2008

The Status of the Crime of Genocide, in Cambodia and under Customary International Law, in 1975 Specifically addressing whether or not genocide was a crime in Cambodia in 1975 and whether or not it was a crime under customary international law. Also, whether the language differences between Article 4 of the ECCC statute and the Convention on the Prevention and Punishment of the Crime of Genocide could have consequences on prosecutions before the ECCC.

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MEMORANDUM FOR THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

ISSUE: THE STATUS OF THE CRIME OF GENOCIDE, IN CAMBODIA AND UNDER CUSTOMARY INTERNATIONAL LAW, IN 1975

SPECIFICALLY ADDRESSING WHETHER OR NOT GENOCIDE WAS A CRIME IN CAMBODIA IN 1975 AND WHETHER OR NOT IT WAS A CRIME UNDER CUSTOMARY INTERNATIONAL LAW. ALSO, WHETHER THE LANGUAGE DIFFERENCES BETWEEN ARTICLE 4 OF THE ECCC STATUTE AND THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE COULD HAVE CONSEQUENCES ON PROSECUTIONS BEFORE THE ECCC.

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Spring Semester, 2008

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I. INTRODUCTION

A. Scope

The Extraordinary Chambers in the Courts of Cambodia ("ECCC") has resolved to prosecute members of the Khmer Rouge for the crime of genocide committed between 1975 and 1979.[1]* In order to enable this prosecution, Cambodia enacted Article 4 of the ECCC statute in 2004, which closely mirrors the language for Articles II and III of the Convention on the Prevention and Punishment of the Crime of Genocide ("the Convention"). Because Cambodia enacted Article 4 of the ECCC almost thirty years after the start of the alleged crimes, there is a question as to whether genocide was indeed a crime in Cambodia at the time the acts of the Khmer Rouge took place. Further, while the language of the ECCC statute is very close to that of the Convention, it is unclear whether the slight difference can have any consequences when the ECCC tries to prosecute Khmer Rouge members. This memorandum will address the status of the law against genocide under, customary international law ("CIL") and in Cambodia, in 1975. Further, it will discuss the language differences between the ECCC statute and the Convention, and how those differences may affect the prosecution of the Khmer Rouge.

[1]* "1. Were the offences described in Article 4 of the ECCC Statute part of customary international law in 1975? 2. Alternatively, were they applicable in Cambodia in 1975? 3. Will the differences of language, between this article and the crimes described in the Genocide Convention, have any consequences on their prosecution before the ECCC? 4. If the answer to question no. 3 is in the affirmative, then what remedial measures should the prosecution take to address these likely consequences?"

B. Summary of conclusions

i. Were the offences described in Article 4 of the ECCC Statute part of CIL in 1975? Were they applicable in Cambodia in 1975?

a. The offences described in Article 4 of the ECCC Statute were part of CIL in 1975.

Article 4 of the ECCC Statute describes the crime of genocide. State practice and *opinio juris* are both components in deciding what constituted CIL. These components can be shown through the dealings of international organizations and resolutions passed by the United Nations. The United Nations passed Resolution 96(I) in 1946, followed by the Convention on the Prevention and Punishment of the Crime of Genocide in 1948. Both of these documents, passed almost thirty years prior to the events in Cambodia, support the assertion that genocide was a part of CIL in 1975.

b. The wording of the Convention shows that the United Nations intended for genocide to be a crime under international law.

The Convention on the Prevention and Punishment of the Crime of Genocide clearly states that in 1948 the United Nations considered genocide to be a crime under international law. References to the wording of the Convention and an advisory opinion of the International Court of Justice confirming that genocide is a crime under CIL have been used by the International Criminal Tribunal for Yugoslavia and the International Criminal Tribunal for Rwanda. These two tribunals, established in the 1990's, refer to language confirming the criminality of genocide as a part of international law dating back to 1951.

c. Cambodia acceded to the Convention in 1950 and never revoked its signature; therefore, Cambodia is subject to the principles as set forth in the Convention.

Cambodia, though not a member of the United Nations, acceded to the Convention in 1950. The Convention has a provision for the procedure for withdrawal if a State no longer wishes to be a party to the Convention; however, Cambodia has never exercised this option. Thus, in 1975, Cambodia was still party to the Convention and therefore bound by its principles.

d. Under *erga omnes* principle, genocide is a crime under international law.

Cambodia, along with every other State, has an obligation to uphold basic human freedoms. The International Court of Justice recognizes the principles of the Convention as principles that are binding upon all States. Thus, even if Cambodia did not have an obligation under the Convention, it is still obliged to uphold the principles set forth by the Convention due to the principles of obligations *erga omnes*.

e. Numerous trials and laws prior to 1975 have found that the prohibition of genocide is a part of CIL.

Starting with the Nuremberg trials and continuing through 1975, various courts around the world have upheld the principles of the Convention. Often, this occurred regardless of whether or not a statute prohibiting genocide was in force at the time the acts occurred. The courts often found genocide to be a part of CIL. This is evidence that the prohibition of genocide was part of CIL in 1975.

f. That Cambodia did not codify genocide as a crime under its domestic laws does not prevent the crimes enumerated in the Convention and Article 4 of the ECCC Statute from being applicable in Cambodia in 1975.

Cambodia shows no evidence of having codified genocide as a crime in its domestic laws prior to 1975. However, this is not evidence that genocide is not a crime under CIL. Furthermore, the ECCC statute is an ex post facto law which covers the period of 1975-1979. While there is some opposition internationally to ex post facto laws in general, there are also cases in which States have applied statutes for genocide ex post facto. Even if a State has no domestic law against genocide, this would not prevent genocide from being against the law in that State under CIL.

ii. Will the differences of language between Article 4 of the ECCC statute and the crimes described in the Convention have any consequences on their prosecution before the ECCC? If the answer to this question is in the affirmative, then what remedial measures should the prosecution take to address these likely consequences?

a. Any differences of language between the Convention and Article 4 of the ECCC statute should be controlled by the Convention in accord with the language of the first sentence of Article 4 of the ECCC.

When interpreting a statute, it is important to look at the intent of the drafters of the statute. The drafters of Article 4 of the ECCC statute clearly stated that the Convention describes the crime of genocide. Further, this statement comes at the beginning of Article 4 and the wording of the sentence says that the ECCC has the power to prosecute genocide ‘as defined’ in the Convention. Thus, this sentence shows that the ECCC drafters intended for the Convention to control the definition of the crime of genocide. The remaining section of Article 4 is simply an

attempt to restate the Convention. Thus, when there is a difference between the language of Article 4 of the ECCC statute and the Convention, the language of the Convention is controlling.

b. Though the language of the ECCC and the Convention are limiting in different ways, in order to avoid acquittal due to the differences in language, the prosecution should charge the defendants under both the ECCC statute and the Convention.

There is a language difference between Article 4 of the ECCC and the Convention. The ECCC statute is more limiting in some respects while the Convention is more limiting in other respects. To avoid any problems that might arise, the tribunal should charge defendants under both the ECCC statute and the Convention. This way, if there is ambiguity between which statute is controlling, or if a charge falls under one document but not the other, there will be no problem of the charge being incomplete.

II. CUSTOMARY INTERNATIONAL LAW

A. Scope of international law

CIL applies to all States in a disagreement, even if they are not party to the treaties in which the rules in question are stated.[2] Thus, the passage of a resolution or treaty may still bind States not party to the resolution or treaty, or States that object to the passage of the resolution or treaty. Further, a State may disagree that a principle is actually part of CIL; however, if the majority of the States exhibit a pattern "of generally shared legal expectation and conforming behavior," the principle still binds the disagreeing State.[3] Therefore, even without evidence of a

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2 Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87(857) INT'L REV. OF THE RED CROSS 175, 177 (Mar. 2005). (Emphasis in original) [reproduced in accompanying notebook at Tab 53].

3 Jordan Paust, *Customary International Law: Its Nature, Sources and Status as Law of the United States*, 12 MICH. J. INT'L L. 59, 64 (1990). [reproduced in accompanying notebook at Tab 60].

principle's being part of CIL through action by the United Nations or another international organization, a court may still find a principle to be part of CIL. Furthermore, CIL can still bind a State, which is not part of the United Nations, to the principles set forth by the United Nations.

i. What constitutes CIL?

CIL can make certain acts illegal, even if they are not part of a State's criminal code because CIL "is of a universally obligatory nature."[4] "A norm of CIL is proved by demonstrating the existence of two elements, state practice and *opinio juris*."[5] These two elements must demonstrate that the issue is "settled practice" and is "obligatory by the existence of a rule of law requiring it."[6] For genocide to be a crime under CIL, it must also meet these factors. Thus, there must be evidence of State practice and *opinio juris* to in order to say that genocide was a part of CIL in 1975.

However, other norms of CIL include *erga omnes* and *jus cogens*.[7] Obligations *erga omnes* is an obligation a State owes to all other States.[8] *Jus cogens* is a "peremptory norm" that

4 JORDAN J. PAUST, M. CHERIF BASSIOUNI, SHARON A. WILLIAMS, MICHAEL SCHARF, JIMMY GURULÉ & BRUCE ZAGARIS, INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS 4 (Carolina Academic Press 1996). [reproduced in accompanying notebook at Tab 36].

5 Hurst Hannum, *International Law and Cambodian Genocide: The Sounds of Silence*, 11(1) HUM. RTS. Q. 82, 117 (Feb. 1989). (explaining how a principle becomes part of customary international law) (Emphasis in original) [reproduced in accompanying notebook at Tab 52].

6 *Id.* at 117.

7 PAUST ET AL., *supra* note 3, at 5. [reproduced in accompanying notebook at Tab 36].

8 Jordan J. Paust, *Federal Jurisdiction Over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law Under the FSIA and the Act of State Doctrine*, 23 VA. J. INT'L L. 191, 225 (1983). [reproduced in accompanying notebook at Tab 61].

trumps any conflicting law.[9] Since *jus cogens* is considered an already established norm, it is beyond the scope of this memorandum.

9

PAUST ET AL., *supra* note 3, at 5. [reproduced in accompanying notebook at Tab 36].

a. State practice is an element of CIL.

International law under State practice arises out of a "usage or a continuous repetition of the same kind of acts."[10] Thus, if many States condemn and refrain from a certain action, that action can become a crime under CIL. However, the conduct of States is not the only evidence of CIL. Further evidence of State practice can be "the actions of international organizations" such as the United Nations.[11] Therefore, when delegates from a State take a position on an issue during meetings or conferences of international organizations, this is expressing State practice.[12] Thus, "the decisions of such organizations…can afford abundant and easily accessible evidence of the growth of international custom."[13] Therefore, the votes of the delegates of States and the decisions of organizations such as the United Nations can carry great weight in deciding what constitutes State practice and its effect on CIL.

b. *Opinio juris* is an element of CIL.

Opinio juris is evidence that the custom in question is already in existence.[14] Under *opinio juris*, a "simple usage can be transformed into a custom with [the] binding power."[15] Evidence of *opinio juris* can be a General Assembly resolution and "the existence of such a resolution declaring, or purporting to declare, the law will require only comparatively slight

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10 Hannum, *supra* note 4, at 117. [reproduced in accompanying notebook at Tab 52].

11 *Id.* at 118.

12 *Id.* at 118.

13 *Id.* at 118.

14 *Id.* at 119.

15 *Id.* at 117-118.

evidence of actual practice to support the conclusion that the rule in question has passed into general customary [international] law."[16] Therefore, a resolution passed by the General Assembly of the United Nations would carry great weight in determining what principles are part of CIL. Once the General Assembly passes a resolution, little more evidence is required for the international community to recognize a custom as part of CIL.

c. *Erga omnes* is another form of international law.

Erga omnes is the idea that States have an obligation "towards the international community as a whole."[17] In 1970, in the judgment in *Barcelona Traction,* the International Court of Justice stated that "such obligations derive…in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person."[18] Thus, even if a State is not a party to a treaty or has no domestic laws in regards to a particular issue, a State may have an obligation to recognize certain acts as crimes under CIL.

ii. Genocide in international law

a. The history of genocide

What is currently termed genocide has been committed throughout history all over the world.[19] Cases of what may be termed genocide today date back to the "eighth and seventh

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Id. at 118-119.

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Payam Akhavan, *Recent Development: Enforcement of the Genocide Convention: A Challenge to Civilization*, 8 HARV. HUM. RTS. J. 229, ¶ 5 (1995). [reproduced in accompanying notebook at Tab 47].

18

Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 3, 32 (Feb. 5). [reproduced in accompanying notebook at Tab 19].

19

LEO KUPER, GENOCIDE: ITS POLITICAL USE IN THE TWENTIETH CENTURY 11 (Yale University Press 1982) (1981). [reproduced in accompanying notebook at Tab 32].

centuries B.C."[20] The most commonly cited cases are those of the killing of Armenians by the Turkish government in 1915 and the atrocities before and during World War II.[21] However, it has taken the world centuries to give this practice a name. In 1944, Raphael Lemkin first used the word genocide "in his book *Axis Rule in Occupied Europe*."[22] In the aftermath of World War II and in conjunction with the efforts of Raphael Lemkin, the General Assembly of the United Nations passed Resolution 96(I) in 1946.[23] Shortly thereafter, in 1948, the General Assembly passed the Convention on the Prevention and Punishment of the Crime of Genocide.[24] Today, international tribunals for Yugoslavia and Rwanda are prosecuting instances of genocide.[25]

b. General Assembly Resolution 96(I) as evidence of *opinio juris*

Following the Nuremberg trials, the United Nations set out to define genocide by passing Resolution 96(I) on December 11, 1946.[26] In Resolution 96(I), the General Assembly "affirm[ed] that genocide is a crime under international law which the civilized world condemns."[27] Further,

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20 *Id.* at 11.

21 *Id.* at 20-21.

22 William Schabas, *The Genocide Convention at Fifty*, U.S. INST. OF PEACE SPECIAL REPORT 2 (Jan. 1999). (Schabas was a professor of law at the University of Quebec in Montreal, a senior fellow at the U.S. Institute of Peace, and an assessor with the Quebec Human Rights Tribunal). [reproduced in accompanying notebook at Tab 64].

23 KUPER, *supra* note 18, at 22-23. [reproduced in accompanying notebook at Tab 32].

24 Genocide Convention, G.A. Res. 260 (III), 3rd Sess., U.N. Doc. A/RES/260(III) (Dec. 9, 1948). [reproduced in accompanying notebook at Tab 12].

25 S.C. Res. 808, U.N. Doc. S/RES/808 (May 25, 1993) (Resolution on the Establishment of the International Criminal Tribunal for Yugoslavia). [reproduced in accompanying notebook at Tab 15].; S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) (Resolution on the Establishment of the International Criminal Tribunal for Rwanda). [reproduced in accompanying notebook at Tab 16].

26 G.A. Res. 96(I), U.N. Doc. A/RES/96(I), ¶ 1 (Dec. 11, 1946). [reproduced in accompanying notebook at Tab 11].

27 *Id.* at ¶ 5.

under the Resolution, there is no need for a connection between genocide and an "armed conflict." [28] The Resolution also proposed elements for "the definition of genocide."[29] However, in 1946, "international criminal law was still underdeveloped" and the General Assembly realized that it would take more to have genocide recognized as a crime under international law.[30] The General Assembly is not a "world legislature" and passing a resolution is not the same as a national government enacting laws.[31] Nevertheless, under the idea of *opinio juris*, the passage of Resolution 96(I) is evidence that the prohibition against genocide is part of CIL. While even the General Assembly realized that the Resolution alone would not make genocide a part of CIL, that realization does not prevent the existence of Resolution 96(I) from carrying substantial weight in the determination.

However, to say that Resolution 96(I) is binding upon all States upon its passage might be premature. While the Resolution is evidence of CIL, Cambodia did not become a member of the United Nations until 1955, nine years after the passage of Resolution 96(I).[32] Though the United Nations and the actions of its members carry a lot of weight in declaring CIL, it is important to remember that Cambodia had no part in the passage of Resolution 96(I) and was not

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WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 46 (Cambridge University Press 2000). [reproduced in accompanying notebook at Tab 41].

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Id. at 47.

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Id. at 47.

31

F. Blaine Sloan, *The Binding Force of a 'Recommendation' of the General Assembly of the United Nations.* 25 BRIT. Y.B. INT'L L. 1, 1 (1948). (Sloan was a member of the New York and Nebraska Bar and the Legal Department of the United Nations Secretariat). [reproduced in accompanying notebook at Tab 66].

32

United Nations Members, *available at* http://www.un.org/members/list.shtml#c (last visited Apr. 18, 2008). (stating the members of the United Nations and the date upon which each State became a member). [reproduced in accompanying notebook at Tab 72].

then a part of the United Nations. Therefore, Cambodia may not have considered itself bound by a United Nations resolution.

c. Convention on the Prevention and Punishment of Genocide as evidence of State practice

Following Resolution 96(I), the United Nations approved the Convention on the Prevention and Punishment of Genocide in December of 1948, in which the "contracting parties confirm that genocide . . . is a crime under international law."[33]

> For the Convention to bind a State, signature must be perfected by filing an instrument of ratification…Customary law, as codified in the Vienna Convention on the Law of Treaties, requires that between the time of signature and ratification a State is obliged to refrain from acts which would defeat the object and purpose of a treaty, until it shall have made its intention clear not to become a party to the treaty.[34]

Thus, even a signature to the Convention would bind a State to abide by the principles of the Convention until ratification or withdrawal of the signature. Cambodia was not a member of the United Nations at the time of the Convention's approval; however, it was one of the twenty, non-member States, which the United Nations invited to sign the Convention.[35] Cambodia acceded to the Convention, without reservation, on October 14, 1950.[36] The Convention "entered into force" on January 12, 1951.[37] Cambodia went beyond just signing the Convention by

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33 G.A. Res. 260 (III), *supra* note 23, Art. I. [reproduced in accompanying notebook at Tab 12].

34 SCHABAS, *supra* note 27, at 507. [reproduced in accompanying notebook at Tab 41].

35 *Id*. at 507.

36 *Id*. at 516.

37 *Id*. at 516.

acceding to it, becoming a full-fledged party. As party to the Convention, Cambodia was bound by the Convention when it came into force in 1951, over twenty years prior to 1975.

However, the Convention alone does not make law. One commentator, F. Blaine Sloan noted in 1948 that:

> While it must be conceded that the General Assembly cannot enact new law, it has already adopted resolutions declaring what it finds to be an existing rule of international law. Perhaps the most important of such resolutions have been the affirmation of the Nuremberg principles and the declaration that genocide is an international crime…If fifty-eight nations unanimously agree on a statement of existing law it would seem that such a declaration would be all but conclusive evidence of such a rule, and agreement by a large majority would have great value in determining what is existing law.[38]

Twenty-five States were party to the Convention when it came into force in 1951.[39] By 1971, sixty-one States had either ratified or acceded to the Convention.[40] The sheer number of States that were party to the Convention in 1971 is even more weight that the Convention and its principles had become established CIL. Thus, the agreement of fifty-eight States for the United Nations to pass Resolution 96(I), followed by the passing of the Convention, is evidence suggesting that genocide is part of existing CIL. That numerous United Nations member States and non-member States continued to become party to the Convention after it came into force further suggests that genocide, if not a part of CIL in 1951, was a part of CIL by 1971. If the combination of Resolution 96(I) and the Convention meet the requirements of State practice and *opinio juris*, as has been previously suggested, then genocide is a crime under CIL. All States are subject to CIL. Thus, genocide was a crime in Cambodia upon the passage of the Convention, or at least by 1971.

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38 Sloan, *supra* note 30, at 24. [reproduced in accompanying notebook at Tab 66].

39 SCHABAS, *supra* note 27, at 507. [reproduced in accompanying notebook at Tab 41].

40 *Id.* at 507.

i) Withdrawal from the Convention

A party to the Convention may withdraw by submitting a written notification.[41] As of 2000, no State has withdrawn from the Convention.[42] Cambodia's accession occurred in 1951, and there is no evidence that it ever submitted a written notification to the United Nations that it intended to withdrawal from the Convention. Thus, Cambodia was still a party to the Convention in 1975. Therefore, Cambodia remained bound by the Convention and its principles in 1975 and is still bound today.

ii) Opposition to the Convention

a) State sovereignty

There are various protests against the Convention. First, some think that genocide is a domestic issue, not an international affair.[43] In further support of this argument, the American Bar Association opposed the Convention, considering it a "clear invasion of states' rights" and suggested that international law was too underdeveloped.[44] The American Bar Association was concerned with the sovereignty of the United States.

One aspect of the opposition to the Convention on the grounds of State sovereignty is an argument against Article VII of the draft convention.[45] Article VII of the draft convention, which

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41 *Id*. at 516.

42 *Id*. at 516-517.

43 E.H.C., *The Declaration of Human Rights, the United Nations Charter and Their Effect on the Domestic Law of Human Rights*, 36(8) VA. L. REV. 1059, 1062 (Dec. 1950). [reproduced in accompanying notebook at Tab 51].

44 *Id*. at 1062-1063.

45 Anonymous, *The Question of the Establishment of an International Criminal Jurisdiction*, 43(3) AM. J. INT'L L. 478, 478-480 (July 1949) (discussing the jurisdictional issues of Article VII of the draft of the Genocide Convention). [reproduced in accompanying notebook at Tab 48].

became Article VI of the Convention, gives an international tribunal jurisdiction to prosecute offenders.[46] The Soviet Union argued that the courts of a State should handle the punishment of genocide because international jurisdiction would be "a violation of the sovereign right of [S]tates."[47]

While this is an argument against the Convention, it is purely a jurisdictional issue and has nothing to do with whether or not genocide is a crime. Further, one widely held view in international law is "that law derives its binding force from the consent of sovereign states."[48] On this view, when a group of sovereign States became party to the Convention, they bound themselves to follow the principles it set forth. Thus, when Cambodia became party to the Convention, Cambodia bound itself to follow the principles of the Convention. Additional, because Cambodia acceded to the Convention without reservation, there is nothing to suggest Cambodia objected to the Convention on State sovereignty grounds. Therefore, objections to the Convention based on State sovereignty are irrelevant because Cambodia consented to the binding force of the Convention.

b) Victor's justice

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Anonymous, *supra* note 44, at 479. [reproduced in accompanying notebook at Tab 48].; G.A. Res. 260 (III), *supra* note 23, Art. VI. [reproduced in accompanying notebook at Tab 12].

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Anonymous, *supra* note 44, at 480. [reproduced in accompanying notebook at Tab 48].

48

Bartram S. Brown, *International Law: The Protection of Human Rights in Disintegrating States: A New Challenge*, 68 CHI.-KENT L. REV. 203, 204 (1992). [reproduced in accompanying notebook at Tab 50].

Another opposition to the Convention is the argument that genocide is a crime that occurs during war, "in occupied territory" or within "a state's own territory." [49] As a result, the usual perpetrators are members of the government or people somehow associated with the government, not private individuals.[50] In these scenarios, the leaders of a State are unlikely to follow the principles of the Convention since it would be the responsibility of the government, which has committed the crime, to bring the perpetrators of genocide to justice.[51] In order to bring those responsible for genocide to justice, there would need to be "a totally victorious revolution, overthrowing the government guilty of those crimes, or the total victor in an international war," which could give rise to "victor's justice" objections.[52] Further, "there is always the fear that a victorious nation or group of nations will join together to define as criminal conduct such activities as they consider contrary to their own interests."[53] Thus, the winning group of nations after a war could outlaw and prosecute acts it considers wrong.

In the case of Cambodia, Vietnam invaded, toppling the Khmer Rouge regime.[54] Thus, the defendants could raise a victor's justice argument, claiming that the post-Khmer Rouge

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[49] Josef L. Kunz, *Present-Day Efforts at International Protection of Human Rights: A General Analytical and Critical Introduction*, 45 AM. SOC'Y INT'L L. PROC. 109, 112 (1951). [reproduced in accompanying notebook at Tab 55].

[50] *Id*. at 112.

[51] *Id.* at 112.

[52] *Id*. at 112.

[53] Nicholas. N. Kittrie, *A Post Mortem of the Eichmann Case. The Lessons for International Law*, 55 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 16, 22 (Mar. 1964). (Kittrie practiced law in Washington D.C. and was a Lecturer in Comparative Law in the Washington College of Law of American University.) [reproduced in accompanying notebook at Tab 54].

[54] CRAIG ETCHESON, AFTER THE KILLING FIELDS: LESSONS FROM THE CAMBODIAN GENOCIDE 8 (Praeger Publishers 2005). [reproduced in accompanying notebook at Tab 29].

government is a victor enacting laws to punish acts that were not criminal when committed. However, this argument would only stand if genocide was not a crime in Cambodia, or a crime under CIL, in 1975.

c) Is the Convention self-executing?

Another objection to the Convention, at least in the United States, dealt with whether or not the Convention is a self-executing treaty. People based this argument on the fear that ratification of a self-executing treaty is very close to amending the U.S. Constitution based on "Article VI (2) of the Constitution."[55] One commentator, Carl B. Rix, said that "it seems to be plain that the essential portions of the Genocide Treaty…are self-executing."[56] Thus, if the treaty is self-executing, ratification is like implementing law in a State. This raised a fear that, by ratification, the Convention would become part of the law of the United States, even without enactment of national legislation. But not every State follows the same self-executing treaty rationale. Ratified treaties in some other countries still require an "express act of the national legislature."[57] Just because the United States has a self-executing provision in its constitution does not mean that Cambodia had such a provision.

In contract, many other commentators have viewed Article V of the Convention as requiring national legislatures to enact domestic laws.[58] One U.S. Senate Committee found that "[Article V] makes clear that the [C]onvention is construed not [to] be self-executing and that implementing legislation is required to give effect to its provisions."[59] If the Convention does

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Carl B. Rix, *Human Rights and International Law*, 43 AM. SOC'Y INT'L L. PROC. 46 (1949). (Rix was a president of the American Bar Association and Chairman of the Special Committee on Peace and Law through United Nations). [reproduced in accompanying notebook at Tab 62].

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Id. at 52.

57

Id. at 51.

58

LAWRENCE J. LEBLANC, THE UNITED STATES AND THE GENOCIDE CONVENTION 125 (Duke University Press 1991). [reproduced in accompanying notebook at Tab 34].

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Senate Committee on Foreign Relations, International Convention on the Prevention and Punishment of the Crime of Genocide, S. Exec. Repot. No. 92-6, 92d Cong., 1st Sess. 1-18 (4 May 1971), *reprinted in part in* INTERNATIONAL

require enactment of domestic legislation, then the Convention did not automatically bind Cambodia to its principle because of Cambodia's accession.

However, whether or not the Convention is self-executing may be irrelevant. "[T]he rapporteur of the UN study of the [C]onvention….pointed out that under Article 27 of the Vienna Convention on the Law of Treaties, no party to the [Co]nvention could invoke a provision of its constitution or laws as a reason for not living up to its international obligations."[60] On this view, once a State is party to a treaty, under the Vienna Convention, the treaty is binding upon that State, regardless of its own constitution or laws. Thus, by signing the Convention, whether it requires later domestic legislation or not, the Convention bound Cambodia to adhere to its principles. However, the Vienna Convention on the Law of Treaties, though drafted in 1969, did not come into effect until 1980[61] and hence was not in force prior to 1975. Therefore, the Convention may not automatically bind Cambodia to its principles simply because Cambodia was party to it.

iii) Democratic Kampuchea's protest to Vietnam's signing of the Convention

On November 9, 1981, Democratic Kampuchea protested Vietnam's signing of the Convention.[62] Within the protest, Kampuchea stated that the Vietnamese had committed

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CRIMINAL LAW: CASES AND MATERIALS 1100 (Carolina Academic Press 1996). [reproduced in accompanying notebook at Tab 43].

60 LeBlanc, *supra* note 57, at 125. [reproduced in accompanying notebook at Tab 34].

61 Vienna Convention on the Law of Treaties of 1969, *available at* http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf. (last visited Apr. 18, 2008). [reproduced in accompanying notebook at Tab 18].

62 SCHABBAS, *supra* note 27, at 528. [reproduced in accompanying notebook at Tab 41].; Parties to the Genocide Convention, note 13, *available at* http://preventgenocide.org/law/convention/UNTreatyCollection-GenocideConventionStatusReport.htm. (last visited Apr. 18, 2008) (listing members to the Genocide Convention). [reproduced in accompanying notebook at Tab 71].

genocide within Kampuchea and that Kampuchea had "denounced and condemned them" since December of 1978.[63] While the official protest of Cambodia came after the end of the Pol Pot regime in 1979, the condemnation of Vietnam's actions and the statement that Vietnam committed genocide preceded the end of Pol Pot's rule. This is recognition that the Convention was in force in Cambodia in 1978, during the Pol Pot regime, and that the regime recognized genocide as a crime. This does not establish that Cambodia recognized the Convention in 1975. However, since Cambodia did sign the Convention, there is nothing to suggest it had refrained from recognition of the Convention until 1978.

d. *Erga omnes*

As previously stated,[64] the International Court of Justice, in the main opinion in *Barcelona Traction,* acknowledged that the outlawing of genocide falls under obligations *erga omnes*.[65] Thus, under *erga omnes* principles, the international community outlaws genocide because of an obligation each State owes to all other States. Therefore, genocide would constitute a crime under CIL simply due to obligation, regardless of the existence of the Convention. Further, Judge Riphagen, in a dissenting opinion in *Barcelona Traction*, stated that "customary international law recognizes—in particular since the Second World War—respect for fundamental human freedoms as an interest of the international community."[66] While obligations *erga omnes* has likely been a concept of international law for a long time, Judge Riphagen's

63 *Id*.

64 See *supra* notes 16-17 and accompanying text.

65 Paust, *supra* note 7, at 225. [reproduced in accompanying notebook at Tab 61].

66 Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 3, 337 (Feb. 5) (dissenting opinion of Judge Riphagen). [reproduced in accompanying notebook at Tab 20].

statement shows that the obligation of one State to other States with regards to "fundamental human freedoms" predates 1975 and thus Cambodia would have an obligation to outlaw genocide. Further, statements by the International Court of Justice "noted as early as 1951 that the principles underlying the Convention are principles which are recognized by civilized nations as binding, even without any conventional obligation."[67] This recognition by the International Court of Justice in 1951 further suggests that genocide is a crime under CIL, with or without the existence of the Convention. Whether a State is party to the Convention is irrelevant because CIL binds all States to uphold the Convention's principles as an *erga omnes* norm.

B. Trials

i. Nuremberg trials

Subsequent to World War II, the Allied powers created the Nuremberg Tribunal to prosecute "the major war criminals."[68] "Although the final judgment in the Trial of the Major War Criminals, issued 30 September-1 October 1946, never used the term, it described at great length what was in fact the crime of genocide."[69] While the Tribunal judgment refrained from the use of the term genocide, a prosecutor from France used the term at the close of the trials in August of 1946, stating that "this is a crime so monstrous, so undreamt of in history…that the term "genocide" had to be coined to define it."[70] Further, a prosecutor from Britain used the

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67 Hunnum, *supra* note 4, at 119. [reproduced in accompanying notebook at Tab 52].

68 STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 162-163 (Clarendon Press 1997). [reproduced in accompanying notebook at Tab 39].

69 SCHABAS, *supra* note 27, at 38. [reproduced in accompanying notebook at Tab 41].

70 *Id*. at 38.

word genocide during a summation, saying that its application went beyond that of the "extermination of the Jewish people or of the gypsies."[71] Resolution 96(I) and the Convention did not yet exist, yet those associated with the Nuremberg trials recognized genocide and the French prosecutor's statement claimed genocide as a crime. The Nuremberg trials are seen as the "first formal, legal recognition" of the term 'genocide.'"[72] The term 'genocide' being recognized by the British and French prosecutors is a sign of the recognition of genocide on the international level.

Further, there are numerous similarities between Article 6(c) of the Nuremberg Charter, and the Convention. Article 6(c) of the Nuremberg Charter forbids:

> Crimes against humanity: namely, murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds of execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[73]

While this is not identical to the Convention, there are similarities. Article II of the Convention mentions "racial or religious groups" and forbids "killing" and "causing serious bodily or mental harm" to these groups.[74] 'Killing' under the Convention would be the same as 'murder' and 'extermination' under the Charter. Further, while the Charter forbids actions based on 'racial or religious *grounds*,' the Convention forbids it in respect to 'racial or religious *groups*.' (Emphasis added.) If someone is being killed on 'racial or religious grounds' it is because they are part of

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71 *Id*. at 38.

72 RATNER & ABRAMS, *supra* note 67, at 25. [reproduced in accompanying notebook at Tab 39].

73 KUPER, *supra* note 18, at 21. [reproduced in accompanying notebook at Tab 32].

74 G.A. Res. 260 (III), *surpa* note 23, at Art. II. [reproduced in accompanying notebook at Tab 12].

that 'racial or religious group.' Thus, in this respect, the Charter and the Convention are forbidding the same thing. Also, the Convention forbids 'causing serious bodily or mental harm' to the enumerated groups. The Charter considers it a crime to commit 'inhumane acts against any civilian population.' In this respect, the Charter is broader than the Convention because it does not specify the forbidden result of the 'inhumane acts.' However, the Charter clearly does not apply to non-civilian populations. Arguably, 'inhumane acts' could result in the 'serious bodily or mental harm' as specified in the Convention, making the Charter and the Convention similar. Further, the groups enumerated in the Convention, specifically the 'racial or religious groups,' are unlikely to be non-civilian. The similarities between Article 6(c) of the Nuremberg Charter and the Convention are clear. The trials at Nuremberg are evidence that at least some principles that were set out in the Convention were considered part of CIL during the initial Nuremberg Trials.

In a trial subsequent to the Trail of the Major War Criminals, the Tribunal charged members of the Einsatzgruppen under Control Council Law No. 10.[75] The language of Article II(1)(c) of Control Council Law No. 10 is almost identical to the language of Article 6(c) of the Nuremberg Charter,[76] and is therefore also similar to the Convention. Further, the Einsatzgruppen indictment, dated July of 1947, charged that "the acts, conduct, plans, and enterprises charged…were carried out as part of a systematic program of genocide."[77] Also,

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The Einsatzgruppen Case (U.S. v. Ohlendorf) TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS, Vol. IV, 13 (Amended Indictment) (Oct. 1946-Apr. 1949). [reproduced in accompanying notebook at Tab 21].

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Control Council Law No. 10, TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS, Vol. IV, Art. II(1)(c) (Jan. 16, 1946). [reproduced in accompanying notebook at Tab 3].

77 The Einsatzgruppen Case, *supra* note 74, at 15. [reproduced in accompanying notebook at Tab 21].

during opening statements in September of 1947, the Prosecutor stated that "genocide, the extermination of whole categories of human beings, was a foremost instrument of the Nazi doctrine."[78] While the original Nuremberg trials support the view that genocide as a term was recognized, the fact that the Tribunal charged members of the Einsatzgruppen using the term 'genocide,' and the subsequent use of the term by the Prosecutor, is evidence that the prohibition of genocide was a part of CIL.

ii. The Israeli Court recognized genocide as a part of CIL.

The Nuremberg Tribunal was not the only court to recognize genocide as a crime. Adolf Eichmann was "the Head of the Central Office for Jewish Affairs" during the Nazi reign in Europe.[79] "Survivors of concentration camps" found Eichmann in Argentina after a fifteen-year search and delivered him to the Israeli Government.[80] The Israeli Government accused Eichmann "of being instrumental…in the extermination of millions of Jews, in creating murderous conditions for millions and in devising measures to sterilize Jews" and "similar crimes" against other groups.[81] Part of Eichmann's indictment fell under "the Nazi Collaborators (Punishment) Law, enacted by the Israeli Parliament in 1950."[82]

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The Einsatzgruppen Case (U.S. v. Ohlendorf) TRIALS OF WAR CIRMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS, Vol. IV, 30 (Opening Statement of the Prosecution) (Oct. 1946-Apr. 1949). [reproduced in accompanying notebook at Tab 22].

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D. Lasok, *The Eichmann Trial*, 11(2) INT'L & COMP. L.Q. 355, 358 (Apr. 1962). [reproduced in accompanying notebook at Tab 57].

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Helen Silving, *In Re Eichmann: A Dilemma of Law and Morality*, 55(2) AM. J. INT'L L. 307, 311-312 (Apr. 1961). [reproduced in accompanying notebook at Tab 65].

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Lasok, *supra* note 78, at 356. [reproduced in accompanying notebook at Tab 57].

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Id. at 356.

The Eichmann case is significant because, while the Israeli Court did not specifically charge Eichmann with genocide, it stated that the "the crime against Jewish people was patterned along the crime of genocide as defined in the Genocide Convention."[83] In 1951, Israel ratified the Convention.[84] The above statement by the Court shows that it recognized the Convention and was trying to uphold its principles. Also, the Eichmann Court gave its opinion that "the crimes dealt with in Eichmann's case were not crimes under Israeli law only; they were, in essence, offences against the law of nations."[85] Further, the Court found that "the authority and jurisdiction to try crimes under international law are *universal*."[86] These statements further suggest that the Court recognized the existence of genocide as a crime under CIL. Additionally, the Israeli Supreme Court found that "the principles of the 1948 United Nations Genocide Convention…were already part of customary international law when the dreadful crimes [of the Holocaust] were perpetrated."[87] In 1961, the Court found Eichmann guilty of "crimes against the Jewish people, and against humanity, for committing war crimes, and for being a member of criminal organization as defined by Article 10 of the Nuremberg Charter."[88] The Israeli Court's

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83 Covey Oliver, *Judicial Decisions: Jurisdiction of Israel to try Eichmann—international law in relationship to the Israeli Nazi Collaborators (Punishment) Law*, 56 AM. J. INT'L L. 805, 812 (1962) (giving an overview of the *Eichmann* trial). [reproduced in accompanying notebook at Tab 59].

84 Lasok, *supra* note 78, at 357. [reproduced in accompanying notebook at Tab 57].

85 LORD RUSSELL OF LIVERPOOL, THE RECORDS: THE TRIAL OF ADOLF EICHMANN FOR HIS CRIMES AGAINST THE JEWISH PEOPLE AND AGAINST HUMANITY 304 (Alfred A. Knoff, Inc. 1963) (1962). [reproduced in accompanying notebook at Tab 40].

86 Oliver, *supra* note 82, at 808. (emphasis in original). [reproduced in accompanying notebook at Tab 59].

87 Ralph Ruebner, *Essay: The Evolving Nature of the Crime of Genocide*, 28 J. MARSHALL L. REV. 1227, 1228 (Sum. 2005). [reproduced in accompanying notebook at Tab 63].

88 LORD RUSSELL OF LIVERPOOL, *supra* note 84, at 301. [reproduced in accompanying notebook at Tab 40].

actions are significant because they show recognition of the crime of genocide under CIL a decade prior to 1975.

iii. People's Revolutionary Tribunal in Phnom Penh

a. Decree Law No. 1 and the trials

The Israeli Court was not the only tribunal to recognize genocide as a crime. The government of Cambodia "passed Decree Law No. 1 establishing the People's Revolutionary Tribunal (PRT) 'to try the Pol Pot – Ieng Sary clique for the Crime of Genocide'" on July 15, 1979.[89] The establishment of the PRT and Decree Law No. 1 shows that the government of Cambodia recognized the crime of genocide. Decree Law No. 1 states that, "in accordance with the Convention on the Prevention and Punishment of the Crime of Genocide" the "decree applies to the criminal acts…committed prior to its signing."[90] Further, "the judgment made explicit reference to 'international law punishing the crime of genocide, in particular the Convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948.'"[91] The decree and judgment also clearly shows that Cambodia recognized that the principles of the Convention were part of CIL during the period of 1975 to 1979. The PRT convicted the Pol Pot – Ieng Sary clique for genocide under Decree Law No. 1[92] stating the "the accused Pol Pot…and Ieng Sary are guilty of genocide."[93] This conviction is more evidence that Cambodia considered genocide a crime.

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89 TOM FAWTHROP & HELEN JARVIS, GETTING AWAY WITH GENOCIDE: ELUSIVE JUSTICE AND THE KHMER ROUGE TRIBUNAL 41 (Pluto Press 2004). [reproduced in accompanying notebook at Tab 30].

90 HOWARD J. DE NIKE, JOHN QUIGLEY & KENNETH J. ROBINSON EDS., GENOCIDE IN CAMBODIA: DOCUMENTS FROM THE TRIAL OF POL POT AND IENG SARY 47 (University of Pennsylvania Press 2000). [reproduced in accompanying notebook at Tab 27].

91 FAWTHROP & JARVIS, *supra* note 88, at 44. [reproduced in accompanying notebook at Tab 30].

92 DE NIKE ET AL., *supra* note 89, at 547. [reproduced in accompanying notebook at Tab 27].

93 *Id*. at 549.

However, the wording of Decree Law No. 1 is not identical to that of the Convention. [94] Arguably, the ECCC can see this as a sign that Cambodia was not truly accepting the Convention as binding. Yet the crimes described in Decree Law No. 1, such as "planned massacres of groups of innocent people," are essentially the same as those described in the Convention.[95] As a result, the ECCC can see the similarities between the offenses described in the Convention and those described under Decree Law No. 1 as supporting the proposition that the Cambodian government recognized the Convention in 1975.

b. People's Revolutionary Tribunal in Phnom Penh as nothing but a show trial

One of the arguments against giving weight to the initial PRT trial in 1975, and the conviction of the Pol Pot – Ieng Sary clique, is that the trial was simply a show trial.[96] The argument is that the trial was not legitimate and was "designed to serve political, not legal ends."[97] If the ECCC views the 1975 trial by the PRT as illegitimate, then the fact that the PRT charged the Pol Pot – Ieng Sary clique with genocide carries little weight in determining whether genocide was a crime under CIL or in Cambodia in 1975. In addition, in 1996, the King of Cambodia pardoned Ieng Sary from "the sentence of death and the confiscation of all his property" which the PRT ordered after his conviction.[98] The decree lists no specific reason for

94 FAWTHROP & JARVIS, *supra* note 88, at 42. [reproduced in accompanying notebook at Tab 30].

95 *Id.* at 42.

96 Peter J. Hammer & Tara Urs, *The Elusive Face of Cambodian Justice, in* BRINGING THE KHMER ROUGE TO JUSTICE: PROSECUTING MASS VIOLENCE BEFORE THE CAMBODIAN COURTS 14, 26 (Jaya Ramji & Beth Van Schaack eds., Edwin Mellen Press 2005). ([reproduced in accompanying notebook at Tab 31].

97 *Id*. at 26.

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the pardon. This can be taken as a further sign that the PRT trial simply was a show trial with very little, if no, legal bearing.

In contrast, however, some commentators still view the PRT trial in Cambodia as significant because "it was the first trial of a government leader, or anyone else, under the Genocide Convention."[99] Further, some commentators believe that the PRT trial paved the way for later proceedings under the Convention such as Bosnia's charge of genocide against Yugoslavia in 1993.[100] These views suggest that the PRT trial gave legitimacy, in Cambodia and elsewhere in the world, to the crime of genocide in CIL and to the Convention.

iv. Trial of Macias in Equatorial Guinea

Actions of other States, such as Equatorial Guinea, also have bearing on whether or not genocide was a crime under CIL. Francisco Macias Nguema ("Macias") became President of Equatorial Guinea in 1968, instituting a "vast campaign of torture and murder."[101] The International Commission of Jurists, "an organization of human rights lawyers" founded in 1952,[102] reported on the situation in Equatorial Guinea in its journal in 1978.[103] An army coup

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99 Royal Decree Pardoning Ieng Sary , NS/RKT/0996/72 (Sept. 14, 1996), *available at* http://www.eccc.gov.kh/english/cabinet/legislation/2/pardon_for_ieng_sary.pdf. (last visited on Apr. 18, 2008). [reproduced in accompanying notebook at Tab 70].

100 DE NIKE ET AL., *supra* note 89, at 17. [reproduced in accompanying notebook at Tab 27].

101 *Id*. at 17.

102 LEO KUPER, THE PREVENTION OF GENOCIDE 133 (Yale University Press 1985). [reproduced in accompanying notebook at Tab 33].

103 HOWARD B. TOLLEY, JR. THE INTERNATIONAL COMMISSION OF JURISTS: GLOBAL ADVOCATES FOR HUMAN RIGHTS xii (University of Pennsylvania Press 1994). [reproduced in accompanying notebook at Tab 46].

Niall MacDermot ed., *Human Rights in the World: Equatorial Guinea*, 21 THE REVIEW: INTERNATIONAL COMMISSION OF JURISTS 1 (Dec. 1978). (detailing the conditions and human rights violations in Equatorial Guinea). [reproduced in accompanying notebook at Tab 58].

overthrew Macias in 1979.[104] Equatorial Guinea put him on trial and he was "found guilty of numerous crimes, including genocide."[105] "However, the legal officer of the International Commission of Jurists" decided that Macias's conviction for genocide was wrong because Equatorial Guinea did not codify genocide in its domestic laws nor had it "signed or ratified" the Convention.[106]

One interpretation of the conclusion by the legal officer of the International Commission of Jurists is that it is an opinion, of a member of a group of international human rights lawyers, that genocide was not part of CIL during the Macias' regime. However, as a non-governmental organization, the opinion of the International Commission of Jurists does not carry the same weight as government-backed organizations such as the United Nations.

The situation is different in Cambodia because Cambodia did accede to the Convention. Further, Macias's conviction for genocide is relevant as evidence of the Convention's acceptance as part of CIL. The fact that the new government of Equatorial Guinea charged Macias with genocide, without domestic codification, suggests that Equatorial Guinea did recognize genocide as a crime under CIL. Of course, a person can also argue that the recognition of genocide in Equatorial Guinea was a case of victor's justice.

v. The Russell Tribunal

Bertrand Russell, a Nobel laureate, started the Russell Tribunal in May of 1967 to inquire into the actions "of the United States in Vietnam."[107] The Russell Tribunals are considered to be

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104 KUPER, *supra* note 100, at 133-134. [reproduced in accompanying notebook at Tab 33].

105 *Id*. at 16.

106 *Id*. at 174.

107

"show trials," creating "no law" and the "verdicts have no *legal* effect"[108] because the Tribunal "lacked [S]tate power."[109] During the second session, one of the Tribunal's tasks was to determine whether the United States had committed genocide.[110] The Tribunal voted unanimously that the Government of the United States was "guilty of genocide against the people of Vietnam."[111] Further, the Second Russell Tribunal convicted Brazil of genocide in 1975.[112] Even though the Russell Tribunals carry no legal effect, the Tribunal attracted the mass media and the media coverage "undermined the moral legitimacy of the United States" and their actions in Vietnam.[113] The mere media coverage of the original Russell Tribunal expressed a message that genocide is unacceptable, even if the Tribunal had no real legal standing. Further, the Russell Tribunal's existence, and subsequent gatherings, made a statement that the participants condemned genocide as a crime in 1967 and 1975.

W. Chadwick Austin & Antony Barone Kolenc, *Who's Afraid of the Big Bad Wolf? The International Criminal Court as a Weapon of Asymmetric Warfare*, 39 VAND. J. TRANSNAT'L L. 291, 308 (Mar. 2006). [reproduced in accompanying notebook at Tab 49].
108

Gregory H. Stanton, *Cambodian Genocide and International Law*, *in* GENOCIDE AND DEMOCRACY IN CAMBODIA 141, 153 (Ben Kiernan ed., Yale University Southeast Asia Studies 1993) (emphasis in original). [reproduced in accompanying notebook at Tab 44].
109

RALPH SCHOENMAN, AGAINST THE CRIME OF SILENCE: PROCEEDINGS OF THE RUSSELL INTERNATIONAL WAR CRIMES TRIBUNAL 6, 8 (John Duffett ed., O'Hare Books 1968). [reproduced in accompanying notebook at Tab 42].
110

JOHN DUFFETT ED., AGAINST THE CRIME OF SILENCE: PROCEEDINGS OF THE RUSSELL INTERNATIONAL WAR CRIMES TRIBUNAL 643-644 (O'Hare Books 1968). [reproduced in accompanying notebook at Tab 28].
111

Id. at 650.
112

KUPER, *supra* note 100, at 191-192. [reproduced in accompanying notebook at Tab 33].
113

Austin & Kolenc, *supra* note 106, at 308. [reproduced in accompanying notebook at Tab 49].

vi. Recognition of Genocide as a crime under CIL by the International Criminal Tribunal for Yugoslavia and the International Criminal Tribunal for Rwanda

The Court in the Akayesu case, heard by the International Criminal Tribunal for Rwanda, in 1998, confirmed that genocide is part of CIL.[114] In doing so, they referenced the "United Nations' Secretary-General in his Report on the establishment of the International Criminal Tribunal for the former Yugoslavia."[115] The Report for the establishment of the International Criminal Tribunal for the former Yugoslavia states that:

> The 1948 Convention on the Prevention and Punishment of the Crime of Genocide confirms that genocide, whether committed in time of peace or in time of war, is a crime under international law for which individuals shall be tried and punished. The Convention is today considered part of international customary law as evidenced by the International Court of Justice in its Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951.[116]

Thus, two international tribunals have recognized that genocide is a crime under CIL. While the establishment of the Yugoslavia tribunal in 1993[117] and the Rwanda tribunal in 1994[118] were subsequent to 1975, their references to the establishment of genocide under CIL date back to 1951. This is further evidence that genocide was a crime under CIL as of 1951, and therefore was a crime under CIL in 1975.

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[114] Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment ¶ 495 (Sept. 2 1998). [reproduced in accompanying notebook at Tab 24].

[115] *Id*. at ¶ 495.

[116] The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808* ¶ 45, U.N. Doc. S/25704 (May 3, 1993), *available at* http://www.un.org/icty/legaldoc-e/basic/statut/s25704.htm. (last visited Apr. 18, 2008). [reproduced in accompanying notebook at Tab 17].

[117] S.C. Res. 808, *supra* note 24. [reproduced in accompanying notebook at Tab 15].

[118] S.C. Res. 955, *supra* note 24. [reproduced in accompanying notebook at Tab 16].

vii. Bangladesh

Similar to the tribunals in Yugoslavia and Rwanda, Bangladesh also recognized genocide as a crime. Bangladesh enacted the Bangladesh International Crimes (Tribunals) Act of July 19, 1973 with the intention to hold trials for a group of Pakistani nationals "for serious crimes, which include genocide."[119] The Act provided for the punishment of persons, regardless of their nationality, who committed genocide in Bangladesh territory prior to and subsequent to the establishment of the Act.[120] Interestingly, when Bangladesh passed the Act, it had not become party to the Convention, which it did not accede until October 5, 1998.[121] Just as Equatorial Guinea prosecuted Macias without being a member of the Convention, Bangladesh attempted to do the same thing. However, Bangladesh, Pakistan and India reached an agreement which returned the suspected Pakistani nationals to Pakistan, the Pakistani Government apologized, and neither Bangladesh nor Pakistan held a trial.[122] Even though no country ever held a trial in regards to the suspected acts of genocide in Bangladesh, the passage of the Bangladesh International Crimes (Tribunals) Act is another example of the recognition of genocide as an international crime. Unlike Cambodia, Bangladesh had not acceded to the Convention, yet Bangladesh recognized genocide as a crime.

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Jordan Paust & Albert Blaustein, *War Crimes Jurisdiction and Due Process: The Bangladesh Experience*, 11 VAND. J. TRANS. L.1 (1978) *reprinted in part in* INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS 742, 742-743 (Carolina Academic Press 1996). [reproduced in accompanying notebook at Tab 37].

120

Bangladesh International Crimes (Tribunals) Act of July 19, 1973, at 3 *reprinted in* INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS 743, Sec. 3 (Carolina Academic Press 1996). [reproduced in accompanying notebook at Tab 1].

121

Parties to the Genocide Convention, *supra* note 61. [reproduced in accompanying notebook at Tab 71].

122

Jordan Paust & Albert Blaustein, *War Crimes Jurisdiction and Due Process: The Bangladesh Experience*, 11 VAND. J. TRANS. L.1 (1978) *reprinted in part in* INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS 755, 757-758 (Carolina Academic Press 1996). [reproduced in accompanying notebook at Tab 38].

III. CODIFICATION OF GENOCIDE IN DOMESTIC LAWS AND EX POST FACTO LAWS

A. Codification in domestic laws

i. Cambodia did not codify the Convention in its domestic laws.

Article V of the Convention says that parties to the Convention are to enact domestic laws "to give effect to the provisions of the" Convention.[123] Section G of the Penal Code of Cambodia from 1956, in French, does not list genocide.[124] The lack of a listing for genocide suggests that Cambodia did not enact domestic law for the crime of genocide at the time Pol Pot came to power in 1975. Further, the three pages of the Penal Code of Cambodia, which are available to this writer in English translation, do not contain any language suggesting that Cambodia had codified genocide as a crime in 1956.[125] Thus, this writer cannot confirm whether Cambodia complied with Article V of the Convention. Further, Article 4 of the ECCC enacts the provisions of the Convention, strongly suggesting that Cambodia did not previously codify genocide in its domestic laws. While some may argue this suggests that Cambodia did not choose to view the Convention as part of its laws, the lack of codification of genocide in domestic laws is not a revocation of compliance with the Convention.

Of course, not all countries consider themselves bound by international conventions. For example, in Finland, the ratification of a treaty or convention "does not require the Finnish courts

123 G.A. Res. 260 (III), *supra* note 23, at Art. V. [reproduced in accompanying notebook at Tab 12].

124 ROYAUME DU CAMBODGE, CODE PÉNAL ET LOIS PÉNALES XLVII (1956). [reproduced in accompanying notebook at Tab 8].

125 Penal Code of Cambodia 1956 (Legal Compendium for The Extraordinary Chambers by Secretariat of The Task Force trans., 2004), *available at* http://law.case.edu/grotian-moment-blog/documents/C010-1956-Penal_Code_of_Cambodia-En.pdf. (last visited Apr. 18, 2008). [reproduced in accompanying notebook at Tab 6].

domestically to follow" the norm set out in the convention or treaty.[126] On this view, that fact that Cambodia is party to the Convention does not necessarily mean that the domestic courts must reinforce it. However, the ECCC is not a purely domestic court, as evidenced by the involvement and cooperation of the United Nations.[127] The international involvement in the ECCC may require the ECCC to uphold the norms of conventions and treaties to which Cambodia is party.

ii. Codification of genocide in the domestic laws of other States

The timing of domestic legislation with regards to the crime of genocide varies greatly from State to State, with some States enacting national legislation immediately upon becoming a party to the Convention and others waiting years to do so. Burkina Faso acceded to the Convention in 1965, yet it did not add a genocide provision to its penal code until 1996.[128] Ethiopia, one of the first to sign the Convention in 1948 and ratify the Convention in 1949, made genocide part of its penal code in 1957.[129] Further, Brazil, which ratified the Convention in 1952,

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[126] D. NEIL MACCORMICK & ROBERT S. SUMMERS EDS., INTERPRETING STATUTES: A COMPARATIVE STUDY 139 (Dartmouth Publishing Company Limited 1991). [reproduced in accompanying notebook at Tab 35].

[127] Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea (Jun. 6, 2003), *available at* http://www.eccc.gov.kh/english/cabinet/agreement/5/Agreement_between_UN_and_RGC.pdf. (last visited Apr. 18, 2008). [reproduced in accompanying notebook at Tab 10].

[128] Parties to the Genocide Convention, *supra* note 61. [reproduced in accompanying notebook at Tab 71].; Burkina Faso Penal Code of 1996, *available at* http://www.preventgenocide.org/fr/droit/codes/burkinafaso.htm. (last visited Apr. 18, 2008). [reproduced in accompanying notebook at Tab 2].

[129] Parties to the Genocide Convention, *supra* note 61. [reproduced in accompanying notebook at Tab 71].; Penal Code of the Empire of Ethiopia of 1957, *available at* http://preventgenocide.org/law/domestic/ethiopia.htm. (last visited Apr. 18, 2008). [reproduced in accompanying notebook at Tab 7].

enacted domestic legislation in 1956.[130] Thus, Cambodia is not the only State that did not enact domestic genocide legislation immediately upon becoming party to the Convention.

In some cases, States who are not party to the Convention have enacted legislation for the crime of genocide. Yugoslavia's genocide code came into effect in 1977 while it did not accede to the Convention until 2001.[131] Even Indonesia, which is not party to the Convention, has enacted domestic legislation in regards to the crime of genocide.[132] This is evidence that these States considered genocide a crime under CIL. Today, at least eighty States have enacted some form of domestic legislation in regards to the crime of genocide, including Cambodia.[133]

While not all States that are party to the Convention have enacted domestic laws in regards to genocide, many have done so. However, even if a State is party to the Convention and has not enacted domestic legislation, this does not necessarily mean that genocide is not a part of the State's domestic laws. Even if a State has not enacted domestic legislation in regard to genocide, CIL still binds the State. Therefore, if genocide is a crime under CIL, then the

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[130] Parties to the Genocide Convention, *supra* note 61. [reproduced in accompanying notebook at Tab 71].;Law N°2.889, of 1° of October of 1956, *available at* http://www.preventgenocide.org/pt/direito/codigos/brasil.htm. (last visited Apr. 18, 2008). (domestic legislation for the crime of genocide in Brazil). [reproduced in accompanying notebook at Tab 5].

[131] Parties to the Genocide Convention, *supra* note 61. [reproduced in accompanying notebook at Tab 71].; Criminal Code of Socialist Federal Republic of Yugoslavia, Art. 141: Genocide, *available at* http://preventgenocide.org/law/domestic/yugoslavia.htm. (last visited Apr. 18, 2008). [reproduced in accompanying notebook at Tab 4].

[132] Parties to the Genocide Convention, *supra* note 61. [reproduced in accompanying notebook at Tab 71].;Undang-Undang Republik Indonesia Nomor 26 Tahun 2000 - Pasil 8 – genosida, *available at* http://preventgenocide.org/id/hukum/genosida-UU26.htm (last visited Apr. 18, 2008). (domestic legislation for the crime of genocide in Indonesia, translation unavailable). [reproduced in accompanying notebook at Tab 9].

[133] Parties to the Genocide Convention, *supra* note 61. [reproduced in accompanying notebook at Tab 71].; Domestic Legislation of States, *available at* http://preventgenocide.org/law/domestic/. (last visited Apr. 18, 2008). (naming States that have domestic legislation with regards to genocide and some links to those laws). [reproduced in accompanying notebook at Tab 67].

principles of CIL binds a State, whether or not it is party to the Convention, and whether or not it has enacted domestic legislation.

B. Ex Post Facto Laws

i. Ex Post Facto nature of Article 4 of the ECCC statute

Article 4 of the ECCC statute states that it is prosecuting persons for crimes committed from 1975-1979.[134] Yet, the Cambodian government did not enact the ECCC statute until 2004.[135] This could create a question of whether or not laws such as the ECCC statute, enacted ex post facto, are legal. One author noted that laws applied retroactively are "prohibited by the [Universal] Declaration of Human Rights."[136] The author also stated that under this principle "the Nuremberg trial would have been annulled."[137] Therefore, under this view, the Declaration of Human Rights would also prohibit Article 4 of the ECCC. However, some courts and the United Nations express other views of ex post facto laws.

Article 15(1) of the International Covenant on Civil and Political Rights states that "no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or *international law*, at the time when it was committed."[138] (Emphasis added). Thus, if the offense would constitute an offense under CIL,

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134 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, Art. 4 (Oct. 27, 2004), *available at* http://www.eccc.gov.kh/english/cabinet/law/4/KR_Law_as_amended_27_Oct_2004_Eng.pdf. (last visited Apr. 18, 2008). [reproduced in accompanying notebook at Tab 14].

135 *Id.*

136 Serge Thion, *Genocide as a Political Commodity*, *in* GENOCIDE AND DEMOCRACY IN CAMBODIA 163, 177 (Ben Kiernan ed., Yale University Southeast Asia Studies 1993). [reproduced in accompanying notebook at Tab 45].

137 *Id.* at 177.

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the fact that it was not an offense codified under national law does not prevent prosecution.

Further, Nicholas N. Kittrie noted in a paper published in 1964 that:

> The Nuremberg court and, subsequently, the United Nations General Assembly in its affirmation of the charter and judgment of the tribunal gave broad international recognition to the legality of such ex post facto legislation. A substantial school of legal scholars subscribes to the view that a penal statute need not be condemned merely because of its retroactive effect, as long as the crime penalized was obviously and undeniably prohibited under the laws of most civilized nations.[139]

Thus, international law has no ban against "retroactive criminal statutes in domestic law."[140] Under this argument, Article 4 of the ECCC is valid law, regardless of its ex post facto nature. Therefore, even though Cambodia did not codify genocide in its domestic laws as set out in the Convention prior to 1975, Article 4 is an effective domestic codification of the Convention. Under this theory, Cambodia can successfully apply Article 4 retroactively to cover the period from1975-1979.

ii. Ex Post Facto Law issues in regard to the Eichmann case

In the Eichmann case discussed above,[141] there was an argument that the Nazi Collaborators (Punishment) Act of 1950 was "invalid for the punishment of acts which were carried out before the foundation of the State of Israel in 1948."[142] Further, the Israeli Court referenced Justice Blackstone when he suggested that it would be unjust for a party to suffer

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139 International Covenant on Civil and Political Rights, G.A. Res. 2200(XXI), Art. 15, U.N. Doc. A/RES/2200B (Dec. 16, 1966). [reproduced in accompanying notebook at Tab 13].

140 Kittrie, *supra* note 52, at 20. [reproduced in accompanying notebook at Tab 54].

141 *Id*. at 21.

142 See *supra* notes 78-87 & accompanying text.

Lasok, *supra* note 78, at 361. [reproduced in accompanying notebook at Tab 57].

consequences when his actions were not criminal when committed.[143] The same argument against ex post facto laws in the Eichmann case can arise in Cambodia. While, unlike Israel, Cambodia was a State in 1975, the analysis in regards to the crime of genocide would be the same.

Like many other States, Israel enacted ex post facto laws "to punish Nazi crimes."[144] These crimes "were recognized as crimes by the laws of all civilized nations…before and after the Nazi regime."[145] Israel was entitled to enact these laws because of the "universal character of the crimes" and because those who committed the crimes knew their actions were criminal.[146] The Eichmann case gives further validity to ex post facto laws for crimes, such as genocide, which the civilized world condemns.

iii. Ex post facto law issues in regard to Bangladesh

Similar to the Eichmann case in Israel, and as discussed previously in this paper,[147] Bangladesh enacted the Bangladesh International Crimes (Tribunals) Act of July 19, 1973.[148] The Act provided for the punishment of persons who committed genocide in Bangladesh territory prior to and subsequent to the establishment of the Act.[149] Thus, Bangladesh also

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143 LORD RUSSELL OF LIVERPOOL, *supra* note 84, at 303. [reproduced in accompanying notebook at Tab 40].

144 Lasok, *supra* note 78, at 363. [reproduced in accompanying notebook at Tab 57].

145 LORD RUSSELL OF LIVERPOOL, *supra* note 84, at 303. [reproduced in accompanying notebook at Tab 40].

146 Lasok, *supra* note 78, at 368-9. [reproduced in accompanying notebook at Tab 57].

147 See *supra* notes 118-121 & accompanying text.

148 Paust & Blaustein, *supra* note 118, at 742-743. [reproduced in accompanying notebook at Tab 37].

149 Bangladesh International Crimes (Tribunals) Act of July 19, 1973, *supra* note 119, at Sec. 3. [reproduced in accompanying notebook at Tab 1].

enacted a domestic law that applied ex post facto. This is just another example of a State applying the codification of genocide in domestic laws, ex post facto. Since Bangladesh did not hold the proposed trials under the Act, the question of the legality of ex post facto laws in this instance did not occur. However, this does not negate that Bangladesh did pass an ex post facto criminal law in regard to genocide.

iv. The Convention applies, regardless of the legality of Article 4 of the ECCC

Whether or not genocide was a crime under domestic Cambodian law in 1975 is irrelevant in regard to whether or not genocide was a crime in Cambodia in 1975. Even if Article 4 of the ECCC is a prohibited ex post facto law under international law, Cambodia is still party to the Convention. One commentator has noted that the important element of the Convention was to declare the "rule of law in international relations," so those accused of genocide are unable to cite "lack of law" as a way to evade punishment.[150] Thus, the lack of codification of genocide in Cambodian law in 1975 would not enable those accused of the crime in Cambodia to use lack of codification as a defense. Further, as Schabas stated, "designation of genocide as a crime under international law means that perpetrators are subject to prosecution, even when there has been no breach of the domestic law in force at the time of the crime."[151] Thus, even if Cambodia were not party to the Convention and had no domestic legislation prohibiting genocide, those accused of genocide could still be prosecuted under CIL.

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150 Agatha La Londe, *The Genocide Convention*, 36 WOMEN LAW. J. 14 (1950). (La Londe was a lawyer in the Foreign Claims Section, Veterans Administration.) [reproduced in accompanying notebook at Tab 56].

151 SCHABAS, *supra* note 27, at 46. [reproduced in accompanying notebook at Tab 41].

IV. DIFFERENCES IN LANGUAGE BETWEEN THE CONVENTION AND ARTICLE 4 OF THE ECCC STATUTE

A. Statutory Interpretation

i. Intent

When interpreting a statute, the intent of the legislature is very important. In relying on legislative intent, the "common purposes or common motivations" of the legislative body are considered.[152] Thus, when interpreting Article 4 of the ECCC statute, it is important to consider the intent of the ECCC.

ii. The use of the term "as defined"

Article 4 of the ECCC statute states that the ECCC has the power to prosecute those who commit "the crimes of genocide *as defined* in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948."[153] (Emphasis added). This statement shows that it was the intent of the drafters of the ECCC to have Article 4 simply restate the Convention. The term 'as defined' points to the Convention for the definition of genocide. Further, this statement precedes the enumeration of acts of genocide in Article 4, thus making the language of the Convention controlling. Additionally, "the meaning of the written general rule of law under consideration must be consistent not only with the historical process of the institution…but also with the entire system of existing legal institutions."[154] Since Article 4 used the term 'as defined' in reference to the Convention, it suggests that Article 4 must be consistent with the Convention because the Convention is part of the historical process. Further, the United Nations, which is responsible for

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[152] JULIO C. CUETO-RUA, JUDICIAL METHODS OF INTERPRETATION OF THE LAW 152 (Paul M. Hebert Law Center Publications Institute 1981). [reproduced in accompanying notebook at Tab 26].

[153] NS/RKM/1004/006, *supra* note 133, at Art. 4. [reproduced in accompanying notebook at Tab 14].

[154] CUETO-RUA, *supra* note 151, at 167. [reproduced in accompanying notebook at Tab 26].

the Convention, supports the ECCC. Since Cambodia is party to the Convention, the Convention is part of the existing legal system. Thus, the ECCC should construe any discrepancies between Article 4 and the Convention in light of the Convention.

Further, it is the intent of the group enacting the law that is important, not the intent of the judges.[155] Therefore, the judges are required to look at the intent of those passing Article 4 of the ECCC statute. The wording of Article 4 suggests the intent to defer to the Convention, and thus should consider the intent of those enacting the Convention. It is clear from the Convention and the preceding Resolution 96(I) that the United Nations intended to make genocide a crime under international law.

iii. Use of the term "such as" and "as such"

It is important in the interpretation of statutes that "fair warning should be given to the world in language that the common world will understand."[156] The ECCC statute uses "such as" immediately followed by a list of acts.[157] Using the term 'such as' prior to a list suggests that the list of acts are just examples and are illustrative, not exhaustive.[158] Further, in *McBoyle v. United States*, the statute stated "the term 'motor vehicle' shall include an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails."[159] The Court considered the meaning of motor vehicle and did not limit it to those

155 *Id*. at 174.

156 McBoyle v. United States, 283 U.S. 25, 27 (1931). [reproduced in accompanying notebook at Tab 23].

157 NS/RKM/1004/006, *supra* note 133, at Art. 4. [reproduced in accompanying notebook at Tab 14].

158 Definition of 'such as,' *available at* http://www.yourdictionary.com/such-as. (last visited Apr. 18, 2008). [reproduced in accompanying notebook at Tab 69].

159 *McBoyle*, 283 U.S. at 26. [reproduced in accompanying notebook at Tab 23].

enumerated in the statute; however, the Court did say that the vehicle would be limited to ones that run on land.[160] While the term 'motor vehicles' in *McBoyle* was not limited to the specific examples in the statute, the examples gave rise to an explanation of the type or motor vehicle that is covered under the statute. Similarly, by using 'such as' in Article 4 of the ECCC statute, the prohibited acts are not limited to those enumerated immediately after the 'such as' term, but may be limited to acts similar to those enumerated. Thus, Article 4 of the ECCC is broad in this respect.

In contract, the Convention, in Article II, states that "*genocide means any of the following acts* committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, *as such*" followed by a list of acts.[161] (Emphasis added.) 'As such' means "with respect to its inherent nature."[162] This 'as such' language in the Convention reflects on the nature of the listed acts. While the use of 'as such' is not itself limiting, the language 'genocide means any of the following acts' is limiting the acts that are considered genocide to those that are enumerated after 'as such.'. Thus, under the Convention, only those acts enumerated are a violation of the Convention. This would result in Article 4 of the ECCC having a broader application in the sense that non-listed acts can still fall under its prohibition, whereas the Convention is limited to only those acts listed.

160 *McBoyle*, 283 U.S. at 26-27.

161 G.A. Res. 260 (III), *supra* note 23, Art. II. [reproduced in accompanying notebook at Tab 12].

162 Definition of 'as such,' *available at* http://www.wordwebonline.com/en/ASSUCH. (last visited Apr. 18, 2008). [reproduced in accompanying notebook at Tab 68].

iv. Use of "acts of genocide" in the ECCC vs. "genocide" in the Convention

Article 4 of the ECCC uses the term "acts of genocide" instead of "genocide," as used in Article III of the Convention.[163] While this causes the two documents to look different, in reality there is no difference between the terms 'acts of genocide' and 'genocide.'[164] Thus, 'genocide' is an 'act of genocide' and vice versa. Therefore, this difference in language does not cause a different interpretation between the two documents.

v. Differences between Article 4 of the ECCC and Article III of the Convention

Article 4 of the ECCC lists only three specific acts as compared to the five acts listed in Article III of the Convention.[165] At first glance, this would make the ECCC statute more limiting than the Convention. However, 'genocide,' which is listed in the Convention and not the ECCC, would fall under the ECCC's 'participation in acts of genocide.'[166] Committing 'genocide' is clearly also 'participation in the acts of genocide.' Further, there is a language difference between the Convention's 'complicity in genocide' and the ECCC's 'participation in acts of genocide.'[167] However, 'complicity' is defined as an "association or participation in a criminal act."[168] Thus, 'complicity' and 'participation' have the same meaning and there is no difference

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[163] G.A. Res. 260 (III), *supra* note 23, Art. III. [reproduced in accompanying notebook at Tab 12].; NS/RKM/1004/006, *supra* note 133, at Art. 4. [reproduced in accompanying notebook at Tab 14].

[164] Email from Michael Scharf, Professor, Case Western Reserve University School of Law, Director of the Frederick K. Cox International Law Center and Director of the Cox Center War Crimes Research Office. (on file with author).

[165] G.A. Res. 260 (III), *supra* note 23, Art. III. [reproduced in accompanying notebook at Tab 12].; NS/RKM/1004/006, *supra* note 133, at Art. 4. [reproduced in accompanying notebook at Tab 14].

[166] *Id.*

[167] *Id.*

[168]

in this regard between the two documents. However, the ECCC lacks 'incitement to genocide' as part if its list of punishable acts.[169] While the list of punishable acts is almost identical between the ECCC and the Convention, lack of 'incitement to genocide' in the ECCC statute makes the ECCC slightly more limited than the Convention in terms of the list of punishable acts.

B. How to avoid problems that could arise from the differences between Article 4 of the ECCC and the Convention

Problems may arise if the ECCC indicts a person under Article 4 and the indictment falls under an area where Article 4 and the Convention differ. This could result in significant time spent in the court trying to figure out whether the difference in language creates a different meaning between the two documents. Therefore, the best way to avoid any problems in regard to charging people under Article 4 is to bring separate charges under the Convention as well. By charging the crimes under both the Convention and the ECCC, the prosecution can avoid any questions of whether or not what is charged is a crime due to the difference of language of the two documents. Also, charging a person under both the ECCC and the Convention would prevent the dismissal of the charge if the ECCC finds that the ECCC statute is inapplicable due to its retroactive nature because the indictment under the Convention would still stand.

Article II of the Convention is arguably more limiting than the corresponding section of Article 4 of the ECCC. By limiting the charges to the examples enumerated in Article II of the Convention, the prosecution would stay within the narrower scope of the Convention. While this

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BLACK'S LAW DICTIONARY 230 (Bryan A. Garner ed., 7th ed. 2000) (definition of complicity) [reproduced in accompanying notebook at Tab 25].

169 G.A. Res. 260 (III), *supra* note 23, Art. III. [reproduced in accompanying notebook at Tab 12].; NS/RKM/1004/006, *supra* note 133, at Art. 4. [reproduced in accompanying notebook at Tab 14].

would prevent the prosecution from using the broader discretion of the ECCC statute, it would avoid any problem that might arise if a defendant challenges the ECCC statute.

In contract, Article 4 of the ECCC is more limiting than Article III of the Convention. All acts listed in the ECCC statute are also listed in the Convention. Thus, by limiting the charges to those acts enumerated in Article 4, the prosecution would not go outside the scope of the Convention. Even if the ECCC finds that the Convention is controlling due to the 'as defined' language at the beginning of Article 4, charging a defendant under Article 4 should not conflict with the language of the Convention. If the prosecution does not choose to charge people under both the Convention and the ECCC statute, then it is advisable to refrain from charging a person with 'incitement to genocide,' which is not listed in Article 4.

V. SUMMARY AND CONCLUSION

With the passage of Resolution 96(I) and the Convention, the United Nations attempted to establish the crime of genocide as part of CIL. Numerous sources, ranging from trials to statements of the International Court of Justice, support that forbidding genocide was an established norm of CIL prior to 1975. There are also suggestions that even absent the Convention, the principles of the Convention are under *erga omnes* norms, and thus Cambodia has an obligation to all other States to protect against and punish those who commit genocide.

Further, Cambodia acceded to the Convention and later even lodged a protest regarding Vietnam's signing of the Convention. Cambodia also held trials and convicted the Pol Pot – Ieng Sary clique for genocide in 1979. This is evidence that Cambodia intended to follow the principles set forth in the Convention.

Numerous other examples exist of States prosecuting, or intending to prosecute, instances of genocide prior to and subsequent to 1975. The statements of these courts and the wording of

the applicable laws to prosecute for genocide show that these States considered genocide to be a crime under CIL. Thus, genocide would also be a crime in Cambodia under CIL.

While Cambodia shows no evidence of having enacted a law making genocide a crime prior to 1975, the ex post facto nature of Article 4 of the ECCC statute does not preclude it from being applicable. First, the ECCC statute is fashioned after the Convention, to which Cambodia is party. Second, many other States, some of which are not even parties to the Convention, have ex post facto laws for genocide. In cases where these ex post facto laws have been applied, the tribunals and courts have upheld their legitimacy because they considered the crime of genocide to be a part of CIL.

Since there is considerable evidence to suggest that the crime of genocide was a part of CIL prior to 1975, the language differences between the Convention and Article 4 of the ECCC statute may be largely irrelevant. Further, since the ECCC statute clearly states that it is codifying the crime of genocide, as defined in the Convention, it would seem that the Convention should control any language differences between the two. However, because differences do exist, it would be prudent to recognize this fact and charge defendants under both the Convention and the ECCC statute.

In summary, the weight of the evidence shows that genocide was a crime under CIL in 1975, which makes genocide a crime in Cambodia in 1975. Further, Cambodia, as party to the Convention, is obliged to uphold the principles set forth in the Convention.