



**អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា**

Extraordinary Chambers in the Courts of Cambodia

Chambres Extraordinaires au sein des Tribunaux Cambodgiens

**Understanding Genocide: “Genocide, Truth, Memory and Justice”  
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**Understanding Genocide and Other Mass Atrocity Crimes:  
Their Definition and Application in Case 002**

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**OUTLINE OF LECTURE**

**PART I: HISTORICAL BACKGROUND AND DEFINITION OF GENOCIDE**

1. Genocide comes from a particular historical and political context
2. Genocide crystallised into an international crime, enshrined in the Genocide Convention, in the aftermath of the Holocaust
3. The definition of genocide refers to a specific set of horrific, but limited, situations

**PART II: GENOCIDE, THOUGH EXTREMELY GRAVE, IS NO “CRIME OF CRIMES”**

4. There are many other international law crimes dealing with mass atrocities that are of equal gravity
5. In the ECCC, genocide and other crimes under international law are on par with crimes under Cambodian law

**PART III: PROSECUTION OF MASS ATROCITY CRIMES IN CASE 002**

6. The general status of Case 002
7. Ways in which the victimisation of various groups will be addressed in Case 002



## PART 1: HISTORICAL BACKGROUND AND DEFINITION OF GENOCIDE

### 1. GENOCIDE COMES FROM A PARTICULAR HISTORICAL AND POLITICAL CONTEXT

- Developed by Raphael Lemkin (1900-1959):
  - Polish Jewish lawyer, prosecutor and scholar<sup>1</sup>
  - Author of the term ‘genocide’<sup>2</sup>
  - Advocated for many years, ultimately successfully, for genocide to be made a crime under international law
- Two main influences to Lemkin’s thinking about genocide:
  - Influence 1: News of major mass atrocity crimes in Europe during WWI and WWII. In particular:
    - Massacre of Armenians (1915 – 1916)<sup>3</sup>
      - Armenians: Christian minority group living in Turkey, a Muslim state
      - Turkish political faction wanted to turn Turkey into a homogenous state
      - Carried out a mass deportation and murder of 500,000 – 1.5 million Armenians from Turkey (Ottoman Empire)<sup>4</sup>
      - Lemkin couldn’t understand why, at the time, the murder of individual people was criminal whereas the mass murder of individuals by the state was not; dedicated himself to working on this issue<sup>5</sup>
    - The Holocaust (1939 – 1945)<sup>6</sup>
      - 1933 seizure of German political power by Hitler; rise of the Nazi Party extreme right wing
      - Jews in Germany and in the rest of Europe targeted
      - From 1933, gradual erosion of Jewish legal rights; marginalised in society

<sup>1</sup> William A Schabas, *Genocide in International Law: The Crime of Crimes*, Cambridge University Press, Cambridge, 2nd edn, 2009, p. 28.

<sup>2</sup> Gerhard Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2005, para. 560.

<sup>3</sup> Center for Jewish History, *Genocide and Human Experience: Raphael Lemkin’s Thought and Vision*, 2000, available at <http://www.cjh.org/lemkin/conference.php>.

<sup>4</sup> See, generally, United Human Rights Council, *Armenian Genocide*, 2010, available at: [http://www.unitedhumanrights.org/genocide/armenian\\_genocide.htm](http://www.unitedhumanrights.org/genocide/armenian_genocide.htm).

<sup>5</sup> Center for Jewish History, *Letters of Conscience: Raphael Lemkin and the Quest to End Genocide*, undated, available at <http://lemkin.cjh.org/exhibits/show/letters-of-conscience/>.

<sup>6</sup> See, generally, United States Holocaust Memorial Museum, *The Holocaust*, 2010, available at: <http://www.ushmm.org/wlc/en/article.php?ModuleId=10005143>.



- Many other minority groups also targeted including ethnic groups (Roma / gypsies); national groups (Poles and Soviets)
  - From 1939, during WWII, these populations were forced to live in ghettos, and in concentration camps (labour camps and death camps)
  - Systematically killed: 6 million Jews; approximately 11 million people in total
- Influence 2: The minority treaty regime which emerged in Europe between WWI and WWII and which tried to give some international law protections to national minorities:<sup>7</sup>
- Tried to guarantee equality between national minorities and other nationals in a State<sup>8</sup>
  - Tried to give national minorities rights to preserve their special racial, traditional and national characteristics<sup>9</sup>
  - Form of the laws: either declarations by single states; agreements between two states; agreements between multiple states
  - A State's treatment of its national minorities would be monitored by an international body known as the League of Nations, which is an organisation on which the present-day UN is modelled

## **2. GENOCIDE CRYSTALLISED INTO AN INTERNATIONAL CRIME, ENSHRINED IN THE GENOCIDE CONVENTION, IN THE AFTERMATH OF THE HOLOCAUST**

- Following Lemkin's advocacy, the term "genocide" first started appearing in the post-WWII trials conducted by the Allies against Nazi leaders:
  - Nuremberg Trial of the Major War Criminals (1945-1946):
    - Genocide was referred to in the indictment<sup>10</sup>
    - The judgement of the Court also described in detail crimes which today would amount to genocide (although there was no official definition of genocide at that time)<sup>11</sup>

<sup>7</sup> Schabas, *Genocide in International Law*, p. 27-28.

<sup>8</sup> *Minority Schools in Albania*, PCIJ Advisory Opinion No. 26, 6 April 1935 (*Minority Schools in Albania*), p. 14.

<sup>9</sup> *Minority Schools in Albania*, p. 14.

<sup>10</sup> Schabas, *Genocide in International Law*, p. 43.

<sup>11</sup> Schabas, *Genocide in International Law*, p. 43.



- Allied trials of other German war criminals (1946-1949):
  - Genocide was charged in cases including the trial against the Einsatzgruppen (mobile death squads) and in the Justice trial (against lawyers, judges and officials)<sup>12</sup>
- The UN General Assembly began considering genocide in 1946, addressing it in a resolution, passed unanimously, requesting that the Genocide Convention be written:
  - Described genocide as “a denial of the right of existence of entire human groups”<sup>13</sup>
  - Noted genocide’s devastating impact on humanity: “such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations”<sup>14</sup>
  - Echoed the idea that genocide was born in a specific historical context, referring to the nature of “many instances” of genocide that had previously occurred<sup>15</sup>
- Development of the Genocide Convention began in 1946. The final Convention was adopted in 1948
  - Secretary-General of the UN and drafters of the Genocide Convention felt it important that genocide be defined to refer only to a small number of situations, so that genocide would not be confused with other crimes<sup>16</sup>
  - Convention has introduced a definition of genocide that has now become one of the very few crimes which has *jus cogens* status under international law (meaning that there are no circumstances under which States can be permitted to commit it)<sup>17</sup>

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<sup>12</sup> Schabas, *Genocide in International Law*, p. 49-50.

<sup>13</sup> UNGA Res. 96(1), UN Doc. No. A/96 (1948).

<sup>14</sup> UNGA Res. 96(1), UN Doc. No. A/96 (1948).

<sup>15</sup> UNGA Res. 96(1), UN Doc. No. A/96 (1948).

<sup>16</sup> Schabas, *Genocide in International Law*, pp. 60-61.

<sup>17</sup> *Case Concerning Armed Activities on the Territory of the Congo (new Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction of the Court and Admissibility of the Application, ICJ Reports 2007, para. 64.



### 3. THE DEFINITION OF GENOCIDE REFERS TO A SPECIFIC SET OF HORRIFIC, BUT LIMITED, SITUATIONS

- Intent to destroy, in whole or in part, a national, ethnical, racial or religious group
  - Intent to destroy: The accused needs to intend to eliminate not simply an individual victim, but rather the cultural and physical existence of the group to which that victim belongs<sup>18</sup>
  - In whole or in part: The way that this law has been applied, if one intends to destroy a group in part, they must intend to destroy a substantial part:
    - a very large percentage of the group; or
    - all of the members of the group living in a particular area; or
    - people that are important symbols of the group,<sup>19</sup> like its political, religious or intellectual leaders<sup>20</sup>
  - The protected groups: only four specific groups: national, racial, ethnical or religious groups
    - What these groups have in common is a group identity that we can generally identify as permanent and stable<sup>21</sup>
    - Reviewing the working documents of the drafters of the Genocide Convention, it is also clear that the drafters had very specific historical experiences at the forefront of their minds:
      - the experiences of the Jews and other victim groups during the Holocaust; and
      - the minority treaties regime that had been developed between the wars to protect the rights of national minority groups
  - Reason political groups were omitted from the protected groups:<sup>22</sup>
    - Some drafters argued that they were not sufficiently permanent
    - There were also fears about the international community using the allegation of genocide against a political group as a pretext for interfering in a State's internal affairs

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<sup>18</sup> *Prosecutor v. Sikirica et al*, Case No. IT-95-8-I, Judgment on Defence Motions to Acquit, 3 September 2001, para. 89.

<sup>19</sup> *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgement, 19 April 2004, pp. 12 - 13 (footnotes omitted).

<sup>20</sup> UN Commission of Experts, cited in *Prosecutor v. Jelisić*, Case No. IT-95-10-T, Judgement, 14 December 1999, para. 82.

<sup>21</sup> *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement, 2 September 1998, para. 511.

<sup>22</sup> See, generally, Schabas, *Genocide in International Law*, pp. 153-165.



- Ultimately, their exclusion seems due to the fact that it was appearing impossible for the drafters of the Genocide Convention to reach agreement on whether they should be included
- Acts prohibited as genocide when directed at a group:<sup>23</sup>
  - Killing members
  - Causing serious bodily or mental harm
  - Deliberately inflicting condition of life to bring about their physical destruction
  - Imposing measures to prevent births
  - Forcibly transferring children to another group

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<sup>23</sup> Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951), article II.



**4. THERE ARE MANY OTHER INTERNATIONAL LAW CRIMES DEALING WITH MASS ATROCITIES THAT ARE OF EQUAL GRAVITY**

- Genocide is one of the gravest crimes in existence; however, the idea that genocide is somehow the “crime of crimes” is arguably incorrect
- Other mass atrocity crimes are of equal gravity – consider crimes against humanity:
  - Like genocide, crimes against humanity:
    - are crimes that States are not permitted to commit under any circumstances (*jus cogens* status)<sup>24</sup>
    - have had a long history of development; the term crime against humanity was first used to describe the massacre of Armenians<sup>25</sup>
  - Crimes against humanity are considered to be an offence against all of humanity “attack on human dignity, on the very notion of humaneness”<sup>26</sup>
  - Crimes against humanity apply to a much wider range of heinous criminality, including persecution of groups on a long list of discriminatory grounds, slavery, several severe forms of sexual violence, apartheid<sup>27</sup>
- Consider crimes in the jurisdiction of the International Criminal Court:
  - World’s first permanent international criminal court (est. 2002)
  - Mandate: to prosecute the “most serious crimes of concern to the international community as a whole”<sup>28</sup>
  - The court can try four crimes: genocide, CAH, war crimes and the crime of aggression<sup>29</sup>

<sup>24</sup> Patricia M Wald, *Genocide and Crimes Against Humanity*, 6 WASHINGTON UNIVERSITY GLOBAL STUDIES LAW REVIEW 621 (2007), pp. 624-625.

<sup>25</sup> Werle, *Principles of International Criminal Law*, para. 636; Antonio Cassese, *International Criminal Law*, Oxford, Oxford, 2nd edn, 2008, p. 101.

<sup>26</sup> *Prosecutor v. Erdemović*, Case No. IT-96-22-A, Judgment (7 October 1997), para. 21.

<sup>27</sup> Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002), article 7(1) (*Rome Statute*).

<sup>28</sup> Rome Statute, preamble.

<sup>29</sup> Rome Statute, article 5.



- All of these crimes are considered equal – no one is more or less serious than the other
- UN’s Responsibility to Protect doctrine treats genocide as of the same gravity as several other mass atrocity crimes:<sup>30</sup>
  - Doctrine was unanimously supported by the Member States of the UN in 2005
  - States pledged that they have a responsibility to protect their people from four mass atrocity crimes
  - The four crimes – equally serious – are genocide, CAH, war crimes, ethnic cleansing

#### **5. IN THE ECCC, GENOCIDE AND OTHER CRIMES UNDER INTERNATIONAL LAW CRIMES ARE ON PAR WITH CRIMES UNDER CAMBODIAN LAW**

- The ECCC applies both Cambodian and international law
  - People tried in the ECCC can be – and are – charged with crimes under both Cambodian law and international law
- In the ECCC, there is no hierarchy between national and international crimes or between any of the crimes under Cambodian law and crimes under international law<sup>31</sup> – they are all subject to the same maximum penalty of life imprisonment<sup>32</sup>
  - International crimes: genocide, crimes against humanity, grave breaches of the Geneva Conventions, destruction of cultural property, crimes against those with diplomatic protection
  - National crimes: homicide, torture, religious persecution

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<sup>30</sup> 2005 World Summit Outcome, GA Res 60/1, UN Doc A/RES/60/1, para. 138 (24 October 2005).

<sup>31</sup> *Prosecutor v. Nuon Chea, Ieng Sary, Khieu Samphan and Ieng Thirith*, Case No. 002/19-09-2007-ECCC-OCIJ, Closing Order, 15 September 2010 (Case 002 Closing Order), paras.1565-66, 1576.

<sup>32</sup> Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), article 39.





**6. THE GENERAL STATUS OF CASE 002**

- Conducting trials against four of the most senior leaders of the Khmer Rouge – Nuon Chea, Ieng Sary, Khieu Samphan and Ieng Thirith
- Investigations for Case 002 began in 2007
- Last month, the Co-Investigating Judges issued the Closing Order in the case
  - The Closing Order is based on an analysis and comparison of evidence gathered by the Office of the Co-Investigating Judges and by the Office of the Co-Prosecutors
  - Formally charges Nuon Chea, Ieng Sary, Khieu Samphan and Ieng Thirith with a range of crimes and orders that these individuals face a criminal trial in the ECCC
  - Crimes charged: genocide, crimes against humanity, grave breaches of the Geneva Conventions, murder, torture and religious persecution<sup>33</sup>
  - Even if we do not argue that these people committed the crimes directly, we are allege that they are responsible for them as senior leaders of the Khmer Rouge
- Next major step: The trial
  - Expected to take place at some stage next year
  - All parties are currently undertaking preparations for this
  - Each of the alleged crimes against each accused person will need to be tested in court
  - It is the role of the Prosecution to prove that each accused person is guilty of each charged crime beyond a reasonable doubt<sup>34</sup>
  - In accordance with international fair trial standards, each accused person is also represented by a defence team which will argue against

<sup>33</sup> Case 002 Closing Order, para. 1613.

<sup>34</sup> Extraordinary Chambers in the Courts of Cambodia Internal Rules (Rev. 6) (ECCC Internal Rules), Rule 87.



the Prosecution's case

- It will be for the judges of the Trial Chamber to determine whether there is sufficient evidence to convict each defendant of each charge made against him or her<sup>35</sup>
- Only a selection of crime sites and criminal activities will be considered at trial:<sup>36</sup>
  - Limited resources of the ECCC
  - Interest in holding the trials as soon as possible considering the age and physical condition of the defendants
  - However, the ECCC recognises that crimes committed during the DK were of an enormous magnitude – estimates are that between 1.7 to 2.2 million people died during the DK regime<sup>37</sup>

## **7. WAYS IN WHICH THE VICTIMISATION OF VARIOUS GROUPS WILL BE ADDRESSED IN CASE 002**

- Buddhists:
  - The treatment of Buddhists will be used in respect of the following charges: crimes against humanity, murder, religious persecution
  - Alleged events that will be addressed include:
    - Buddhists being murdered when they refused to be defrocked<sup>38</sup>
    - CPK policy of prohibiting Buddhism and the practice of Buddhism<sup>39</sup>
    - Pagodas and sanctuaries being destroyed, or converted for other purposes such as security centres, pig pens, dining halls, hospitals or warehouses<sup>40</sup>
    - Disrobing of virtually all Buddhist monks and nuns<sup>41</sup>
  - Why the persecution of the Buddhists will not be charged as genocide:<sup>42</sup>

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<sup>35</sup> ECCC Internal Rules, Rule 87.

<sup>36</sup> Extraordinary Chambers in the Courts of Cambodia, *Co-Investigating Judges indict Khieu Samphan, Nuon Chea, Ieng Sary and Ieng Thirith*, 16 September 2010, available at: [http://www.eccc.gov.kh/english/news.view.aspx?doc\\_id=369](http://www.eccc.gov.kh/english/news.view.aspx?doc_id=369).

<sup>37</sup> Extraordinary Chambers in the Courts of Cambodia, *Co-Investigating Judges indict Khieu Samphan, Nuon Chea, Ieng Sary and Ieng Thirith*, 16 September 2010, available at: [http://www.eccc.gov.kh/english/news.view.aspx?doc\\_id=369](http://www.eccc.gov.kh/english/news.view.aspx?doc_id=369).

<sup>38</sup> Case 002 Closing Order, para. 1378.

<sup>39</sup> Case 002 Closing Order, para. 1421.

<sup>40</sup> Case 002 Closing Order, para. 1421.

<sup>41</sup> Case 002 Closing Order, para. 1421.



- There was intent to eliminate the practice of Buddhism (cultural genocide) but not the people who constitute the group
    - Buddhists were killed sporadically and most were re-educated rather than killed
    - If the Buddhists stopped practicing the religion, they were not killed
  - There is no clear documentation that the CPK wanted to kill all the Buddhists, unlike in the case of the Cham, where there is clear evidence of a plan to exterminate the entire group
  - There is no strong evidence that senior monks were killed
  - Approximately 5% of Buddhists were killed compared to 36% of the Cham people
- Chams:
  - The treatment of the Chams will be used in respect of the following charges: genocide, crimes against humanity (murder, extermination, religious persecution)
  - Alleged events that will be addressed include:
    - Campaign of genocidal killing against the Chams<sup>43</sup>
    - Murder of Chams at Kroch Chhmar and Wat Au Trakuon security centres<sup>44</sup>
    - Widespread killing of Chams beginning in 1977<sup>45</sup>
    - Country-wide suppression of Cham culture, traditions, and language<sup>46</sup>
    - Banning of the practice of Islam and forbade the Cham from praying, seized and burned Qurans, closed or destroyed mosques, and forced Cham people to eat pork<sup>47</sup>
    - Arrest and killing of religious leaders and learned Islamic scholars<sup>48</sup>
    - Break up of Cham communities<sup>49</sup>
    - Forcible movement and dispersion of Cham people throughout Cambodia<sup>50</sup>

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<sup>42</sup> This information was provided by Anees Ahmed, Dale Lysak and Craig Etcheson on 20 October 2010.

<sup>43</sup> Case 002 Closing Order, paras. 1336-1342.

<sup>44</sup> Case 002 Closing Order, para. 1378.

<sup>45</sup> Case 002 Closing Order, para. 1378.

<sup>46</sup> Case 002 Closing Order, para. 1420.

<sup>47</sup> Case 002 Closing Order, para. 1420.

<sup>48</sup> Case 002 Closing Order, para. 1420.

<sup>49</sup> Case 002 Closing Order, para. 1420.

<sup>50</sup> Case 002 Closing Order, para. 1420.



- Vietnamese:
  - The treatment of the Vietnamese will be used in respect of the following charges: genocide, crimes against humanity (murder, deportation, racial persecution)
  - Alleged events that will be addressed include:
    - Campaign of genocidal killing against the Vietnamese<sup>51</sup>
    - Deportation of Vietnamese in 1975-1976 and the murder of those who resisted<sup>52</sup>
    - Systematic identification and targeting of Vietnamese on the basis of race – expulsion from Cambodian territory, arrest, detention, murder<sup>53</sup>
    - Calls to kill all Vietnamese remaining in Cambodia<sup>54</sup>
  
- Khmer Krom:
  - The treatment of the Khmer Krom will be used in respect of the following charges: genocide (in relation to the overall policy of genocide against the Vietnamese), and crimes against humanity (forced transfer) (in relation to population movements within Cambodia)
  - Alleged events that will be addressed include:
    - Forced transfer of the Khmer Krom from the Central (Old North), Southwest, West and East Zones<sup>55</sup>

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<sup>51</sup> Case 002 Closing Order, paras. 1343-1349.

<sup>52</sup> Case 002 Closing Order, paras. 1398, 1378.

<sup>53</sup> Case 002 Closing Order, para. 1345.

<sup>54</sup> Case 002 Closing Order, para. 1346.

<sup>55</sup> Case 002 Closing Order, paras. 1448, 1468.

