មជ្ឈមណ្ឌលឯកសារកម្ពុជា

The Possibility of Bringing Genocide Charges on Behalf of the Khmer Krom

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Memorandum

i. Executive Summary

The Khmer Krom are ethnic Khmers with historical ties to land now located within southern Vietnam who were targeted for systematic abuse by the Khmer Rouge. The question presented is whether the Khmer Krom qualify as protected group under the Genocide Convention, and if so, what standard the ECCC should adopt to determine their group status.

The jurisprudence of the International Criminal Tribunals for the Former Yugoslavia ("ICTY") and Rwanda ("ICTR") has demonstrated that the Genocide Convention was intended to cover permanent and stable groups and exclude mobile groups such as political or economic groups. The common criteria for protection is that membership within the group should be involuntary.

To define a group as protected, there three different approaches have been applied that all use a mix of objective and subjective evidence to determine whether a victim group is protected. Both the so-called "objective" and "subjective" approaches seek to introduce the same types of evidence to prove the existence of a protected group and its membership, essentially creating a group based on the qualities of its members. However, the objective approach does not recognize

the frequent disconnect between the objective qualities of a group and the perceived qualities of its members. The subjective approach does recognize these disconnects, but risks inclusion of unstable and mobile groups who were never intended to be protected by the drafters of the Genocide Convention.

By far the most prevalent approach is one that is a hybrid of the two. The "hybrid" approach, unlike the objective and subjective approaches, does not seek to determine the status of the victim group by the same analysis by which it identifies its members. The hybrid approach requires some objective factors for group determination but also recognizes that those who are targeted for destruction because of their perceived identity may not always correspond with the objective criteria of the group. Thus, the court applying this approach enters into a two-part analysis. First, it determines the status of the victim group as a protected group within the meaning of the Genocide Convention on a case-by-case basis using both subjective and objective evidence[1] while taking in to account the relevant social political and historical context.[2] Once it has determined that a victim group is a protected, it uses a subjective approach to identify group members. The majority of cases recognize that membership within a group is a subjective concept, and that being perceived to be a member targeted for destruction is in theory sufficient to be a considered a member of the protected group. Thus if the court determines that there is a protected group, it is sufficient that individual victims were perceived by the perpetrators to be a part of that pre-existing group to include them within the group. Any other subjective or objective ties to that group are supplemental.

Following the jurisprudence of the ICTY and ICTR, there are three ways that the

[1] Prosecutor v. Blagojević, Case No. IT-02-60 (Trial Chamber, 17 Jan. 2005), para 667; Prosecutor v. Brđjanin, Case No IT-99-36 (Trial Chamber, 1 Sept. 2005), para 684. *See also* Prosecutor v. Semanza, Case No. ICTR-97-20-T (Trial Chamber, 15 May 2003), para. 317; *see also* Prosecutor v. Kajelijeli, Case No. ICTR-98-44-A (Trial Chamber II, 1 Dec. 2003), para. 811.

[2] Prosecutor v. Rutaganda, Case No. ICTR-96-3 (Trial Chamber 6 Dec. 1999), para. 56.

Extraordinary Chambers in the Court of Cambodia ("ECCC") could catagorize the Khmer Krom. First, the ECCC could classify them as their own protected group. To do this the court would have to show that the Khmer Krom were distinct enough from the Khmer majority to be their own group, and that individuals were targeted by reason of their membership within this group. Whether or not this approach has merit, it is not practically possible in Case 002 because the Khmer Krom group was not included in any of the co-prosecutor's submissions to the co-investigating judges, and such submissions define the contours of what may be investigated and charged. Second, the ECCC could use the hybrid approach and classify the Khmer Krom victims as members of the protected Vietnamese group. To do this, the court would have to find that the perpetrators targeted the Khmer Krom victims because they subjectively perceived the Khmer Krom to be Vietnamese. Third, the court could use the targeting of the Khmer Krom as evidence to support the genocidal intent towards the Vietnamese group based on the Khmer Krom's perceived political affiliation. The evidence would have to show that the Khmer Rouge wanted to kill the Vietnamese, and by extension the Khmer Krom based on there political sympathies. This last approach, while providing formal recognition of the crimes committed against the Khmer Krom, would not characterize them as victims of genocide.

Classifying Khmer Krom as an independent ethnic group or as "Vietnamese" may have unwanted political consequences for them today in both Cambodia and Vietnam. In Cambodia, most Khmer Krom wish to be seen as Khmer and not a minority group or Vietnamese. On the other hand, Khmer Krom in Vietnam sometimes have incentives to emphasize the Vietnamese aspect of their identity to avoid being seen as a separate minority. Such concerns merit consideration by advocates seeking to advance Khmer Krom interests before the ECCC.

1. Introduction

Ethnic Khmers known as Khmer Krom "or lower Khmers" have inhabited the region of the Mekong Delta for many centuries, possibly as far back 550 CE.[3] While maintaining many of the cultural aspects of Cambodians they have been heavily influenced by Vietnamese culture. Most notably they speak three Khmer dialects often heavily colored by a Vietnamese's accent.[4] This mixed identity has precariously placed them politically and socially somewhere in-between Cambodia and Vietnam. Because of their perceived dual allegiance they were systematically targeted for abuse by the Khmer Rouge. This paper will address the question of how the Khmer Krom group should be classified by the Extraordinary Chambers of the Courts of Cambodia ("ECCC"), specifically if they can be brought under the protection of the Genocide Convention. It will begin with an historical overview of the Khmer Krom, and a history of the atrocities committed against them. This paper will cover the relevant international jurisprudence on the standards for group determination and membership identification. Finally, this paper will address the possible ways the ECCC could use evidence of atrocities against the Khmer Krom to prove genocide charges in Case 002.

2. Historical background

Until around the 14th Century, the Mekong Delta was primarily populated by Khmer people, but the Vietnamese presence steadily increased. In the late 19th century French authorities included the Khmer population in the Mekong Delta in a territory called Cochinchina,

[3] Harris, Ian, *Buddhism Under Pol Pot*, Documentation Series No. 13 Documentation Center of Cambodia 2007, at 247.
[4] *Id*.

making the Vietnamese people the majority in the region.[5] Beginning in this period there was a small but steady migration of Khmer Krom to what would become present-day Cambodia.[6] Today Khmer Krom on both sides of the French delineated border between Vietnam and Cambodia refer to the Mekong Delta area as Kampuchea Krom, expounding a claim to the land and an identity inexorably tied to the region.

This mixed and at the same time separate identity made them ideal sources for military support from both the U.S. military and anti-communist right-wing political groups within Cambodia.[7] During the Vietnam War, U.S. special forces recruited a substantial number of soldiers from the Khmer Krom population to fight the Viet Cong.[8] These soldiers were referred to as the "white scarves" and described themselves as a liberation movement of Kampuchea Krom. [9] John D. Ciociari, senior legal advisor to the Documentation Center of Cambodia, notes that contemporaneously militant anticommunist movements within Cambodia, such as the *Khmer Serei* ("Free Khmer") movement, also enlisted many Khmer Krom as soldiers. The *Khmer Serei* had the primary purposes of staging a coup against the Cambodian King and repelling communist advances. Furthermore, Ciorciari notes that after Marshal Lon Nol seized power in March 1970, *Khmer Serei* soldiers were enlisted in the ongoing Cambodian civil war with the Khmer Rouge. While not all Khmer Krom were aligned with the U.S. military or the anticommunist movements that opposed Pol Pot in the civil war, the Khmer Krom as a group were identified as a possible political threat to the Khmer Rouge.[10] Ciociari notes that after the

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[5] Ciorciari, John D., *The Khmer Krom and the Khmer Rouge Trials* (an unpublished essay on file at the Documentation Center of Cambodia).
[6] Ben Kiernan, *The Pol Pot Regime: Race, Power, and Genocide under the Khmer Rouge, 1975-1979* (New Haven, CT: Yale University Press, 1996), at 298.
[7] Ciorciari, *supra* note 5.
[8] Kiernan, *supra* note 6, at 1.
[9] *Id.*
[10] Ciorciari, *supra* note 5.

Khmer Rouge took power in 1975 they had "fresh memories" of a war in which Khmer Krom soldiers had previously fought against them. They also viewed the Khmer Krom as "culturally impure" and believed their dual cultural and political identities could "complicate the business of constructing a new Cambodian state."[11] In 1975 after the Khmer Rouge took power, relations between Cambodia and Vietnam deteriorated significantly. Khmer Krom, because of their ability to blend in with the Cambodian society and perceived dual allegiance, were identified as a conduit of Vietnamese espionage and were often treated as traitors and targeted for persecution and elimination.[12]

3. Examples of targeting of the Khmer Krom

Ben Kiernan in his book *The Pol Pot Regime* makes it clear that the Khmer Krom group was singled out during the Democratic Kampuchea period ("DK") and gives several example of its targeted persecution. The first example he provides occurred in 1976 when the Vietnamese pushed a group of 68 "white scarves" into Cambodia. The Khmer Krom soldiers sought out the local Khmer Rouge officials as allies in the fight against Vietnam. Their offer of an alliance was denied and 67 unarmed soldiers were gunned down while fleeing for their lives. A worse fate was in store for their commander who was brought to the infamous Tuol Sleng prison. Before being executed and after being tortured he confessed to being an "internal enemy of Democratic Kampuchea.[13] This only fueled the fire of suspicion against the Khmer Krom. A few months later in Kivong district local officials boasted of killing over two thousand Khmer Krom "white scarves" as "American slaves" identified by their "longer hair" and penchant for drinking milk; both were seen as a sign of foreign influence. The Khmer Krom "White Scarves" soldiers were

[11] *Id*.
[12] *Id*. *See also* Kiernan, *supra* note 6, at 298.
[13] Kiernan, *supra* note 6, at 3.

killed because of the possibility that they could become future enemies of the DK. The extermination of the Khmer Krom was justified by propaganda expounded both by leaders of the DK and local cadres claiming that the Khmer Krom were not really Khmer. Khmer Krom were labeled as "Khmer bodies with Vietnamese minds" and as such they were perceived to be racially distinct.[14] The Khmer Krom who were singled out were not limited to those from Vietnam. In the Bati district of the southwest region of Cambodia in 1976, entire families of Khmer Krom (many of whom probably had been in Cambodia for generations) were massacred in a wat; Khmer Rouge authorities claimed it was because that they could speak Vietnamese.[15]

As the conflict with Vietnam grew worse and the grip of the Khmer Rouge on the country started to weaken, paranoia over the presence of Vietnamese agents within the country correspondingly increased. Khmer Krom were often suspect. Documents from the Kraing Ta Chan prison in Takeo show that Khmer Krom were frequent suspects of espionage and other "counterrevolutionary" activities.[16] Ciorciari found that documents from the prison, on file at the Documentation Center of Cambodia, indicate that most prisoners at the Kraing Ta Chan facility were Khmer Krom.[17]

In 1977 in the Bakan district of Pursat province, the provincial chief, a Khmer Krom, was accused of treason. The remaining Khmer Krom were separated from other Khmer on the basis of their heritage.[18] Later that year they were all taken away and massacred as "traitors."[19] Ciociari notes that they were targeted for extermination because of their perceived connection to

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[14] *Id.* at 4.
[15] *Id*. at 299.
[16] Ciorciari, *supra* note 5.
[17] *Id*.
[18] *See id*. (noting that "[t]hrough interview research, Kim Keokanitha has found that in Rumlech district, Khmer Rouge officials compiled personal histories of people working in the area cooperatives, identified Khmer Krom, and physically separated them from the rest of the community for observation."). *See also* Kiernan, *supra* note 6, at 300 (noting that Khmer Krom were separated by their kinship lines).
[19] Kiernan, *supra* note 6, at 299.

Vietnam. Kiernan mentions that in other areas Khmer Krom were delineated on the basis of their surnames such as Thach, Son, Nhoeng.[20] In the Western Zone local cadres proclaimed that the "Khmer Krom had all become Vietnamese" [21] to the Khmer Rouge as the Khmer Krom were considered contaminated by centuries of Vietnamese contact.[22] To that effect, cadres in the same year made an announcement that any Khmer Krom who showed up in the region would be executed.

4. Classifying the Khmer Krom as a protected Group under the Genocide Convention

The ECCC, through article nine of the Framework Agreement[23] between Cambodia and the United Nations, has subject matter jurisdiction for the crime of genocide as defined by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Article 4 of the law establishing the ECCC ("ECCC Law") defines genocide as "any acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as:[24]

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;

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[20] *Id*. at 424.
[21] *Id*. at 425 (author's interview in Santuk district, Kampong Thom, October 16, 1980).
[22] *Id.*
[23] Law on the Establishment of the Extraordinary Chambers, with in inclusion of amendments as promulgated on October 27, 2004(NS/RKM/1004/006) (hereinafter Framework Agreement).
[24] *Compare* 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, promulgated 27 October 2004 (NS/RKM/1004/006), *with* Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature Dec. 9, 1948, 78 U.N.T.S. 277 (hereinafter Genocide Convention) (saying "as such" and not "such as").

e) Forcibly transferring children from one group [25] to another group. [26]

Genocide addresses the destruction or attempted destruction of certain protected groups of human beings in whole or in part. The problem, however, is determining which groups the Genocide Convention protects and if a given population fits into one of those protected groups. The Genocide Convention limits application of the crime of genocide to national, ethnical, racial or religious groups; however, the Convention fails to define those groups or establish parameters for membership within the group. The International Criminal Tribunal for Rwanda ("ICTR") and the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), which are collectively known as the "ad hoc" tribunals, have struggled with the issue of group identification and sought to apply these abstract categories to real human populations. While common sense may suggest that a given population is a "group," there are nonetheless practical difficulties in placing one within the legal framework of the Genocide Convention.

5. What groups are protected?

a. Political Groups Are Specifically Not Covered by the Genocide Convention

i. If Members of a Group Are Targeted Because of Their Political Affiliations, or if the Targeted Group Is Defined by Political Criteria Then the Group Is Not Protected by the Genocide Convention

The Genocide Convention does not cover all types of groups. The ad hoc courts have consistently held that political and economic groups fall outside the protection of the Genocide Convention. The ICTR Trial Chamber in *Rutaganda*, upon a reading "the *traveaux preparitiors* of the Genocide Convention, reasoned "that certain groups, such as political and economic groups, have been excluded from the protected groups, because they are considered to be 'mobile

[25] *See* Genocide Convention (original text reads "of the group" not from one group).
[26] Framework Agreement. *See also* Genocide Convention).

groups' which one joins through individual, political commitment."[27] Thus, if one is targeted by reason of their voluntary political affiliation they are not protected by the Genocide Convention.

Similarly, the ICTR held in *Jelisić* that "the preparatory work of the [Genocide] Convention demonstrates that a wish was expressed to limit the field of application of the Convention to protecting 'stable' groups objectively defined and to which individuals belong regardless of their own desires." This ultimately means that if a group is defined and targeted only because of its political affiliations it is not protected by the Genocide Convention.

ii. Protected Group Targeted for Additional Reasons

The issue has arisen at the ICTR whether a protected group that is inherently tied to a political group in the eyes of the perpetrators is protected, or if the addition of a political dimension negates the protected group status. The ICTR found that the presence of additional motive for annihilation of a protected group does not negate protected status. For example, the Trial Chamber in *Nahimana* determined that "the association of the Tutsi ethnic group with a political agenda, effectively merging ethnic and political identity, does not negate the genocidal animus that motivated the accused." [28] In fact the court reasoned, "the identification of Tutsi individuals as enemies of the state associated with political opposition, simply by virtue of their Tutsi ethnicity, underscores the fact that their membership in the ethnic group as such, was the sole basis on which they were targeted.[29]

In a subsequent case, the ICTR Trial Chamber in *Ndindabahizi*[30] considered whether a victim with a mixed heritage could be a victim of genocide. The court heard testimony to the

[27] *Rutaganda*, Trial Chamber, *supra* note 2, at 57.
[28] Prosecutor v. Nahimana, Case No. ICTR-99-52- T (ICTR Trial Chamber 3 Dec. 2003), para. 56.
[29] *Id*.
[30] Prosecutor v. Ndindabahizi, Case No. ICTR-07-71 (Trial Chamber I, 15 July 2004).

effect that the victim, Nors, was killed because he appeared to be Tutsi. Additionally, the court heard testimony that he was killed because he was "half cast."[31] The court decided that "the presence of additional motives for the killing of Nors (for example, because he was part-Belgian) did not displace the killers' genocidal intent."[32]

b. The Enumerated Groups Protected by the Genocide Convention

The ICTY Trial Chamber in Krstić found that the Genocide Convention's "application is confined to national, ethnical, racial or religious groups."[33] The problem however, as the court in *Rutaganda* noted, is "that the concepts of national, ethnical, racial and religious groups have been researched extensively and, at present, there are no generally and internationally accepted precise definitions thereof."[34]

Akayesu[35] was the first case of the ICTR to address whether the Tutsi victim group qualified as a protected group within the meaning of the Genocide Convention. The court began its analysis by establishing definitions of ethnic, racial and national groups that would be later adopted by other chambers of the ICTR and the ICTY. It defined an ethnic group as "a group whose members share a common language or culture."[36] A racial group on the other hand is "based on the hereditary physical traits often identified with a geographical region." "[A] national group is defined as a collection of people who are perceived to share a legal bond based on a common citizenship, coupled with reciprocity of rights and duties."[37] The problem the Chamber confronted was distinguishing the victim Tutsi group from the Hutu group on the basis

[31] *Id.* at 467.
[32] *Id*. at 469.
[33] Prosecutor v. Kristić, Case No. IT-98-33-T (ICTR Trial Chamber, 2 Aug. 2001), para 554.
[34] *Rutaganda* Trial Chamber, *supra* note 2 at para. 56.
[35] Prosecutor v. Akayesu, Case No. ICTR-96-4-T (ICTR Trial Chamber, 2 Sept. 1998).
[36] *Id*. at 513.
[37] *Id*. at 512.

of these definitions, as both of the Hutus and the Tutsis share the same customs, language, and general physical characteristics. Additionally they both inhabit the same geographic area.[38] As objectively defined, they would both ostensibly belong to the same ethnic, racial, religious and national group.

c. Protected Groups That Do Not Specifically Correspond to One of the Four Enumerated Groups

To address the problem of classification of the Hutu and Tutsi, the ICTR in *Akayesu* relied on the *travaux préparatoires* of the Genocide Convention, which indicated "that the crime of genocide was allegedly perceived as targeting only "stable" groups, constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more "mobile" groups."[39] Subsequently, the Chamber found that the Tutsi were a permanent and stable group that qualified for protection under the Genocide Convention despite that fact that the Tutsi population does not have its own language or a distinct culture from the rest of the Rwandan population. [40] This expansive group identity, determined by the common criteria of stability, was not readily adopted by the Chambers of the ICTY and the other Trial Chambers of ICTR. While some Chambers have used the individual members' lack of mobility, or voluntary commitment, to show the intention of the Genocide Convention to limit the scope of its protection to stable and permanent groups,[41] no subsequent decisions have tried to expand protection beyond the four enumerated groups or to adopt such a potentially broad definition of protected groups. All but

[38] *Id*. at 170.
[39] *Id*. at 516.
[40] *Id*. at 170.
[41] *See* Prosecutor v. Jelisić, Case No. IT-95-10 (ICTY Trial Chamber, 14 Dec. 1999), para 67. *See also Rutaganda* Trial Chamber, *supra* note 2, para. 57.

one of the subsequent discussions in both the ICTR and the ICTY classify the victim group as belonging to one of the four enumerated groups.

Similar to the expansive approach used in *Akayesu*, the *Krstić* Chamber at the ICTY reasoned that that "[t]he preparatory work of the Genocide Convention shows that setting out such a list [of enumerated groups] was designed more to describe a single phenomenon, roughly corresponding to . . . 'national minorities,' rather than to refer to several distinct prototypes of human groups." Thus, it would be inconsistent with the purpose of the Genocide Convention to "attempt to differentiate each of the named groups on the basis of scientifically objective criteria."[42] For this reason, the *Krstić* court did not expand coverage beyond the four enumerated groups[43]; instead it held that for a group to be protected it need not be classified as any one of the four but can have the overlapping characteristics of any of the four. Accordingly, the *Krstić* court did not attempt to classify the Bosnian Muslim group specifically as either an ethnic, racial, national, or religious group. Instead *Krstić* held simply that the Bosnian Muslim population constituted a "protected group." [44]

[42] *See Kristić* Trial Chamber, supra note 33, para. 556.
[43] *See id*. at 554 (noting "[i]ts application is confined to national, ethnical, racial or religious groups"). Thus it appears that Kristić does not seek to extend protection beyond the four groups it merely holds that you need not specify one of the four categories to which the group corresponds.
[44] *But see* Prosecutor v. Kristić, Case No. IT-98-33-T (Appeals Chamber, 19 April 2004), para 6. (Holding that the *Kristić* Trial Chamber "determined that the Bosnian Muslims were a specific, distinct national group, and therefore covered by Article 4" even though it was never specifically mentioned in the Trial chamber. This is similar to what happened in *Akayesu*, where the Trial Chamber never specifically held that a Tutsi group was an ethnic group. It only said that they were a group "referred to as 'ethnic.'" *Akayesu*, Trial Chamber, *supra* note 35, para. 702. Nevertheless, the Chamber in Prosecutor v. Kayeshima and Runzindana, ICTR-95-1 and ICTR-96-10 (Trial Chamber, 21 May 1999), para. 526 (noting that the *Akayesu* court did classify the Tutsi group as an ethnic group).

6. The Ad Hoc Tribunals Standards for Defining Protected Groups for the Purposes of Genocide Have Taken the Forms of "Objective," "Subjective" and "Hybrid" Approaches

To ascertain whether a group is a protected within the meaning of the Genocide Convention, the ad hoc tribunals have more or less broken down the inquiry into a two-step process. First, they determine if the group is protected under the Genocide Convention and second, they identify its members, or in other words, define the parameters for membership. At both stages of the analysis, various Chambers have used a combination of subjective and objective factors.

a. "Objective" Approach

The so-called "objective" approach was the first used by the ICTR to determine a victim group and identify its members. The use of the term "objective" is actually a misnomer. None of the courts follow a completely objective approach, but invariably look to some subjective factors such as the perceptions of the victim group. The key element of the so-called objective approach is that the group is classified or determined to be a protected group using the same objective evidence that shows proof of membership. That is, the criteria for membership within the group and determination of group status are coextensive. In fact, the objective approach looks to the objective qualities of its group members to determine whether the group qualifies as a protected group.

For example, to determine group identification, the court in *Akayesu* used the objective approach to define the group by the objective qualities of its members. The Chamber noted that the Hutus and Tutsis did not separately fit the definition of any one of the enumerated groups because ostensibly they shared the same culture, language, religion and national identity.[45] Nonetheless, the Chamber determined that the "intent of the drafters of the Genocide Convention

[45] *Akayesu* Trial Chamber, *supra* note 35, para. 170.

. . . was clearly to protect any stable and permanent group."[46] Thus the Trial Chamber needed to show objectively within the political and ethic conflict climate in Rwanda that the Tutsis could stand apart as a stable and permanent group. In actuality, the Chamber looked to both objective and subjective evidence. However it relied more heavily on the former, which consisted of a preexisting legal classification system imposed by the Belgian colonizers and maintained by the Rwandan government.[47] For example, "the identity cards at the time included a reference to *"ubwoko"* in Kinyarwanda or *"ethnie"* (ethnic group) in French which, depending on the case, referred to the designation Hutu or Tutsi."[48] The Chamber also noted that "witnesses who appeared before it invariably answered spontaneously and without hesitation the questions of the Prosecutor regarding their ethnic identity" as Hutu or Tutsi.[49] A community's perception of its own identity in ethnic terms would later be commonly regarded as subjective evidence. The Chamber in Akayesu tried to look at this subjective self identification in an objective way, focusing not on the perceptions of the Rwandans themselves but their "spontaneous" self identification, objectively observed by the court. Thus, the Chamber presented the evidence such as a study conducted by objective observers, focusing not on what the witnesses said but how they said it. Notably, the Chamber did not say that the Tutsi were an ethnic group. It instead determined that "the Tutsi group constituted a group *referred* to as 'ethnic.'"[50] The Chamber consequently held that "the Tutsi did indeed constitute a stable and permanent group and were identified as such by all." [51]

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[46] *Id*. at para. 701.
[47] *Id*. at para. 83.
[48] *Id*. at para. 702.
[49] *Id*. at para. 702 (emphasis added).
[50] *Id*.
[51] *Id*. at para. 702. *But see* Prosecutor v. Kayeshima and Runzindana, ICTR-95-1 and ICTR-96-10 (Trial Chamber, 21 May 1999), para. 526 (holding that the court in *Akayesu* did determine that the Tutsi were an ethnic group).

In *Prosecutor v. Kayishema,*[52] the ICTR again considered whether the Tutsi constituted a protected group. The *Kayishema* Chamber extended the meaning of ethnic group to allow for subjectively determined identity. The Chamber decided that an ethnic group protected by the Genocide Convention could be a group "which distinguishes itself as such (self identification); or, a group identified as such by others, including perpetrators of the crimes (identification by others)." [53] While ostensibly endorsing a subjective approach, and theoretically leaving the possibility open for group determination based solely on subjective factors, in actuality the Chamber looked to the same kinds of evidence as the *Akayesu* Chamber. This evidence included evidence that is commonly regarded as objective. Specifically, the *Kayishema* Chamber relied on government issued identity card that solidified distinct ethnic identities from what were once divisions in a class based system, and the fact that the Rwandans contemporaneously viewed themselves in these ethnic terms.[54]

The second component of defining a group as protected is ascertaining who constitutes its members. The defining characteristic of the objective approaches used in *Akayesu* and *Kayeshima* is that these Chambers sought out objective evidence to define the parameters of the group or, in other words, to define the characteristics of membership. The Chamber in *Akayesu* determined that a "common criterion in the four types of groups protected by the Genocide Convention is that membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner."[55] Thus, for example, while the existence of identity cards helped to determine the group as protected it also defined individuals as members within the group.

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[52] *See Kayeshima and Runzindana* Trial Chamber *supra* note 51, para. 98.
[53] *Id.*
[54] *Id.* at 34.
[55] *See Akayesu* Trial Chamber, *supra* note 35, para. 511.

b. "Subjective" Approach

The so called "subjective" approach works much like the objective approach in the sense that courts seek to determine the status of a group as a protected group using the same criteria defining the parameters of membership within the group. However, following this approach, the stigmatization or subjective perception of the group both identifies the individual members and determines whether the group constitutes a protected group.

In *Jelisić,* the ICTY's first attempt to address the issue of group determination, the Trial Chamber specifically focused on the possibility of a perpetrator-defined victim group. It noted, "Although the objective determination of a religious group still remains possible . . . it is more appropriate to evaluate the status of a national, ethnical or racial group from the point of view of those persons who wish to single that group out from the rest of the community."[56] The Chamber reasoned, "It is the stigmatization of a group as a distinct national, ethnical or racial unit by the community, which allows it to be determined whether a targeted population constitutes a [distinct group] in the eyes of the alleged perpetrators.[57] *Jelisić* is the most subjective Trial Chamber decision, basing its determination that the Bosnian Muslims are a protected group primarily on the stigmatization of the victim group at the hands of the perpetrators.[58] However, the Chamber to some extent recognized that the determination of the victim group should be limited to the four groups enumerated in the Genocide Convention "objectively defined."[59] The decision indicates that the protected group must objectively correspond to one of the four enumerated groups. It minimally supports this proposition with some anecdotal evidence that all

[56] *See Jelisić* Trial Chamber, *supra* note 41, para. 70.
[57] *Id.*
[58] *Id.*
[59] *Id.*

the victims were Muslim.[60] While *Jelisić* without question determined group status by relying on subjective evidence, it is not entirely clear if it was proposing that a victim group could *solely* be defined subjectively. The dicta in the subsequent *Statić* Appeals Chamber decision strongly indicates that this would be a disfavored approach.

The ICTY in *Krstić*[61] followed the reasoning in *Jelisić* closely, extending the reach of the subjective determination to include religious groups. The Trial Chamber held, "A group's cultural, religious, ethnical or national characteristics must be identified within the socio-historic context which it inhabits . . . the Chamber identifies the relevant group by using as a criterion the stigmatization of the group, notably by the perpetrators of the crime, on the basis of its perceived … characteristics.[62] While *Krstić* included the subjective perceptions of the perpetrators as a factor in the group determination, it nevertheless relied on objective evidence that the group was legally recognized within the Serbian constitution.[63] Thus, while *Krstić* appears to leave it open whether or not a group may be determined by the subjective perception of its members or perpetrators, in practice it used a mixed approach consisting of both objective and subjective evidence.

An attempt to classify a group—that is to both determine the group and define its membership —based solely on the subjective perceptions of the perpetrators or other subjective characteristics, has not expressly been prohibited but appears to have been rejected by the *Statić* Appeals Chamber. *Statić* held that *Krstić* and *Rutaganda* [64] did not stand for the proposition that a group could solely be determined subjectively. [65] Note that the Chamber did not rule on what

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[60] *Id.* at 74.
[61] *See Kristić* Trial Chamber, *supra* note 33.
[62] *Id.* at 556.
[63] *Id.*
[64] *See Rutaganda* Trial Chamber, *supra* note 2.
[65] *Prosecutor v. Statić,* Case No. IT-97-24-A (Appeals Chamber, 22 March 2006), para. 25.

the appropriate standard should be, it merely held that the Chambers' decisions did not stand for the proposition that a victim group could be defined solely by the subjective perception of the perpetrators.

c. The Hybrid Approach

The hybrid approach similarly looks to both objective and subjective evidence. The key distinction of this approach is the evidence used to determine protected group status is not necessarily co-extensive with the parameters of group membership. Essentially, this approach separates the analysis of group protection and the analysis of the criteria for group membership. Following this approach a court can define a group as protected by using both objective and subjective evidence while identifying its members using only the subjective perception of the perpetrators.

For example, ICTR and ICTY Chambers have consistently held that 'the correct determination of the relevant protected group must be made on a case-by-case basis, consulting both objective and subjective criteria."[66] However, the *Brdjanin* Trial Chamber also held that the members of "the relevant protected group may be identified by means of the subjective criterion of the stigmatization of the group, notably by the perpetrators of the crime, on the basis of its perceived national, ethnical, racial or religious characteristics." In some instances, the victim may perceive himself or herself to belong to the aforesaid group. [67] This shows that at least one chamber has been willing to entertain charges for genocide for victims as members of an objectively determined group who are identified and targeted solely based on the subjective perception of the perpetrators. This may happen even though the individual victims would not

[66] *Blagojević* Trial Chamber, *supra* note 1, para. 667; *Brđjanin* Trial Chamber, *supra* note 1, para. 684. *See also Semanza* Trial Chamber, *supra* note 1, para. 317; *Kajelijeli* Trial Chamber II, *supra* note 1, para. 811.
[67] *Brdjanin* Trial Chamber, *supra* note 1, para. 683.

fall with in the group objectively and may not even consider themselves part of the group.

Similarly, in *Baglishima,* the ICTR held that the subjective perpetrator-defined criterion for membership is paramount when identifying group members. However, like other Chambers, it said that subjective perception is not enough to determine the group status. However, once a group has been objectively determined, membership in that group should be analyzed subjectively. This approach recognizes that the people who are targeted may not necessarily correspond directly with the common characteristic of the group but are nonetheless targeted because they were perceived by the perpetrators fall within the group. As the *Baglishima* Chamber reasoned, "[T]he perpetrators of genocide may characterize the targeted group in ways that do not fully correspond to conceptions of the group shared generally, or by other segments of society. In such a case . . . if a victim was perceived by a perpetrator as belonging to a protected group, the victim could be considered by the Chamber as a member of the protected group." [68] This approach recognizes the practical difficulty in scientifically defining the parameters of a group, and the disconnect between what perpetrators of genocide may perceive and what the victims of genocide or the larger community as a whole may perceive. This approach emphasizes that the analysis for determining the existence of a group should not be the same as the one used to identify its members. As the Chamber in *Rutaganda* determined, "[M]embership of a group is, in essence, a subjective rather than an objective concept. The victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction . . . Nevertheless, the Chamber is of the view that a subjective definition alone is not enough to determine victim groups."[69]

In practice, the *Baglishima* and *Rutaganda* chambers both relied on objective evidence

[68] Prosecutor v. Baglishema, Case No. ICTR-95-1A-T (Trial Chamber I, 7 June 2001), para. 65.
[69] *Rutaganda* Trial Chamber, *supra* note 2, paras. 56-57. *See also* Prosecutor v. Musema*,* Case No. ICTR-96-13-A (Trial Chamber, 27 Jan. 2000).

including legally recognized divisions in the constitution.[70] Thus the primary difference between this approach and what is labeled the "objective approach" has to do with how the evidence is analyzed. Following the objective approach, the evidence is used to both determine the group and define the parameters for its membership. Following the hybrid approach, the objective evidence is supplemental and is used to show that there is a distinct group and that the members correspond, if not directly then in the eyes of the perpetrators, to this preexisting group.

The ICTR case of *Ndindabahizi*[71] offers a clear example of a case that relies solely on the subjective perception of the perpetrator to identify the victim of a protected group for the purposes of genocide. There, the victim had a Belgian father and a Rwandan mother.[72] In a country where ethnicity is determined by the father, within the legal framework of the government he would be objectively Belgian. [73] The Chamber, relying on *Baglishema*, noted that when determining membership within a protected group, "the subjective intentions of the perpetrators are of primary importance."[74] The Chamber found that the victim was killed because "[he] was perceived to be at least in part, of Tutsi ethnicity."[75] The evidence used to reach this finding was based solely on inferred perceptions of the perpetrators ascertained through witness testimony.[76] In this case there was no use of objective evidence such as identity cards to show that the victim was Hutu or Tutsi.[77] The Chamber only heard testimony that he was perceived to have some features that were considered to be Tutsi.[78] Thus, he was found to be

[70] *Rutaganda* Trial Chamber, *supra* note 2, para. 364.
[71] *See Ndindabahizi* Trial Chamber I, *supra* note 30.
[72] *Id.* at para. 467.
[73] *Id*.
[74] *Id.* at para. 468.
[75] *Id.* at para. 469.
[76] *Id.*
[77] *Id.* at para. 467.
[78] *Id.*

a victim of genocide based solely on the perceptions of the perpetrators. [79] The Chamber found that perpetrator-defined identification of members within an objectively established victim group is not only acceptable but "of primary importance."[80]

7. Why the Khmer Krom Were Targeted and the Implications on Group Classification

In classifying the Khmer Krom group, the first issue to be addressed is the motivation for their targeting. There are three possibilities: They were targeted because of their counter-revolutionary politics, existence as an ethnic minority, or because they were perceived to be nationally Vietnamese. One theory is that they were targeted because of their past involvement with the *Khmer Serei,* which opposed the communists in the civil war that preceded the Khmer Rouge regime, or because of their military involvement in the Vietnam War backed by the Americans. Under this prospective they were targeted because of their political associations. For this reason some believe that genocide charges could not be brought on their behalf because political groups are not protected by the Genocide Convention. But as noted above, politics and race are often intertwined. Ben Kiernan pertinently said, "this [readiness to suppress the Khmer Krom] was justified on racial grounds that their minds could not be controlled." Thus the "racial ideology expressed political suspicion."[81]

To bring genocide charges behalf of the Khmer Krom, the ECCC would have to determine that they were targeted by reason of their involuntary membership in the Khmer Krom group. Any political targeting would have to be shown to be intertwined with their ethnic identity. Individual's political views would have to have been assumed on the basis of their membership within the group. The threat of political opposition may have been an underlying

[79] *Id.* at para. 469.
[80] *Id.* at para. 468.
[81] Kiernan, *supra* note 6, at 5.

motive but it would have to be tied to their ethnicity. As the ICTR Chamber in *Nahimana* said, an ulterior motive for targeting a group does not negate the genocidal intent,[82] rather targeting a protected group because of a presumed political agenda reinforces this intent. Thus if the Khmer Krom can be classified as a protected group either on their own or as part of the Vietnamese group then the existence of a political motive for annihilation would not negate the genocidal intent.

On the other hand, if the ECCC were to find that the members of the Khmer Krom were targeted not because of the fact that they were Khmer Krom, but instead individual members were targeted because of their political affiliations, genocide charges would not be applicable. In that case the victims would not have been targeted on the basis of their ethnicity[83] and a charge of crimes against humanity for persecution of a political group would be more appropriate.

There is an undisputed overlap of race and politics. The court will have to determine where on the spectrum between from ethnicity to politics the targeting of the Khmer Krom falls. The tipping point may be where the victim's politics were necessarily assumed based on their ethnic identity

8. Possibility of Defining Khmer Krom as a Protected Ethnic Minority within the Meaning of the Genocide Convention.

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[82] *Ndindabahizi* Trial Chamber I, *supra* note 30, para 469.

[83] *See Kristić* Trial Chamber, *supra* note 33, para. 561 (holding that "the victims of genocide must be targeted *by reason* of their membership in a group . . . The intent to destroy a group as such, in whole or in part, presupposes that the victims were chosen by reason of their membership in the group whose destruction was sought. Mere knowledge of the victims' membership in a distinct group on the part of the perpetrators is not sufficient to establish an intention to destroy the group as such."). *See also Jelisić*, Trial Chamber, *supra* note 41, para. 67 (holding "The special intent which characterizes genocide supposes that the alleged perpetrator of the crime selects his victims because they are part of a group which he is seeking to destroy. Where the goal of the perpetrator or perpetrators of the crime is to destroy all or part of a group, it is the 'membership of the individual in a particular group rather than the identity of the individual that is the decisive criterion in determining the immediate victims of the crime of genocide.'").

While ostensibly the Khmer Krom are ethnically the same as Khmer there is a possible argument for defining them as a distinct ethnic group, similar to the way the ICTR classified the Tutsi as their own ethnic group. In the *Akayesu* case, four facts consisting of both objective and subjective evidence led the ICTR chamber to find that there was sufficient evidence that the Tutsi were targeted for destruction as an ethnic group. Similar factors exist to separately define the Khmer Krom. First, at road blocks set up all over the country after the crash of the President's plane on 6 April 1994, Tutsi were separated on the basis of identity cards and facial features from Hutus and killed, [84] Similarly in the Bati region of Cambodia Khmer Krom were separated from other Khmer based on their heredity and were killed. [85] Although The Khmer Krom were not issued state recognized identity cards they were recognized by objective factors including their accent,[86] clothing,[87] and surnames.[88]

Second, the ICTR considered evidence of the propaganda campaign by radio and print media, overtly calling for the mass killing of Tutsi, who were considered to be accomplices of the Rwandan Political Front and accused of plotting to take over the power lost during the revolution of 1959.[89] In Cambodia, there was a massive propaganda campaign against the Vietnamese: "Phnom Penh Radio charged that entire generations of Vietnamese had devised cruel strategies to kill the Cambodian people and exterminate them. [90] In many instances Khmer

[84] *Akayesu*, Trial Chamber, *supra* note 35, para. 701.
[85] Kiernan, *supra* note 6, at 298.
[86] *Id*.
[87] KinKanitha, Keo, *Khmer Kampuchea Krom in the Mind of Khmer Rouge,* Searching for the Truth, 31 July 2002.
[88] Sok-Keang Ly, *Khmer Kampuchea Krom: From Justice Voyage to Memorial Initiative,* Searching for the Truth, June 2009.
[89] *Akayesu* Trial Chamber, *supra* note 35.
[90] Kiernan, *supra* note 6, at 366.

Krom were targeted because they were believed to be Vietnamese spies.[91] Ben Kiernan argues in his book that by 1978 there was a nationwide screening and massacring of ethnic Vietnamese and Khmer Krom.[92]

Third, the Hutu and Tutsi were legally delineated by identity cards indicating an official governmental recognition as separate groups. While not directly comparable, the fact that in Cambodia Tuol Sleng prison regulations recognized that those who were perceived to be affiliated with Kampuchea Krom were seen as traitors indicates some official governmental recognition of the Khmer Krom as a separate group.[93] Fourth, Rwandans identified themselves as either Hutu or Tutsi in court. In Cambodia the Khmer Krom identify themselves as Khmer Krom.[94] Additionally, the Khmer Krom have historic ties to the land of the Mekong Delta. The ICC pre-trial chamber has used historic ties to land as evidence of an ethnic identity.[95] In sum, some similar objective and subjective evidence of the type used by the ICTR is available from which it may be possible to classify the Khmer Krom as their own ethnic group within the meaning of the Genocide Convention.

However, there are practical limitations to classifying the Khmer Krom as an ethnic group for the purposes of bringing genocide charges in Case 002 of the ECCC. The Khmer Krom were not included in any of the co-prosecutors' submissions to the co-investigating judges, which define the scope of the investigation. Supplemental evidence of the crimes committed

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[91] Sok-Kheang Ly, *supra* note 88.
[92] Kiernan, *supra* note 6, at 423-25. *See also* Ciorciari, *supra* note 5.
[93] Tuol Sleng Regulations, No. 8. *A History of Democratic Kampuchea* (Phnom Penh: Documentation Center of Cambodia, 2007), p. 50 (regulation No. 8 reads "do not make pretexts about Kampuchea Krom so as to hide your true existence as a traitor.").
[94] Sok-Kheang Ly, *supra* note 88.
[95] Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09-3, (Pre-Trial Chamber, 4 March 2009), para. 137. The ICC Pre-Trial decision held that there was sufficient evidence to bring genocide charges on behalf of the minority groups of the Darfur region of Sudan. One piece of the evidence cited was historic ties to the land. The Pre-Trial Chamber also notes that they did not decide the issue of what the appropriate standard would be, either objective, or subjective.

against them could be introduced, but not to support genocide charges brought on their behalf as an independent protected group.

9. Defining Khmer Krom As Ethnically or Nationally Vietnamese According to the Subjective Perception of the Khmer Rouge

It may be possible for the ECCC to find that some Khmer Krom were viewed and targeted by the Khmer Rouge as members of the Vietnamese group. To do this, the court would have to adopt the hybrid approach used by the ad hoc tribunals. The court must first determine that the Vietnamese are a protected group. There would likely be little difficulty in doing so. Secondly, the co-prosecutors would have to prove that the Khmer Krom victims were targeted because they were subjectively perceived to be nationally, ethnically, or racially Vietnamese. Thus they would have to demonstrate a logical connection between the victims and the Vietnamese group. The ECCC would have to find that the Khmer Krom were not perceived as politically sympathetic to the Vietnamese but as actually Vietnamese.

There is some support for this notion, as noted above. For example, in the Bati district in 1976 entire families of Khmer Krom were massacred because authorities claimed that they could speak Vietnamese.[96] One Khmer Krom held captive after being removed from Kampuchea Krom recalls that when asked if they could speak Vietnamese, "We all said no. If we had said yes, we would have been killed. We all had to do family biographies. If we said we had any relatives still in Vietnam, we would be killed."[97] The DK regime wanted to reclaim the Kampuchea Krom and eliminate all traces of the Vietnamese. It has been reported that in the Tram Kak district of Region 13, in late 1978 local officials said, "If the Vietnamese are all gone, the Khmer remain; if

[96] Kiernan, *supra* note 6, at 299.
[97] Kiernan, *supra* note 6, at 426.

the Khmer are all gone then the Vietnamese remain."[98] The propaganda expounded divisive language that created a threat of assured destruction if the Vietnamese threat was not eliminated. The ECCC would have to find that the Khmer Krom were targeted because they were not an extension of this threat but implicitly included in this threat as Vietnamese nationals.

10. Third Approach, Using Evidence of Attacks against Khmer Krom to Show Genocidal Intent Towards the Vietnamese

A third approach would be to use the evidence of the atrocities committed against the Khmer Krom to prove genocidal intent towards the Vietnamese. This is similar to an approach used by the ICTR. The ICTR used evidence of crimes committed against politically moderate Hutus to show the genocidal intent towards the Tutsi. This would be the simplest option for the court. However, it would serve to prosecute the senior leaders of the Khmer Rouge only for the genocide committed against the Vietnamese. Many historians look back and refer to the fact that no charges were brought on behalf of the moderate Hutus. A similar historical perspective may appear in the future if the court does not seek justice for the Khmer Krom on their own behalf.

11. Political Implications of Bringing Genocide Charges

As John D. Ciorciari notes, "The ECCC has an obligation to deliver justice to victims, but it has an equally important obligation to advance what the relevant court officials believe—in their best professional judgment—to be the truth."[99] This begs the question of how far the court should go to bring genocide charges on behalf of the Khmer Krom. To do so, the co-investigating judges would first have to decide whether the Khmer Krom were persecuted because they were Khmer Krom or whether the DK regime actually sought the destruction of

[98] Kiernan, *supra* note 6, at 364.
[99] Ciorciari, *supra* note 5.

the group.[100]

Even if genocide charges on behalf of the Khmer Krom as a distinct group are possible, it is not clear that they want to be legally recognized as a separate ethnic group. The Khmer Krom in Cambodia have a range of preferences on the extent to which they are perceived as Khmer or Khmer Krom. It remains to be seen whether the court's official recognition of a Khmer Krom ethnic group would change public or official perceptions at all or affect the interplay between the Khmer Krom and the Khmer.

If the ECCC were to bring genocide charges on behalf of the Khmer Krom by saying that they were subjectively perceived to be Vietnamese, it may perpetuate the idea that Khmer Krom are Vietnamese. Labeling the Khmer Krom as Vietnamese could be beneficial in some respects to Khmer Krom living in Vietnam who strive to be seen there as political and social equals; however the decision could conceivably have a negative impact on the community living in Cambodia. Cambodia and Vietnam have had long-standing historic tensions. Labeling the Khmer Krom as Vietnamese could adversely affect their social status in Cambodia. Again, the ECCC's designation will not necessarily have a major public or official effect but could matter at the margins.

Lastly, if the court hears evidence of the atrocities committed against the Khmer Krom and uses it only to support charges brought on behalf of the Vietnamese, the Khmer Krom may feel that the court is not addressing the atrocities committed against them. Addressing the co-prosecutors' failure to investigate crimes against the Khmer Krom as a group, Means Chanthorn, a Khmer Krom victim said, "according to the law, the ECCC recognizes the death of

[100] *Brdjanin* Trial Chamber, *supra* note 1, para. 683 (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.").

the Cham people and the Vietnamese. Why do you not except our explanation?"[101]

In the end, the ECCC will have to wrestle with these issues and seek to legally define the Khmer Krom, both objectively and subjectively, so that justice is served.

[101] Bopha Phorn and Alice Foster, *Prosecutor Has Kind Words, No Answers for Krom,* The Cambodia Daily, 16 June 2010.