

## **Proving Genocidal Intent: International Precedent and ECCC Case 002**

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### **I. Introduction: The Problem of Intent**

On December 29, 2009, ECCC co-investigating judges announced charges of genocide in Case 002 against defendants Nuon Chea, Khieu Samphan, Ieng Sary and Ieng Thirith—widely considered the most senior surviving members of the Khmer Rouge—for their role in the regime’s persecution of the Cham Muslim and ethnic Vietnamese minorities.<sup>1</sup> The co-investigative judges’ decision as to whether to include genocide charges based on Khmer Rouge persecution of Buddhists is pending.<sup>2</sup>

At the same time, legal commentators have long recognized that despite genocide’s symbolic resonance as identifying and condemning mass killings of the worst kind, its circumscribed legal definition is limited to persecution of national, ethnic, racial or religious groups. Thus, it is widely accepted that “most crimes committed by the Khmer Rouge” do not fall under the rubric of genocide “because they were intended to destroy political enemies.”<sup>3</sup>

This paper seeks to evaluate international legal precedent on an issue that is likely to be critical to the ECCC’s examination of these genocide charges: establishing a criminal defendant’s genocidal *mens rea* by inference from the surrounding factual circumstances. In particular, it identifies and explores four key factors that international tribunals have found relevant to determining whether genocidal intent is properly inferable: (1) statements of the accused and his or her associates; (2) the scale of atrocities in question; (3) systematic targeting of the victim group; and (4) evidence that atrocities were planned.

The paper also seeks to offer preliminary observations on the relative applicability of international precedent to the Cambodian context. It is important to recognize, however, that the law on this question is far from firmly settled and that the ECCC – however it rules on the question – will inevitably break new ground.<sup>4</sup>

### **II. Genocide: the ECCC’s Legal Definition**

#### A. Actus Reas

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<sup>1</sup> Order on Request for Investigative Action on the Applicability of the Crime of Genocide at the ECCC, Case No. 002/19-09-2007-ECCC-OCIJ (Co-Investigating Judges, Dec. 29, 2009).

<sup>2</sup> Interview with ECCC staff, January 21, 2010.

<sup>3</sup> Anne Heindel, *Overview of the Extraordinary Chambers, in ON TRIAL: THE KHMER ROUGE ACCOUNTABILITY PROCESS*, 91 (eds. John D. Ciorciari & Anne Heindel 2009) (also noting that “despite ... recent efforts ... to include social, political, and economic groups” in the legal definition of genocide, “[i]t is extremely unlikely that the ECCC will find that any other protected groups fall within the definition of genocide as it existed from 1975-79”, the temporal jurisdiction of the Court).

<sup>4</sup> Note that two major current developments – the ICTY’s trial of Radovan Karadžić, former President of the Republika Srpska and alleged architect of the Srebrenica genocide, and the ICC’s potential pursuit of genocide charges against Omar al-Bashir, the current President of Sudan, for his role in the atrocities at Darfur – will also do much to settle the jurisprudence on this question.

ECCC Law Article 4 defines, in relevant part, an act of genocide as “any ... committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group”.<sup>5</sup> International courts have interpreted identical language in their respective statutes as imposing a requirement of special” or “specific intent”.<sup>6</sup> Thus, establishing liability for a principle perpetrator of genocide “requires proof of intent to commit the underlying act” as well as “proof of intent to destroy the targeted group.”<sup>7</sup> And as genocide is a “mass crime”, the intent to destroy a protected group “in part” must encompass “at least a *substantial* part of the group.”<sup>8</sup> Measuring the substantiality of the targeted part involves examination of *inter alia* its numeric size, in both absolute terms and “in relation to the overall size of the entire group”; the “prominence” or importance of the targeted part to the overall group; and the “area of the perpetrators’ activity and control”.<sup>9</sup>

## *ii. Motive versus Intent*

International tribunals have repeatedly emphasized the imperative to “distinguish[] between motive and intent”, as “in genocide cases, the reason why the accused sought to destroy the victim group has no bearing on guilt.”<sup>10</sup> Thus, while a perpetrator may be *motivated* by any number of unrelated objectives – such as personal economic gain, tactical military advantage, or the desire to expel a group from a given territory – this does nothing to neuter the *specific intent* to achieve these objectives through genocidal means.<sup>11</sup> At the same time, commentators recognize that the “prototypical case[] of genocide” is one in which genocidal intent aligns with the motive of “hatred of the targeted groups”.<sup>12</sup>

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<sup>5</sup> ECCC Law art. 4. The ICTY statute’s definition of genocide includes the phrase “as such”, which that court found to mean that “the group [must have] been targeted, and not merely specific individuals within that group”. Prosecutor v. Sikirica et al., Case No. IT-95-8-T, Judgment on Defence Motions to Acquit, ¶ 89 (Sept. 3, 2001).

<sup>6</sup> Prosecutor v. Kayishema and Ruzindana, Case No ICTR-95-1-T, Judgment, ¶ 89 (May 21, 1999); *see also* Prosecutor v. Jelusic, Case No. IT-95-10-A, Judgment, ¶ 45 (July 5, 2001) (noting that “[t]his intent has been referred to as ... special intent, specific intent, dolus specialis, particular intent and genocidal intent.”).

<sup>7</sup> Prosecutor v. Krstić, Case No IT-98-33-A, Judgment, ¶ 20 (April 19, 2004) (also noting that “proof of the mental state with respect to the commission of the underlying act can serve as evidence [from which to infer] the intent to destroy”).

<sup>8</sup> Prosecutor v. Jelusic, Case No. IT-95-10-T, Judgment, ¶ 82 (Dec. 14, 1999) (citing Report of the International Law Commission on the Work of its Forty-Eighth Session, 6 May – 26 July 1996, G.A.O.R., 51st session, Supp. No. 10 (A/51/10) (1996)).

<sup>9</sup> Krstić, IT-98-33-A, Judgment, ¶ 12-14 (noting that: “[t]hese considerations ... are neither exhaustive nor dispositive. They are only useful guidelines. The applicability of these factors, as well as their relative weight, will vary depending on the circumstances of a particular case.”); *see also* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v. Serbia), 2007 I.C.J. 91 (Feb. 26), ¶¶ 197-201 (pointing to “substantiality”, the geographic “area of the perpetrator’s activity and control”; and the “prominence” of the part).

<sup>10</sup> Prosecutor v. Stakic, Case No. IT-97-24-T, Judgment, ¶ 45 (July 31, 2003); *see also, e.g.*, Jelusic, IT-95-10-A, ¶ 49 (noting the “irrelevance” of motive to criminal intent); Prosecutor v. Tadic, Case No.: IT-95-1-A, Judgment, ¶ 269 (July 15 1999); Kayishema, ICTR-95-1-A, Judgment, ¶ 161 (June 1, 2001).

<sup>11</sup> *See* Prosecutor v. Krstić, Case No IT-98-33-T, Judgment, ¶ 572 (Aug. 2, 2001) (noting that “an armed force could decide to destroy a protected group during a military operation whose primary objective was totally unrelated to the fate of the group.”).

<sup>12</sup> Andrew T. Cayley, *The Prosecutor’s Strategy in Seeking the Arrest of Sudanese President Al Bashir on Charges of Genocide*, 6 J. INT’L CRIM. JUST. 829, 837 (2008) *citing* W. Schabas, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 255 (2000).

### *iii. Secondary Liability: Aiding and Abetting*<sup>13</sup>

In order to be held liable for aiding and abetting genocide before an international court, an individual need not possess the exacting “specific intent to destroy ... a national, ethnic, racial or religious group”.<sup>14</sup> Instead, the requisite *mens rea* is “the intent ... to knowingly aid or abet one or more persons to commit the crime of genocide”.<sup>15</sup> The *mens rea* element for aiding and abetting genocide can be therefore broken down into two distinct ‘knowledge’ requirements: First, one must knowingly aid and abet the primary perpetrator in the commission of the genocidal *actus reas* (e.g., assist someone murder members of a protected group). Second, one must do so with knowledge (or having reason to know) of the principal’s specific genocidal intent.<sup>16</sup>

Note that under this standard, an individual may be liable for aiding and abetting genocide even if he does not share the primary perpetrator’s genocidal intent.<sup>17</sup> As this paper is primarily interested in flushing out the legal standard for inferring genocidal intent, it does not fully explore the various modes of liability by which a defendant could conceivably be prosecuted for genocide absent a showing of such intent.

### **III. Inferring Genocidal Intent**

In *Akayesu*, the first-ever genocide prosecution in an international tribunal,<sup>18</sup> the ICTR’s Trial Chamber noted that “[i]ntent is a mental factor which is difficult, even impossible, to determine” directly, at least absent a confession.<sup>19</sup> The Court further determined, however, that “the genocidal intent inherent in a particular act” may “be inferred ... from the general context” in which the act occurred.<sup>20</sup> In other words, the ICTR recognized that – absent extraordinary

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<sup>13</sup> Some argue that “specific intent always has to be shown” to prove genocide. *See id.* at 839 *citing* Prosecutor v. Brdanin, Case No. ICTY-99-36-A, Decision on Interlocutory Appeal (Shahabuddeen, J. dissenting), ¶ 4 (March 19, 2004). Others, however, urge that genocide can be established via indirect modes of liability, such as Joint Criminal Enterprise and Command Responsibility. *See id.* at 838 *citing* Brdanin, ICTY-99-36-A, Decision on Interlocutory Appeal ¶ 6; Brdanin, ICTY-99-36-T, Judgment, ¶ 711-12 (Sept. 1, 2004).

<sup>14</sup> *See* Brdanin, ICTY-99-36-T, Judgment at ¶¶ 134-35, 140-43.

<sup>15</sup> Prosecutor v. Akayesu, Case No ICTR-96-4-T, Judgment, ¶ 540 (Sept. 2, 1998).

<sup>16</sup> *Id.* at ¶ 545 (finding that “an accused is liable as an accomplice to genocide if he knowingly aided or abetted ... one or more persons in the commission of genocide, while knowing that such a person or persons were committing genocide, even though the accused himself did not have the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”).

<sup>17</sup> *See* Krstić, IT-98-33-T at ¶ 637 *aff’d in* Krstić, Case No IT-98-33-A at ¶ 539 (noting that liability attaches for aiding and abetting “even [if] he regretted the outcome of the offence”).

<sup>18</sup> SAMUEL TOTTEN ET AL., DICTIONARY OF GENOCIDE: A-L 6 (2008). Note that, at the very outset of the ICTR’s existence, Rwandan interim Prime Minister Jean Kambanda pled guilty to charges of genocide (though he later attempted to rescind the plea). Prosecutor v. Kambanda, Case No ICTR-97-23-S, Judgment and Sentence (Sept. 4 1998). As the Rwandan head of state during the atrocities, Kambanda’s early guilty plea was symbolically powerful. And one could accordingly argue that it framed the parameters of debate at the ICTR in terms of how deep into the military and political hierarchy individual liability for the genocide would extend, not whether genocide had occurred or whether individuals were properly liable for its perpetration.

<sup>19</sup> Akayesu, ICTR-96-4-T, Judgment at ¶ 523; *see also* Kayishema, ICTR-95-1-A, Judgment at ¶ 527 (noting that “evidence, in the present case, is considered in light of [the] reality” of “the difficulty in finding explicit manifestations of a perpetrator’s intent”).

<sup>20</sup> Akayesu, ICTR-96-4-T, Judgment at ¶ 523. *Akayesu*’s formulation for inferring genocidal intent was widely adopted and followed in subsequent ICTR decisions. *See, e.g.,* Prosecutor v. Georges Rutaganda, ICTR-96-3-T, Judgment, ¶ 61 (Dec. 6, 1999).

circumstances or a confession – direct evidence of genocidal intent will very rarely be available even where such intent otherwise exists.<sup>21</sup> As such, courts must rely on inferences from the surrounding factual circumstances in order to determine whether a defendant acted with the requisite genocidal intent.

The ICTR’s observation has proven prescient. It appears that – as of January 2010 – every successful genocide prosecution in an international forum has relied to at least some degree on inferences of genocidal intent from the factual context in which the accused acted.<sup>22</sup> A review of the applicable case law has identified four key factors in this highly-contextual analysis: (1) statements indicating genocidal intent; (2) the scale of the atrocities committed; (2) systematic targeting of the protected group; and (4) evidence suggesting that commission of the *actus reus* was consciously planned.

It must be emphasized that inferring genocidal intent is not a mechanical inquiry. Though these four factors have thus far proven to hold the most sway with international tribunals, nothing precludes a future Court from identifying additional factors.<sup>23</sup> As such, no particular combination of factors can be identified as necessary or sufficient to prove genocidal intent. And as relevant as the *existence* of a factor is the *degree* with which it is demonstrated (e.g., the clarity with which a statement indicates genocidal intent, the extent of systematic targeting etc.). The caselaw establishes, moreover, that inferring specific genocidal intent requires considerably more than merely demonstrating the accused’s “extreme racial and ethnical hatred” of the targeted group.<sup>24</sup> As the ICTY Appeals Chamber noted in *Jelusic*, even seemingly ‘smoking-gun’ verbal expressions of genocidal intent,<sup>25</sup> combined with dozens of murders targeting a protected group<sup>26</sup>, is not necessarily sufficient contextual evidence from which to infer genocidal intent. Instead, courts conduct a holistic inquiry into whether the overall factual context constitutes “the physical expression of an affirmed resolve to destroy ... a group as such”.<sup>27</sup> That

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<sup>21</sup> Note that the necessity of demonstrating intent by inference is by no means limited to proving genocide. See MICHAEL ALLEN, TEXTBOOK ON CRIMINAL LAW 57 (9th ed. 2007) (noting that “[t]he state of a person’s mind ... is not an easy fact to prove” and therefore courts are generally “left to use their collective common sense to draw inferences from the circumstances and ... the accused’s conduct in those circumstances”).

<sup>22</sup> What has perhaps emerged as the prevailing legal formulation for inferring genocidal intent states that: specific intent ... may, in the absence of direct explicit evidence, be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts

*Jelusic*, IT-95-10-A, Judgment at ¶ 47 (cited by UN Darfur Commission Report, *supra* note 5, at ¶ 502).

<sup>23</sup> Nor does it prevent a court from disclaiming the relevance of those previously identified. See Section III.B.ii (noting that the ICTY declined to rely on evidence of an accused’s derogatory statements to infer genocidal intent despite the ICTR’s earlier reliance on such evidence). But the author considers the four factors identified in this paper to be sufficiently well-established within international criminal jurisprudence such that their wholesale rejection is highly unlikely.

<sup>24</sup> *Jelusic*, IT-95-10-T, Judgment at ¶ 70.

<sup>25</sup> *Jelusic* involved the de facto head of a Serbian prison camp who described himself as the “Serbian Adolf” – even at the ICTY; asserted that his reason for going to the camp “was to kill Muslims”; told the detainees that he “held their lives in his hands and that only between 5 to 10% of them would” survive; that he “hated Muslims and wanted to kill them all” and that Muslims “had proliferated too much and that he had to rid the world of them”. *Id.* at ¶ 102.

<sup>26</sup> *Jelusic* “reputedly said to one witness that ... he had killed one hundred and fifty persons”. *Id.* at ¶ 150.

<sup>27</sup> Though *Jelusic* personally murdered dozens of Muslims, the Tribunal found that he had acted “arbitrarily rather than with the clear intention to destroy a group”. *Id.* at ¶ 108.

the defendant committed acts satisfying the *actus reus* of genocide while motivated by racial, ethnic, national, or religious animus is insufficient.<sup>28</sup> The relevant *mens rea* is the “intent to destroy” a protected group and nothing less. Finally, at least one international court has suggested that in order to derive genocidal intent from the surrounding context, such an inference must be “*the only reasonable inference available on the evidence*” and not susceptible to competing interpretations.<sup>29</sup>

#### A. The General Existence of Genocide

Prior to assessing the question of a defendant’s individual liability, international criminal tribunals first seek to establish that the situation in question generally constitutes genocide.<sup>30</sup> In assessing the *mens rea* element at this initial stage “[t]he inference that a particular atrocity was motivated by genocidal intent may be drawn ... even where the individuals to whom the intent is attributable are not precisely identified.”<sup>31</sup> In other words, courts do not require in this first inquiry that the factual circumstances point to any particular individual(s); they merely seek to establish whether the broader atmospherics suggest that *someone* acted with genocidal intent. Similarly, in determining the general existence of genocidal *actus reus*, courts do not dwell on “whether [the] acts [in question] were committed by the [accused] or others.”<sup>32</sup>

If the tribunal makes a general finding of genocide,<sup>33</sup> it then investigates whether the individual in question participated in the genocidal *actus reus* while possessing the requisite *mens rea*. While this entails a distinct second inquiry into factual circumstances particular to the accused, courts necessarily draw to some extent on their earlier observations and findings. “Although not itself sufficient to support a genocide conviction” (as this would, in effect, sanction guilt by association), the larger atmosphere in which an individual acted is “relevant to the context in which individual crimes are charged.”<sup>34</sup> In other words, while courts must of course determine whether or not the accused him or herself possessed the requisite genocidal intent,<sup>35</sup> they draw on factual circumstances with which the accused is not directly connected in order to inform their interpretation of the individual’s actions.<sup>36</sup>

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<sup>28</sup> See Jelisić, IT-95-10-A, Judgment at ¶¶ 61-64 (finding genocidal intent lacking despite the accused’s demonstrated murderous hatred of Muslims).

<sup>29</sup> Prosecutor v. Brdanin, Case No. IT-99-26-T, Judgment, ¶ 353 (Sept. 1, 2004) (emphasis added).

<sup>30</sup> Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-95-1-T, Judgment, ¶ 273 (May 21, 1999); (finding the question of “whether genocide took place in Rwanda in 1994 ... is so fundamental to the case against the accused that the Trial Chamber feels obliged to make a finding of fact on this issue” prior to addressing issues of individual liability).

<sup>31</sup> Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, ¶ 34 (April 19, 2004).

<sup>32</sup> Akayesu, ICTR-96-4-T, Judgment at ¶ 523.

<sup>33</sup> Note that, after several cases in which the ICTR Appeals Chamber investigated anew each time whether genocide had taken place in Rwanda, it took judicial notice of this “fact of common knowledge”. See Prosecutor v. Karemera, Ndirumpatse, and Nzirorera, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor’s Interlocutory Appeal of Decision on Judicial Notice (June 16, 2006).

<sup>34</sup> *Id.* at ¶ 36.

<sup>35</sup> Kayishema, ICTR-95-1-T, Judgment at ¶ 273 (emphasizing that “a finding that genocide took place in Rwanda is not dispositive of the question of the accused’s innocence or guilt” and that it must “make a finding of the possible responsibility of each person” accused of genocide).

<sup>36</sup> See *id.* (finding the question of “whether genocide took place in Rwanda in 1994 ... of general importance” to a determination of individual liability).

Though commentators criticize the ICTR for relying on general evidence of genocide in assigning individual liability thereof, they tend to vastly oversimplify the logical relationship between the two inferential calculi. One commentator suggests, for example, that using “the existence of the nationwide campaign” of genocide to infer genocidal intent is illegitimate, as the only plausible bases for doing so are that it “counsels skepticism toward defendants’ claims that they did not commit genocide” or “that there are a significant number of genocidal acts for which the defendant could be responsible”.<sup>37</sup> This analysis ignores, however, that certain factors are only revealed to be suggestive of individual genocidal intent when first situated amongst the broader context of society-wide genocide. For example, in *Kayishema*, the ICTR found relevant to its general finding of genocide in Rwanda that machetes had been widely distributed to the Hutu civilian population.<sup>38</sup> It then found that such machete distribution had occurred in Kibuye Province, where the accused was Prefect (i.e. governor), supporting its finding of genocidal intent amongst at least some individuals in Kibuye.<sup>39</sup> With respect to inferring the accused’s personal genocidal *mens rea*, the Tribunal noted that – at massacres of Tutsi where Kayishema was demonstrated to have been “leading and directing” – many of his followers “hacked ... [their] victims to death [with] machetes.”<sup>40</sup> In this manner, the Tribunal implicitly found that that the distribution of machetes in Rwanda and Kibuye Province – actions to which no evidence linked the accused – supported an inference of his individual genocidal intent. Widespread possession of machetes among Kayishema’s followers does little by itself to suggest that Kayishema possessed genocidal intent (for all the Court knows, most Rwandans might already have had machetes in their personal possession). But it takes on new meaning once coupled with the fact that government leaders had distributed those machetes widely among the population in furtherance of a genocidal plan.

Likewise, in order to understand the “context” in which the accused acted, the ICTR has often pointed to incriminating statements made by persons to whom no direct association with the accused could be shown and that therefore do not bear directly on the accused’s *mens rea*. For example, the ICTR has made several references to statements made in radio broadcasts, pamphlets and at public meetings by Leon Mesera, a professor and propagandist, declaring that assailants “had to cut the legs ... [off] babies who were still sucking ... so that they would not be able to walk”; that “we will not make the ... mistake where we let the younger [Tutsis] escape”; and urging listeners to “throw [Tutsi] into the river so they can go out of the country”.<sup>41</sup> The court has found such statements relevant, if indirectly, to discerning whether the accused also possessed the requisite genocidal intent.

In addition, the initial finding that genocide generally occurred in a given situation can be independently relevant to a case’s disposition even if the tribunal finds that the accused did not personally possess genocidal intent. This is because it is a predicate finding for assigning indirect liability for genocide, which as discussed *supra*, often does not require proof of specific genocidal intent. The ICTY Appeals Chamber in *Krstić*, for example, found that the factual

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<sup>37</sup> See Kevin Heller, *International Decision: Prosecutor v. Karemera, Ndirumpatse, & Nzirorera*, 101 AM. J. INT’L L 157, 159, 161 (2007).

<sup>38</sup> *Kayishema*, ICTR-95-1-T, Judgment at ¶ 284, 298.

<sup>39</sup> *Id.* at ¶ 298.

<sup>40</sup> *Id.* at ¶¶ 536-37.

<sup>41</sup> *Id.* at ¶ 280; see *Akayesu*, ICTR-96-4-T, Judgment at ¶ 100.

circumstances in that case supported an inference that some unidentified party possessed genocidal intent, but found evidence of Krstić's personal genocidal intent lacking. Nevertheless, the Court found that he had knowingly aided and abetted others' commission of genocide, and was therefore held indirectly liable for their genocidal acts.<sup>42</sup>

## B. Statements Manifesting Individual Genocidal Intent

The most direct evidence by which one might infer individual genocidal *mens rea* is through examining a defendant's verbal and written statements that manifest one's intent to destroy a protected group.<sup>43</sup> Accordingly, in the course of determining whether an individual possessed the requisite genocidal intent, the ICTR has closely examined the accused's public statements arguably to that effect. For example, in *Akayesu* the Tribunal found relevant a witness's testimony that the accused had publicly declared that "if a Hutu woman were impregnated by a Tutsi man, the Hutu woman had to be found in order 'for the pregnancy to be aborted'."<sup>44</sup> Similarly, in *Kayishema*, the ICTR found that the accused had "encourage[ed] the extermination of the Tutsis", and thus possessed the requisite genocidal intent, on the basis of witness testimony that he had exhorted his followers to "go to work" or "get down to work" just prior to a massacre of Tutsis. In another example, in *Muhimana* the ICTR found evidence that the accused had stated "that he was going to hold a meeting to encourage the Hutu population to go out and kill Tutsi", combined with evidence that a massacre of Tutsi followed a meeting at the accused's residence, to be highly probative of his genocidal intent.<sup>45</sup>

Moreover, while the inference of genocidal intent might logically be strongest when the defendant himself utters the incriminatory statement, the ICTR has often relied on statements manifesting genocidal intent made by others associated with the defendant. Sometimes the association has legal significance in itself, as in *Kayishema*, where the ICTR pointed to "songs about exterminating the Tutsi" sung by those for whom the defendant had command responsibility.<sup>46</sup> Similarly, in their application for the arrest of Omar al-Bashir, President of Sudan, ICC prosecutors pointed to statements issued by those allegedly under his command responsibility such as "[t]he power of Al BASHIR belong to the Arabs and we will kill you until the end"; "we will kill all the black" and "we are here to eradicate blacks".<sup>47</sup>

In other instances, however, the association in question merely supports a factual inference that the accused agreed with the statements made by the other person. In the course of finding that Jean Paul Akayesu acted with genocidal intent, for example, the ICTR pointed to the testimony of two witnesses indicating that the accused had "chaired ... a public meeting" at which others had stated, respectively, "that all the Tutsi had to be killed so that someday Hutu children would

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<sup>42</sup> See Krstić, Case No IT-98-33-A, Judgment at ¶ 539

<sup>43</sup> See Cayley, *supra* note 26, at 837 (finding that, in his experience as an ICC and ICTY prosecutor, "[g]enocidal intent is most easily established through unambiguous statements, such as public speeches or declarations").

<sup>44</sup> Akayesu, ICTR-96-4-T at ¶ 121.

<sup>45</sup> Prosecutor v. Mikaeli Muhimana, Case No ICTR-95-1B-T, Judgment, ¶ 81, 496 (April 28, 2005).

<sup>46</sup> Kayishema, ICTR-95-1-T, Judgment at ¶ 539. The lyrics of the song "urge[] attackers not to spare [Tutsi] elderly and even [Tutsi] babies" because some members of the Tutsi militia had left Rwanda as a child. *Id.*

<sup>47</sup> Prosecutor's Application for Warrant of Arrest under Article 58 Against Omar Hassan Ahmad AL BASHIR, International Criminal Court, 9 (hereinafter "ICC Bashir Arrest Warrant Application").

not know what a Tutsi looked like” and that the speaker “would rest only when no single Tutsi is left in Rwanda.”<sup>48</sup>

### *1. Statements Not Sufficient*

While statements urging listeners to engage in genocidal acts can themselves constitute the *actus reus* of genocide if they amount to “incitement”,<sup>49</sup> even clear outward manifestations of genocidal *mens rea* still require courts to make inferences regarding the speaker’s intent. For example, one cannot conclude that the statement “I specifically intend to destroy all Tutsi” manifests genocidal intent without also finding that the speaker meant what he said (in other words, that the statement was not merely hortatory or made for rhetorical punch). Accordingly, the ICTY Trial Chamber noted in *Kragisnik* that “[w]hen reviewing speeches and statements ... in search of evidence of genocidal intent, utterances must be understood in their proper context.”<sup>50</sup> Thus, in determining the probative weight to attach to a given statement, courts closely parse its content as well as the context in which it is made. For example, the ICTR in *Ntagerura* found that one Hutu politician’s statements at a public meeting during the genocide “ask[ing] the people at the meeting if they could accept ‘*Inyenzis*’ [cockroaches] ... running the country” and “urg[ing] the crowd to ... mobilize itself, and take up arms to return [them] to the place from where they came” was not a sufficiently clear manifestation of his desire for the destruction of Tutsis as a group to support an inference of his genocidal intent.<sup>51</sup> Buttressing this conclusion was the fact that Court determined that the prosecution had “failed to prove that the purpose of the meeting was to organize, prepare and encourage genocide.”<sup>52</sup> In other words, the ICTR did not examine statements arguably manifesting genocidal intent in isolation. When confronted with an ambiguous statement – which could possibly support an inference of genocidal *mens rea* but could also suggest any number of other mental states (e.g., mere racial animus, the desire for military victory) – the Tribunal examined the circumstances surrounding the utterance to discern its true meaning.

Recognizing that statements alone, no matter how incendiary, are likely insufficient to independently support an inference of genocidal intent, international tribunals uniformly supplement such evidence by pointing to other underlying factual circumstances, discussed further in Sections B, C & D.

### *2. Distinguish: Mere Derogatory Statements*

International tribunals have disagreed over whether “the use of derogatory language toward members of the targeted group”<sup>53</sup> that stops short of calling for (or suggesting support for) the group’s physical destruction is probative of genocidal intent. For example, in *Kayishema*, the defendant’s use of “hostile language when referring to Tutsis,” together with several other factual circumstances through which the Tribunal evinced his genocidal intent,<sup>54</sup> led the ICTR’s

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<sup>48</sup> Akayesu, ICTR-96-4-T, Judgment at ¶¶ 18-19.

<sup>49</sup> See *id.* at ¶ 481.

<sup>50</sup> Prosecutor v. Kragisnik, Case No. IT-00-39-T, Judgment, ¶ 1092 (Sept. 27 2006).

<sup>51</sup> Prosecutor v. Ntagerura, Bagambiki & Imanishimwe, ICTR-99-46-T, Judgment, ¶¶ 96-102 (Feb. 24, 2004). Due to the prosecution’s failure to demonstrate that genocidal intent could be inferred from the factual circumstances of the case, Ntagerura was acquitted of all charges.

<sup>52</sup> *Id.* at ¶ 145.

<sup>53</sup> Kayishema, ICTR-95-1-T, Judgment at ¶ 93.

<sup>54</sup> *Id.* at ¶¶ 292-313, 531-40.



to find that he possessed the requisite genocidal intent.<sup>55</sup> Specifically, the Tribunal put weight on the fact that the accused had referred to Tutsi as “filth”, “dirt”, “dogs”, “sons of bitches”, and “cockroaches”.<sup>56</sup> Similarly, in their application for al-Bashir’s arrest, ICC prosecutors urge that his subordinates’ use of general derogatory language directed at the targeted group supports an inference of his genocidal intent.<sup>57</sup>

Nevertheless, courts do not appear to rely strongly on general derogatory language to prove genocidal intent. As noted above, in *Ntagerura* the ICTR did not find the fact that the accused had publicly labeled Tutsi “cockroaches” to have significant probative weight in assessing whether he possessed genocidal *mens rea*.<sup>58</sup> Unlike the defendant in *Kayishema*, the accused’s derogatory statements were among the only pieces of evidence indicating his specific intent to destroy the Tutsi as a group.<sup>59</sup> More broadly, in *Krstić* the ICTY ruled that “no weight can be placed upon [] Krstić’s use of derogatory language [against Bosnian Muslims] in establishing his genocidal intent.”<sup>60</sup> In making this finding, the Court noted that “charged language is commonplace amongst military personnel during war”. Whether the ICTY would extend this reasoning outside of the military context to apply to civilian leaders and private citizens, however, is unclear.

### 3. Rwanda: *Sui Generis*?

Notwithstanding the previous discussion, it is clear that the evidentiary burden of proving defendants’ genocidal intent at the ICTR has been significantly alleviated by the ease with which prosecutors have been able to point to defendants’ public statements made during the course of the genocide. In Rwanda, where the public itself was enlisted into the perpetrators’ genocidal plans, many Hutu leaders issued highly public exhortations for their followers to “exterminate the cockroaches”, thus openly communicating their genocidal objectives at public meetings, boisterous political rallies, and via the media.

The existence of such blatantly incriminating statements seems linked to the underlying character of the Hutu Power movement – namely, its grassroots structure.<sup>61</sup> Given the distinctive nature of the Rwandan genocide, one might rightly caution against assuming – based on the ICTR’s heavy reliance on incriminating statements made by defendants and their associates to infer genocidal intent – that evidence of such statements is required to prove genocidal *mens rea*. Indeed, the ICTY – which itself enjoyed the evidentiary benefit of access to perpetrators’ intercepted

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<sup>55</sup> *Id.* at ¶ 311.

<sup>56</sup> *Id.* at ¶ 280; see also Muhimana ICTR-95-1B-T, Judgment at ¶ 496.

<sup>57</sup> ICC Bashir Arrest Warrant Application, *supra* note 61, at 9 (pointing to statements such as “You are Zaghawa tribes, you are slaves” and “You are Masalit. Why do you come here, why do you take our grass?”).

<sup>58</sup> *Ntagerura*, ICTR-99-46-T, Judgment ¶¶ 96-102.

<sup>59</sup> Note that the ICTR’s reasoning in *Ntagerura* is not necessarily incompatible with its earlier reliance on derogatory statements to infer genocidal intent in *Kayishema*. In the latter case, *Kayishema*’s derogatory statements were accompanied by several other factual circumstances through which the Tribunal evinced his genocidal intent. As such, in contrast to the ICTY’s ruling in *Krstić*, ICTR jurisprudence can logically be interpreted as finding derogatory statements has some – if minimal – probative value.

<sup>60</sup> *Krstić*, IT-98-33-T, Judgment at ¶ 130 (emphasis added).

<sup>61</sup> See generally TOTTEN, *supra* note 32, at 292 (describing the organization framework of Rwandan political parties); Rene Lemarchand, *The 1994 Rwandan Genocide*, in A CENTURY OF GENOCIDE (Samuel Totten, William S. Parsons eds., 2008).

telephone conversations made during the course of the Balkans conflict<sup>62</sup> – expressly recognized that evidence of an accused’s incriminating statements is not necessary to inferring his genocidal intent.<sup>63</sup>

### C. Scale of the Atrocities Committed

It appears that in every instance in which an international tribunal has contemplated the factors bearing on an inference of genocidal intent, it has emphasized the importance of assessing the “scale ... of the atrocities”.<sup>64</sup> The scale by which the *actus reus* was committed is relevant from both an absolute and a relative perspective (i.e. “the [total] number of victims from the group” affected; and “the relative proportionate scale of the actual or attempted destruction of a group”).<sup>65</sup> Inferring genocidal intent from the scale of atrocities appears to derive from the legal presumption – present in many domestic jurisdictions<sup>66</sup> – that people intend the foreseeable consequences of their deliberate acts. In other words, the fact that one takes action (e.g., killing large amounts of people) “with full knowledge of the detrimental consequences it would have for the physical survival of [a particular] community” is highly probative on the question of whether the actor specifically intended to achieve this result.<sup>67</sup>

The preceding analysis begs the question: what constitutes ‘large scale’ atrocities? Again, the Rwandan genocide seems to offer the paradigmatic modern example. Though definitive findings on the absolute number and relative proportion of the population of Tutsi killed during the genocide will likely never emerge, experts estimates range from five hundred thousand to two million were killed in less than four months, constituting from seventy-five to eighty-five percent of the Tutsi population living in Rwanda at that time.<sup>68</sup> Subsequent jurisprudence makes clear, however, that a scale of this staggering magnitude is not necessary for atrocities to be sufficiently ‘large-scale’ so as to support an inference of genocidal intent. In *Krstić*, for example, the ICTY found that the murder of 7,000 to 8,000 Bosnian Muslim men – of a geographically limited target population of at least four times that number<sup>69</sup> – constituted a large enough “scale of killing” (along with other factual circumstances) to support a finding of the perpetrators’ genocidal intent.<sup>70</sup>

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<sup>62</sup> See, e.g., *Krstić*, IT-98-33-A, Judgment at ¶ 52-53, 55-58, 66, 72-76.

<sup>63</sup> *Id.* at ¶ 34 (“the record contains no statements by members of the VRS Main Staff indicating that the killing of the Bosnian Muslim men was motivated by genocidal intent to destroy the Bosnian Muslims of Srebrenica. The absence of such statements is not determinative.”); cf. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v. Serbia), 2007 I.C.J. 91 (Feb. 26), ¶¶ 287-97 (endorsing the ICTY’s finding in *Krstić*).

<sup>64</sup> See, e.g., Akayesu, ICTR-96-4-T, Judgment at ¶ 118; *Krstić*, IT-98-33-A, Judgment at ¶ 10-12, 34; *Bosnia v. Serbia*, 2007 I.C.J. 91 at ¶ 438; *Prosecutor v. Laurent Semanza*, ICTR-97-20, Judgment, ¶ 313 (May 15, 2003); see also *Ntagerura* ICTR-99-46-T, Judgment ¶ 663.

<sup>65</sup> Kayishema, ICTR-95-1-T, Judgment at ¶ 93.

<sup>66</sup> See, e.g., JOHN STUART MILL, ANALYSIS OF THE PHENOMENA OF THE HUMAN MIND, Vol 2. 401 (1869); Raymond Lyons, *Intention and Foresight in Law*, 85 MIND 84, 84 (1976).

<sup>67</sup> *Krstić*, IT-98-33-A, Judgment at ¶ 29.

<sup>68</sup> Alan J. Kuperman, *Rwanda in Retrospect*, FOREIGN AFFAIRS, January/February 2000; see also Kayishema, ICTR-95-1-T, Judgment at ¶ 291 (estimating the dead at between 800,000 and 1,000,000—one seventh of Rwanda’s population at the time); Edwin Musoni, *Report Claims 2 Million Killed in 1994 Genocide*, THE NEW TIMES (KIGALI), Oct. 4, 2008.

<sup>69</sup> *Krstić*, IT-98-33-T, Judgment at ¶ 1.

<sup>70</sup> *Krstić*, IT-98-33-A, Judgment at ¶ 2, 35.

On the other hand, while highly probative, the existence of ‘large scale atrocities’ committed at the hands of the perpetrator and/or his associates is not necessary to an inference of genocidal intent. Indeed, in ratifying the theoretical possibility of a “lone *génocidaire* scenario” whereby a “single perpetrator ... [is] capable of committing genocide” on the basis of a relatively small number of discrete killings,<sup>71</sup> the Appeals Chamber of the ICTY implicitly recognized that the scale of atrocities in question is not a dispositive variable in the calculus of inferring genocidal intent. In other words, “[t]here is no numeric threshold of victims necessary to establish genocide.”<sup>72</sup>

#### D. Systematic Targeting

Genocidal intent to destroy a group may also be inferred from “the perpetration of other culpable acts systematically directed against the same group.”<sup>73</sup> For example, in *Akayesu* and other cases, the ICTR found it highly relevant that Tutsis nationwide had been singled out for persecution and condemnation, even if the particular defendants in question did not directly participate in the actions or utter the statements in question. The Court found that systematic targeting of Tutsi during the Rwandan genocide occurred through three principle means: First, the setting up of roadblocks, at which “soldiers, troops of the Presidential Guard and/or militiamen ... systematic[ally] check[ed] identity cards indicating the ethnic group of their holders”.<sup>74</sup> Anyone listed as a Tutsi was then “immediately apprehended and killed, sometimes on the spot”<sup>75</sup>. Second, the distribution of “execution lists” composed largely of the names of Tutsis and perceived Tutsi sympathizers, with substantial evidence linking the use of such lists to the actual targeting of Tutsi and the sparing of others.<sup>76</sup> Third, “a propaganda campaign conducted before and during the tragedy” via the audio, visual and print media which involved the widespread dissemination of messages “overtly call[ing] for the killing of Tutsi” as a group.<sup>77</sup> In some instances, moreover, this propaganda campaign extended beyond the media, with the Tribunal pointing to a letter “intended for the widest possible dissemination” from a regional “staff headquarters” and signed by a military colonel. This letter defined the term “enemy” as “the extremist Tutsi within the country or abroad who are nostalgic for power and who have NEVER acknowledged and STILL DO NOT acknowledge the realities of the Social Revolution of 1959 [which led to the overthrow of Tutsi political leadership in Rwanda]” as well as “anyone who lent support in whatever form to the primary enemy”.

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<sup>71</sup> Prosecutor v. Jelisić, Case No. IT-95-10-A, Judgment, ¶ 61-65 (July 5, 2001) (finding on the basis of other factual circumstances that the individual in question did not have the requisite genocidal intent); *see also id.* (Wald J., dissenting in part) (citing W. Schabas, GENOCIDE IN INTERNATIONAL LAW 9 (2000)) (endorsing the idea that “the currency of [genocide,] this ‘crime of all crimes’ should not be diminished by use in other than large scale state-sponsored campaigns to destroy minority groups, even if the detailed definition of genocide in our Statute would allow broader coverage.”).

<sup>72</sup> Muhimana, ICTR-95-1B-T, Judgment at ¶ 498.

<sup>73</sup> Jelisić, IT-95-10-A, Judgment at ¶ 47.

<sup>74</sup> In the 1930s, while governing Rwanda as a colony, the Belgians formally established a system of government-tracked racial classification whereby an individual’s ethnicity is listed on their national identification card.

<sup>75</sup> Akayesu, ICTR-96-4-T, Judgment at ¶ 123.

<sup>76</sup> In one instance, “patients and nurses [were] killed in a hospital because a soldier had a list including their names.” *Id.* at ¶ 126; *see also* Kayishema, ICTR-95-1-T, Judgment at ¶ 278.

<sup>77</sup> Akayesu, ICTR-96-4-T, Judgment at ¶ 123.

Similarly, though disputes over other circumstantial elements have left the ICC's prosecution of Sudanese leaders for genocide in doubt,<sup>78</sup> all parties seem to agree that the exclusive targeting of so-called "African" villages<sup>79</sup> – with "[t]he attackers [going] out of their way to spare from attack so-called "Arab" villages even where they were located very near to the targeted towns" – is strong, though not dispositive,<sup>80</sup> evidence of genocidal intent.<sup>81</sup> In addition to targeting of predominantly "African" villages for military attack, the Prosecutor alleges that Sudanese forces have targeted "African" women and children for rape; targeted the group for "massive forced displacement"; targeted the group for killing within prison camps; and targeted their property.<sup>82</sup>

*i. Distinguishing Intent from Genocidal Actus Reus*

Though the systematic targeting of Tutsis was part and parcel to the *actus reus* of the Rwandan genocide (the murdering of Tutsi) it is not necessary for the targeting in question to be in furtherance of the genocidal *actus reus* to be fairly interpreted as manifesting genocidal intent. In *Krstić*, for example, the ICTY found the forcible transfer of certain segments of a targeted group – when viewed in light of the accompanying genocidal act – supported an inference of genocidal intent, even though forcible transfer is not a genocidal act under the ICTY Statute.<sup>83</sup> *Krstić* involved the Serbian Army's simultaneous mass murder of Bosnian Muslim men at, and forced removal of Bosnian Muslim women and children from, Srebrenica. Rejecting *Krstić*'s argument that the perpetrators' decision to bifurcate the targeted group based on their age and gender suggested a lack of genocidal intent, the ICTY noted that, in a patrilineal society, "Bosnian Serb forces [must have known] that the combination of killing [the men] with the forcible transfer of the women, children and elderly would inevitably result in the physical disappearance of the [entire targeted group]".

The ICTY in *Krstić* ascribed inferential weight to forms of targeting with even less direct relation to the genocidal act than forcible transfer, such as "destroying homes" of Bosnian Muslims, destroying the city's "principal mosque", and "preventing any decent burial [of the dead] in accord with religious and ethnic customs." While such offenses are clearly not acts of

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<sup>78</sup> See *infra* Section III.D.iii.

<sup>79</sup> The distinction between "African" and "Arab" tribes in Darfur is largely illusory, at least in terms of its connection to ethnic, national, or racial identity. All speak Arabic, practice Islam, live in Africa, and extensive intermarriage has rendered any physical differences very difficult to detect, even amongst members of the two 'groups'. Nevertheless, the UN Darfur Commission found that 'African' Darfur tribes (including the Fur, Zaghawa, Massalit, Jebel, and Aranga) subjectively constitute a "group" within the meaning of the Genocide Convention, as they "are perceived and in fact treated as belonging to one of the protected groups, and ... consider themselves as belonging to one of such groups" (noting further that "collective identities, and in particular ethnicity, are by their very nature social constructs"). UN Darfur Commission Report, *supra* note 5, at ¶¶ 1, 498-99.

<sup>80</sup> The UN Darfur Commission found that the systematic targeting of 'Africans' in Darfur for forcible migration did not manifest genocidal intent but a desire "to vacate the villages and prevent rebels from hiding among, or getting support from, the local population." It further found other forms of systematic targeting (e.g., attacks on 'African' villages) were relevant to proving crimes against humanity, but could not independently sustain an inference of genocidal intent. *Id.* at ¶ 514.

<sup>81</sup> ICC Bashir Arrest Warrant Application, *supra* note 61, at 3.

<sup>82</sup> *Id.* at 4-5.

<sup>83</sup> Note that forcible transfer could constitute a genocidal act according to the term's applicable ECCC definition. See ECCC Law, art. 4 (defining "acts of genocide" as "any acts committed" with genocidal intent".) Note also that, both according to the Genocide Convention and ECCC law, "[f]orcibly transferring children of the group to another group" satisfies the *actus reus* of genocide. *Id.*; see also Genocide Convention, art. II.

genocide,<sup>84</sup> the Tribunal found “evidence relating to acts that involved cultural and other non-physical forms of group destruction” highly relevant to discerning the genocidal intent of their perpetrators.<sup>85</sup>

The “physical targeting of the group[‘s] ... property”<sup>86</sup> can be interpreted in a number of ways according to the context in which it arises and the manner in which it occurs. In *Krstić*, for example, the ICTY seemed to view attacks on property in a similar light as attacks on culture: as manifesting animus for, and attempting to ensure the destruction of, the targeted group. In *Kayishema*, on the other hand, the ICTR considered the looting of Tutsi property as conceptually linked to (i.e., as a side effect of) the fact that “authorities [had] guaranteed [the Hutu masses] impunity to kill the Tutsis”.<sup>87</sup> Nevertheless, in both cases the targeting of the protected group for “non-physical or non-biological”<sup>88</sup> destruction ultimately buttressed the tribunals’ inference of the perpetrators’ genocidal intent even though none of the acts in questions were formally acts of genocide.

#### *ii. Systematic Targeting: No Requirement of Exclusivity*

No international tribunal that has considered evidence of systematic targeting of a protected group for its bearing on genocidal intent has suggested that such targeting must be exclusively directed at the protected group in order to be probative. In Rwanda, for example, the aforementioned military-issued public letter defining “the enemy” listed several non-Tutsi social and ethnic groups, including “Hutu dissatisfied with the current regime”, “Foreigners married to Tutsi women” and the “Nilotic-hamitic tribes in the region”. That the targeting in question was not exclusively directed at the Tutsi, however, did not negate the inference of the perpetrators’ genocidal intent with respect to the Tutsi. Similarly, in Darfur the targeting of “African” tribes and individuals has not been fully exclusive. Accordingly, the Prosecutor’s application for an arrest warrant on charges of genocide carefully qualifies every allegation of targeting by noting that only “most” of those targeted are members of a protected group.<sup>89</sup>

Though the ICTR has not dwelled on the import of non-exclusivity in its targeting analysis, three factors have probably led the Tribunal to discount its significance. First, the vast majority of those targeted were Tutsi. Second, a huge number of Tutsi – both in absolute terms and relative to their total population – were targeted. And third, many of the non-Tutsi targeted were singled-out precisely for their alleged sympathy to the Tutsi.<sup>90</sup>

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<sup>84</sup> The cultural destruction of a group (i.e. “cultural genocide” has been repeatedly rejected as a form of genocide. See *Krstić*, IT-98-33-T, Judgment at ¶ 576 (citing ILC Draft Code, pp. 90-91, 1286 UN Doc. AG/Res./47/121 of 18 December 1992) (noting that “[a]s clearly shown by the preparatory work for the [Genocide] Convention, the destruction in question is the *material destruction of a group either by physical or by biological means*, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group”).

<sup>85</sup> *Id.* at ¶ 577; see also *Krstić*, IT-98-33-A, Judgment (Shahabudden J., dissenting in part) at ¶ 53 (noting that while not constituting the *actus reus* of genocide, “the destruction of culture ... [i]n this case, the razing of the principle mosque ... confirm[s] an intent, to be gathered from other circumstances, to destroy the group as such”).

<sup>86</sup> *Kayishema*, ICTR-95-1-T, Judgment at ¶ 123.

<sup>87</sup> *Id.* at ¶ 290.

<sup>88</sup> *Krstić*, IT-98-33-A, Judgment (Shahabudden J., dissenting in part) at ¶ 49.

<sup>89</sup> See ICC Bashir Arrest Warrant Application, *supra* note 61.

<sup>90</sup> *Kayishema*, ICTR-95-1-T, Judgment at ¶ 302 (noting that those helping Tutsi refugees had their houses burned down).

Furthermore, two general considerations counsel against requiring exclusivity for targeting of a protected group to bear on an inference of genocidal intent. First – in instances where the targeting is manifested purely by the perpetrators’ actions – one must recognize that even if an actor intended to exclusively target a particular group, the targeting is highly unlikely to be exclusive in execution. Hutu names will inadvertently be included on lists intended to be made exclusively composed of Tutsi, “Arabs” will be mistaken for “Africans” and so on.<sup>91</sup> Second, genocidal intent is not necessarily *motivated* purely (or at all) by racial, ethnic, national or religious animus. A perpetrator’s genocidal intent can be driven by, for example, the desire to expel “outsiders” from a territorial region or a belief that elimination of the group will strategically assist the achievement of a military victory; if so, he would logically target any and all groups posing an obstacle to the achievement of these objectives. The fact that the intended destruction of some such groups (*e.g.*, Hutus sympathetic to the Tutsi) does not legally constitute genocide because they are not of a sort contemplated by the Genocide Convention is of no consequence to an inference of genocidal intent with respect to groups that are so protected.

Nevertheless, the ICTR has found that the relative probative *weight* of targeting is increased if the perpetrators “exclud[e] the members of other groups”, and is presumably concomitantly reduced to the extent that other groups are targeted as well.<sup>92</sup>

### *iii. Comprehensiveness of Targeting: the Existence of an Armed Conflict*

Most instances of alleged genocide in the modern era have occurred amidst an armed conflict in which a military force perpetrated mass killings against a population sharing racial, ethnic or national characteristics with an opposing military force.<sup>93</sup> In this context, defendants have often responded to genocide charges by asserting that any targeting of the protected group was driven by tactical military considerations rather than the desire for the group’s destruction.<sup>94</sup>

International tribunals, however, have universally rejected the contention that the existence of a military conflict between forces largely comprised of two ethnic, national, or racial groups necessarily negates an inference of genocidal intent from one group’s targeting of the other. As an initial matter, tribunals have pointed to any targeting of civilian persons as near-definitive proof that the motive was not primarily military.<sup>95</sup> The ICTR in *Akayesu*, for example, emphasized that Tutsi women and children were targeted as well as men, and that these two groups were not generally combatants in the civil war.<sup>96</sup> The Tribunal also noted that the accused had publicly declared that “if a Hutu woman were impregnated by a Tutsi man, the Hutu woman had to be found in order ‘for the pregnancy to be aborted’”; “even newborn [Tutsi] babies were not spared” from violence; and that “pregnant women, including those of Hutu

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<sup>91</sup> See, *e.g.*, Muhimana, ICTR-95-1B-T, Judgment at ¶ 571 (noting that the accused apologized to a girl he raped when he found out she was a Hutu not a Tutsi).

<sup>92</sup> Akayesu, ICTR-96-4-T, Judgment at ¶ 523.

<sup>93</sup> The obvious counterexample to this, of course, is the Holocaust.

<sup>94</sup> See, *e.g.*, Krstić, IT-98-33-A, Judgment at ¶ 26.

<sup>95</sup> See also UN Darfur Commission Report, *supra* note 5, at ¶ 5 (rejection the Sudanese government’s consistent asserted that any killings were for “counter-insurgency purposes and were conducted on the basis of military imperatives,” due to its finding that “most attacks were deliberately and indiscriminately directed against civilians.”).

<sup>96</sup> Akayesu, ICTR-96-4-T, Judgment at ¶ 111, 121.

origin, were killed on the grounds that the foetuses in their wombs were fathered by Tutsi men.”<sup>97</sup>

Similarly, even though Serbian forces explicitly spared Muslim women and children from murder at Srebrenica – thereby enhancing the credibility of Serbian claims of harboring purely military motives – the ICTY in *Krstić* refused to hold this factor dispositive.<sup>98</sup> Instead, the Court noted that Serbian forces did not distinguish between different *types* of men, killing almost all members of this sub-group (including the handicapped and “many boys well below ... and elderly men several years above [military] age”) regardless of whether or not they could be expected to serve in battle.<sup>99</sup>

To the extent it is possible at this preliminary stage to discern the contours of the debate within the ICC over the propriety of charging al-Bashir with genocide, the debate seems largely focused on the relative import of the fact that, when attacking a village predominantly populated by the protected group, “both militias and Government forces ... refrain[] from exterminating the whole population ... but instead selectively kill[] groups of young men”.<sup>100</sup> According to the UN Darfur Commission, this observation “clearly shows that the intent of the attackers was not to destroy an ethnic group as such,” but “to murder all those men they considered rebels.”<sup>101</sup> In seeming retort to this argument, ICC prosecutors point to the attackers’ “deliberate failure to differentiate between civilians and persons of military status”.<sup>102</sup> The ICC Pre-Trial Chamber has yet to definitively rule on whether charges of genocide against al-Bashir will proceed.<sup>103</sup>

While the uncertain and preliminary status of the ICC’s prosecution makes it difficult to extract concrete lessons from the Sudanese example, the debate does tell us that this question is unresolved. In an effort to deflect accusations of genocidal intent, perpetrators of allegedly

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<sup>97</sup> *Id.* at ¶ 121.

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

<sup>99</sup> *Krstić*, IT-98-33-T, Judgment at ¶ 85-86. As the Defense pointed out, however, Serb forces did spare the wounded. *Id.* at 88. In reaction, the Trial Chamber again pointed to “international pressure” as an explanation. *Id.*

<sup>100</sup> UN Darfur Commission Report, *supra* note 5, at ¶¶ 513-14:

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

<sup>101</sup> *Id.* at ¶ 520. Note that the Commission did not examine the individual culpability of a particular defendant, but whether the Sudanese Government as a whole manifested a genocidal plan. As such, the Commission explicitly left open the possibility that “single individuals, including Government officials, may entertain a genocidal intent”, and if so, “it would be for a competent court to make such a determination on a case by case basis”.

<sup>102</sup> ICC Bashir Arrest Warrant Application, *supra* note 61, at 9.

<sup>103</sup> In July, 2009, Prosecutors at the International Criminal Court (ICC) appealed a 2-1 decision by the Pre-Trial Chamber to refrain from charging the President of Sudan, Omar Hassan Ahmad al Bashir with genocide for his role in the violence occurring in Darfur since March, 2003. See *Appeal on Bashir Genocide Charges*, BBC, July 7, 2009; *Interview with Luis Moreno-Ocampo*, UN NEWS CENTRE, June 5, 2009, available at: <http://www.un.org/apps/news/newsmakers.asp?NewsID=13>. On February 3, 2010, the Appeals Chamber reversed and remanded, finding that the Pre-Trial Chamber had applied a too-stringent evidentiary standard given the preliminary nature of the initial proceeding. Without ruling on the merits of the genocide charges, the Appeals Chamber ordered the Pre-Trial Chamber to reconsider the Prosecutor’s genocide petition. See *Darfur: Bashir genocide charges to be reconsidered*, BBC News, Feb. 3, 2010, available at: <http://news.bbc.co.uk/2/hi/8494759.stm>.

genocidal abuses will almost invariably allege that their actions were taken pursuant to an ongoing military conflict. The ICTY in *Krstić*, however, determined that killing every man within a protected group – even if rationally related to tactical military objectives of winning the territory – strongly supports an inference of genocidal intent. Whether systematic targeting of narrower classes of alleged potential combatants, as occurs in Darfur, can support a similar inference remains an open question.

Again, note how the distinction between motive and intent is critical to the preceding analysis. As discussed *supra*, a perpetrator’s motivation for destroying a protected group in whole or part could very well be to gain tactical military advantage. But this can be entirely consistent with his intent to achieve this objective through destruction of the protected group. Highlighting the motive/intent distinction suggests that the extended discussion in *Krstić* regarding the relative veracity of the Serbian Force’s alleged military motives for committing the Srebrenica massacre may be irrelevant. Even a highly-circumscribed plan of mass murder, narrowly tailored to only encompass those individuals of a group exhibiting characteristics of the opposition military force (e.g., men of a certain age and physical vigor), could arguably constitute both the *actus reus* of genocide and support an inference of genocidal intent.

Notably, the ICTR has recognized that mass murder and military conflict follow no necessary causal orientation: genocide may be a means for achieving military objectives just as readily as military conflict may be a means for instigating a genocidal plan.<sup>104</sup> In fact, the ICTR found that the Rwandan “genocide was probably facilitated by the conflict, in the sense that the fighting ... was used a pretext for the propaganda inciting genocide against the Tutsi, by branding [opposition] fighters and Tutsi civilians together”.<sup>105</sup> As such, even if an inference regarding genocidal intent is fairly discernable from the mere existence of an armed conflict between the perpetrator and victim groups, its causal direction is anything but clear.

#### D. Evidence of Planning

International tribunals consider evidence suggesting that commission of the crime’s *actus reus* was the result of conscious planning to be probative of genocidal intent. As the ICTR remarked in *Kayishema*, “although a specific plan to destroy does not constitute an element of genocide, it would appear that it is not easy to carry out a genocide without such a plan, or organisation.”<sup>106</sup> In other words, while “the existence of a plan [is] not a legal ingredient of the crime of genocide” it can “be of evidential assistance to prove the intent of the authors of the criminal act(s).”<sup>107</sup> International courts thus tend to treat any evidence that commission of the *actus reus* resulted from conscious “methodical planning”<sup>108</sup> to inexorably support an inference of genocidal intent.

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<sup>104</sup> A recent report by a Rwandan government commission charged with investigating the assassination of President Juvénal Habyarimana, for example, found that the assassination was directly linked to Hutu extremists’ opposition to Habyarimana’s decision to make peace with the Tutsi force, and their desire to implement a genocidal plan against the Tutsi instead. Report of the Investigation into the Causes and Circumstances of and Responsibility for the Attack of 06/04/1994 Against The Falcon 50 Rwandan Presidential Aeroplane Registration Number 9XR-NN, available at: <http://mutsinzireport.com/>.

<sup>105</sup> Akayesu, ICTR-96-4-T, Judgment at ¶ 127.

<sup>106</sup> Kayishema, ICTR-95-1-T, Judgment at ¶ 94.

<sup>107</sup> *Krstić*, IT-98-33-T, Judgment at ¶ 572 (citing *Jelisić*, IT-95-10-A, Judgment at ¶ 48).

<sup>108</sup> Kayishema, ICTR-95-1-A, Judgment at ¶ 93.



Courts appeal to this presumption of a rough equivalence between evidence of planning and evidence of genocidal intent, however, without necessarily engaging in a considered analysis of the presumption's logical justification. Instead, they tend to uncritically presume that "evidence ... reveal[ing] the existence of a plan" to commit the genocidal *actus reas* is also illustrative of genocidal intent,<sup>109</sup> and then immediately proceed to investigate whether evidence of planning is fairly inferable from the facts of the case.<sup>110</sup> Accordingly (and similar to the process for inferring genocidal intent itself), determining the sorts of acts which indicate that atrocities were "pre-arranged" is a contextual, fact-intensive process. For example, the ICTR has pointed to the following as evidence that the atrocities in Rwanda were planned: "the existence of lists of Tutsi to be eliminated", which were in some cases prepared months before the violence began;<sup>111</sup> the media propaganda campaign condemning Tutsis, which it described as "psychological preparation of the population to attack the Tutsi";<sup>112</sup> and the roadblocks at which Tutsi were screened out and killed, and "which were erected with great speed after the downing of the President's plane" precipitated the crisis in which the violence occurred.<sup>113</sup>

#### *i. Pattern of Purposeful Conduct*

International courts treat evidence demonstrating "a pattern of purposeful action"<sup>114</sup> to be indicative of prior planning. For example, the ICTY found evidence that the massacre at Srebrenica was planned from "the number of [Serbian military] forces involved, the standardised coded language used by the units in communicating information about the killings" and the invariability of the killing methods applied".<sup>115</sup> Similarly, the ICTR found the "consistent ... repetitive [and] methodical manner" by which attacks against Tutsi took place to be "compelling" evidence of planning.<sup>116</sup>

#### *ii. Scale, Targeting, and Statements*

In many instances, however, the factual circumstances from which courts infer genocidal intent are also susceptible to an inference that the genocidal *actus reas* was planned, with the latter finding presumably serves to circle-back and reinforce the core inference of genocidal intent. The ICTY, for example, pointed to "the scale of the executions" at Srebrenica as both evidence of planning and evidence of genocidal *mens rea*.<sup>117</sup> Similarly, the ICTR has found several factors that facilitated the targeting of Tutsi in Rwanda to suggest atrocities were planned, including: the existence of "arms caches" in Kigali, the Rwandan capital; the rapid "distribution of [machetes] to the civilian population"; and "the training of militiamen by the Rwandan Armed Forces";<sup>118</sup> and "the proximity of the distribution of weapons to the massacres of Tutsi civilians."<sup>119</sup> And courts have often pointed to an accused's written and verbal communications

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<sup>109</sup> *Id.* at ¶ 308-311.

<sup>110</sup> *See id.* at ¶ 308 (presuming the equivalence of "evidence that reveals the existence of a plan to destroy the [Tutsi]" and "evidence relative to the acts demonstrating the intent to commit genocide").

<sup>111</sup> Kayishema, ICTR-95-1-T, Judgment at ¶ 309.

<sup>112</sup> Akayesu, ICTR-96-4-T, Judgment at ¶ 126.

<sup>113</sup> Kayishema, ICTR-95-1-T, Judgment at ¶ 276.

<sup>114</sup> *Id.* at ¶ 538.

<sup>115</sup> Krstić, IT-98-33-T, Judgment at ¶ 572.

<sup>116</sup> Kayishema, ICTR-95-1-T, Judgment at ¶¶ 534-35.

<sup>117</sup> Krstić, IT-98-33-T, Judgment at ¶ 572. *See supra* Section III.C.

<sup>118</sup> *Id.* at ¶ 276.

<sup>119</sup> *Id.* at ¶¶ 275, 298; Akayesu, ICTR-96-4-T, Judgment at ¶ 126.

which arguably presuppose the execution of a genocidal plan, though they have differed in their interpretation of such statements. In the course of finding that the atrocities in question were planned, for example, the ICTR in *Kayishema* pointed to “written communications ... [to] Kayishema ... that contain language regarding whether ‘work has begun’ and whether more ‘workers’ were needed” as well as a “letter sent by Kayishema ... request[ing] ... reinforcement to undertake clean-up efforts” at the site of a Tutsi massacre.<sup>120</sup> The ICTY Appeals Chamber in *Krstić*, however, found that analogous communications, one of which “urgently requested the assistance of Krstić in the distribution of ‘3,500 parcels’” (i.e. captured civilians), did not support a finding that Krstić shared his superiors’ genocidal plan.<sup>121</sup> Similarly, the ICTY deemed a conversation between Krstić and a subordinate occurring two hours after the subordinate oversaw the massacre of 1,000 to 1,500 Bosnian Muslims (where Krstić asked “How’s it going”, the subordinate replied “It’s going well” to which Krstić responded “Don’t tell me you have problems”) to be “too oblique” to support a finding that the subordinate was reporting on the successful execution of their common genocidal plan.<sup>122</sup>

### *iii. Intensity*

Finally, the intensity with which perpetrators commit the genocidal *actus reus* is relevant to a finding of planning and thus indicative of genocidal intent. For example, the ICTR in *Kayishema* pointed to the rapid temporal duration within which the Rwandan genocide unfolded – with an estimated 800,000 to 1,000,000 Tutsi killed over a mere one hundred days – as evidence that it was planned.<sup>123</sup> Further, the Tribunal emphasized the fact that atrocities immediately followed a precipitating event (the assassination of the Prime Minister) in determining the existence of a genocidal plan.<sup>124</sup> Note, however, that the ICTY made clear in *Krstić* that intensity is merely probative and not determinative of the existence of a genocidal plan. An incomplete or inefficient genocidal plan is still a genocidal plan.<sup>125</sup>

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

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<sup>120</sup> *Kayishema*, ICTR-95-1-T, Judgment at ¶ 309.

<sup>121</sup> *Krstić*, IT-98-33-A, Judgment at ¶ 75; *see id.* at ¶¶ 74-77.

<sup>122</sup> *Id.* (Shahabudden J., dissenting in part) at ¶ 24.

<sup>123</sup> *Kayishema*, ICTR-95-1-T, Judgment at ¶ 289, 291 (finding that “the massacres of the Tutsi population indeed were ‘meticulously planned and systematically co-ordinated’ by top level Hutu extremists .... The widespread nature of the attacks and the sheer number of those who perished within just three months is compelling evidence of this fact.”).

<sup>124</sup> *See id.* at ¶ 293.

<sup>125</sup> *Krstić*, IT-98-33-A, Judgment at ¶ 32 (“genocide does not require proof that the perpetrator chose the most efficient method to accomplish his objective of destroying the targeted part. Even where the method selected will not implement the perpetrator’s intent to the fullest, leaving that destruction incomplete, this ineffectiveness alone does not preclude a finding of genocidal intent.”).

## E. Other Factors

In wrestling with whether an individual’s genocidal intent is fairly discernable from the factual context in which he or she acted, international courts have repeatedly invoked the four factors examined above. Of course, nothing prevents subsequent courts from disclaiming the relevance of these factors or pointing to different considerations; but these are the elements that have been expressly relied upon by previous courts. While courts have pointed to other factors, further investigation reveals that they are merely alternate verbal formulations for the considerations discussed above. Two such factors – the “general nature” of the genocidal *actus reas* and the perpetration of “destructive and discriminatory acts” – are illustrative in this respect.

### *i. The General Nature of Atrocities*

The ICTR has found that a perpetrator’s genocidal intent can be partially inferred from the “general nature of the atrocities” committed.<sup>126</sup> This in itself, however – without further elaboration – offers little more specificity in terms of substantive content than inferences from “context” or “circumstances”.

In *Muhimana*, the ICTR noted that relevant aspects of the atrocities’ “general nature” “include[e] their scale and geographic location, weapons employed in an attack, and the extent of bodily injuries”.<sup>127</sup> This suggests that the “general nature of the atrocities” factor – like invocations of their “general context” – is really a catch-all for any factual circumstance the court finds relevant to an inference of genocidal intent rather than an independent basis by which one can discern a perpetrator’s relevant mens rea. As such, some factors identified in *Muhimana* as within this “general nature” aphorism — such as the scale of the crime — are now regularly cited in the jurisprudence while others merely remain in the grab-bag of background considerations that international courts may or may not invoke depending on whether they seem particularly relevant to the case at hand (e.g., the type of weapons employed in an attack). Perhaps in recognition that inquiries into the crime’s “general context” and “general nature” are really indistinguishable, later iterations of the formulation for inferring genocidal intent omit any reference to the “general nature of the atrocities”.<sup>128</sup>

### *ii. Destructive and discriminatory acts*

In *Jeliscic*, the ICTY Appeals Chamber distinguished between systematic targeting of a protected group, articulated as “the perpetration of other culpable acts systematically directed against the same group” and “the repetition of destructive and discriminatory acts” against that group.<sup>129</sup> While it found both factors to support an inference of genocidal intent, the Tribunal focused most of its discussion on systematic targeting, leaving the import of the “destructive and discriminatory acts” factor in doubt. It is unclear from existing jurisprudence whether and/or how the two factors differ from one another, as no case has offered occasion for an international tribunal to elaborate on the supposed distinction. Indeed, subsequent ICTY cases – while

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<sup>126</sup> See *Muhimana* ICTR-95-1B-T, Judgment at ¶ 496; see also *Akayesu*, ICTR-96-4-T, Judgment at ¶ 523.

<sup>127</sup> *Muhimana* ICTR-95-1B-T, Judgment at ¶ 496; see also *Akayesu*, ICTR-96-4-T, Judgment at ¶ 118 (emphasizing the “atrociousness” with which Tutsi massacres occurred in its findings of genocidal intent).

<sup>128</sup> See, e.g., *Jeliscic*, Case No. IT-95-10-A, Judgment at ¶ 47; see also UN Darfur Commission Report, *supra* note 5, at ¶ 502.

<sup>129</sup> *Jeliscic*, Case No. IT-95-10-A, Judgment at ¶ 48.

continuing to explore “systematic targeting” – make no mention of “destructive and discriminatory acts” factor.<sup>130</sup>

#### IV. Applying International Precedent to Cambodia

The following is intended as a rudimentary overview of the ways in which the preceding legal analysis might be applied by the ECCC in addressing the charges of genocide in Case 002. In a debate that precedes the establishment of the ECCC, commentators have long disagreed over whether the atrocities perpetrated in Cambodia by the Khmer Rouge legally constitute genocide, and if so, which ones.<sup>131</sup> As done by the ICTR and ICTY in the cases of Rwanda and Srebrenica, therefore, the ECCC will first have to engage in a threshold inquiry as to whether genocide *was committed* in Cambodia before addressing the narrower question of whether the particular defendants before the Court can be held individually liable for its commission.

##### A. Statements

Given the secretive nature of the Khmer Rouge regime,<sup>132</sup> there are unlikely to be many public statements made by high-level officials which manifest genocidal intent. At the least, any statements that do exist are unlikely to be as explicit or as graphic as those relied on by the ICTR. But ECCC prosecutors may adopt an approach similar to that being pursued by prosecutors at the ICC and instead point to statements by lower-level Khmer Rouge agents which are arguably attributable to the senior officials on trial. It is unclear as of yet whether this strategy will prove viable.

Written documentation, however, may prove a more promising source for incriminating statements by which the Court might infer genocidal intent. The Documentation Center of Cambodia has collected and catalogued “hundreds of thousands of pages” of documents from the Khmer Rouge era,<sup>133</sup> which some observers believe to contain many strong indications of the regime’s genocidal intent.<sup>134</sup> While this paper does not seek to delve deeply into the weeds of interpreting and analyzing individual documents, the foundation of the prosecutor’s case will likely consist of references to written statements contained in the documentary evidence.

##### Scale

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<sup>130</sup> See Krstić, IT-98-33-A, Judgment.

<sup>131</sup> See, e.g., William A. Schabas, *Problems of International Codification – Were the Atrocities in Cambodia and Kosovo Genocide?*, 35 NEW ENGLAND L. REV. 287 (2000); Jason Abrams, *The Atrocities in Cambodia and Kosovo: Observations on the Codification of Genocide*, 35 NEW ENGLAND L. REV. 303 (2000); Ben Kiernan, *The Cambodian Genocide: Issues and Responses*, in GENOCIDE: CONCEPTUAL AND HISTORICAL DIMENSIONS 191, 197-98 (George J. Andreopoulos ed., 1994).

<sup>132</sup> See SAMUEL TOTTEN, *THE PREVENTION AND INTERVENTION OF GENOCIDE* 16 (Vol. 6 2007) (noting that “the Khmer Rouge ran a very secretive and insular society and because of that refugee reports of widespread killing and brutality were largely unconfirmed” while the atrocities were taking place).

<sup>133</sup> These include: “official Khmer Rouge correspondence, biographies of Party members and arrested persons, prisoner confessions, notebooks of Khmer Rouge cadres, photos of Party cadres, films, tape recordings, Party magazines, other publications, and maps of Democratic Kampuchea.” DC-Cam Khmer Rouge Database, available online at: <http://www.dccam.org/Database/Index1.htm>.

<sup>134</sup> See BEN KIERNAN, *supra* note 16, at xxix (2008) (asserting that documents discussing the “repression and forced dispersion of the Chams ... [i]n legal terms ... constituted destruction of an ethnic group as such—genocide.

The atrocities committed by the Khmer Rouge were of undeniable scale, and at least with respect to the Cham Muslim minority, this factor should point clearly towards an inference of genocidal intent. Though exact numbers are difficult to precisely ascertain, Youk Chhang of DC-Cam estimates that between 100,000 and 400,000 Cham died during the Khmer Rouge regime.<sup>135</sup> The staggering absolute number of Cham casualties is even more devastating when one considers that a mere 240,000 Cham are estimated to be alive today.<sup>136</sup> Others estimate that around 100,000 of a total 1975 population of 250,000 were killed over the four years of Khmer Rouge rule.<sup>137</sup>

Evidence with respect to ethnic Vietnamese and Buddhists is less definitive in this respect. The historical evidence suggests that a large proportion of ethnic Vietnamese were subject to forcible removal, with the Khmer Rouge “killing those that remained behind.”<sup>138</sup> Reliable estimates of the number of ethnic Vietnamese killed, however, are unavailable.<sup>139</sup> And with respect to Buddhists, the scope of the alleged genocidal *actus reus* is limited to religious figures (i.e. priests and monks), which necessarily limits its scale.

### *Specific targeting*

In many respects, the specific targeting factor militates towards a finding of genocidal intent in the context of the Khmer Rouge. It has been widely observed that the Cham “suffered immensely” under Khmer Rouge rule, “as the regime broke up their families, banned their language and customs, and killed their leaders”.<sup>140</sup> In addition, ethnic Vietnamese minorities were subject to widespread forcible removal; and both Muslims and Buddhists suffered ongoing onslaughts on their religion. These are all specific contextual elements that the ICTY and ICTR has found relevant to inferring genocidal intent in the past.

But while ICTR and ICTY jurisprudence demonstrates that strict exclusivity in targeting is not required for this element to be relevant,<sup>141</sup> the lack of exclusivity with which Khmer Rouge leaders targeted the Cham Muslims, ethnic Vietnamese and Buddhists will pose significant difficulties for ECCC prosecutors in their efforts to establish the Khmer Rouge leaders’ specific intent to destroy these groups. Broad targeting of many sectors of society suggests that the Khmer Rouge may not have been singling out specific groups protected by the Genocide Convention for destruction. While observers have argued that ethnic Vietnamese and Cham Muslims were disproportionately targeted by the Khmer Rouge,<sup>142</sup> the strength of any inference drawn from their disproportionate targeting is necessarily far weaker than that involved in situations like Rwanda, Darfur, and Srebrenica, where the protected group in question was the near *exclusive* target of persecution.

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<sup>135</sup> *Genocide Charge for Cambodia’s KRouge Ex-Head of State*, AFP NEWS AGENCY, Dec. 18, 2009.

<sup>136</sup> *Id.*

<sup>137</sup> KISSI, *supra* note 6, at 116.

<sup>138</sup> Abrams, *supra* note 145 at 306.

<sup>139</sup> AFP NEWS, *supra* note 149.

<sup>140</sup> Abrams, *supra* note 145, at 306. In addition, Cham were forced to dress like the Khmer majority and work together with them in collectives, which involved raising pigs against their religion. KISSI, *supra* note 6, at 64.

<sup>141</sup> *See supra* Section III.D.ii.

<sup>142</sup> *See* KIERNAN, *supra* note 16, at 250-310, 458.

Notice, however, how ICTY prosecutors in *Krstić* also faced targeting difficulties: the population allegedly targeted was limited to the small geographic area of Srebrenica, which had a population of a little over the 36,000 prior to the massacre and an area of only 527 square kilometers. They overcame this difficulty by creatively re-framing the relevant group as only those Bosnian Muslims residing within that limited geographic area, a categorization that the ICTY Appeals Chamber accepted.<sup>143</sup> Following this precedent, the task of ECCC prosecutors might be substantially advanced if they could identify and isolate a smaller geographic region within Cambodia where the targeting of Cham and Vietnamese was relatively more concentrated. While the specific analogy to *Krstić* may be faulty in this respect – as the ICTY suggested that the relevant geographic area should be defined with respect to the area within the perpetrators’ effective control,<sup>144</sup> and the Khmer Rouge controlled nearly all of Cambodian territory – the case will still offer a helpful analogue for ECCC prosecutors.

As noted above, prosecutors are unlikely to allege that the Khmer Rouge intended to kill all Buddhists, but will instead rely on the fact that the regime “drove Buddhist priests and monks from their religious practice ... killing those who resisted.”<sup>145</sup> Relying on a dissenting opinion by Judge Shahabuddeen in *Krstić*, prosecutors are likely to urge that these killings, combined with the Khmer Rouge’s express desire to destroy the practice of Buddhism in the areas under their control, manifest a genocidal intent to “destroy” Buddhists “as such.”<sup>146</sup> These semantic gymnastics go beyond existing jurisprudence. To be successful, such a theory would seem to require the ECCC to accept a reformulation of the relevant group (i.e. to constitute Buddhist religious figures rather than all followers of the religion) or a reformulation of genocidal intent away from its traditional conception as physical/biological destruction (and perhaps creeping towards the red herring of “cultural genocide”).

Finally, ECCC prosecutors will likely need to overcome contentions that any targeting of protected groups was merely incidental to the Khmer Rouge’s broader military and/or ideological objectives. In particular, they are likely to face objections that any disproportionate targeting of the Cham Muslims was merely the result of that group’s greater intransigence in resisting the regime’s political reforms. Defense lawyers will surely point to the Cham insurgency as evidence that the Cham’s greater proportionate prosecution was logically related to Khmer Rouge military objectives. To rebut this claim, prosecutors will likely point to the Khmer Rouge’s targeting of combatants and non-combatants (such as women, the elderly and children) alike—a line of argumentation persuasive to the ICTY in *Krstić*.

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None of the preceding considerations demonstrates definitively that it cannot be proven that genocide occurred in Cambodia under the Khmer Rouge regime. Indeed, rigorous external examination of whether it would accord with international practice and precedent to infer genocidal intent in that case is infeasible at this time, as the co-prosecutors’ charging documents,

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<sup>143</sup> Prosecutor v. *Krstić*, Case No IT-98-33-A, Judgment, ¶ 17 (April 19, 2004).

<sup>144</sup> *Id.* (noting that “[f]rom the perspective of the Bosnian Serb forces alleged to have had genocidal intent in this case, the Muslims of Srebrenica were the only part of the Bosnian Muslim group within their area of control.”).

<sup>145</sup> Abrams, *supra* note 145, at 306.

<sup>146</sup> *Cf.* *Krstić*, IT-98-33-A, Judgment (Shahabuddeen J., dissenting in part) ¶¶ 23-40.

as well as the specific evidence relied upon in those documents, are currently under seal. In any case, resolving this question in its entirety is beyond the scope of this paper. Instead, this section merely hopes to flag potential issues and offer a very preliminary assessment of how they might be resolved by the ECCC.

Further, note that this section engages with the initial, global question of whether the Khmer Rouge – writ large – committed genocide, and does not delve into the weeds of whether and how the specific defendants in Case 002 manifested genocidal intent. A few general observations on individual liability in the Cambodian context, however, can be made. First, differences in the internal mechanisms by which the Khmer Rouge and Hutu Power regimes achieved their murderous objectives, explored above, suggest that it might be easier to attribute individual atrocities to senior Khmer Rouge leaders than their Rwandan counterparts. The undisciplined, chaotic, and grassroots nature of the Rwandan genocide forced the ICTR to either rely on incitement as the genocidal *actus reus*, or produce specific evidence that the accused directly participated in acts of genocide (such as killing, rape, and distribution of weapons to those with clear genocidal objectives). Like the Serbian military officials prosecuted at the ICTY, however, the Khmer Rouge leaders in Case 002 by and large stood atop a tightly disciplined military and civilian hierarchy.<sup>147</sup> The ECCC may find such an institutional framework more amenable to inferences genocidal intent on the part of high-level officials for context/circumstances largely dictated by ground-level cadres. On the other hand, note that the only successful genocide prosecution thus far at the ICTY involved a relatively low-level military official who was determined to have aided and abetted – not directly perpetrated – genocide.<sup>148</sup> Aiding and abetting has a relaxed intent requirement,<sup>149</sup> but is conceptually less palatable as a backup to direct liability the higher in the chain of command one goes.

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<sup>147</sup> See KIERNAN, *supra* note 16, at 200.

<sup>148</sup> See Krstić, IT-98-33-A, Judgment.

<sup>149</sup> See *supra* Section II.B.iii.