

ប្រធានបទស្រាវជ្រាវ

Textual Discrepancies in the Law on the Establishment of the  
Extraordinary Chambers in the Courts of Cambodia  
for the Prosecution of Crimes Committed during the Period of  
Democratic Kampuchea and their Legal Consequences

by  
Andre Olivie and Heather Muwero  
International Human Rights Clinic, Seattle University, USA  
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**ABBREVIATIONS**

|             |                                                |
|-------------|------------------------------------------------|
| <b>ICTR</b> | International Criminal Tribunal for Rwanda     |
| <b>ICTY</b> | International Criminal Tribunal for Yugoslavia |
| <b>PCIJ</b> | Permanent Court of International Justice       |
| <b>ICJ</b>  | International Court of Justice                 |
| <b>UN</b>   | United Nations                                 |
| <b>ILC</b>  | International Law Commission                   |

|                            |                                                                                 |
|----------------------------|---------------------------------------------------------------------------------|
| <b>Genocide Convention</b> | Convention on the Prevention and Punishment of the Crime of Genocide            |
| <b>Law on the ECCC</b>     | Law on the Establishment of the Extraordinary Chamber of the Courts of Cambodia |

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## **I. INTRODUCTION**

Genocide has been described as the crime of crimes, responsible for destroying whole societies. The creation of the Extraordinary Chambers in the Courts of Cambodia represents an acknowledgment that serious crimes took place during the period of Democratic Kampuchea and that certain individuals should be held responsible for those crimes. One crime that has been included in the jurisdiction of the trials is that of genocide. The definition of genocide was codified in 1948 with the Convention on the Prevention and Punishment of the Crime of Genocide (the Convention on Genocide), following the atrocities of World War II. Subsequently, the statutes for both the International Criminal Tribunal for Yugoslavia and Rwanda have adopted the definition of genocide utilized in the Convention. In 2001, with the assistance of the United Nations, Cambodia formulated its own law, the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia (Law on the ECCC). However, the Law on the ECCC differs in significant aspects from the Convention's definition of genocide. These discrepancies will be explored in the present memorandum in order to assess their implications for the present and future trials.

## **II. BACKGROUND**

The Law on the ECCC began in theory in 1997, when the then Co-Prime Ministers of Cambodia requested United Nation (UN) assistance in organizing Khmer Rouge Trials. The UN commissioned a study on the feasibility of a trial the following year. In 1999, the Royal government of Cambodia created the Task Force for Cooperation with Foreign Legal Experts and Preparation of the Proceedings for the Trial of Senior Khmer Rouge Leaders (Task Force). The Task Force drafted a version of the Law on the ECCC in 1999 and presented it to a UN

delegation. In December of 2000, Senior Minister Sok An introduced the draft Law on the ECCC to the Cambodian National Assembly. It was signed into Law by King Norodom Sihanouk on 10 August 2001. On 31 August 2001, the law was translated into English and French by the Council of Jurists<sup>1</sup> and sent to Hans Corell, the Under-Secretary General of Legal Affairs for the United Nations. Hans Corell responded with 11 points of concern, none of which dealt with the discrepancies discussed in this memorandum.<sup>2</sup> On 27 October 2004 Amendments to the final and current Law on the ECCC were promulgated. The amendments addressed the points of concern raised by Cambodia and the UN, most notably the issue of proportion of Cambodian and International Judges.

### **III. DISCREPANCIES**

There are several small but material discrepancies between the definition of genocide as defined in the 1948 Convention on Genocide and those Article 4 definitions located in the current versions of the Cambodian Law on the Establishment of the Extraordinary Chambers (Law on the ECCC). Variances also appear between the 2001 English version of the Cambodian Law on the ECCC and the amended 2004 Law on the ECCC, despite there being no specific amendment to Article 4. Further discrepancies are apparent between each of the official working language versions of the Law on the ECCC.

In contrast to the Law on the ECCC, the French and English versions of the Convention

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<sup>1</sup> The Council of Jurists is a Cambodian governmental institution created in 1994 and attached to the Office of the Council of Ministers. Its primary mission is to ensure and maintain the cohesion of Cambodian law and to disseminate Khmer substantive law to Khmer nationals as well as foreign jurists and investors in search of reliable translations of legal texts. Available at: [http://www.bigpond.com.kh/Council\\_of\\_Jurists/AboutCJ.htm](http://www.bigpond.com.kh/Council_of_Jurists/AboutCJ.htm) (Last visited on April 5, 2009). *The head of the Council is His Excellency Sok An. He is also the head of the Task Force charged with drafting the Law on the ECCC.*

<sup>2</sup> Corell did, however, express concern over the use of only one official language and the issue of Russian translations. Sok An, head of the Task Force responded in a letter dated, 22 January 2002 to Hans Corell with the following response: "Here I would like to emphasize that the sole "official working language" of the Extraordinary Chambers is Khmer. While we have always maintained that translations and interpretation into and from Russian should be provided (along with English and French) all such translation is in order to meet the needs of the participants in the process, and we too would not want the trial to be impeded by

on Genocide are identical, at least with respect to the elements currently under consideration. However, the Khmer, English and French versions of the Law on the ECCC, each contain small but material variations. As of this writing, no expressly official translations of the Law on the ECCC exist. All versions of the law referenced in this memorandum were obtained from the ECCC website and expressly state that they are unofficial translations by the Council of Jurists. However, there is every indication that these documents are being treated as official and are intended to be used by the Court.<sup>3</sup> The relevant discrepancies are explained below.

**A. MATERIAL VARIATIONS BETWEEN ARTICLE II OF THE CONVENTION ON GENOCIDE AND ARTICLE 4 OF THE ENGLISH VERSION OF THE LAW ON THE ECCC.**

The first major variation between the two statutes is the absence of the phrase “any of the following acts” in regards to the list of underlying crimes in the English version of Article 4 of the Law on the ECCC. Instead, the English version of Article 4 reads “any acts”.<sup>4</sup> The second difference is that the English version of Article 4 transposes the phrase “as such,” using instead the phrase, “such as”. The legal consequences of these discrepancies are significant and are discussed below.

***Convention on the Prevention and Punishment of the Crime of Genocide***  
***Article II***

*In the present Convention, 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**:*

*( a ) Killing members of the group;*

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any lack in this area...” Available at: <http://www.cambodia.gov.kh/krt/pdfs/Sok%20An%2002-01-22%20to%20HC%20on%2011%20points.pdf> (Last visited on March 29, 2009).

<sup>3</sup> Email response from Anne Heindel, Legal Advisor to the Documentation Center of Cambodia, “The official English translation of the 2004 law can be found at <http://www.eccc.gov.kh/english/law.list.aspx>, the Khmer at <http://www.eccc.gov.kh/khmer/law.list.aspx> (first one), and the French at <http://www.eccc.gov.kh/french/law.list.aspx>. I know of no more authoritative sources. All three versions are equally official. As far as I know no one has raised the point that the language in the 2001 law and 2004 law are different or that the English and French versions are different.” (Email in possession of Andre Olivie. Dated Feb. 8, 2009).

<sup>4</sup> Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea [hereinafter Law of the ECCC] art 4.

- ( b ) Causing serious bodily or mental harm to members of the group;*
  - ( c ) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;*
  - ( d ) Imposing measures intended to prevent births within the group;*
  - ( e ) Forcibly transferring children of the group to another group.*
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***Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006).***

***Article 4***

*The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed the crimes of genocide as defined in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, and which were committed during the period from 17 April 1975 to 6 January 1979.*

*The acts of genocide, which have no statute of limitations, mean **any acts** committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, **such as**:*

*killing members of the group;*  
*causing serious bodily or mental harm to members of the group;*  
*deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;*  
*imposing measures intended to prevent births within the group;*  
*forcibly transferring children from one group to another group.*

**B. MATERIAL VARIATIONS BETWEEN ARTICLE II OF THE CONVENTION ON GENOCIDE AND ARTICLE 4 OF THE FRENCH VERSION OF THE LAW ON THE ECCC.**

The French version of the relevant language in Article 4 of the Law on the ECCC and Article 2 of the Convention on Genocide are virtually identical. Unlike the English version of the same law, the French language version includes the phrase “*l’un quelconque des actes ci-après*” which translates as “one of the following acts” and not the more expansive, “any acts”. The French version ends with the phrase “*comme tel*” which, in this context, translates as “as such”. However, it should be pointed out that the French equivalent of “such as” is also “*comme*”.

tel”.<sup>5</sup>

## **Convention Pour la Prévention et la Répression du Crime de Génocide**

### **Article II**

*Dans la présente Convention, le génocide s'entend de l'un quelconque des actes ci-après, commis dans l'intention de détruire, ou tout ou en partie, un groupe national, ethnique, racial ou religieux, comme tel :*

- a) Meurtre de membres du groupe;*
- b) Atteinte grave à l'intégrité physique ou mentale de membres du groupe;*
- c) Soumission intentionnelle du groupe à des conditions d'existence devant entraîner sa destruction physique totale ou partielle;*
- d) Mesures visant à entraver les naissances au sein du groupe;*
- e) Transfert forcé d'enfants du groupe à un autre groupe.*

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## **Loi sur la création des chambres extraordinaires, avec inclusion d'amendements, promulguée le 27 octobre 2004 (NS/RKM/1004/006)**

### **Article 4:**

*Les chambres extraordinaires sont compétentes pour juger les suspects qui ont commis des crimes de génocide, tels que définis dans la Convention de 1948 pour la prévention et la répression du crime de génocide, entre le 17 avril 1975 et le 6 janvier 1979.*

*On entend par crime de génocide, qui est imprescriptible l'un quelconque des actes ci-après, commis dans l'intention de détruire, en tout ou en partie, un groupe national, ethnique, racial ou religieux, comme tel :*

- le meurtre de membres du groupe,*
- les atteintes graves à l'intégrité physique ou mentale de membres du groupe,*
- la soumission intentionnelle du groupe à des conditions d'existence devant entraîner sa destruction physique totale ou partielle,*
- les mesures visant à entraver les naissances au sein du groupe,*
- les transferts forcés d'enfants du groupe à un autre,*

*Les actes suivants sont passibles des mêmes peines: ...*

## **C. MATERIAL VARIATIONS BETWEEN ARTICLE II OF THE CONVENTION ON GENOCIDE AND ARTICLE 4 OF THE KHMER VERSION OF THE LAW ON THE ECCC.**

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<sup>5</sup> Unofficial translation from the French to the English by Nicolas Mura, Seattle University law student and native French speaker. Translated on Feb. 4, 2009. Email contact: [muran@seattleu.edu](mailto:muran@seattleu.edu)

The Khmer version of the relevant language in Article 4 of the Law on the ECCC appears to be a hybrid of the English and French versions. The Khmer version includes the phrase “ គឺជាអំពើមួយក្នុងចំណោមអំពើដូចខាងក្រោមហើយ” which translates to “any one of the following acts”, yet ends with the phrase “ មួយដូចជា” which translates to “such as”.<sup>6</sup>

***Convention on the Prevention and Punishment of the Crime of Genocide***

***Article II***

*In the present Convention, 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**:*

- ( a ) Killing members of the group;*
- ( b ) Causing serious bodily or mental harm to members of the group;*
- ( c ) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;*
- ( d ) Imposing measures intended to prevent births within the group;*
- ( e ) Forcibly transferring children of the group to another group.*

**មាត្រា ៤.**

អង្គជំនុំជម្រះវិសាមញ្ញមានអំណាចវិនិច្ឆ័យទោសពនសង្ស័យទាំងឡាយដែលបានប្រព្រឹត្ត, ឧក្រិដ្ឋាកម្ម ប្រល័យពូជ សាសន៍ ដូចមានចែងក្នុងអនុសញ្ញាឆ្នាំ ១៩៤៨ ស្តីពីការបង្ការនិងឆ្លងទោសចំពោះឧក្រិដ្ឋាកម្ម ប្រល័យពូជសាសន៍ ហើយ ដែលបានប្រព្រឹត្ត ក្នុងអំឡុងថ្ងៃ ១៧ ខែ មេសា ឆ្នាំ ១៩៧៥ ដល់ថ្ងៃ ៦ ខែ មករា ឆ្នាំ ១៩៧៩។

អំពើប្រល័យពូជសាសន៍ដែលក្រុមអាជ្ញាធរកាល គឺជាអំពើមួយក្នុងចំណោមអំពើដូចខាងក្រោមហើយ ដែលបានប្រព្រឹត្ត ក្នុងគោលបំណងបំផ្លិចបំផ្លាញទាំងស្រុង ឬមួយផ្នែកនៃក្រុមជាតិ ជាតិពន្ធុ ពូជសាសន៍ ឬសាសនាណា **មួយដូចជា**:

- ការធ្វើមនុស្សឃាតទៅលើសមាជិកនៃក្រុម
- ការធ្វើឱ្យរបួសយ៉ាងធ្ងន់ធ្ងរដល់រូបរាងកាយ ឬ សេចក្តីស្នេហាសមាជិកនៃក្រុម
- ចងក្រងបញ្ចូលគ្នាដោយលេខាធិការដ្ឋានក្រុមការងាររាជរដ្ឋាភិបាល ៣
- ការធ្វើដោយចេតនាឱ្យក្រុមនេះ ទទួលបានស្ថានភាពរស់នៅមួយដែលបានរៀបចំឡើង សម្រាប់បំផ្លិចបំផ្លាញរាងកាយទាំងស្រុង ឬមួយផ្នែក
- ការដាក់នូវវិធានការនានា ដែលមានបំណងរារាំងមិនឱ្យមានការផ្តល់កំណើតទារក

<sup>6</sup> Unofficial translation from the Khmer to the English by Frank Smith, Khmer Lecturer at University of California- Berkeley. Translated on Feb. 14, 2009. Email contact: fjsmith@berkeley.edu



- ការបញ្ជូនកុមារដោយបង្ខំ ពីក្រុមមួយទៅឱ្យក្រុមមួយផ្សេងទៀត ។ □

**D. MATERIAL VARIATIONS BETWEEN ARTICLE III OF THE CONVENTION ON GENOCIDE AND ARTICLE 4 OF THE OF THE LAW ON THE ECCC.**

Neither the Khmer, English nor French version of the Law on the ECCC contains language identical to Article III of the Convention on Genocide, which deals with specific modes of participation. However, the three versions of the law on the ECCC are almost consistent in this instance. While the Convention Genocide lists five possible modes of participation, the Law on the ECCC lists only three. The Law on the ECCC oddly does not list the simple term “genocide” as a separate punishable offense, nor does it include an element for “direct and public incitement to commit genocide”. Furthermore, the Law on the ECCC does not contain “complicity” as a mode of participation, but does provide for punishment for “participation in acts of genocide“. “Conspiracy” and “attempts to commit genocide”, on the other hand, are punishable in both instruments. In the English version of Article 4 of the Law on the ECCC the term “attempts” and the term “acts” are used in the plural. The equivalent terms are singular in the French and the Khmer as well as in the Convention on Genocide.

***Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006).***

***Article 4***

*The Extraordinary Chambers shall ...*

*The acts of genocide...*

***The following acts shall be punishable under this Article:***

*attempts to commit acts of genocide;*

*conspiracy to commit acts of genocide;*

***participation in acts of genocide.***

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***Convention on the Prevention and Punishment of the Crime of Genocide***

***Article III***

*The following acts shall be punishable:*

- ( a ) Genocide;***
- ( b ) Conspiracy to commit genocide;***
- ( c ) Direct and public incitement to commit genocide;***
- ( d ) Attempt to commit genocide;***
- ( e ) Complicity in genocide.***

**IV. TRANSLATION ERRORS AND INTENTIONAL VARIANCES**

The above analyses on the three multilingual versions of the Law on the Establishment of the Extraordinary Chambers suggest that the law contains material discrepancies in three key areas. The first area is the underlying list of criminal acts. It is generally believed that the list under the Genocide Convention is exhaustive.<sup>7</sup> This belief is supported by the inclusion of the phrase “any of the *following* acts.”<sup>8</sup> Under the French and Khmer versions of the Law on the ECCC, this phrase is present, also implying that the underlying list of criminal acts is exhaustive.

The English version of the Law on the ECCC uses only the phrase “any acts” suggesting that the underlying list of crimes is illustrative. This interpretation is further supported by the fact that the English version ends with the phrase “such as”. Read together, “any acts...such as” implies an illustrative list. Though these discrepancies exist, all three versions of Article 4 begin with the phrase “The Extraordinary Chamber shall have the power to bring to trial all Suspects who committed the crimes of genocide *as defined in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948....*” As we have seen above, the Convention on Genocide is in line with that of the French and Khmer versions, in which the underlying list of

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<sup>7</sup> Steven Ratner & Jason Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy 30 (Oxford University Press, 2001).

<sup>8</sup> Convention on the Prevention and Punishment of the Crime of Genocide [hereinafter Genocide Convention] art II, Dec. 9, 1948.

crimes is exhaustive. Given that the Convention is expressly referenced in Article 4 in this manner, it is likely that the discrepancy regarding the list of underlying acts in the English version of the Law on the ECCC is an unintentional error; possibly a translation error.

The second key area is that of the “as such” element. In this case, it is the French version of the Law on the ECCC that stands out as being the only version that uses the phrase “as such” while the English and Khmer versions use the phrase “such as”. This discrepancy changes the meaning of genocide dramatically by removing the “as such” element. In the Convention on Genocide and elsewhere, the phrase “as such” means that the physical victim of the crime of genocide must have been selected because he or she belonged to the targeted group. In other words, the intent of the perpetrator of genocide must be to destroy the group ‘as a separate and distinct entity.’<sup>9</sup> If “as such” is no longer an element of the crime of genocide, victims of genocide no longer need to be targeted based upon their membership of a certain group.<sup>10</sup> The fact that the Convention on Genocide uses “as such” and that this phrase refers to a central element of the crime makes it likely that use of “such as” too is an unintentional translation error.

This conclusion is further supported by the fact that the English version of the 2001 Law on the ECCC does use the phrase “as such”. It is true that the 2001 law was amended; however, Article 4 was not an amended article. Thus, the “as such” was likely transposed in the current version of the law unintentionally. Given the uncommon usage of the phrase “as such” and the common usage of the phrase “such as,” especially in conjunction with a colon and a list, this type of error is not surprising.

The third key area is in reference to the modes of liability in the latter half of Article 4 of

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<sup>9</sup> Guenael Mettraux, *International Crimes and the Ad Hoc Tribunals* 231 (Oxford University Press, 2005), *Prosecutor v. Stakic*, Case No. IT-97-24-T, Judgment, ¶ 521, (July 31, 2003), *Prosecutor v. Stakic*, Case No. IT-97-24-T, Decision on Rule 98bis

the Law on the ECCC and in Article III of the Convention on Genocide. There is only one discrepancy among the versions of the Law on the ECCC: the English version uses the plural form of “acts” and “attempts.” This is not the case in the French and Khmer versions. There is a major difference between the modes of participation in the Law on the ECCC and Article III of the Convention on Genocide. Above, the conclusion that the discrepancy in question was an unintentional error was supported by two elements: a) the pertinent language diverges from the Convention on Genocide *and* b) the language varies among language versions. In this instance, however, the clear omissions of certain modes of participation are consistent throughout all versions of the Law on the ECCC, thus suggesting that this was an intentional variance from the text of the Convention on Genocide. Nevertheless, it is possible that the use of the phrase “participation in genocide” was meant to encompass the aforementioned omitted crimes.

## **V. MULTI-LINGUAL INTERPRETATIONS UNDER INTERNATIONAL LAW**

Whether these discrepancies are translation errors may not matter when it comes interpreting the meaning of the statute. Article 45 of the Law on the ECCC and Article 26 of the 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 (Agreement Between UN and Cambodia), state that the official working languages of the Court are to be Khmer, French and English.<sup>11</sup> The Law on the ECCC does not explicitly mention an official language; however, the official language of Cambodia is Khmer and it has been stated by the main architect of the Law on the ECCC, Sok An, in reference to the 2001

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Motion for Judgment of Acquittal, ¶30 (October 31, 1992).

<sup>10</sup> Mettraux, *supra* note 9 at 231.

<sup>11</sup> Law of the ECCC, *supra* note 4 and Sok An and Hans Correll, 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, Article 26, 6 June 2003. Available at:

version, that the only official text of the Law on the ECCC is the Khmer language text.<sup>12</sup> This conclusion is further supported by the fact that the English and French versions of the ECCC Statute, available on the Court's website, state in footnotes, "Unofficial translation by the Council of Jurists and the Secretariat of the Task Force."<sup>13</sup> Furthermore, Article 26 of the Agreement states that Khmer is the official language of the Extraordinary Chambers and the Pre-Trial Chamber. The Khmer version is clear in providing for an exhaustive list. Thus, the issue of an exhaustive or illustrative underlying list of crimes can be resolved if the official Khmer version can be properly translated into English.

Neither the Law on the ECCC nor the Agreement discusses what to do if there are inconsistencies between languages. However, the ECCC is an international hybrid court in which both Cambodian law and international law will be used. Because of the authors' unfamiliarity with Cambodian domestic law, the following section of this memorandum will only discuss the possibility of interpreting language variances under international law. For sake of analysis, the authors will assume that the law in the French and English are as authentic as law in the Khmer.

The process of interpreting the Laws of the ECCC in light of the discrepancies between it and the Genocide Convention requires the use of several legal doctrines and instruments. In this section, we will attempt to reconcile the variances by applying the rules of construction from

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<http://www.cambodia.gov.kh/krt/pdfs/Agreement%20between%20UN%20and%20RGC.pdf> (last visited on April 24, 2009).

<sup>12</sup> Letter to His Excellency Hans Corell, Under Secretary-General for Legal Affairs of the United Nations from Senior Minister, Sok An, on 23 November 2001 regarding the 2001 version of the Law on the ECCC and his refusal to duplicate the text of the Articles of Cooperation, *"May I repeat my oft-stated reminder to you that under the Constitution of Cambodia the only official language is Khmer, and hence the only official text of the Law is the Khmer language text promulgated."* Available at: <http://www.cambodia.gov.kh/krt/pdfs/Sok%20An%2001-11-23%20to%20HC%20on%20Aoc.pdf>. (Last visited on March 29, 2009).

<sup>13</sup> The English version is located at [http://www.eccc.gov.kh/english/cabinet/law/4/KR\\_Law\\_as\\_amended\\_27\\_Oct\\_2004\\_Eng.pdf](http://www.eccc.gov.kh/english/cabinet/law/4/KR_Law_as_amended_27_Oct_2004_Eng.pdf) (Last visited March 29, 2009) and the French version is located at [http://www.eccc.gov.kh/french/cabinet/law/1/ECCC\\_law\\_2004\\_French.pdf](http://www.eccc.gov.kh/french/cabinet/law/1/ECCC_law_2004_French.pdf) (last visited March 29, 2009). The French version only cites the Council of Jurists and not the Secretariat of the Task Force - "Révision de la traduction effectuée par le Conseil des Juristes du G.R.C."

relevant international treaties, doctrines, and jurisprudence on multi-lingual treaty interpretation.

#### **A. VIENNA CONVENTION ON TREATY INTERPRETATION**

The Law on the ECCC does not contain any provisions regarding interpretation. However, the Agreement Between the UN and Cambodia, which preceded and informed the Law on the ECCC, provides in Article 2 that the agreement is subject to the Vienna Convention on the Law of Treaties. The Vienna Convention is widely considered a codification of customary international law on the subject of treaty interpretation.<sup>14</sup> Article 31 of the Convention states generally that treaties should be interpreted in “good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context in light of its object and purpose.”<sup>15</sup> Article 33 of the Convention applies to differences in multilingual versions of the same document.

##### ***Article 33(4)***

*4. Except where a particular text prevails in accordance with paragraph 1<sup>16</sup>, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.*

Article 31(1) and Article 33(4) require that the interpretation be in line with the object and purpose of the document. In this instance, the purpose of Article 4 of the Law on the ECCC is arguably to codify genocide, as it is defined in the Convention on Genocide, in order to facilitate the Khmer Rouge trials. As stated above, Article 4 begins with the following, “the Extraordinary Chambers shall have the power to bring to trial all Suspects who committed the crimes of genocide as defined in the Convention on the Prevention and Punishment of the Crime

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<sup>14</sup> Dinah Shelton, *Reconcilable Differences? The Interpretation of Multilingual Treaties*, 20 Hastings International and Comparative Law Review 611, 632 (1997). “The Vienna Convention on the Law of Treaties attempts, to set forth common principles of treaty interpretation.”

<sup>15</sup> Vienna Convention on the Law of Treaties art 31, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 69.

<sup>16</sup> *Id.* at art 33(1), “When a treaty has been authenticated in two or more languages, the text is equally authoritative in each

of Genocide of 1948...”<sup>17</sup> Moreover, Article 1 of the ECCC Law states that the law’s purpose is to “bring to trial senior leaders...for...serious violations of...international conventions recognized by Cambodia.”<sup>18</sup>

Under this analysis, it would be appropriate to interpret the discrepancy dealing with the underlying crimes in Article 4 of the Law of the ECCC in favor of that interpretation which is closest to the definition in the Convention on Genocide. Viewing the Law under the rules of interpretation set forth in Articles 31 and 33(4) it is clear that the underlying crimes should be read as exhaustive; that the English version of the Law of the ECCC should be read as “any of the following acts” rather than “any acts” and that the phrase “such as” in the English and Khmer versions should be read as “as such” so as not to stray from the general object and purpose of the Law on the ECCC.

## **B. THE ILC, PCIJ AND ICJ METHODS OF INTERPRETATION**

The International Law Commission (ILC) has noted that “when the meaning of terms is ambiguous or obscure in one language but it is clear and convincing as to the intentions of the parties in another, the plurilingual character of the treaty facilitates interpretation of the text the meaning of which is doubtful.”<sup>19</sup> This position supports the analysis done above in which the different language versions are compared to each other so as to come to a consensus as to the real intent of the drafters.

The Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ) have suggested potentially conflicting rules of multi-lingual treaty interpretation. The PCIJ

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language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.”

<sup>17</sup> Law on the ECCC, *supra* note 4 at art 4.

<sup>18</sup> Law on the ECCC, *supra* note 4 at art 1.

<sup>19</sup> *Draft Articles on the Law of Treaties with Commentaries, Report of the ILC to the General Assembly on the Work of its 8<sup>th</sup> Session* [[hereinafter ILC Commentary](#)], 2 Y.B. Int’l L. Comm’n 224, art. 29, para. 6, U.N. Doc A/6309/Rev.1 (1966).

has stated that “where two versions possessing equal authority exist one of which appears to have a wider bearing than the other, it is bound to adopt the more limited interpretation which can be made to harmonize with both versions and which as far as it goes, is doubtless in accordance with the common intention of the Parties.”<sup>20</sup> This rule of interpretation in favor of the most restrictive meaning would support a finding in favor of the exhaustive list of underlying crimes, however no other international tribunal to date has accepted this method.<sup>21</sup>

The ICJ has stated that it is appropriate “to give effect to [words of a treaty] in their natural and ordinary meaning in the context in which they occur. If relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter.”<sup>22</sup> This method, by which the plain meaning of the text should take precedence, does not seem appropriate in this instance, where the three language versions are in conflict and where the natural meaning of the phrase “such as” leads to a drastically different meaning than the phrase “as such.” However, the ICJ, like the Vienna Convention, also suggests that the context, object and purpose are important when the ordinary meaning is different in two or more equally authoritative texts.”<sup>23</sup>

## **VI. CONSEQUENCES OF ARTICLE 4 STATUTE AS WRITTEN**

Applying the English version of Article 4 on genocide of the Law on the ECCC in its plain meaning would have significant consequences for the prosecution of genocide in Cambodia. There exists limited jurisprudence on the crime of genocide under international law, though there have been increasing attempts to charge and convict individuals with genocide or

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<sup>20</sup> Mavrommatis Concessions, P.C.I.J. (ser. A) No. 2 at 19 (1924).

<sup>21</sup> Jean Hardy, *The Interpretation of Plurlingual Treaties by International Courts and Tribunals*, 27 Brit. Y. Int'l L. 72, 117 (1961).

<sup>22</sup> Admission of a State to Membership in the United Nations, 1950 I.C.J. 8 (Mar. 3, 1950).

<sup>23</sup> ILC Commentary, *supra* note 19, art. 29, para. 8.



genocide related crimes in both Rwanda and the Former Yugoslavia. The definition of genocide in the Convention on Genocide in 1948 was not altered by the statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), or the International Criminal Court (ICC)'s Rome Statute.

The variations from the traditional codification of genocide found in Article 4 of the Law on the ECCC require an analysis into the possible consequences of the material changes. The following section of this memorandum will discuss these potential implications, including under the assumption that the English version—in which the list of underlying crimes is illustrative and the “as such” element is transposed to “such as”—is authoritative as written. This section will also address the consequences of the variance and omissions in the substantive criminal modes of participation for genocide under Article 4 of the Law on the ECCC, including the omission of the terms “genocide” (standing alone), “direct and public incitement of genocide” and “complicity.” Furthermore, the introduction of the concept “participation in genocide” will be discussed.

#### **A. UNDERLYING CRIMES OF GENOCIDE: AN ILLUSTRATIVE LIST**

There is a general consensus that the underlying list of crimes under the Convention on Genocide and the Rwandan and Yugoslavian statutes is exhaustive.<sup>24</sup> This interpretation has put limits on those crimes that can be recognized as discrete genocidal offenses. Intending this list to be illustrative would expand the possibilities of genocidal crimes. The result of this change may blur the line between genocide and crimes against humanity, whose list of acts is both greater and illustrative. An illustrative list would suggest that there are more than five crimes that could rise to the level of a genocidal act. While it is difficult to identify all acts that could arguably qualify as genocide under more flexible standards, one can start by studying the boundaries

established by international tribunals in this respect.

One controversial and progressive move was made by judges at the ICTR, where rape was found to constitute an actus reus of genocide despite the fact that rape is not one of the underlying crimes under the ICTR statute. The court in the Akayesu Case held that rape and sexual violence

constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group targeted as such. Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims...<sup>25</sup>

In order to prosecute rape as genocide it was necessary to place rape in the context of physical or mental harm, an actus reus that is expressly listed.<sup>26</sup> Given the possibility of an illustrative list, it would be feasible to include rape as an explicit, stand-alone crime--making it unnecessary to satisfy the elements of the other listed acts.

While it may be argued that an illustrative list is not necessary to interpret rape as a genocidal act, since it clearly causes “serious bodily or mental harm,” it may be necessary for the inclusion of other crimes. For example, while the crime of forcible transferring of children is included in the list of underlying acts, the forcible transfer of adults is not. Though it is reasonable to imagine that one could destroy in whole or in part a protected group via forcible transfer of adults, it would be difficult for a judge to interpret that into any of the enumerated acts of the exhaustive list. The ICTY has stated that, under its definition of genocide, forcible transfer of adults does not constitute a genocidal act; the Court, nevertheless has acknowledged

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<sup>24</sup> Mettraux, *supra* note 9 at 243-244.

<sup>25</sup> *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 731 (Sept. 2, 1998).

<sup>26</sup> *Id.* at ¶ 731.

that it provides evidence from which genocidal intent can be inferred.<sup>27</sup> Had the ICTY genocide statute been illustrative, the court would have been able to include the forcible transfer of adults as both evidence of intent and as a stand-alone genocidal act.

In the context of the Cambodian atrocities, an example of a possible addition to the list of underlying crimes may be that of forced labor. It could be argued that the Khmer Rouge committed genocide via forced labor or enslavement. It has been well documented that over a million Cambodian citizens perished from forced labor in addition to extrajudicial killings and torture. While the crime of enslavement is considered a crime against humanity, under similar reasoning to that of including rape as genocide, it may be arguable that enslavement also belongs under genocide.

These are just two examples of possibilities that an illustrative list would likely allow. Since not all acts may be justified as constituting a possible *actus reus* of genocide, a Court would expectedly use a method of reasoning similar to that employed in the determination of additional crimes against humanity not expressly enumerated. In any case, the development of a genocide statute with an illustrative list of underlying crimes will only increase the opportunity and decrease some difficulties of charging individuals with this crime.

On the other hand, the possibility of an illustrative list may be academic, if one considers that even the UN prosecutor, presumably working in English, will have to collaborate with his Cambodian counterpart from an early stage. At that point, it seems that the Khmer version would need to be followed, and indictments would need to adhere to that version's exhaustive list. Nevertheless, as discussed below, the Khmer version of the law offers complications of its own, since the Khmer version appears to read, in its Article 4, "such as" as opposed to "as such."

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<sup>27</sup> *Krstic v. Prosecutor*, Case No. IT-98-33-A, Appeal Judgment, ¶ 33 (August 2, 2001).

## **B. OMISSION OF THE ACTUS REUS ELEMENT**

Few things are more important in successfully prosecuting a criminal case than providing that all elements of the crime are met. Thus to remove one element both changes the meaning of the crime and makes it easier to find that one has committed the crime. By replacing the phrase “as such” with the phrase “such as,” Article 4 of the Law on the ECCC in Khmer and in English expressly requires only specific intent to destroy, in whole or in part, a particular national, ethnical, racial or religious group. In contrast, the Convention on Genocide and the genocide statutes of the ICTY and ICTR require both specific intent to destroy, in whole or in part, a national, ethnic, racial or religious group, *as such*—in other words, to destroy one or more members of the particular groups because they are member(s) of that group and for the purpose of destroying that group. The International Law Commission has stated that “the intention must be to destroy the group ‘as such,’ meaning as a separate and distinct entity, and not merely some individuals because of their membership in a particular group.”<sup>28</sup>

Under a genocide statute in which there is no “as such” element, an individual could be convicted of genocide for committing any of the enumerated acts under Article 4 of the Law on the ECCC, if they had intent to destroy, in whole or in part, one of the protected groups for any reason at all. The removal of this element drastically changes the meaning of specific intent for genocide and greatly expands the actions that would fall under this version of genocide. Under this interpretation, one could be convicted of genocide for murdering a group of ethnic Vietnamese villagers, not because of any particular opinion on their ethnicity but for any separate reason, such as their location on a plot of disputed land. Though an atrocity, this act

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<sup>28</sup> Beth Van Schaack & Ron Slye, *International Criminal Law and Its Enforcement: Cases and Materials* 428 (Foundation Press 2007).

would generally not be considered genocide, as their ethnicity was only incidental to the intention of the perpetrator.

A genocide statute without the “as such” element would blur the line between traditional genocide, as defined in the Convention on Genocide, and other crimes such as persecution, a crime against humanity. The *Brdjanin* Case of the ICTY distinguishes genocide from persecution, holding, “the intent to destroy makes genocide an exceptionally grave crime and distinguishes it from other serious crimes, in particular persecution, where the perpetrator selects his victims because of their membership in a specific community but does not necessarily seek to destroy the community as such.”<sup>29</sup> Under the current English and Khmer versions of the Law on the ECCC, what would generally amount to persecution or a crime against humanity at the ICTY could arguably constitute genocide at the ECCC.

In the Khmer Rouge context, evidence of the crime of genocide has included the Khmer Rouge’s treatment of the Cham, ethnic Vietnamese, Chinese, and Thai, as well as religious groups such as Buddhist monks.<sup>30</sup> The Khmer Rouge’s treatment of the Cambodian majority has had less support as a crime of genocide due to the fact that the Khmer Rouge were part of the same ethnic group, making the “as such” element of genocide more difficult to prove.<sup>31</sup> Under the Khmer language version of the Law on the ECCC, however, the crime of genocide might thus require only that the Khmer Rouge intended to destroy in whole or in part the Cambodian people—a far more feasible charge for the ECCC prosecutors.

### **C. SUBSTANTIVE CRIMES**

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<sup>29</sup> *Prosecutor v. Brdjanin*, Case No. IT-99-36-T, Judgment ¶ 699 (Jan. 9, 2004).

<sup>30</sup> Ratner and Abrams, *supra* note 7 at 285.

<sup>31</sup> See Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135, ¶ 63-65 (February 18, 1999). See also Ratner and Abrams, *supra* note 7 at 287. “The argument that the Khmer Rouge committed genocide with respect to the Khmer national group appears to be relatively weak in light of the facts. Most of the literature

## I. OMISSION OF ACT OF GENOCIDE

The act of genocide, as a crime, has been committed when the specific criminal conduct, its *actus reus*, taken with the specific genocidal intent or *mens rea* has been committed against a specifically-targeted person, based on the national, ethnical, racial or religious group to which he or she belongs.<sup>32</sup> The act of genocide is one of various forms of criminal participation in the crime of genocide.

The “act of genocide” as such is not listed under Article 4 of the ECCC as a punishable crime.<sup>33</sup> There are only three acts listed as punishable under Article 4: attempts to commit acts of genocide, conspiracy to commit acts of genocide, and participation in acts of genocide.<sup>34</sup> However, Article 29 of the Law on the ECCC outlines individual responsibility for crimes referred to in Articles 3, 4, 5, 6, 7 and 8 of the law. Article 29 provides that any suspect who *committed* the crimes referred to in Articles 3, 4, 5, 6, 7 or 8 shall be individually responsible for the crime.<sup>35</sup> Article 29’s language, then, seems to compensate for the absence of the phrase “act of genocide;” as a result, Article 4’s omission seems to have little consequence.

## II. OMISSION OF DIRECT AND PUBLIC INCITEMENT

The Law on the ECCC has omitted the crime of “direct and public incitement of genocide” in the genocide statute. Direct and public incitement to commit genocide requires “directly provoking the perpetrator(s) to commit genocide, whether through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public

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suggests that the Khmer Rouge did not take their non-minority victims as members of the Khmer nation ‘as such’. “

<sup>32</sup> Mettraux, *supra* note 9 at 246-247.

<sup>33</sup> Law of the ECCC, *supra* note 4 art 4.

<sup>34</sup> Law of the ECCC, *supra* note 4 art 4.

<sup>35</sup> Law of the ECCC, *supra* note 4 at art 29. “Any Suspect who planned, instigated, ordered, aided and abetted, or committed the

gatherings, or through the public display of placards or posters, or through any other means of audiovisual communication.”<sup>36</sup> To prove public incitement to genocide, the prosecution must establish that the perpetrator intended directly to prompt or provoke another to commit genocide by creating in that person a particular state of mind necessary to commit genocide.<sup>37</sup>

Generally, Tribunals have held that the incitement should assume a direct form and specifically provoke another to engage in a criminal act. A more vague or indirect suggestion may still constitute incitement, but that is determined on a case-by-case basis.<sup>38</sup> Importantly, the Chamber in Rwanda was of the opinion that the direct element of incitement should be looked at in light of its cultural and linguistic content.<sup>39</sup> Considering the culture in question and the specific circumstances of the case, acts of incitement can be viewed as direct or not, but the primary focus should be on whether the person for whom the message was intended immediately grasped the implications of the acts (direct or indirect).

The omission of the crime of “direct and public incitement” certainly limits the opportunity to prosecute individuals for genocide-related crimes. As in Rwanda, there may have been instances while the Khmer Rouge regime was in power in which individuals directly and publicly incited others to commit atrocities. It is possible that propaganda against Vietnamese minorities may have compelled individuals to kill members of this ethnic group. Without the explicit mention of a crime against direct and public incitement against genocide in the Law on the ECCC, prosecutors may find it difficult or even impossible to charge someone whose responsibility for genocide is only through incitement.

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crimes referred to in article 3 new, 4, 5, 6, 7 and 8 of this law shall be individually responsible for the crime. “

<sup>36</sup> *Akayesu*, *supra* note 26 at 559.

<sup>37</sup> *Id.* at 560.

<sup>38</sup> *Id.* at 557 and 558.

<sup>39</sup> *Id.* at 557.

### III. OMISSION OF COMPLICITY OF GENOCIDE

The Law on the ECCC has also omitted the crime of “complicity of genocide” within its genocide statute. The exact meaning of “complicity of genocide” is unclear and conflicting definitions have come out of the ICTY and the ICTR. There is some consensus that, generally speaking, to be liable for complicity in genocide the prosecution must establish that the accomplice provided practical assistance, encouragement, or moral support which had a substantial effect on the perpetration of the crime.<sup>40</sup> Encouragement or practical assistance can be given, for example, by transporting executioners to the killing site, identifying the members of the enemy group and pointing them out or providing forces and ammunition for the actual killing.<sup>41</sup>

The ad hoc tribunals have not clearly differentiated the meaning and implications of the substantive crime of complicity in genocide and the mode of liability of “aiding and abetting” genocide. Some cases have even suggested that the elements of complicity in genocide are identical to the requirements for aiding and abetting under Article 7 of the ICTY and Article 6 of the ICTR.<sup>42</sup> In any event, the ad hoc tribunals have held that complicity in genocide can only exist when there is a punishable principle act in which an accomplice was complicit.<sup>43</sup> In other words, liability may only attach for complicity in genocide when it has been proven that the crime of genocide has been committed.<sup>44</sup> However, the main perpetrator of genocide does not have to be identified and the ICTY Trial Chamber has even said that it is not necessary to

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<sup>40</sup> *Prosecutor v. Furundzija*, Case No. IT-95-17/1-A, Judgment, ¶ 249 (July 21, 2000). *Prosecutor v. Stakic*, Case No. IT-97-24-T, Decision on Rule 98bis Motion for Judgment of Acquittal, ¶ 6 (Oct. 31, 1992). *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Judgment and Sentence, ¶ 917 (Jan. 27, 2000). *Prosecutor v. Rutaganda*, Case No. ICTR-96-3, Judgment and Sentence, ¶ 391 (Dec. 6, 1999).

<sup>41</sup> *Prosecutor v. Ntakirutimana, Elizaphan and Gerard*, Case No. ICTR-96-10 and ICTR-96-17-T, Judgment and Sentence, ¶ 789, 829 and 791 (Feb. 21, 2003) and *Rutaganda* Trial Judgment, *supra* note 41 at 86.

<sup>42</sup> Mettraux, *supra* note 9 at 257.

<sup>43</sup> Mettraux, *supra* note 9 at 259 and *Akayesu* Trial Judgment, *supra* note 25 at 529.



identify the specific individual who was the principal in the offense in order to convict an accused of complicity in genocide.<sup>45</sup> The Rwanda Tribunal has held that complicity can only exist when there is a punishable, principle act, in the commission of which the accomplice has associated himself; and that in order for an accused to be convicted of complicity in genocide, it must be proven beyond a reasonable doubt that the crime of genocide has been committed.<sup>46</sup>

The most obvious consequence of the omission of the crime of complicity in the Law of the ECCC is that it seemingly will not be possible to charge or convict someone for providing practical assistance, encouragement or moral support, which has a substantial effect on the perpetration of the crime.<sup>47</sup> For example, the head of Tuol Sleng, Kaing Guek Eav a.k.a. Duch is currently on trial. He or any other Khmer Rouge soldiers who were complicit could be liable for having transferred prisoners from S-21 to any one of the killing fields, such as Chaeng Ek. As stated above, the ICTR has found that transferring prisoners to killing sites might be considered complicity to genocide. Yet under Article 4 of the Law on the ECCC, Duch could not be charged with the crime of complicity in genocide. Liability under “participation in genocide” may be possible and will be discussed below—but the specific crime of complicity in genocide as defined above would not be under the Court’s jurisdiction.

#### **D. PARTICIPATION IN ACTS OF GENOCIDE**

“Participation in genocide” is one of the three enumerated acts that are punishable as crimes under the Law of the ECCC.<sup>48</sup> “Participation in genocide,” as a substantive crime is not

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<sup>44</sup> Mettraux, *supra* note 9 at 259.

<sup>45</sup> Mettraux, *supra* note 9 at 260 and *Akayesu* Trial Judgment, *supra* note 25 at 530.

<sup>46</sup> *Akayesu* Trial Judgment, *supra* note 25 at 529 and 530.

<sup>47</sup> Although liability for aiding and abetting could attach to an act punishable under Article 4, particularly since ad hoc tribunals have not clearly differentiated the meaning of complicity and aiding and abetting and have suggested they may even have the same elements. (See footnote 42).

<sup>48</sup> Law of the ECCC, *supra* note 4 at art 4.

defined in the ECCC Statute and is not a substantive crime for which someone could be held liable in any other ad hoc tribunal statute. It is, therefore, unclear what the specific elements of the crime will be. It has been suggested that the inclusion of participation in genocide in Article 4 of the Law of the ECCC is a translational error from the word ‘complicity’.<sup>49</sup> Without any relevant legislative history or jurisprudence on the definition of this concept, it is necessary for the authors to engage in some educated inferences on the meaning of the crime.

The term “participation” in other contexts has a broad definition. The United States has codified immigration regulations that state that ‘participation in genocide’ applies to one who has “ordered, incited, assisted or otherwise participated in conduct that would be defined as genocide.”<sup>50</sup> Black’s Law Dictionary defines ‘participation’ as the act of taking part in something, such as a partnership, a crime or a trial.<sup>51</sup> The Khmer version of the Law on the ECCC of the crime, “participation in genocide” too has been criticized as having no legal meaning.<sup>52</sup> References to the word ‘participation’ in other ad hoc tribunals is limited. The ICTY has stated that “[C]omplicity is a form of participation governed by the general principles of criminal law”.<sup>53</sup>

The consequences of the inclusion of the substantive crime of participation in genocide will depend upon how the Chambers of the ECCC interpret its meaning and whether they find it to include the substantive crimes left out of Article 4 of the ECCC Statute. If the Chambers do

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<sup>49</sup> Bora Touch, Cambodian- Australian Attorney states in his article on the Law on the ECCC, Jurisdictional and Definitional Issues, that “the word “complicity” is translated in Khmer as “choul ruom” and the English version of the draft as “participation” - both words are legally unintelligible. Available at: <http://www.khmerinstitute.org/articles/art03b.html> (Last visited April 6, 2009).

<sup>50</sup> 8 U.S.C. 1182 (a)(3)(E)(ii). “Participation in genocide Any alien who ordered, incited, assisted, or otherwise participated in conduct outside the United States that would, if committed in the United States or by a United States national, be genocide, as defined in section 1091 (a) of title 18, is inadmissible.”

<sup>51</sup> *Black’s Law Dictionary* 522 (3<sup>rd</sup> pocket ed. 2006).

<sup>52</sup> See Note 49.

<sup>53</sup> *Prosecutor v. Blagojevic and Jokic*, Case No. IT-02-60-T, Judgment on Motions for Acquittal Pursuant to Rule 98bis, ¶ 776

not interpret participation in genocide to include the three modes of liability left out of Article 4, then liability for those crimes may not be possible.

Given the broad nature of the meaning of participation, it is possible that “participation in genocide” can be interpreted to include acts of genocide, direct and public incitement to genocide and complicity in genocide. Guenael Mettraux, in his book International Crimes and the *Ad Hoc* Tribunals titles a section in the chapter discussing genocide and forms of criminal involvement, “The various listed forms of criminal *participation*”.<sup>54</sup> The forms of criminal participation discussed in that section are genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide.<sup>55</sup> The implication is that all of these substantive crimes are forms of participation in genocide. As stated above, the U.S. immigration law on genocide also includes the term incitement in the definition of “participation in genocide.”

Arguably the ECCC Trial Chamber could interpret the statutory definition of “participation in genocide” to include the three substantive crimes omitted from Article 4. It is also possible that the Trial Chamber could interpret participation to include direct and public incitement and complicity in genocide, leaving the act of genocide to be covered by Article 29 of the Law of the ECCC. It may be necessary, however, for a prosecutor to argue for an all-encompassing definition of participation in genocide, since Article 29 of the Law of the ECCC does not outline substantive crimes that can be charged, but instead modes of liability.

In response, a defense attorney could argue for a narrow interpretation of participation in genocide that only encompasses very specific acts that involve direct participation in taking a

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(April 4, 2004).

<sup>54</sup> Mettraux, *supra* note 9 at 245 [emphasis added].

victim's life in the process of genocide. A potential situation in the Cambodian context may be relevant to this analysis. For example, loading prisoners from Toul Sleng onto a vehicle to be taken to the killing fields is not a form of participation in genocide under a narrow interpretation, as there was no direct participation in the actual killing. On the other hand, a broad interpretation may suggest that any positive act that leads to genocide is enough to be guilty of "participation in genocide." Although a suspect did not actively participate in the killing of an individual, their acts of placing prisoners in vehicles might make them guilty of the broad crime of participation in genocide.

Why, then, if participation in genocide is such a broad concept, are not conspiracy to commit genocide and attempts to commit genocide also included in that category? An attempt to commit a crime is traditionally defined as an act carried out with intent to commit a certain crime, which is more than merely preparing to commit the crime, but which has not been fully successful.<sup>56</sup> Thus, attempts to commit genocide refer to carrying out an act that is not successful but that has the requisite genocidal intent. Including attempts to commit genocide as a substantive crime allows flexibility for charging a crime, as long as the requisite intent to do harm is present.

Conspiracy in criminal law means an agreement between two or more persons to commit an unlawful act.<sup>57</sup> The difference between a mere agreement to commit an unlawful act and the actual participation in an unlawful act, such as genocide, is significant. This might be why conspiracy and participation remain two separate criminal acts that are punishable under the Law of the ECCC. This theory lends further credence to a broad definition of participation in

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<sup>55</sup> *Id.* at 245.

<sup>56</sup> *Id.* at 257.

genocide as any positive act that engages one in the act of genocide.

## VII. CONCLUSION

The Cambodian genocide statute as written in the Law on the ECCC was intended to provide a legal means to bring to justice those who were responsible for genocide “as defined in the Convention on Genocide.” However, for a variety of reasons related to language, translation, poor drafting or intentional omissions, genocide as defined under the Law on the ECCC is significantly different from that of the Convention on Genocide. These differences will lead to some significant consequences for those seeking to prosecute individuals for genocide at the Extraordinary Chambers.

Research into the relevant legal documents and legislative history has led to the conclusion that of the three language versions of the Law on the ECCC, only the Khmer law is the official language and thus its provisions are authoritative and superior to any provisions in either the English or the French. This conclusion is supported by two significant elements: a) Khmer is the only official language of the Kingdom of Cambodia where the Law on the ECCC is a domestic law<sup>58</sup>; and b) the three languages are listed in the Law on the ECCC as “working languages,”<sup>59</sup> and the main drafter of the Law on the ECCC has expressed his opinion that only the Khmer Language version was to be official.<sup>60</sup>

Given the conclusion that the Khmer version of the Law on the ECCC is authoritative, it is important to address its material discrepancies. The Law on the ECCC in the Khmer generally resembles the Convention on Genocide in providing for the list of crimes under genocide to be

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<sup>57</sup> *Id.* at 252.

<sup>58</sup> Kingdom of Cambodia, Country Overview, Available at: <http://www.cambodia.gov.kh/unisql1/egov/english/country.overview.html>

<sup>59</sup> Law on the ECCC, *supra* note 4 at art 45.

<sup>60</sup> See Note 12.

exhaustive. However, the Khmer version, as in the English, omits the “as such” element. This significant change in the definition of genocide will have major consequences for those seeking to prosecute the crime of genocide and those seeking to defend such charges. Under a genocide statute with no “as such” element, prosecutors will only need to show intent for destroying in whole or in part member(s) of an ethnicity, nationality, religion or race—without having to show that defendants intended to destroy the victims because they belonged to a particular group. In the case of Cambodia, this is particularly relevant, as many atrocities involved Khmer killing Khmer. Under this version of the law, it will not be necessary to show that a defendant intended to destroy the Khmer people—a national or ethnic group—with his or her acts.

The Law on the ECCC in the Khmer omits several of the punishable acts that are listed in the Genocide Convention, while also adding the new act of “participation in genocide”. The omission of the act of genocide is tempered by the fact that Article 29 of the Law on the ECCC provides that any suspect who *committed* the crimes referred to in Articles 3, 4, 5, 6, 7 or 8 shall be individually responsible for the crime.<sup>61</sup> The omission of “direct and public incitement” could make it difficult or even impossible to charge someone whose responsibility for genocide is only through incitement. Similarly, the omission of complicity makes it difficult or even impossible to charge or convict a defendant for providing practical assistance, encouragement or moral support that has a substantial effect on the perpetration of the crime.

Nevertheless, the omissions of direct and public incitement and complicity may very well be rectified by the inclusion of the crime of “participation in genocide,” although this concept is not defined in the Law on the ECCC. The ECCC Trial Chamber could quite conceivably

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<sup>61</sup> Law of the ECCC, *supra* note 4 at art 29. “Any Suspect who planned, instigated, ordered, aided and abetted, or committed the crimes referred to in article 3 new, 4, 5, 6, 7 and 8 of this law shall be individually responsible for the crime. “

interpret the statutory definition of ‘participation in genocide’ to include complicity and direct and public incitement.

Finally, “attempts to commit acts of genocide” is a separate substantive crime because it is possible to be guilty based on unsuccessful efforts. “Conspiracy to commit genocide” is also separate, because to be liable, one must only agree with another to commit the act. Therefore, “participation in acts of genocide” was arguably introduced into the statute because it is a broad term that could include any positive acts of genocide, from committing the actual act to complicity in genocide.

End.