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Definition of Genocide: A Critical Analysis of the Judgment of Extraordinary Chambers in the Courts of Cambodia (Case 002/2)

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Abstract:

The Khmer Rouge under the leadership of Pol Pot carried terrifying crimes in Cambodia between 1975 - 1979 against ethnic groups. Official documents of that regime showed the systematic mistreatment and denied of the rights of these peoples as well as their sole existence; these documents later helped the international community to proof committing one of the most outrageous crimes: genocide. In 2018, the Extraordinary Chambers in the Courts of Cambodia (ECCC) issued a historical judgment in Case 002/2 convicting two Khmer Rouge leads for the crime of genocide. The judgment acknowledged two minority groups as the victims of genocide, namely the Vietnamese and the Cham. This paper analysis the judgment of Case 002/2 and the court's understanding of the elements of genocide and the protected groups. On one hand, this judicial ruling is important in recognizing the rights of the victims, and on the other, it represents a judicial precedent in the Far East where the repercussions of the genocide against the Muslim Rohingya minority still exist. With the development of the international case law with regard to genocide, and the experience of previous courts, particularly the ad hoc International Criminal Tribunal for Rwanda and the International Criminal Tribunal for former Yugoslavia, this paper examines the ECCC's contribution to international criminal law and transitional justice.

Keywords: elements of the definition of genocide, Khmer Rouge, judge Ottara, separate opinion.

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INTRODUCTION

On November 16, 2018, the Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia (ECCC) issued a historic judgment in Case 002/2 convicting two former Khmer Rouge leaders, Nuon Chea and Khieu Samphan, of the crime of genocide. This crime was committed between 1975 and 1979 in Cambodia. The judgment acknowledged two minority groups as the victims of genocide, namely the Vietnamese and the Cham. This was the first case in which the ECCC had ever charged defendants with committing genocide. This paper examines the extent to which that judgment contributes to justice and accountability for the most severe crimes. The importance of this case is that it adds new perspectives to the development of the understanding of genocide, a term that has been evolving in accordance with related case law.

The ECCC verdict issued in 2018 is significant for a number of reasons. First, it recognizes the pain and sorrow of victims and their families. Although in 2014, four years before the genocide verdict, the ECCC had sentenced the above defendants to life imprisonment, condemning them for crimes against humanity, victims and their families were eager for a conviction to acknowledge their mass suffering. The loss of at least 1.7 million lives, which comprised almost one quarter of the entire Cambodian population,⁽¹⁾ was not possible for the remaining Cambodians to forgive or forget. Although the regime ended forty years ago, the unresolved grief continues to be evident in political tensions in later decades.

Second, the verdict can also be seen as a recognition of the importance of diversity. The Khmer Rouge sought to establish a “racially pure” and atheistic society. This meant eliminating racial minorities and religious groups. The Khmer Rouge considered both the Cham Muslims and the Vietnamese as enemies whom they needed to execute. By labeling the crimes against the above two groups as genocide, the ECCC acknowledged the rights of all ethnic and religious groups to

(1) Estelle Bockers, Nadine Stammel, and Christine Knaevelsrud, “Reconciliation in Cambodia: thirty years after the terror of the Khmer Rouge regime”, *Torture: Quarterly Journal on Rehabilitation of Torture Victims and Prevention of Torture* 21(2) (2011), 71.

live, and to freely hold and exercise religious beliefs openly and peacefully.

Third, case law contributes to the development of international criminal law, and the ECCC verdict offers insight into how to interpret the elements of international crimes including genocide. Defendants are not infrequently found guilty of the other international crimes, namely crimes against humanity and war crimes. But defendants are seldom found guilty of genocide. Aside from the fact that is difficult to prove the intent of genocide, a particular stigma is attached to genocide. It has been called the “crime of crimes,” and it attracts special condemnation and opprobrium. In a few cases international courts have concluded that genocide has been committed. These cases are the crimes committed in 1994 against ethnic Tutsi and politically moderate Hutu in Rwanda, and the Srebrenica massacre committed in 1995 in Srebrenica against Bosnian Muslims.⁽²⁾ In the past, although Asia has witnessed genocide crises, for example the 1971 Bangladesh mass killing, no court verdict has acknowledged these genocides. Thus, the ECCC judgment can provide guidance to future court decisions, particularly in the case regarding the Rohingya who fell victim to the Myanmar military’s persecutions.

Correspondingly, the ECCC judgment has symbolic importance. Although not all criminals were brought to justice, prosecuting the main leaders sends a message worldwide that the international community will not tolerate such crimes. The international community will vigorously condemn and prosecute similar violations against protected groups.

This research paper begins by providing background on the genocide in Cambodia, the following attempts to do justice, and the establishment of the ECCC. It then examines ECCC Case 002/2, the accused, and the charges, followed by a critical analysis of the judgment. The analysis discusses the elements of the crime of genocide, and considers whether the judgment builds upon the set precedents of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and

(2) When to Refer to a Situation as Genocide: Guidance Note 1”, UN Office on Genocide Prevention and the Responsibility to Protect, online:
[https://www.un.org/en/preventgenocide/rwanda/assets/pdf/GuidanceNote- When%20to%20refer%20to%20a%20situation%20as%20genocide.pdf](https://www.un.org/en/preventgenocide/rwanda/assets/pdf/GuidanceNote-When%20to%20refer%20to%20a%20situation%20as%20genocide.pdf).

the International Criminal Tribunal for Rwanda (ICTR) case laws. The judgment is critically analyzed to explore the ECCC's understanding of the protected groups, as well as the view of Judge You Ottara in his separate opinion on defining the elements of genocide and the protected groups.

I. BACKGROUND

A. Background of the Conflict in Cambodia

On April 17th, 1975, the Communist Party of Kampuchea (CPK), better known as the Khmer Rouge, seized power in Cambodia. The CPK, a closed circle of Communist leaders led by Prime Minister Pol Pot and his cronies, closed the borders of the newly proclaimed Democratic Kampuchea (DK) and cut the country off from the world. The CPK's four-year rule became a symbol of bigotry and hate, since they executed extremely violent and destructive policies. In the period between April 1975 and January 1979, the CPK committed numerous crimes with the objective of forming their desired socialist state. They forced the population to transfer from cities into worksites in the countryside, where the people faced grave mistreatment. Cultural differences were frowned upon and a merciless cultural assimilation policy was enforced. This policy banned the use of minority languages such as the Cham language, as well as religious practices.⁽³⁾ Resistance to these policies was dealt with by violent suppression; it is estimated that almost 36% of the Cham population- more than 90,000 people- died during the 1975 purge. Similarly, as soon as they came into power the Khmer Rouge regime began to discriminate against the ethnic Vietnamese population. By 1979, more than 150,000 Vietnamese people had been expelled, and the remaining 10,000 were subjected to discriminatory violent policies that led to the systemic extermination of Vietnamese people.⁽⁴⁾ The CPK's violence was not committed only against minorities but also against the Khmer people who constituted the majority. To suppress any potential political uprising, the CPK targeted former Khmer officers and their

(3) Ben Kiernan, *The Pol Pot Regime: Race, Power, and Genocide in Cambodia under the Khmer Rouge, 1975-79* (New Haven: Yale University Press, 2008) 326.

(4) *Ibid*, 460.

families through mass killing. Survivors of this horrendous era have described Democratic Kampuchea as a “prison without walls.”⁽⁵⁾ The primary goal of the Khmer Rouge was to bring about a rapid agricultural revolution through the abolition of private property, money markets, class distinctions, family ties, and civil liberties. Pol Pot’s strategies to attain this goal proved disastrous for the people of Cambodia. Author Karl D. Jackson characterizes the Khmer Rouge as “sectarians,” radical egalitarians who believed that the “differences” between people were the root of all evil.⁽⁶⁾ It is estimated that more than 1.7 million innocent lives were lost. Half of these people were murdered, while the rest died of starvation, lack of basic facilities, and overwork.⁽⁷⁾

Even though the Khmer Rouge’s crimes were massive, international jurisprudence long avoided labeling those crimes as genocidal. For the past four decades, victims’ families, survivors, and Cambodian people in general have been looking for a verdict that validates their pain and suffering by defining the crimes committed in DK as genocide. While no punishment can bring back the millions of innocent people who lost their lives, the label of genocide has provided some relief to the survivors and victims’ families.

B. Attempts at justice and the establishment of the ECCC

In 1979, after the fall of DK, the People’s Republic of Kampuchea (PRK) formed the People’s Revolutionary Tribunal to try leaders of the Khmer Rouge. As the leaders had already escaped to exile, the tribunal tried them in absentia. This included the prime minister of DK, Pol Pot, and the deputy prime minister, Ieng Sary, both of whom were sentenced to death for “genocidal crimes” in violation of Decree Law N^o 1 of 15 July 1979.⁽⁸⁾ However, special courts with their special laws are often rushed and revengeful, thus lacking due process and legal safeguards.

(5) David Chandler, *Voices from S-21: Terror and History in Pol Pot’s Secret Prison* (Berkeley: University of California Press, 2000) 72.

(6) Karl D. Jackson, *Cambodia 1975-1978: Rendezvous with Death* (Princeton, Princeton University Press, 1989).

(7) Kiernan, 455-63.

(8) People’s Revolutionary Tribunal Held in Phnom Penh for the Trial of the Genocide Crime of the Pol Pot - Ieng Sary Clique, The International Crimes Database, online: <http://www.internationalcrimesdatabase.org/Case/812/Pol-Pot-and-Ieng-Sary/> Peter Bartu and Neil Wilford, “Transitional Justice and DDR: The Case of Cambodia” International Center for Transitional Justice, June 2009, 16-17.

The court's decisions neither grasped the attention of the international community nor met victims' urge and expectations for justice. But because the whole country was still suffering a civil war, justice was delayed. More delay was caused because of the Cambodian-Vietnamese War from 1978 to 1989.

The peace process in Cambodia emerged more clearly in 1991 with nineteen countries signing the Comprehensive Cambodian Peace Agreements (Paris Agreement). Among its mandates, the Paris Agreement called for establishing a peacekeeping operation in Cambodia known as the UN Transitional Authority in Cambodia (UNTAC). UNTAC operated between 1992 and 1993. Its mandate was to supervise Cambodian authorities in restoring human rights and holding free and fair elections.⁽⁹⁾ A new government was elected in 1993 with challenging tasks ahead of it.⁽¹⁰⁾ The newly formed government of Cambodia continued cooperating and negotiating with the UN, especially regarding security and justice. The goal of bringing criminals to justice was achieved-at least partially- through a lengthy process.

In 2003, the government of Cambodia and the UN signed an agreement to establish the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (ECCC). In 2006, the Supreme Council of the Magistracy of Cambodia formed this judicial body, which included Cambodian and international judges, the latter nominated by the UN Secretary-General.

The court's jurisdiction covers several international crimes. Relevant international crimes include war crimes as defined in the Geneva Conventions of 1949, crimes of genocide as defined in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, crimes against humanity as defined by the Law of Extraordinary Chambers of

(9) The Comprehensive Cambodian Peace Agreement of 23 October 1991, in Letter dated 30 October 1991 from the Permanent Representatives of France and Indonesia to the United Nations addressed to the Secretary-General, UN General Assembly, Forty-sixth session, Agenda item 24, The Situation in Cambodia, A/46/608 - S/23177, 8.

(10) Parliamentary Chamber: Constituent Assembly, Elections Held in 1993", Historical Archive of Parliamentary Election Results, online: http://archive.ipu.org/parline-e/reports/arc/2051_93.htm

2004, crimes against cultural property as defined by the 1954 Hague Convention for Protection of Cultural Property in the Event of Armed Conflict, and crimes against internationally protected persons as defined in the Vienna Convention of 1961 on Diplomatic Relations. The penalties which the court may impose include imprisonment and confiscation of personal property or money. The death penalty is not included because Cambodia abolished it in 1989, and courts established by the UN do not impose it.⁽¹¹⁾ It should be noted that the ECCC's task was completed by the trial of five of the Khmer Rouge senior leaders.

Hybrid courts such as the ECCC face numerous inherent difficulties, but there were several positive features in the ECCC's operations. Trials were held in situ, with the involvement of national judges, prosecutors and defense lawyers. Proceedings were broadcast in the national language and accessible to direct public involvement. Victims participated in the process.⁽¹²⁾ Scholars supported victim participation, but also expressed frustration over how the ECCC found the truth, especially since the accused remained mostly silent and did not testify. Furthermore, some of the accused died during the trials, which has also led to loss of information.⁽¹³⁾

While it is too early to fully appreciate the impact of the ECCC as a whole, the ECCC's work is crucial to a public debate about one of the most shocking cases of mass atrocities since the Second World War.⁽¹⁴⁾ Nonetheless, controversies regarding the long process and the court's jurisdiction cannot be ignored. To hold just five individuals responsible for the entire genocide may not meet the expectations of victims and their families. However, hybrid courts are defined as courts of mixed composition and jurisdiction, encompassing both national and international aspects, usually operating within the jurisdiction where the crimes occurred.⁽¹⁵⁾ They are often

(11) Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (Oxford: Oxford University Press, 2008) 85.

(12) Helen Jarvis, "Trials and Tribulations: The Long Quest for Justice for the Cambodian Genocide" Simon M. Meisenberg and Ignaz Stegmüller (eds) in *The Extraordinary Chambers in the Courts of Cambodia* (The Hague: Springer, 2016) 42.

(13) Ratana Ly, "Prosecuting the Khmer Rouge: Views from the Inside" International Nuremberg Principles Academy 2017, 13.

(14) Thomas Karl Forster, *The Khmer Rouge and the Crime of Genocide* (Zurich Dike, 2012) 174.

(15) *Ibid*, 1.

designed in such a way that only a small number of defendants accused of particularly serious crimes will come before them, since most defendants will face justice before the domestic justice system. In such cases, hybrid courts should not be considered in isolation, but instead as parts of a multi-level process. As mentioned earlier, many of the defendants were elderly, and many even had died before being sentenced; when this court decision was issued, Chea was 92 years old and Samphan was 87 years old. These were the two most senior living former leaders of the Khmer Rouge.

II. CASE 002/2

A. The Accused and the Charges

Case 002 is concerned with the responsibility of Nuon Chea and Khieu Samphan for the crimes committed in Democratic Kampuchea between the period of April 17, 1975, and January 6, 1979. Nuon Chea served as Chairman of the People's Representative Assembly, Acting Prime Minister, and member of the Military Committee of the CPK Central Committee.⁽¹⁶⁾ The other accused, Khieu Samphan, had held the positions of President of the State Presidium, Chairman of Political Office 870 and member of the CPK Central Committee.⁽¹⁷⁾ The accused, Nuon Chea and Khieu Samphan, were brought to trial after a long three years of judicial investigation which resulted in the Closing Order by the Co-Investigating Judges on September 15, 2010.⁽¹⁸⁾ Initially, the case involved two other accused, namely Ieng Thirith and Ieng Sary. However, due to the deaths of these accused in 2015 and 2013 respectively, all criminal and civil actions against them were extinguished.⁽¹⁹⁾

On November 16, 2018, the ECCC issued its verdict in Case 002/2, convicting Nuon Chea and Khieu Samphan of various charges of crimes against humanity, genocide, and grave breaches of the Geneva

(16) Case 002/02 Judgement, ECCC, 002/19-09-2007/ECCC/TC, 16 November 2018, para 289-297.

(17) Ibid, paras 14-15.

(18) Closing Order of Case 002, Case File No.: 002/19-09-2007-ECCC-OCIJ, Office of the Co-Investigating Judges, 15 September 2010.

(19) Ieng Thirith, Khmer Rouge Minister in Cambodia, Dies at 83. *The New York Times*, 22 August 2015, online: <https://www.nytimes.com/2015/08/23/world/asia/ieng-thirith-khmer-rouge-minister-in-cambodia-dies-at-83.html>.

Conventions while participating in a joint criminal enterprise. Both were sentenced to life imprisonment.⁽²⁰⁾ The full text of the judgment, spanning 2259 pages, was released later on March 28, 2019. This paper is solely focused on the court's decision regarding the crime of genocide.

The Trial Chamber found the accused Nuon Chea to be guilty of genocide for breaching Articles 4, 29, and 39 of the ECCC Law by killing members of Cham Muslim groups.⁽²¹⁾ According to the judgment

[T]he Chamber finds that a large number of people, including a majority of Cham [...] were arrested and brought to Wat Au Trakuon in 1977 where they were executed. It further finds that, in 1978, a great number of Cham [...] were arrested and taken to Trea Village Security Centre, located in the same district, where their membership of the Cham group was verified. Those who were deemed to be Cham were executed while non-Cham were spared.

The Chamber also finds that orders targeting the Cham [...] came from the upper echelon. While the Chamber was unable to establish a definite number of victims, it is satisfied that a great number of Cham civilians were taken to both Wat Au Trakuon Security Centre and Trea Village Security Centre and were thus killed on a massive scale⁽²²⁾ [Emphasis added]

The Trial Chamber found Chea to be guilty of genocide for killing members of the Vietnamese ethnic group. According to the judgment,

The Chamber also finds that the CPK upper echelon ordered the identification of Vietnamese, as a result of which, from April 1975, lists and biographies were prepared by the lower echelons and then communicated back to the upper echelon for further action.⁽²³⁾

The Chamber further finds that specific instances of killings of Vietnamese civilians were established, for instance, in Svay Rieng in 1978; on Democratic Kampuchea waters after April or May 1977 and on

(20) Briefing Paper: Recent Developments at the Extraordinary Chambers in the Courts of Cambodia, The Open Society Justice Initiative, August 2019, 1, online: <https://www.justiceinitiative.org/uploads/db1828f3-d7ea-4b7b-96bd-1e4e5f46876a/briefing-eccc-recent-developments-20190829.pdf>.

(21) Case 002/02 Judgement, para 3281.

(22) Ibid, para 3516.

(23) Ibid, para 3423.

19 March 1978; in Kampong Chhnang province in 1977; at Wat Khsach (Siem Reap province) in late 1978; and in Kratie in September 1978. These deliberate killings occurred on a massive scale, were systematically organised and directed against the Vietnamese. In each case, Vietnamese were targeted not as individuals but based on their membership of the group and their perceived ethnicity. This happened under the umbrella of the CPK's policy to specifically target the Vietnamese, including civilians, as a group.⁽²⁴⁾ [Emphasis added]

The Trial Chamber found the accused responsible for genocide committed in the infamous detention facility S-21 Security Centre

Regarding the treatment of Vietnamese detained at S-21 Security Centre, the Chamber finds that hundreds of Vietnamese civilians and soldiers were killed after having been interrogated using coercive methods and having been subjected to the dire conditions at S-21. Those killed were either Vietnamese civilians or prisoners of war and thus protected persons for the purposes of the Geneva Conventions. Confessions extracted from Vietnamese prisoners were published in various Democratic Kampuchea publications aimed at showing the Vietnamese "aggression" against Democratic Kampuchea[...]⁽²⁵⁾

The Chamber thus finds that the crime of genocide and the crimes against humanity of murder, extermination, deportation and persecution on racial grounds were committed regarding the Vietnamese.⁽²⁶⁾

The Trial Chamber considered Chea a superior within the CPK; thus, his position makes him responsible for the crime of genocide committed against the Cham and the Vietnamese. The Trial Chamber also found Samphan to be guilty of the same crime against the Vietnamese victims, but he was acquitted of liability for the crime of genocide against the Cham victims.⁽²⁷⁾

(24) Ibid, para 3516.

(25) Ibid, para 33.

(26) Ibid, para 34.

(27) Briefing Paper: Recent Developments at the Extraordinary Chambers in the Courts of Cambodia, 5.

B. Critical Analysis of the Judgment of Case 002/02

On Genocide

On Genocide

The ECCC's understanding of the crime of genocide is based on the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 (Genocide Convention). Accordingly, the ECCC law adopts the definition of Genocide verbatim as given in the Genocide Convention.⁽²⁸⁾

Article II of the Convention defines the crime of Genocide as

any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.⁽²⁹⁾

Genocide implies the targeting of particular groups. Before a particular person can be held accountable for genocide, their individual role in specific criminal acts must be determined.⁽³⁰⁾ Holding perpetrators accountable may be one of the most important tasks of dealing with the consequences of systematic violence. An important legal lacuna in the definition of genocide is that the law does not state whether the responsibility of genocide should be fixed on an individual or on an entire organization/state. In practice, it is almost impossible for an individual to single-handedly destroy a protected group. Only a deliberately planned collective activity can bring about the physical, cultural, and social destruction of the whole group.⁽³¹⁾ In the crime of genocide, criminal activities masterminded by the party leadership are directed against the targeted group nationwide, systematically enforcing the patterns which

(28) Case 002/02 Judgement, para 790-804.

(29) Convention on the Prevention and Punishment of the Crime of Genocide 1948.

(30) Forster, 12.

(31) William A. Schabas, "The 'Odious Scourge': Evolving Interpretations of the Crime of Genocide", *Genocide Studies and Prevention: An International Journal*, September 2006, 1:2, 96.

lead to the destruction of that group.⁽³²⁾ Additionally, it is more difficult to ascertain the intent of a group than the intent of an individual, which gives considerable leeway to the defendants to plead their innocence. It should be noted that intent is the most difficult element to prove, as will be shown in a following subsection.

Actus reus

The Scope of the Crime of Genocide

The physical element of the crime of genocide consists of the criminal act (*Actus reus*), which includes murder, causing serious physical or mental harm, inflicting conditions on the group which cause physical destruction of the group in whole or in part, imposing measures intended to prevent births, and forcibly transferring children of one group to another. The first two acts, killing and causing serious bodily or mental harm, can be committed with or without a plan, unlike the rest of the acts, which are more likely to require previous preparation.⁽³³⁾ Establishing torture methods, and torture camps such as the Khmer Rouge's infamous S-21 Security Centre where thousands of helpless Cambodians and Vietnamese faced violent death,⁽³⁴⁾ is an example of pre-planned targeted mass violence that could be defined either as crimes against humanity or genocide-depending on the intention, as shown in later parts of this paper. Another example of causing serious harm is depriving groups of food, causing serious illness or even death from starvation, as was done in Cambodia, affecting the lives of over one million people.

The ECCC limited its definition of the *actus reus* of genocide to killing members of a protected group.⁽³⁵⁾ This excludes other forms of genocide mentioned in Article II of the Genocide Convention, such as

(32) Sonja C. Grover, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia Since 1991, in Sonja C. Grover (ed), *Prosecuting International Crimes and Human Rights Abuses Committed Against Children* (Berlin, Heidelberg: Springer Berlin Heidelberg, 2010) 321-49.

(33) Philip Spencer, *Genocide Since 1945* (London: Routledge, 2012) 13.

(34) Case 002/02 Judgement, para 81.

(35) Closing Order of Case 002, para 1335.

causing bodily or mental harm, and taking measures to prevent births within a group. The ECCC did not clarify the reason behind excluding the other forms of genocide, such as the crimes the CPK committed against women to prevent births within protected groups. Nonetheless, the ECCC charged the accused with a variety of crimes against humanity, which included murder, extermination, deportation, enslavement, imprisonment, torture, persecution on political, religious and racial grounds, and other inhumane acts through attacks against human dignity, conduct characterized as enforced disappearances, forced transfer, forced marriage and rape within the context of forced marriage.”⁽³⁶⁾ Briefly, crimes against humanity are large-scale acts of violence against civilian populations in cases where the intent is to target civilians generally rather than to destroy a particular national, ethnical, racial or religious group. The charge of genocide is most concerned with violations of the rights of the group, whereas crimes against humanity can be constituted in violation of individual rights.⁽³⁷⁾

In determining the scope of genocide, the ECCC focuses on murder, which requires that “the victim is dead as a result of acts or omissions of the accused or of one or more persons for whom the accused is criminally responsible.”⁽³⁸⁾ Furthermore, genocide, as distinct from mere murder, must be committed on a large scale. However, there is no specific standard for the number of victims. Murder becomes an act of genocide when it “target[s] a member or members of a group on the basis of their group membership”⁽³⁹⁾ with the intent to destroy the group in whole or in part.

Protected Groups

Crimes of genocide are defined as crimes committed against protected groups. The Genocide Convention provides an exhaustive list of four groups (national, ethnic, religious, and racial). Drafters of the convention considered these groups to be more susceptible to harm

(36) Case 002/02 Judgement, para 4326.

(37) Patricia M Wald, *Genocide and Crimes Against Humanity*” Washington University Global Studies Law Review 2007, 6:3, 14.

(38) Case 002/02 Judgement, para 628.

(39) *Idem*, 796.

because members of these groups cannot escape their identities. There are inherent inescapable characteristics of each group which render the members vulnerable. Protected groups may not be defined by territories, or by the boundaries of states. They can be present in different states and still constitute a single group. The United Nations General Assembly Sixth Committee finds that minorities within states are also considered protected groups, if they meet certain set criteria regarding stability and numerical strength.⁽⁴⁰⁾

The ECCC concluded that the accused committed genocide against the Cham and the Vietnamese. It defined the Cham as members of “an ethnic and religious group that distinguishes itself as such and is identified as such by others.”⁽⁴¹⁾ Whereas it defined the Vietnamese as members of “an ethnic and national group, who may also have been considered as a racial group by the CPK.”⁽⁴²⁾ The ECCC’s understanding of protected groups is based on the Genocide Convention.

The Chamber found that the Convention does not precisely define the protected groups. Therefore, in identifying protected groups based on ethnicity, religion, nationality, and race, it considered case law. Previous tribunals have defined protected groups with reference to their particular socio-cultural and political contexts, which may be unique in each case.⁽⁴³⁾ For instance, the ICTY denied a merely objective approach in defining protected groups, stating that

to attempt to define a national, ethnical, racial or religious group today using objective and scientifically irreproachable criteria would be a perilous exercise whose result would not necessarily correspond to the perception of the persons concerned by such categorization.⁽⁴⁴⁾

The ECCC addressed the subjective and objective approaches. A subjective approach means identifying the protected group based on the views of the perpetrators or the victims.⁽⁴⁵⁾ According to the Chamber,

(40) Schabas, 95.

(41) Case 002/02 Judgement, para 1336.

(42) Idem, para 1434.

(43) Idem, 792.

(44) Prosecutor v. Goran Jelisić, ICTY IT-95-10-T, 14 December 1999, para 70.

(45) Claus Kreb, The International Court of Justice and the Elements of the Crime of Genocide, *The European Journal of International Law* (2007) 18:4, 623.

the subjective approach is defined by “the way in which the perpetrator stigmatises the victims or the way in which the victims perceive themselves.”⁽⁴⁶⁾ The essential part in this approach is the offender’s subjective mindset, his intention to target a specific group.⁽⁴⁷⁾ The trial chamber of ICTY justified the use of the subjective approach by stating that

The preparatory work of the [Genocide] Convention shows that setting out such a list was designed more to describe a single phenomenon, roughly corresponding to what was recognized, before the second world war, as national minorities, rather than to refer to several distinct prototypes of human groups. To attempt to differentiate between each of the named groups based on scientifically objective criteria would thus be inconsistent with the object and the purpose of the Convention.⁽⁴⁸⁾

It has been established in different cases that the perpetrator’s perception of the victim(s) is of utmost importance. The Darfur commission also recognized this, saying

The Genocide Convention hinges on four categories of groups which, however, are no longer identified only by their objective connotations but also based on the subjective perceptions of members of groups.⁽⁴⁹⁾

On the other hand, the objective approach means that members of the protected group share scientific characteristics, such as biological characteristics, which define the group in ways independent of the perpetrator’s perspective. During the prosecution, the accused, Nuon Chea and Khieu Samphan, argued in their defense that only objective criteria must be used in defining protected groups, and that “a perpetrator’s subjective perception that an individual is a member of the protected group is insufficient on its own to establish membership of

(46) Case 002/02 Judgement, para 795.

(47) Jens David Ohlin, “Attempt to Commit Genocide” in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (Oxford: Oxford University Press, 2009) 195.

(48) *Prosecutor v. Radislav Krstić*, ICTY Judgment, IT-98-33-A, 2 August 2001, para 556.

(49) Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General: Pursuant to Security Council Resolution 1564 of 18 September 2004”, 25 January 2005, para 501.

the group.”⁽⁵⁰⁾ The Chamber held that an objective approach was in line with the purpose of the Genocide Convention, which protects “relatively stable and permanent groups.”⁽⁵¹⁾ Nevertheless, the Chamber adopted both subjective and objective criteria—an approach also found in the case law established by other international courts.⁽⁵²⁾ For example, the ICJ noted that “the parties essentially agree that international jurisprudence accepts a combined subjective-objective approach.”⁽⁵³⁾ In this respect, the ECCC states that “alone is insufficient to establish membership of the protected group, and finds that both objective and subjective criteria may be taken into account.”⁽⁵⁴⁾ By following the precedents of previous international tribunals, the ECCC’s judgment strengthens international criminal jurisprudence.

The Chamber also emphasized that it cannot use a negative approach in defining a protected group, meaning that victims do not have to possess distinct features from the perpetrators in order to be identifiable as a separate group.⁽⁵⁵⁾ For example, the ICTY Appeals Chamber rejected defining targeted group as the “non-Serbs”; instead, the protected group had to be clearly specified as Bosnian Croats and Bosnian Muslims. This means that the ECCC would not accept “non-Khmer” as protected groups. According to the ECCC verdict, “In the determination of what constitutes a protected group, the Chamber notes that the group must have a particular distinct identity and be defined ‘as such’ by its common characteristics rather than a lack thereof. A protected group cannot be defined by negative criteria.”⁽⁵⁶⁾ So the lack of

(50) Case 002/02 Judgement, para 794.

(51) *Idem*, 795.

(52) *Idem*, para 795.

(53) Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ, February 26, 2007, para 191.

(54) Case 002/02 Judgement, para 795; See also Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) ICJ, 26 February 2007, para 191.

(55) Case 002/02 Judgement, para 793. For more on the meaning of the negative approach, see Fanny Martin, “The Notion of ‘Protected Group’ in The Genocide Conviction and Its Application” in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (Oxford: Oxford University Press, 2009) 124.

(56) Case 002/02 Judgement, para 793.

certain distinct features, would not suffice to qualify certain sets of victims as protected groups.⁽⁵⁷⁾

Even though the ECCC concluded that victims can share the perpetrators' characteristics, including ethnicity, the closing order eliminated Khmer victims from the protected groups considered in the charges of genocide. This exclusion of the Khmer victims is not explained, "not adequately or at all," as Judge You Ottara points out in his separate opinion on genocide.⁽⁵⁸⁾ As mentioned earlier, the CPK targeted former officials of the Khmer Republic, including civil servants and military personnel, and their families. According to the ECCC, "former officials were identified as 'enemies' based on their real or perceived political beliefs."⁽⁵⁹⁾ Although the ECCC defined the targeting of Khmer officials and their families as persecution on political grounds, which is a crime against humanity rather than a crime of genocide,⁽⁶⁰⁾ Judge Ottara argues that the Chamber could have defined crimes committed against Khmer officials and their families as genocide. In his view, the CPK destroyed "a substantial part of the very fabric of the Cambodian national group as it then existed."⁽⁶¹⁾ He argued that the CPK committed genocide against the Cambodian nation in part, and thus the ECCC should have considered the victims as protected national groups. In his words

the Khmer Rouge intended to purify Cambodia by intentionally destroying a substantial part of the Cambodian national group, both in terms of numbers and the qualitative features of the society - its religion, leaders and the political, social and cultural features which (and this is the crucial point) defined the national group between 17 April 1975 and 6 January 1979 - the ECCC might have been able to give to such deaths and destruction their proper meaning.⁽⁶²⁾

Judge Ottara thinks that the ECCC should have focused on the national ground of the crimes committed against the Cambodian society,

(57) *Idem*, para 793.

(58) *Idem*, para 4468.

(59) *Idem*, para 3520.

(60) *Idem*, para 3521.

(61) *Idem*, para 4517.

(62) *Idem*, para 4517.

which should be defined in a political, religious, and cultural context. He argues that the political grounds associated with the crimes committed against Khmer officials are an additional factor rather than a distinctive one.⁽⁶³⁾ Judge Ottara refers to Judge Ineta Ziemele's opinion in *Vasiliauskas v. Lithuania*, in which she argued that even though the Genocide Convention did not specifically extend protection to political groups, in certain cases political groups might be considered as essential components of protected national groups. In her opinion

The Court should have been able to distinguish between, on the one hand, a prominent part of a national group being targeted for political, social or, in any event, discriminatory reasons, and, on the other, a political group plain and simple. There is nothing in the history of outlawing genocide which would exclude from its scope an intention to destroy in part or as a whole a (national) group for political and otherwise discriminatory purposes. Regrettably, the Court has not exemplified this issue, which is crucial to this case.⁽⁶⁴⁾

Judge Ottara further provides a detailed explanation of the meaning of the phrase “destruction in whole or in part”, and of how the CPK actually destroyed Cambodian society in part (Cambodians being a national group eligible for protection). According to him, the term “in part” is not restricted to quantitative factors, meaning that a group may be destroyed in part, not only by the destruction of large numbers of people, but also by the destruction of significant sections of the group. He refers to William A. Schabas's study on genocide, which states that the term “‘in part’ would seem to imply a reasonably significant number, relative to the total of the group as a whole, or else a significant section of a group such as its leadership.”⁽⁶⁵⁾ In this regard, Judge Ottara argues that when the CPK targeted Khmer former military officials and their

(63) *Idem*, para 4517.

(64) *Vasiliauskas v. Lithuania*, Judgement (GC), ECtHR, Application no. 35343/05, 20 October 2015, Dissenting Opinion of Judge Ziemele, para 15.

(65) Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide Prepared by Mr. B. Whitaker”, UN Economic and Social Council Commission on Human Rights, Sub- Commission on Prevention of Discrimination and Protection of Minorities, 3E/CN.4/Sub.2/1985/6 - 2 July 1985, para 29.

families, it committed genocide against protected national groups by destroying in part the “fabric of the nation”⁽⁶⁶⁾ of Cambodia. This is only the view of Judge Ottara. However, if this broad interpretation of genocide based on national criteria had been adopted by the majority of the ECCC, the judgment could have expanded the protected groups to include the Khmer and the Buddhists, in addition to the Cham and the Vietnamese, as victims of genocide.

Mens rea

Genocide requires a specific intent to destroy a group, in whole or in part.⁽⁶⁷⁾ This requires the perpetrator to intentionally direct his criminal acts against protected groups with the aim of causing harm to them and destroying them partially or completely.⁽⁶⁸⁾ Genocide is a crime beyond ordinary homicide or serious assault, and it does not take place accidentally: it requires knowledge and the intent to harm.⁽⁶⁹⁾ Mass yet random murder of civilians without the intent to destroy specific groups could be punishable as a crime against humanity, but not as genocide.

The Chamber specifies the intent or mens rea in genocide as being “to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”⁽⁷⁰⁾ Knowledge is one part of mens rea, and it requires the perpetrator’s awareness of the circumstances of the crime. This knowledge can be demonstrated by the process of planning and preparing the genocidal crimes. Because of its scope, the crime of genocide, which is widespread and affects the lives of a group or groups in whole or part, cannot be committed solely by an individual. It often exists in the form of collaboration between leaders, experts, officers, and

(66) Case 002/02 Judgement, paras 4498 to 4506.

(67) Ibid, para 797.

William A. Schabas, “Problems of International Codification - Were the Atrocities in Cambodia and Kosovo Genocide,” (2001) 35 New England Law Review (2001 2000) 206.

(68) Paul Behrens, “The Mens Rea of Genocide” in Paul Behrens and Ralph Henham (eds), *Elements of Genocide* (London: Routledge, 2013) 210.

(69) William A. Schabas, “Problems of International Codification - Were the Atrocities in Cambodia and Kosovo Genocide,” (2001) 35 New England Law Review (2001 2000) 206.

(70) Case 002/02 Judgement, paras 797 and 4334.

(71) Ibid, 207; See also Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Washington: Carnegie Endowment for International Peace, 1944) 79.

implementers (often soldiers). Genocide is thus a planned and organized crime, not a spontaneous one.⁽⁷¹⁾ The Chamber does not require “a plan or policy,” but the existence of such a plan or policy “may support the inference that the perpetrator has the requisite specific intent.”⁽⁷²⁾

The judgment shows that the CPK targeted the Cham and the Vietnamese for two main reasons: to protect revolutionary ideologies and ideals from any threats, and to preserve Kampuchean racial purity.⁽⁷³⁾ The CPK invoked the first reason as it targeted these groups as the “enemies” of the regime. For instance, the ECCC referred to the testimony of a former CPK member who said, “The Cham are the enemy of Angkar because they plan to rebel so Angkar has to smash them.”⁽⁷⁴⁾ Angkar is a term referring to the organization of the CPK. Similarly, the CPK labeled the Vietnamese “Enemy Number One,”⁽⁷⁵⁾ “the most dangerous enemy” and “hereditary enemy” of the people and of the Party.⁽⁷⁶⁾ The CPK justified its lethal policy towards these two groups based on its fear of what the “enemy” could do rather than what it did to the so-called revolutionary ideology. The ECCC refers to a speech by the former Prime Minister Pol Pot, who stated, in his praise of the CPK’s revolutionary ideology, that DK had to “Defend the revolutionary state authority, the fruits of the revolution, defend the Party, the people, the Army, independence, sovereignty, etc, [against] every form of enemy activity, both overt and covert.”⁽⁷⁷⁾ In referring to the CPK’s conflict with what it considered as counter-revolutionary enemies, the ECCC pointed out that the “enemy” included combatants and civilians.⁽⁷⁸⁾ The inclusion of civilians led the ECCC to conclude that the defendants specifically intended to destroy the protected groups.

The CPK used its goal of purifying Kampuchea to justify an ethnic cleansing policy against other races. A former soldier testified that the CPK considered “any race other than the Khmer people as enemies.”⁽⁷⁹⁾ To show that genocide was committed based on racial grounds, the

(72) Case 002/02 Judgement, para 803.

(73) *Idem*, paras. 3216 and 3218, 3824.

(74) *Idem*, para 3219, footnote 10842.

(75) *Idem*, para 3381, footnote 11391.

(76) *Idem*, para 3381.

(77) Case 002/02 Judgement, para 3774.

(78) *Idem*, paras 3853, 4102, 4159, 4363.

(79) *Idem*, para 3218.

ECCC considered victims' age and gender. Evidence shows that the CPK targeted all Vietnamese, including women and children. For instance, the CPK considered that the Vietnamese ethnicity was passed down matrilineally, through the mother. The Chamber referred to a testimony that justified the collective killing of families with Vietnamese bloodlines by saying "[When you] dig up grass, dig it out by the roots."⁽⁸⁰⁾ In the case of Vietnamese women who were married to Cambodian men, digging out the roots meant killing the mothers and their children to ensure that Vietnamese blood would not be passed down.⁽⁸¹⁾

As for the Cham, the Chamber brings evidence that the CTK targeted them as a racial group. However, expert Elizabeth Becker argues that the CPK "confused the idea of race with that of culture, creed, language, and nation, as had the Nazis. They arbitrarily decided that Cambodia's minorities - [...] the Chams, [...] - were a threat to the health and vitality of the Kampuchean nation. Their solution was to decree the assimilation of all people into a super- race of Kampuchean worker-peasants."⁽⁸²⁾ Although the ECCC was able to show that the Cham were targeted as a group, it did not clearly show how they are a distinct racial group and not a cultural minority as Becker suggests. The court avoids going into details in explaining the Chams' race. Such a detailed explanation would have required external experts, a path that the Co-Investigating Judges rejected, believing that it was the task of the judges to define the protected groups and their characteristics.⁽⁸³⁾ The ECCC looked into the CPK's overall plan, which was to create a single "super-race" through different levels of racial and religious cleansing, ranging from banning religious practices and symbols to conducting mass executions. This plan indeed included the destruction of the Cham, as was shown in the historical background in this paper. The challenge that the ECCC faced was proving the specific intent of genocide, demonstrat-

(80) See *idem*, para 4041, footnote 13384.

(81) Carola Lingaas, "Emerging Voices: 'Race' in the ECCC Judgment in the Case 002/02-One Step Forward, Two Steps Back?", 5 August 2019, *Opinio Juris*, online: [s race-in-the-eccc-judgment-in-the-case-002-02-one-step-forward-two-steps-back](https://www.opiniojuris.org/2019/08/05/race-in-the-eccc-judgment-in-the-case-002-02-one-step-forward-two-steps-back/).

(82) Case 002/02 Judgement, para 3219, footnote 10844.

(83) Case 002/02 Judgement, para 4468.

ing that the CPK targeted these protected groups with the aim of destroying them partially or completely.

As intent is hard to prove, courts consider the patterns, nature, scale, methodology, and synchronized plans of mass atrocities.⁽⁸⁴⁾ In Case 002/02, the Chamber analyzed relevant factors and evidence taken together to determine whether they demonstrated “a genocidal mental state.”⁽⁸⁵⁾ These factors included “the general context, the perpetration of other culpable acts systematically directed at the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership in a particular group, or the repetition of destructive and discriminatory acts.”⁽⁸⁶⁾ The Chamber also considered “speeches made in public or in meetings to support a finding of specific intent.”⁽⁸⁷⁾ The Chamber analyzed the related factors and concluded that the CPK targeted the Vietnamese and the Cham.

The Chamber drew its conclusion of the specific intent of genocide against the Vietnamese by analyzing related evidence. The Chamber examined notebooks of the CPK’s members and records of the infamous security center S-21, where prisoners were detained, tortured, and killed. These documents show the CPK’s motive in targeting the Vietnamese. For instance, the documents describe the Vietnamese as the “enemy” who must be “smashed” in order to “defend the collective regime.”⁽⁸⁸⁾ They also showed that the CPK targeted not only Vietnamese soldiers, but also civilians including women and children.⁽⁸⁹⁾ The Chamber thus concluded that such attacks targeted “the whole of the Vietnamese population.”⁽⁹⁰⁾

As for the Cham, the Chamber reached its conviction by analyzing related evidence and historical facts. The targeting of the Cham began in 1970 in some areas and spread throughout the country until January 1979. The targeting policies included forcing the displacements of Cham

(84) Prosecutor v Jean-Paul Akayesu, ICTR, ICTR-96-4-T, 2 September 1998, 260-72.

(85) Case 002/02 Judgement, para 803.

(86) Idem.

(87) Idem.

(88) Idem, paras 2469, 2470, 2478.

(89) Idem, para 2478.

(90) Idem, para 2469.

villagers and prohibiting the Cham religion, culture, language, and dress. According to the ECCC, the CPK targeted the Cham “first by restricting their cultural and religious practices, then by brutally suppressing ‘rebellions’ and dispersing Cham communities and, at a later stage, by ordering to purge all the Cham who had not yet been deemed as being fully assimilated to the Khmer society.”⁽⁹¹⁾ The later stage took place from 1977 to 1978, during which time the CPK adopted a “policy of destroying the Cham as a group” which “manifested in mass executions.”⁽⁹²⁾ The CPK arrested all of “the Cham of a particular region” and took “them to be killed in groups at an execution site.”⁽⁹³⁾ The executions took place in mid-1978 in the Trea Village Security Centre and the Wat Au Trakuon Security Centre, where the CPK also detained and tortured the Cham.⁽⁹⁴⁾ This policy was not applied to non-Cham people, who “were specifically and expressly excluded from the attacks.”⁽⁹⁵⁾ The Chamber concluded that the CPK policy against the Cham and the way it evolved over time allowed the Chamber to “assess genocidal intent.”⁽⁹⁶⁾ According to the Chamber, “Wat Au Trakuon and Trea Village Security Centres demonstrated a genocidal mental state toward the Cham found to have been killed in those locations.”⁽⁹⁷⁾ The Chamber reported that it had used “the existence of such a policy specifically targeting the Cham as an ethnic and religious, and thus a protected group, and its evolution over time to assess genocidal intent.”⁽⁹⁸⁾

The ECCC has contributed to the evolution of the concept of *Mens Rea* by emphasizing the relevance and importance of *Dolus eventualis*, which is the lowest fault degree, meaning a person knew in advance that certain actions would end in specific negative consequences and yet persisted in planning or taking those actions. Both defendants were charged with genocide based on their conspicuous participation in a joint

(91) *Idem*, para 3345.

(92) *Idem*, para 3206.

(93) *Idem*.

(94) *Idem*, para 3270.

(95) *Idem*.

(96) *Idem*, para 3345.

(97) *Idem*, para 3347.

(98) *Idem*, para 3345.

criminal enterprise. The accused shared the common purpose of the joint criminal enterprise, including implementing swift socialist revolution according to party guidelines using whatever heinous means were deemed necessary.⁽⁹⁹⁾ In this way, they shouldered the burden of collective liability along with Secretary Pol Pot and Army Chairman Son Sen. The policies they intentionally drafted and executed formed the basis for the charges in Case 002/02.

CONCLUSION

Cambodians had high hopes that the tribunal would provide exemplary punishments for the abhorrent crimes committed by the accused. Credible tribunal proceedings and strong sentences have helped to bring justice to dead victims' families and to give respite to the survivors of that era. Nevertheless, ECCC verdict can be described as “too little and too late”, taking a long time to prosecute only two people; not to mention the long period between the time of committing the crimes and the final judgment. This can make the verdict of a symbolic value, recognizing the validation of victimization and collective suffering. But even this symbolic justice remains incomplete for not including Buddhist and Khmer victims.

A major critique of the ECCC verdict focuses on the protected groups. While the definition of genocide is narrow under the genocide convention, the court took an even narrower perspective by excluding Buddhist victims as a religious group and Khmer victims as a national/political group. The ECCC did not provide reasons for this exclusion, leaving open questions about its decision. Although the ECCC determined that victims can share the perpetrators' ethnicity, the closing order elimination of Buddhist and Khmer victims suggests that the ECCC avoided questioning the possibility of considering attacks against groups that share the same nationality, ethnicity, and race of the perpetrators as genocide, leading to denying the Buddhist and Khmer victims protection under the Genocide Convention.

(99) *Idem*, para 3727.

A different and an original view provided by one of the ECCC members, Judge You Ottara. In a separate opinion, he considered the above groups, Buddhists and Khmer, as national units of the Cambodian society, and claimed that, in targeting these units, the defendants targeted the fabric of Cambodian society in part. He is not advocating for identifying what some call political or cultural genocide, but he calls for acknowledging that Buddhists and Khmer victims are part of a national group that the perpetrators intended to destroy them in whole or in part. This interpretation of the meaning of “national group” might sound broad, but it is in line with the objectives of the Genocide Convention, and it could have provided greater recognition to the Cambodian society that includes Buddhist and Khmer people. Ottara’s opinion might seem bold and unconventional but reflecting on it could guide future cases.

In identifying the elements of genocide, the ECCC verdict followed precedents of other international courts and tribunals. The verdict can thus be viewed as a quantitative addition in determining genocide in the international case-law. This does not necessarily undermine its value; in fact, the verdict being in agreement with other judgments can help in establishing customary international law regarding the elements of genocide.

The ECCC verdict’s focuses on the concept of “enemy” that the CPK use to justify their crimes against the Vietnamese and the Cham. The courts considered the label of “enemy” as an indication for the genocide intent to destroy in whole or in part the enemy groups. Perpetrators throughout history have been adding politicized and emotional dimensions to the word “enemy” as a pretext to convince the public for the need of violence to secure the nation. The court successfully identified the real motive behind the CPK use of language, and that racial and religious cleansing cannot be justified under any label or pretext. In this sense, this verdict is useful to national and international courts, which need to identify criminals based on wrong-doings and not based on identity.

The ECCC verdict provides a helpful contribution to international jurisprudence, though the “too little, too late” criticisms should hopefully lead to future speedy trials. The fact remains that the ECCC

handled factual and legal challenges despite facing political, national, and international pressure. Thus, it succeeded in examining massive amounts of evidence in the form of hundreds of thousands of pages of individual testimonies, interviews, reports, and scholarship of the past four decades. The ECCC by convicting former senior leaders has communicated a strong message for justice. The ECCC judgment has told the world that there is no place for genocide in the future and that perpetrators will be tried and sentenced.

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تعريف الإبادة الجماعية: تحليل نقدي لحكم الدوائر الاستثنائية في محاكم كامبوديا قضية 2/002

الدكتورة / فاطمة الظبيري

ارتكب نظام الخمير الحمر جرائم مروعة في كمبوديا بين عام ١٩٧٥-١٩٧٩ ضد الجماعات العرقية. وثائق رسمية لذاك النظام بينت السياسة الممنهجة لسوء المعاملة وانكار هذه الشعوب حقوقها بل ووجودها. هذه الوثائق ساعدت لاحقاً المجتمع الدولي في إثبات ارتكاب أحد أفظع الجرائم: الإبادة الجماعية. في عام ٢٠١٨، أصدرت الدوائر الاستثنائية في محاكم كمبوديا حكماً تاريخياً في القضية رقم ٢/٢ بإدانة قياديين من الخمير الحمر بارتكاب جريمة الإبادة الجماعية. وأقر الحكم بأن مجموعتين من الأقليات كانتا ضحيتين للإبادة الجماعية، وهما الفيتناميون والشام. تحلل هذه الورقة الحكم الصادر في القضية ٢/٠٠٢ مع تبيان فهم المحكمة لعناصر الإبادة الجماعية والمجموعات المحمية. لهذا الحكم القضائي أهمية في الاعتراف بحقوق الضحايا من جهة، وفي سن سابقة قضائية في الشرق الأقصى حيث تداعيات الإبادة الجماعية ضد أقلية الروهانغا المسلمة لانزال قائمة .

مع تطور القانون الدولي من خلال السوابق القضائية فيما يتعلق بالإبادة الجماعية، وتجربة المحاكم السابقة، ولا سيما المحكمة الجنائية الدولية الخاصة برواندا والمحكمة الجنائية الدولية ليوغوسلافيا السابقة، تبحث هذه الورقة مساهمة محكمة كامبوديا في القانون الجنائي الدولي والعدالة الانتقالية

الكلمات الافتتاحية: الخمير الحمر، الرأي المنفصل، القاضي أوتارا، عناصر جريمة الإبادة الجماعية.

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