge persecution of the Buddhist majority under the "leadership" theory outlined by Judge Shahabuddeen in his *Krstić* dissent,[353] would solve this problem by offering nearly all affected victim groups a place within the genocide framework. But, at least if the past practice of international tribunals is any guide, such efforts face a high likelihood of failure, as they rely on highly novel legal theories unsupported in current genocide jurisprudence. Moreover, opening up the genocide charges to encompass the entirety of the Khmer Rouge's crimes would almost certainly entail an unacceptably long and costly trial—one whose risks are especially pronounced due to the old age and fragile health of the defendants in Case 002.[354] It is a race against time, one that perversely forces the tribunal's backers to

351. *See, e.g.*, TOM T. TYLER, WHY PEOPLE OBEY THE LAW (1990).

352. Kiernan, *supra* note 25, at 5 & n.26.

353. *See supra* text accompanying note 208.

354. As of November 7, 2010, the defendants in Case 002 are 86, 84, 79 and 78. *See* JAYA RAMJI-NOGALES & ANNE HEINDEL, GENOCIDE: WHO ARE THE SENIOR KHMER ROUGE LEADERS TO BE JUDGED? THE IMPORTANCE OF CASE 002 2-14 (Documentation Center of Cambodia 2010). Moreover, there is evidence that many are in very poor health, as indicated by the repeated defense motions urging that the defendants are too ill to be fit for trial.

hope that the architects of one of the most ruthless and murderous regimes in modern history remain alive, mentally lucid, and in good health. This analysis suggests that ECCC prosecutors—despite their instincts to the contrary—may most efficaciously further the interests of international criminal law by adopting a narrow, minimalist approach to the genocide charges in that case.

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