TOWARD A COMPARATIVE APPROACH TO THE CRIME OF GENOCIDE

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ABSTRACT

The annihilation of more than 1.5 million Cambodians at the hands of the Khmer Rouge is widely considered a quintessential case of genocide. Whether these atrocities meet the definition of genocide as a legal matter, however, remains unsettled. As of October 2012, the question of whether genocide occurred in Cambodia within the meaning of the 1948 United Nations Genocide Convention is pending before the Extraordinary Chambers in the Courts of Cambodia (ECCC). The ECCC will determine this question against the backdrop of an ongoing debate about the appropriate scope of the crime of genocide. This debate pits expansionists, who believe the definition of the crime should be broadened to include mass killings of political groups, against restrictivists, who assert that genocide's definition must remain tightly tethered to the crimes first articulated in the 1948 Genocide Convention. This Note finds both approaches wanting, and argues that the court should eschew dichotomies in favor of a comparative law approach to the crime of genocide. By approaching the crime of genocide in the Cambodian context as a legal transplant, the ECCC can achieve the uniformity critical to international law without sacrificing the cultural specificity necessary to ensuring that international legal principles remain locally meaningful.

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INTRODUCTION

More than 1.5 million Cambodians died at the hands of the Khmer Rouge between 1975 and 1979.[1] The atrocities committed by the brutal regime defy imagination. Myopically focused on achieving an agrarian utopia, the Khmer Rouge fomented a revolution that swept across Cambodia with the destructive fury of a typhoon. In short order, money, markets, religion, education, books, private property, the family unit, and expressions of individuality were obliterated.[2] The Khmer Rouge's utopian vision created a dystopian reality in which one in five Cambodians died of overwork, starvation, deprivation, torture, or execution.[3] The regime's fall from power on January 9, 1979, left behind a shattered society that still struggles to comprehend its horrific past.[4]

Despite the enormity of their atrocities, for decades the perpetrators were left unpunished, their crimes unaddressed.[5] It took nearly thirty years for the Cambodian government, with the support of the United Nations (UN), to create the Extraordinary Chambers in the Courts of Cambodia (ECCC), a tribunal designed to establish the truth about what happened in Cambodia, provide reconciliation to the Cambodian people, and at last bring to justice the perpetrators of

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1. *See* Youk Chhang, *The Thief of History—Cambodia and the Special Court*, 1 INT'L J. TRANSITIONAL JUST. 157, 160 n.3 (2007) ("The most commonly accepted estimates [of the number of people killed during the Khmer Rouge regime] today are between 1.7 and 2 million."); Ben Kiernan, *The Demography of Genocide in Southeast Asia: The Death Tolls in Cambodia, 1975–79, and East Timor, 1975–80*, 35 CRITICAL ASIAN STUD. 585, 586–87 (2003) ("We may safely conclude, from known pre- and post-genocide population figures and from professional demographic calculations, that the 1975–79 death toll was between 1.671 and 1.871 million people, 21 to 24 percent of Cambodia's 1975 population.").

2. *Cf.* Chhang, *supra* note 1, at 159 ("Their first act . . . was to empty the cities and force their inhabitants to hard labor in the countryside. Then, they sealed off the borders, dismantled the country's infrastructure and collectivized property. The only personal possessions most people were allowed were a plate and a spoon. The Khmer Rouge then turned on the population . . . ." (footnote omitted)).

3. DAVID CHANDLER, A HISTORY OF CAMBODIA 7 (4th ed. 2008). Exact death toll figures vary, and one in five is a conservative estimate. *See supra* note 1.

4. *See* Thomas Hammarberg, *How the Khmer Rouge Tribunal Was Agreed: Discussions Between the Cambodian Government and the UN* (pt. 1), SEARCHING FOR THE TRUTH, June 2001, at 36, 36, *available at* http://www.d.dccam.org/Projects/Magazines/Previous%20Englis/Issue18.pdf ("During my first mission to Cambodia . . . it immediately became clear to me that the Khmer Rouge crimes in the 1970's still cast a paralyzing shadow over Cambodian society.").

5. *See id.* ("The fact that no one had been held accountable for the mass killings and other atrocities had clearly contributed to the culture of impunity which was still pervasive in Cambodia.").

some of the most heinous crimes the world has ever seen.[6] The ECCC's co-investigating judges indicted four former Khmer Rouge leaders in *Case 002*[7] on September 15, 2010.[8] The CIJs' indictment thereby placed the question of whether a genocide occurred in Cambodia during the Khmer Rouge's reign before the ECCC's trial chamber[9] for the first time. Therefore, as a threshold issue, the trial chamber will determine whether, as a legal matter, genocide occurred in Cambodia.[10]

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6. *See* Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea art. 1, June 6, 2003, 2329 U.N.T.S. 117, 118–19 ("The purpose of the present Agreement is to regulate the cooperation between the United Nations and the Royal Government of Cambodia in bringing to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.").

7. Case 002, Case No. 002/19-09-2007-ECCC (Extraordinary Chambers in the Cts. of Cambodia). For a collection of pleadings, opinions, and other documents related to the case, see *Find Court Document:* Case 002, EXTRAORDINARY CHAMBERS IN THE CTS. OF CAMBODIA, http://www.eccc.gov.kh/en/search/document/court/results/taxonomy%3A2 (last visited Sept. 5, 2012). On September 16, 2012, the Supreme Court Chamber ordered the conditional release of Ieng Thirith, one of the four accused. Case 002, Case No. 002/19-09-2007-ECCC-TC/SC(16), Decision on Co-Prosecutor's Request for Stay of Release Order of Ieng Thirith (Extraordinary Chambers in the Cts. of Cambodia Sept. 16, 2012), http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E138_1_10_1_2_1_EN.pdf. Ieng had been found mentally unfit to stand trial by the ECCC's Trial Chamber on September 13, 2012. Case 002, Case No. 002/19-09-2007/ECCC/TC, Decision on Reassessment of Accused Ieng Thirith's Fitness To Stand Trial Following Supreme Court Chamber Decision of 13 December, 2011 (Extraordinary Chambers in the Cts. of Cambodia Sept. 13, 2012), http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E138_1_10_EN.pdf.

8. Case 002, Case No. 002/19-09-2007-ECCC-OCIJ, Closing Order, para. 1613 & at 402 (Extraordinary Chambers in the Cts. of Cambodia Sept. 15, 2010), http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D427Eng.pdf. On April 11, 2011, the ECCC's pre-trial chamber rejected the various appeals raised by the accused, thereby sending *Case 002* to trial. Case 002, Case No. 002/19-09-2007-ECCC/OCIJ (PTC75), Decision on Ieng Sary's Appeal Against the Closing Order, paras. 1–19 (Extraordinary Chambers in the Cts. of Cambodia Apr. 11, 2011), http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D427_1_30_EN.pdf.

9. *See* Anne Heindel, *Overview of the Extraordinary Chambers*, *in* ON TRIAL: THE KHMER ROUGE ACCOUNTABILITY PROCESS 85, 108, 116 (John D. Ciorciari & Anne Heindel eds., 2009) (describing the role of the ECCC's trial chamber to conduct trials and issue judgments against the accused persons after becoming seized of an indictment issued by the Office of the Co-Investigating Judges).

10. Other international tribunals tasked with determining individual liability for genocide have found it necessary to first establish whether genocide occurred. For example, the International Criminal Tribunal for Rwanda (ICTR) in *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement (Sept. 2, 1998), http://www.unictr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf, noted, "As regards the massacres which took place in Rwanda between

Although in the popular imagination the Cambodian massacre is an archetypal example of genocide,[11] determining whether the atrocities meet the legal definition of the crime of genocide is no simple matter. At the international level, the definition of genocide is inextricably linked to the historical context in which it developed. The first articulation of genocide was a historically contingent response to the atrocities perpetrated by the Nazis during World War II.[12] It represented a political product reflecting the compromises necessary to obtain widespread acceptance.[13] To this day, the Holocaust remains the lens through which other cases of possible genocide are interpreted, which has significantly limited the number of incidents

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April and July 1994, . . . the question before this Chamber is whether they constitute genocide. . . . The answer to this question would allow a better understanding of the context within which the crimes with which the accused is charged are alleged to have been committed," *id.* para. 112. The International Criminal Tribunal for the Former Yugoslavia (ICTY) has also noted the importance of determining whether a genocide occurred before addressing the issue of criminal liability for genocide. *See* Prosecutor v. Jelisic, Case No. IT-95-10-T, Judgement, para. 101 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 14, 1999), http://www.icty.org/x/cases/jelisic/tjug/en/jel-tj991214e.pdf ("[I]t will be very difficult in practice to provide proof of the genocidal intent of an individual if the crimes committed are not widespread and if the crime charged is not backed by an organisation or a system."); Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-T, Judgement, para. 273 (May 21, 1999), http://www.unictr.org/Portals/0/Case/English/kayishema/judgement/990521_judgement.pdf ("A question of general importance to this case is whether genocide took place in Rwanda in 1994 . . . .").

11. *See* Ryan Park, *Proving Genocidal Intent: International Precedent and ECCC* Case 002, 63 RUTGERS L. REV. 129, 130 (2010) ("The mass murder perpetrated by the Khmer Rouge regime is popularly conceptualized as 'genocide.' It has been so labeled by sources as disparate as the United States Congress, United Nations General Assembly, countless media and scholarly publications, and domestic Cambodian efforts to memorialize and document the horror of the period." (citations omitted)).

12. *See, e.g.*, JOHN QUIGLEY, THE GENOCIDE CONVENTION: AN INTERNATIONAL LAW ANALYSIS 4 (2006) ("The mass killing by the Third Reich served as a catalyst to defining a crime to deal with efforts to wipe out a people."). On one hand, the Holocaust is both "the paradigm of genocide and . . . the inspiration and prototype of the . . . genocide definition" in the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), *opened for signature* Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277; on the other, it is a "unique and unprecedented" incident, which "mak[es] it difficult to compare it with other mass atrocities." MALIN ISAKSSON, THE HOLOCAUST AND GENOCIDE IN HISTORY AND POLITICS: A STUDY OF THE DISCREPANCY BETWEEN HUMAN RIGHTS LAW AND INTERNATIONAL POLITICS 23 (2010). This duality "pav[es] the way for the possibility that the Holocaust is contributing to hindering the prevention of other genocidal incidents as nothing is comparable to it." *Id.*

13. *See* Beth Van Schaack, Note, *The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot*, 106 YALE L.J. 2259, 2268 (1997) (explaining that the Genocide Convention drafters needed to respond to the "tragedy of the Nazi Holocaust" without "having the Convention inculpate Stalin's politically motivated purges of the *kulaks*" to secure the approval of the Soviet bloc).

that have ultimately been labeled as genocide.[14] Furthermore, the explicit omission of political groups from the definition of genocide that was enshrined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention)[15] exemplifies the practical compromises that were necessary to ensure widespread support in the harsh world of Cold War politics.[16] Ultimately, as a result of the context in which genocide was first legally defined, the majority of the Cambodian deaths may be beyond the reach of the Genocide Convention[17] because many commentators attribute the Khmer Rouge's crimes to the regime's desire to purge Cambodia of perceived political enemies.[18]

To determine whether, as a legal matter, genocide occurred in Cambodia, the ECCC may have to take sides in a debate over the appropriate definition of genocide, a debate that has raged since the Genocide Convention's adoption.[19] This genocide debate pits restrictivists, who seek to tightly tether any application of the crime to the text of the Genocide Convention, against expansionists, who advocate for a broader understanding of the crime of genocide.[20] This

14. *Cf.* ISAKSSON, *supra* note 12, at 19 ("[T]he Holocaust has become and 'continues to function as a lens through which to interpret' other cases of possible genocide. . . . [T]his has implications for which incidents are branded as genocide." (quoting DAVID B. MACDONALD, IDENTITY POLITICS IN THE AGE OF GENOCIDE: THE HOLOCAUST AND HISTORICAL REPRESENTATION 1 (2008))).

15. Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 12.

16. Van Schaack, *supra* note 13, at 2272.

17. *See id.* at 2261 ("A close reading of the Genocide Convention leads to a surprising and worrisome conclusion. The Genocide Convention, unlike other international legal instruments, limits the protected classes to national, ethnic, racial, and religious groups. As such, it does not cover a significant portion of the deaths in Cambodia." (citations omitted)).

18. *E.g.*, Park, *supra* note 11, at 131.

19. *See* William A. Schabas, *Genocide Law in a Time of Transition: Recent Developments in the Law of Genocide*, 61 RUTGERS L. REV. 161, 161 (2008) (describing "more or less incessant calls to amend the definition of the crime [of genocide] set out [in the Genocide Convention]").

20. *See* Michael J. Kelly, *"Genocide"—The Power of a Label*, 40 CASE W. RES. J. INT'L L. 147, 157 (2008) ("Restrictivists seek to restrain the label's usage to atrocities more akin to the Holocaust, while expansionists seek to broaden the label's usage to include tangential atrocities. . . . What scholars now argue strenuously about is whether the definition of genocide covers . . . extermination and ethnic cleansing, and whether political groups should be included as protected groups."); *see also* David L. Nersessian, *Comparative Approaches To Punishing Hate: The Intersection of Genocide and Crimes Against Humanity*, 43 STAN. J. INT'L L. 221, 223 (2007) ("Perhaps the most significant criticism [of the Genocide Convention] . . . is that political groups are not among the human collectives that the Convention protects."). One genocide scholar insists that a narrow definition of genocide is necessary to comport with the principles of

restrictivist/expansionist dichotomy in some ways reproduces a larger debate in the human rights field. In this larger debate universalists, who assert that human rights derive power from their ability to transcend local, national, or international laws, geographically as well as temporally, clash with relativists, who insist that human rights ideals should not be imposed uniformly across cultures.[21] The interpretive approach employed by restrictivists in the genocide debate mirrors the interpretive approach universalists use to make sense of human rights. Similarly, the expansionist approach to the law of genocide reflects the relativist interpretation of human rights more generally.[22] In light of these similarities, lessons drawn from the broader human rights debate can provide guidance to the ECCC as it approaches the definition of genocide.[23] In the case of Cambodia, adopting an uncompromisingly universalist approach to the crime of genocide may undermine the legitimacy of international law and

judicial fairness that "militate against liberal constructions of penal offenses," to respect the rule against retroactive offenses, and to ensure that the Genocide Convention's prevention obligations are not triggered too readily. William A. Schabas, *Problems of International Codification—Were the Atrocities in Cambodia and Kosovo Genocide?*, 35 NEW ENG. L. REV. 287, 301 (2001). In contrast, expansionists such as Professor David Luban argue that the definition of genocide must be amended to guarantee that a restrictive understanding of genocide does not become an "excuse for inaction in the face of mass atrocity." David Luban, *Calling Genocide by Its Rightful Name: Lemkin's Word, Darfur, and the UN Report*, 7 CHI. J. INT'L L. 303, 320 (2006).

21. *See, e.g.*, Kirsten Hastrup, *Collective Cultural Rights: Part of the Solution or Part of the Problem?*, *in* LEGAL CULTURES AND HUMAN RIGHTS: THE CHALLENGE OF DIVERSITY 169, 169 (Kirsten Hastrup ed., 2001) (suggesting that human rights law has been stymied by "an unhealthy trench warfare between universalists and relativists, who have been unable to find a solution"). Universalists believe that the "elements of supranationalism and efficacy" in international law and its institutions can be "extremely powerful" tools that "might influence or even restrain the Hobbesian order established by the politics of States." Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 385 (2000). Relativists argue, in contrast, that "less hierarchical international criminal justice system[s]," which are more responsive to national concerns and "diverse perspectives," ultimately prove more effective at ensuring international law's goals. Jenia Iontcheva Turner, *Nationalizing International Criminal Law*, 41 STAN. J. INT'L L. 1, 1 (2005).

22. *See infra* Part I.A.

23. For the sake of clarity, this Note will employ the term universalist to discuss both universalist approaches to human rights and restrictivist approaches to the crime of genocide. Similarly, the term relativist is used to refer both to relativist interpretations of human rights, as well as expansionist approaches to the crime of genocide. Combining the restrictivist/expansionist labels used in the genocide debate with the universalist/relativist labels drawn from the human rights debate also serves to reinforce the commonality between universalist and restrictivist interpretive approaches on the one hand and relativist and expansionist methods on the other.

internationalized courts by rendering the acts of the Khmer Rouge unpunishable. A purely relativist approach is hardly superior because it threatens the symbolic and normative importance of recognizing certain rights as fundamental.[24] Both approaches fall short of what is required.

This Note argues that the ECCC should bypass this dichotomy and instead adopt a comparative law approach to the crime of genocide that draws upon the concept of legal transplants—rules moved from one legal setting to another.[25] Unlike relativism or other culturally contingent modes of interpretation, the study of a transplant requires a more comprehensive assessment of the law, including how it originated, how it evolved, and how it differs from society to society, taking into consideration the "reciprocal influences of different legal systems . . . and the spread of legal ideas from culture to culture."[26] Moreover, the idea of transplants provides a useful tool for judges who are tasked with applying universal human rights in local settings. Judges can adapt widely recognized rights to discrete cultural contexts, thereby ensuring that universal principles remain universally meaningful.[27] Despite these significant advantages, scant attention has been paid to the utility of legal transplants in the international law of genocide.[28]

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24. *See infra* Part I.A.

25. *See infra* Part I.B.

26. William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 AM. J. COMP. L. 489, 510 (1995).

27. *Cf.* Sally Engle Merry, *Transnational Human Rights and Local Activism*: *Mapping the Middle*, 108 AM. ANTHROPOLOGIST 38, 39 (2006) (describing how legal translators adapt "the discourses and practices from the arena of international law and legal institutions to specific situations of suffering and violation").

28. Although no one has written about legal transplants in the context of genocide, a survey of the scholarship on legal transplants in other fields may help orient this Note. For example, Professor Jonathan Wiener investigates the role of legal transplants in the context of "trans-echelon legal borrowing in global environmental law." Jonathan B. Wiener, *Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law*, 27 ECOLOGY L.Q. 1295, 1307 (2001). Similarly, Professor Julie Mertus describes the roles of nongovernmental organizations in transplanting "laws and, in some cases, entire legal systems from one place to another" in promoting the rule of law. Julie Mertus, *From Legal Transplants to Transformative Justice: Human Rights and the Promise of Transnational Civil Society*, 14 AM. U. INT'L. L. REV. 1335, 1378 (1999). Professor Bill Bowring addresses "transplant[ed]" human rights principles applied domestically in the former Soviet Union. *See* Bill Bowring, *Rejected Organs? The Efficacy of Legal Transplantation, and the Ends of Human Rights in the Russian Federation*, *in* JUDICIAL COMPARATIVISM IN HUMAN RIGHTS CASES 159, 159–60 (Esin Örücü ed., 2003) ("Perhaps [comparative law] can ease the pain of transition [toward global

Although legal scholars and practitioners have neglected to address the utility of a comparative approach to the crime of genocide, the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have not. These Tribunals have adopted a tacitly comparative jurisprudence to determine what genocide means in discrete contexts.[29] This Note argues that the ECCC should embrace this comparative approach, treating the crime of genocide as the legal transplant that it is. A comparative approach to the law of genocide is superior to existing approaches because the use of legal transplants would enable the ECCC to interpret the legal definition of genocide in a manner designed to achieve uniformity without sacrificing cultural specificity without necessitating a redrafting of the law itself.

This Note proceeds in four parts. Part I describes the existing approaches to interpreting international human rights law and demonstrates that the concept of legal transplants provides a useful analytical tool for making genocide meaningful in a variety of contexts. Part II turns to the law of genocide in international and comparative law, describing the historically contingent nature of the Genocide Convention and the existing international criminal law regime. It then describes the debate over defining genocide in Cambodia to illustrate the shortcomings of both universalist and relativist approaches to the law of genocide. Part III analyzes the tacitly comparative judicial approach to defining the crime of genocide adopted by the ICTY and ICTR. Part IV describes what a comparative analysis of the law of genocide at the ECCC would look like, the shortcomings of the ECCC's universalist approach, and the concerns specific to Cambodia that should inform the ECCC's analysis. Part IV then examines how the ECCC could approach defining the crime of genocide in the Cambodian context. The Note

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harmonization of law] by inventively smoothing out legal differences, creatively interpreting legal change to those who must accept it, or preserving familiar forms, concepts and styles of legal practice while adjusting their effects to meet transnational requirements."). Professor Roger Cotterrell suggests that comparative legal principles offer a fruitful method for approaching human rights locally and even alludes to human rights as legal transplants. Roger Cotterrell, *Seeking Similarity, Appreciating Difference: Comparative Law and Communities*, *in* COMPARATIVE LAW IN THE 21ST CENTURY 35, 45 (Andrew Harding & Esin Örücü eds., 2002). Cotterrell, however, limits his discussion to the theoretical and does not apply a comparative approach to any particular human right. *See id.* at 45–46 (referring only to "human rights," "fundamental values," and "the essential nature of humanity").

29. *See infra* Part III.

concludes by emphasizing that recognizing genocide as a legal transplant is integral to ensuring the law's defense of fundamental human rights.

I. DEFINING GENOCIDE: TOOLS OF INTERPRETATION

The inadequacies of both the universalist and relativist approaches to human rights make the nuanced, culturally contingent comparative idea of legal transplants particularly appealing for a court that is tasked with applying the law of genocide in a particular local setting. If the ECCC adopts a relativist approach to genocide, it will have to redefine the law to fit idiosyncratic social needs by expanding the definition to include instances in which victims are targeted for not conforming to the perpetrators' vision of their own national, ethnic, racial or religious identity.[30] Alternatively, if the ECCC espouses the universalist approach, it will mandate a uniform application of the law across cultures and time and insist that "the Genocide Convention must be tightly tethered to its text, . . . thereby steering clear of broadly purposive, deontological reasoning."[31] Such uncompromising approaches to the law of genocide ultimately prove to be unsatisfactory. This Part assesses the inadequacies of the strict universalist and relativist interpretive approaches to human rights. It then discusses the advantages of approaching genocide as a legal transplant.

A. The Limitations of Universalist and Relativist Approaches to International Law

Purely relativist approaches to international law undermine the symbolic and normative importance of selecting and defining fundamental human rights as universal and inviolable.[32] The relativist

30. *See, e.g.*, Park, *supra* note 11, at 134–35 ("[H]istorian Ben Kiernan proposes the concept of 'autogenocide' to encompass instances in which the perpetrators and victims of an alleged genocide share the relevant national, ethnic, racial and/or religious characteristic, yet the perpetrators target the victims for, in their eyes, not sufficiently exhibiting the essentialized characteristics of the group in question (i.e., the urban, educated elite not being 'true' Khmers, according to the Khmer Rouge)." (citing BEN KIERNAN, THE POL POT REGIME 3 (2d ed. 2002))).

31. *Id.* at 137.

32. *See* WIKTOR OSIATYNSKI, HUMAN RIGHTS AND THEIR LIMITS 175–76 (2009) (noting the importance of universal human rights as a set of "[r]ules that should be observed even when

approach rejects the notion that universal legal principles can be imposed on another culture without accounting for how local cultural conditions and values should temper their interpretation.[33] In the context of genocide, for example, a relativist approach may encourage an overly flexible definition of genocide—one that can be stretched to encompass any instance of mass killing.[34] Such an expansive definition could ultimately strip all real meaning from the concept of genocide, thereby divesting it of practical and rhetorical force.[35]

Although international law has traditionally insisted on universally acceptable norms to regulate international interactions in a global society,[36] an uncompromisingly universalist approach to the definition of genocide is hardly superior. Universal human rights movements have come under fire, cast as "'civilizing' crusade[s]" in which rights are wielded "as an instrument of global domination and neocolonialism" rather than as a tool to end oppression.[37] This accusation stems from international law's failure to engage with and adapt to local cultural settings. In the context of international tribunals designed to restore justice in the wake of mass atrocities, for instance, the failure to take local cultural values into account has led

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someone does not share—or does not know—the underlying philosophy" to prevent "grave abuses perpetrated in the name of cultural differences").

33. *See* Jaya Ramji-Nogales, *Designing Bespoke Transitional Justice: A Pluralist Process Approach*, 32 MICH. J. INT'L L. 1, 68 (2010) ("Legal rules and institutions imposed in the ostensible pursuit of uniformity that do not incorporate or respond to competing normative preferences cannot succeed in their quest.").

34. Schabas, *supra* note 20, at 290.

35. For example, Slobodan Milosevic brought charges of genocide against North Atlantic Treaty Organization (NATO) countries before the International Court of Justice (ICJ). Application Instituting Proceedings, Legality of Use of Force (Yugoslavia v. Spain), at 5 (Apr. 29, 1999), http://www.icj-cij.org/docket/files/112/7169.pdf. Milosevic drew upon themes of relativism, arguing that genocide may be found any time victims of mass violence are members of a national group. Milosevic asserted that his Serbian forces were not attempting to expel the local ethnic Albanians through a campaign of fear and force, but that the Serbian police were attempting to "escort" Serbia's Albanian population as they fled from NATO bombs. Tom Hundley, *Milosevic Plays Blame Game at War Crimes Trial*, CHI. TRIB. (Mar. 3, 2002), at 3 (internal quotation marks omitted).

36. *See* JEFFREY L. DUNOFF, STEVEN R. RATNER & DAVID WIPPMAN, INTERNATIONAL LAW: NORMS, ACTORS, PROCESS 1 (3d ed. 2010) ("International law . . . dates back thousands of years, and reflects the felt need of most independent political communities for agreed norms and processes to regulate their interactions.").

37. OSIATYNSKI, *supra* note 32, at 153 (quoting Makau Mutua, *The Complexity of Universalism in Human Rights*, *in* HUMAN RIGHTS WITH MODESTY: THE PROBLEM OF UNIVERSALISM 51, 58 (András Sajó ed., 2004)).

local populations to dismiss the tribunals' findings, thereby rendering the courts' work—and by extension, the international legal system—illegitimate and ineffective.[38]

B. The Promise of Comparative Law: Genocide as a Legal Transplant

In contrast to these uncompromising approaches, treating the law of genocide as a legal transplant compels an application of the law that is designed to translate genocide so that it makes sense locally without unmooring the concept of genocide from its universally recognized definition. Legal transplants metaphorically describe "the moving of a rule . . . from one country to another, or from one people to another."[39] As laws are transplanted, they must be adapted or "domesticat[ed]" to make sense in new cultural contexts.[40] The idea of legal transplants thus works to undermine the perception of the law as a "coherent and consistent object," and instead demands an "analytic, dynamic, and realistic picture of the . . . law"[41]—one capable of recognizing that the law takes on a multiplicity of substantive and structural meanings when it crosses borders.[42]

The approach to the law compelled by the notion of transplants readily applies to international human rights, which are legal "values or beliefs" that have been translated into "legal form" and transplanted across cultures.[43] During the transplant process, these values are exposed to reinterpretation and reappropriation, while

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38. *See* Ramji-Nogales, *supra* note 33, at 28 (noting that locals frequently dismiss the findings of internationalized tribunals due to inability of the tribunals to "adapt to the local cultural context"); *see also* Mertus, *supra* note 28, at 1356 ("Legitimacy is central to the enforcement of human rights. Only human rights processes and bodies perceived as legitimate are taken seriously; only States perceived as legitimate can enforce human rights norms successfully.").

39. ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW 21 (2d ed. 1993).

40. Michele Graziadei, *Legal Transplants and the Frontiers of Legal Knowledge*, 10 THEORETICAL INQUIRIES L. 723, 728–29 (2009) (internal quotation marks omitted).

41. Michele Graziadei, *Comparative Law as the Study of Transplants and Receptions*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 441, 471–72 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

42. *See* Edward M. Wise, *The Transplant of Legal Patterns*, 38 AM. J. COMP. L. (SUPP.) 1, 12 (1990) (noting that legal transplants require "not simply a catalog of borrowed 'traits,' but an examination of the devices for cultural sharing and selection through which legal 'unity' is constructed and sustained").

43. Cotterrell, *supra* note 28, at 48.

universalist notions are confronted by relativist principles that insist on acknowledging cultural differences.[44] Transplant theory offers a mechanism for appreciating these differences, and provides both a method and a rationale for applying the "reasonable freedom of interpretation" necessary to making human rights principles meaningful in local settings.[45]

This is especially useful for judges, for whom the process of translating human rights across cultures can be particularly fraught. Human rights law is highly controversial, not only because of the plurality of meanings "human rights" conveys, but also because of the close relationship that human rights themselves bear to political and economic forces.[46] This tight linkage means that when judges, in either an international or domestic setting, interpret human rights laws, they do more than interpret law—they make a political judgment about the extent, nature, or existence of a particular right in their society.[47]

In an effort to avoid overtly political or patently personal interpretations, it has become common for courts to refer to human rights decisions from foreign jurisdictions.[48] This approach recognizes the "constructed [and] contingent nature" of human rights opinions.[49] As a result, in comparing foreign judgments, judges do not find "discovered truth" or "higher law," but rather a record of the struggles that fellow judges in different settings endured in pondering how to resolve the conflicting human rights principles at issue.[50] Thus, foreign judicial decisions are not adopted, but considered[51] as a tool to sharpen judicial understandings of what an international human rights

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44. *Id.* at 45.

45. Kirsten Hastrup, *Accommodating Diversity in a Global Culture of Rights: An Introduction*, *in* LEGAL CULTURES AND HUMAN RIGHTS: THE CHALLENGE OF DIVERSITY, *supra* note 21, at 1, 16.

46. Christopher McCrudden, *Human Rights and Judicial Use of Comparative Law*, *in* JUDICIAL COMPARATIVISM IN HUMAN RIGHTS CASES, *supra* note 28, at 1, 1.

47. *Id.*

48. *Id.* at 4.

49. *Id.*

50. *Id.* at 18. *But see* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1383–84 (2006) ("Courts are concerned about the legitimacy of their decisionmaking and so they focus . . . on [whether] they are legally authorized . . . to make the decision they are proposing to make. . . . Distracted by these issues of legitimacy, courts [ignore] the heart of the matter.").

51. McCrudden, *supra* note 46, at 17.

principle means in the context of the court's domestic legal system.[52] The transplant metaphor thus provides a mechanism for judges to approach these judicial reinterpretations of fundamental values, recognizing that although the human rights principle at issue may be the same, the context in which it is applied may lead to different interpretations, understandings, and outcomes.

II. GENOCIDE IN INTERNATIONAL AND COMPARATIVE LAW

Legal transplants also have tremendous implications for the law of genocide—a law that is at once an embodiment of fundamental human rights and an articulation of an international crime.[53] The definition of genocide that is memorialized in the Genocide Convention is recognized as the authoritative articulation of the crime.[54] The vast majority of states have ratified the Genocide Convention,[55] and the International Court of Justice (ICJ) has recognized that the Convention's underlying principles are binding on states, even absent a formal conventional obligation.[56] The law of genocide as it appears in the Genocide Convention is reproduced verbatim in the statutes creating the ICTY and the statute of the ICTR.[57] Although the Convention's definition of genocide is

52. *Id*.

53. The law of genocide sits at a nexus between international human rights law and international criminal law. With the ratification of the Genocide Convention in the aftermath of World War II, "the international community resolved, at least officially, to treat acts of genocide as criminal under international law." David L. Nersessian, *The Razor's Edge: Defining and Protecting Human Groups Under the Genocide Convention*, 36 CORNELL INT'L L.J. 293, 294 (2003). Thus, genocide is situated within the realm of international criminal law. At the same time, "[g]enocide is focused on the right to life, and on racial discrimination. To that extent, the prohibition of genocide is at the heart of the values that underpin modern international human rights law." Schabas, *supra* note 19, at 192.

54. *Draft Code of Crimes Against the Peace and Security of Mankind* art. 17 cmt. 3, *in* Rep. of the Int'l Law Comm'n, 48th Sess., May 6–July 26, 1996, at 9, 44, U.N. Doc. A/51/10 (1996), GAOR, 51st Sess., Supp. No. 10 (1996), *reprinted in* [1996] 2 Y.B. INT'L L. COMM'N 15, U.N. Doc. A/CN.4/L.532.

55. *Id*.

56. Reservations to Convention on Prevention and Punishment of Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28).

57. *Compare infra* note 62 and accompanying text, *with* Statute of the International Tribunal for Rwanda, S.C. Res. 955, Annex art. 2, at 1, 3–4, U.N. Doc. S/RES/955 (Nov. 8, 1994), as amended, *reprinted in* 33 I.L.M. 1602 (1994) (same), *and* Updated Statute of the International Tribunal Report of Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), Annex, art. 4, U.N. Doc. S/25703 (May 3, 1993), as amended, *reprinted in* 32 I.L.M. 1992, 1993 (1993) (same); *see also* Draft *Code of Crimes Against the Peace*

ostensibly universal, it originated as a response to a particular experience, in a unique geopolitical context.[58] Therefore, further applications of this definition in other legal settings require the law of genocide to be treated as a legal transplant.[59] This Section considers the influence of historical context on the articulation of the crime of genocide and how genocide is perceived in the current international legal regime. It then distinguishes the ECCC from other internationalized tribunals, emphasizing how the ECCC's unique features should influence its genocide analysis.

A. The Historically Contingent Development of the Law of Genocide

Acts of genocide have inflicted tremendous losses on humanity throughout the course of history.[60] It was not until the aftermath of the Nazi Holocaust and the horrors of World War II, however, that the international community finally acted to outlaw the targeted annihilation of an entire group of people.[61] In 1948, under the aegis of the UN, the international community defined the crime of genocide in the Genocide Convention 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;

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and Security of Mankind, *supra* note 54, art. 17 cmt. 3, at 44 ("The definition of genocide contained in article II of the [Genocide] Convention, which is widely accepted and generally recognized as the authoritative definition of this crime, is reproduced in article 17 of the [draft code].").

58. *See supra* note 12 and accompanying text.

59. For a definition of legal transplants, see *supra* note 39 and accompanying text.

60. Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 12, pmbl., 78 U.N.T.S., at 278.

61. The annihilation of hundreds of thousands of Armenians by Turkey at the beginning of the twentieth century was the first atrocity to spark an official governmental response. QUIGLEY, *supra* note 12, at 1. In spite of the outrage provoked by the Turkish brutality, a generation passed before "an international crime [was] defined" to criminalize Turkey's behavior. *Id.*

(e) Forcibly transferring children of the group to another group.[62]

Three important restrictions in the official definition reveal the limitations that resulted from the context in which the Genocide Convention was drafted. First, the Genocide Convention confines the crime of genocide to acts ultimately designed to ensure the physical destruction or extermination of a group.[63] This restriction implicitly excludes acts of cultural genocide, which contemplates "a vicious assault on culture, particularly language, religious, and cultural monuments and institutions," but falls short of acts of physical or biological destruction.[64] Second, international tribunals have emphasized the distinction between motive and intent.[65] Thus, whether a perpetrator is motivated by personal greed, military expediency, or a desire to cleanse a region of a particular ethnicity has no impact on the specific intent to accomplish these purposes through genocidal means.[66] Finally, the Genocide Convention

62. Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 12, art. 2, 78 U.N.T.S. at 280. In part, the Genocide Convention owes its creation to deficiencies in the scope of previously defined crimes against humanity. For example, the Charter of the International Military Tribunal Annexed to the London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (Nuremberg Charter), Aug. 8, 1945, 59 Stat. 1546, 82 U.N.T.S. 284, which was used to indict the Nazis, characterized the destruction of European Jews as a species of crime against humanity. WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 12 (2009). But the Charter implied that crimes against humanity required a nexus to an ongoing military conflict, which created a troubling precedent for future human rights protections. *Id*.; *see also* Charter of the International Military Tribunal Annexed to the London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, *supra*, art. 6(c), 82 U.N.T.S. at 288 (providing for jurisdiction over crimes against humanity only "in execution of or in connection with" crimes against peace and war crimes). Ultimately "the Genocide Convention, not the Nuremberg Charter, first recognized the idea that gross human rights violations committed in the absence of an armed conflict are nevertheless of international concern." *Id*.

63. *See* Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 12, art. 2, 78 U.N.T.S. at 280 ("[G]enocide means . . . acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group . . . .").

64. Schabas, *supra* note 19, at 171.

65. *See, e.g.*, Prosecutor v. Jelisic, Case No. IT-95-10-A, Judgement, para. 49 (Int'l Crim. Trib. for the Former Yugoslavia July 5, 2001), http://www.icty.org/x/cases/jelisic/acjug/en/jel-aj010705.pdf (describing motive as irrelevant to criminal intent); Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-A, Judgement (Reasons), para. 161 (June 1, 2001), http://www.unictr.org/Portals/0/Case/English/kayishema/judgement/010601.pdf (emphasizing that motive and intent should not be conflated); Prosecutor v. Tadić, Case No. IT-94-1-A, Judgement, para. 269 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999) http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf (noting that motive is only relevant as a mitigating or aggravating factor at sentencing).

66. Park, *supra* note 11, at 149–50.

expressly limits its protections to just four enumerated human groups, defined by race, ethnicity, nationality, or religion.[67] As a visceral response to the atrocities of the Holocaust, the drafters of the Genocide Convention tailored the document's language to "describe the widespread disapproval of the perpetrators of these events,"[68] and it thus applies narrowly, "only to the losers of World War II."[69] As such, several scholars have cast the Genocide Convention as a "retrospective condemnation of the Nazi enterprise" rather than a mechanism to prevent and punish future genocide.[70]

For these scholars, the Genocide Convention can be redeemed only if the definition of genocide it articulates is amended to explicitly include political groups within its protections.[71] Such a radical step is necessary only if the ambiguous definition of genocide fails to make broad application possible—and this Note will show that it does not. If viewed as a legal transplant, the law of genocide can fit in a variety of contexts and settings. To this end, the inherent ambiguities in the law of genocide are actually beneficial, providing requisite space for the "reasonable interpretive freedom" necessary to domesticate the law.[72] To take advantage of this interpretive space, legal translators—such as judges and others who engage with legal transplants—must shun both strict relativist and universalist approaches to the law.

B. Genocide in the Current International Legal System

In 1993, the UN Security Council established the ICTY for "the prosecution of persons responsible for serious violations of

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67. Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 12, art. 2, 78 U.N.T.S. at 280.

68. FRANK CHALK & KURT JONASSOHN, THE HISTORY AND SOCIOLOGY OF GENOCIDE: ANALYSIS AND CASE STUDIES 3 (1990).

69. *Id.* at 11.

70. Van Schaack, *supra* note 13, at 2268; *see also* Lori Lyman Bruun, Note, *Beyond the 1948 Convention—Emerging Principles of Genocide in Customary International Law*, 17 MD. J. INT'L L. & TRADE 193, 206 (1993) (describing the Genocide Convention as "an ambiguous and weak document" with little practical effect).

71. *See, e.g.*, CHALK & JONASSOHN, *supra* note 68, at 407 ("The world cannot afford to ignore [ideologically motivated] genocide simply because most of its victims were not selected as members of racial, religious, or ethnic groups."); Luban, *supra* note 20, at 319 ("It is high time to revisit and revise the definition of genocide, to bring it into line with its moral reality.").

72. *See* Hastrup, *supra* note 45, at 21 ("The challenge of diversity is still to allow for a certain freedom of interpretation: human rights must be both general and particular for them to work as a common standard of achievement.").

international humanitarian law committed in the territory of the former Yugoslavia."[73] Since the establishment of the ICTY, the international community has established a variety of international tribunals to prosecute and judge crimes like genocide, war crimes, and crimes against humanity in countries from Sierra Leone to Timor-Leste[74] and including, notably, the ICTY's "sister institution," the ICTR.[75] International legal scholars and practitioners frequently describe these institutions as "ad hoc" tribunals, a reference to the ad hoc manner of their establishment, which is "the product of on the ground innovation rather than grand institutional design."[76] But their success in addressing egregious human rights abuses set the stage for the International Criminal Court (ICC),[77] the "last great international institution of the Twentieth Century."[78] The ICC was established in 1998 after decades of arduous negotiations.[79] The ICTY and ICTR proved that genocide and other human rights abuses were not beyond the reach of international law.[80] The ICC builds upon this foundation by promising to end "impunity for the perpetrators of" atrocities "that deeply shock the conscience of humanity."[81]

Despite this promise, the ICC's concern with universal standards of fairness, impartiality, transparency, and independence clashes with the priorities of domestic groups. For example, the ICC may reject a traditional conflict-resolution method for failing to meet the due-process standards deemed necessary by universalist-oriented proponents of international justice.[82] Concerns such as these have led many commentators to argue against "[a]n isolated and dominant

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73. S.C. Res. 827, pmbl., U.N. Doc. S/RES/827 (May 25, 1993).

74. Ralph Zacklin, *The Failings of Ad Hoc International Tribunals*, 2 J. INT'L CRIM. JUST. 541, 541 (2004).

75. *Id.* at 542.

76. Laura A. Dickinson, Comment, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295, 296 (2003).

77. *See* Sadat & Carden, *supra* note 21, at 396 (noting that the establishment of the ICC reflects the lessons learned by the international community from the ICTY and the ICTR).

78. *Id.* at 385.

79. *Id*. at 383–84.

80. The ICTY exposed the fallacy inherent in the notion that crimes like genocide and other grave human rights violations could "forever remain beyond the reach of international law." Zacklin, *supra* note 74, at 541. Thus, "[t]he establishment of the ICTY was an important event because it showed that an international criminal tribunal could, in fact, work." *Id.* at 542.

81. Rome Statute of the International Criminal Court, pmbl., July 17, 1998, 2187 U.N.T.S. 3, 91.

82. Ramji-Nogales, *supra* note 33, at 21.

ICC" in favor of an international criminal justice regime that better reflects relativist priorities by collaborating with local governments and addressing diverse perspectives, local concerns, and cultural differences.[83]

Recognizing the various legitimacy, capacity-building, and norm-establishing problems faced by purely international tribunals, the international community began turning to hybrid courts,[84] which blend international and domestic laws and procedures, allowing domestic and foreign judges to oversee cases side by side, and bringing foreign and domestic lawyers together to prosecute alleged perpetrators.[85] The ECCC is one such hybrid institution.[86]

C. Genocide in Cambodia and the Unique Context of a Hybrid Tribunal

1. *The Structure of the ECCC.* Unlike other international tribunals, which are designed to "advance a body of law uniformly applicable around the globe and wholly independent from the context in which its subjects are situated,"[87] the ECCC, as a "hybrid tribunal," is explicitly linked to Cambodian concerns.[88] The importance of domestic concerns, processes, and actors in the ECCC is the result of efforts to harmonize the universalist views of the UN with the relativist perspectives of Cambodian officials. Wary of the international community's motives, Cambodian officials lobbied for a predominantly domestic process.[89] During the negotiations leading up

83. Turner, *supra* note 21, at 1.

84. Dickinson, *supra* note 76, at 300.

85. *Id.* at 295.

86. John D. Ciorciari, *Introduction* to ON TRIAL: THE KHMER ROUGE ACCOUNTABILITY PROCESS, *supra* note 9, at 13, 13.

87. Turner, *supra* note 21, at 16.

88. Heindel, *supra* note 9, at 85. Hybrid courts use a mix of international and domestic elements, including employing judges from both foreign and local judiciaries and applying a blend of international and domestic law. Laura A. Dickinson, *The Relationship Between Hybrid Courts and International Courts: The Case of Kosovo*, 37 NEW ENG. L. REV. 1059, 1059 (2003). Unlike other hybrid courts, the ECCC has "distinct national and international 'sides' that have separate hiring and reporting structures." Heindel, *supra* note 9, at 87. It alone employs "co-" national and international prosecutors, and "co-" national and international investigating judges, as well as a method for victims to actively participate in the proceedings as civil parties. *Id.* (internal quotation marks omitted).

89. John D. Ciorciari, *History & Politics Behind the Khmer Rouge Trials*, *in* ON TRIAL: THE KHMER ROUGE ACCOUNTABILITY PROCESS, *supra* note 9, at 33, 67.

to the creation of the tribunal, Cambodia's Foreign Minister, Hor Nam Hong, noted,

> The international community talks about finding justice for the Cambodian people. Cambodia agrees to find justice for Cambodians and for humanity. But what has the international community been doing vis-à-vis the Khmer Rouge lately? Once the genocidal Khmer Rouge regime was toppled, the so-called international community continued to support the Khmer Rouge. . . . It said nothing about responsibility of the Khmer Rouge, let alone prosecution of them. . . . Can we trust them?[90]

Ultimately, the Cambodians secured a majority in each of the

considered in reaching any conclusions on the question of genocide in Cambodia.[96]

2. *Assessing Genocide in the Hybrid Court.* In the popular imagination, the atrocities committed in Cambodia between 1975 and 1979 have long been considered to be genocide.[97] Yet whether these crimes fall within the Genocide Convention's definition remains the subject of ongoing debate.[98] At the international level, genocide is limited to the intentional and targeted annihilation, in whole or in part, of a national, ethnic, racial, or religious group.[99] The genocide perpetrated by the Khmer Rouge has been characterized as markedly political in nature.[100] First the Khmer Rouge targeted individuals associated with the *ancien régime*, and then they turned to perceived treasonous elements within the Khmer Rouge regime itself.[101]

The political nature of the purges is potentially dispositive. If the Khmer Rouge identified their enemies primarily on the basis of perceived political affiliation—rather than ethnicity, race, nationality,

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96. Many observers opine that hybrid courts, given their proximity to and involvement with local populations, provide greater legitimacy and stability to international justice. *See, e.g.*, Turner, *supra* note 21, at 2 ("[T]he hybrid-court model has a strong normative appeal. . . . In a pluralist world, reasoned deliberation across borders and across levels of government offers the most legitimate, as well as the most durable, foundation for an international legal regime."). *But see* Ramji-Nogales, *supra* note 33, at 24 ("In theory, hybrid courts were designed to harness the benefits of both national and international criminal courts, ensuring the support of local populations and international justice proponents alike, but in practice they have failed to adequately incorporate local preferences into their design processes."). These observations provide support for a comparative approach to the application of the law of genocide at the ECCC.

97. *See, e.g.*, Cambodian Genocide Justice Act, Pub. L. No. 103-236, tit. V, pt. D, 108 Stat. 486, 486–87 (1994) (codified at 22 U.S.C. § 2656 note (2006)) (supporting the establishment of a tribunal to try Khmer Rouge leaders for genocide and creating a special office in the United States State Department to collect documentation and evidence of genocide); ISAKSSON, *supra* note 12, at 26 (noting that the Cambodian genocide is generally perceived as "archetypal"); Park, *supra* note 11, at 130 (noting "sources as disparate as the United States Congress, United Nations General Assembly, countless media and scholarly publications, and domestic Cambodian efforts" have labeled the Khmer Rouge's atrocities as genocide).

98. *See, e.g.*, Luban, *supra* note 20, at 317 (noting that the Cambodian atrocities may not be genocide, because "the targeted groups were designated because of the Khmer Rouge's peculiar theory of social classes"); Schabas, *supra* note 20, at 291 (arguing that "[d]estruction of Khmers by Khmers simply stretches the definition [of genocide] too much").

99. Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 12, art. 2, 78 U.N.T.S. at 280.

100. *See* Van Schaack, *supra* note 13, at 2269 ("[T]he Khmer Rouge's genocide campaign began and ended with political persecution . . . .").

101. *Id.*

or religion—it is questionable whether the acts of the Khmer Rouge may be labeled genocide under the Genocide Convention.[102] For many, this limitation epitomizes the disconnect between the legal and moral understandings of genocide and the danger of an unduly restrictive definition of the crime.[103]

For its part, the Cambodian government has twice attempted to redefine the law to more easily punish senior Khmer Rouge leaders for committing the crime of genocide. First, Cambodia's 1979 People's Revolutionary Tribunal, which was created to prosecute two top-ranking Khmer Rouge officials for the atrocities committed by their regime, developed its own eccentric definition for genocide:

> planned massacres of groups of innocent people; expulsion of inhabitants of cities and villages in order to concentrate them and force them to do hard labor in conditions leading to their physical and mental destruction; wiping out religion; destroying political, cultural and social structures and family and social relations.[104]

This idiosyncratic definition of genocide was tailored specifically to address the destruction that the Khmer Rouge leaders wreaked upon Cambodia.[105] Yet the People's Revolutionary Tribunal's definition also reveals that in the immediate aftermath of the Khmer Rouge's brutality, the people of Cambodia believed that they had endured one of the worst incidents of genocide in history, having lost between 21 percent and 24 percent of the population in four short years.[106] Thus, Cambodia's 1979 definition also undermines the "universality" of the definition of genocide as previously articulated in the Genocide Convention.[107] The Cambodian government responded in a patently relativist manner, refashioning the crime's

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102. Schabas, *supra* note 20, at 291 ("[T]he fundamental difficulty with using the term genocide to describe the Cambodian atrocities lies with the group that is the victim of genocide.").

103. *See, e.g.*, Luban, *supra* note 20, at 317 (conceding that the Cambodian "auto-genocide" may not fit the legal definition of genocide, but arguing that this illustrates "how far the law deviates from common moral classification").

104. Decree Law No. 1: Establishment of People's Revolutionary Tribunal at Phnom Penh To Try the Pol Pot-Ieng Sary Clique for the Crime of Genocide, July 15, 1979, art. 1 (People's Rep. of Kampuchea), *reprinted in* GENOCIDE IN CAMBODIA: DOCUMENTS FROM THE TRIAL OF POL POT AND IENG SARY 45, 45 (Howard J. De Nike, John B. Quigley & Kenneth J. Robinson eds., 2000); *see also infra* notes 205–213 and accompanying text.

105. Schabas, *supra* note 20, at 290.

106. *See supra* notes 1, 3.

107. For more on the 1979 Tribunal, see *supra* note 104.

definition to fit Cambodia's situation and overlooking the possibilities for domestication inherent in the international definition.[108]

Two decades later, in the midst of negotiations with the UN to create a special tribunal to try senior Khmer Rouge leaders, the Cambodian government again proposed its own definition of the crime of genocide, this time to include "wealth, level of education, sociological environment (urban/rural), allegiance to a political system or regime (old people/new people), social class or social category (merchant, civil servant etc.)."[109] The UN's universalist response failed to recognize the dissatisfaction with the Genocide Convention's definition latent in Cambodia's attempted redefinition and rejected the Cambodian articulation as a violation of the prohibition of retroactive offences.[110] Ultimately, the UN's vision prevailed. Article 4 of the Law Establishing the Extraordinary Chambers in the Courts of Cambodia gives the ECCC subject matter jurisdiction over genocide "as defined in the Convention on the Prevention and Punishment of Genocide of 1948."[111]

Advocates and academics have nevertheless continued calling for an amendment to the law of genocide in the Genocide Convention to better address the crimes committed by the Khmer Rouge.[112] Like the

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108. Ieng Sary, one of the four defendants in *Case 002*, was convicted *in absentia* of genocide by the 1979 Tribunal. Anne Heindel, *Jurisprudence of the Extraordinary Chambers*, *in* ON TRIAL: THE KHMER ROUGE ACCOUNTABILITY PROCESS, *supra* note 9, at 125, 144. Although Ieng was sentenced to death and confiscation of all his property, in 1996 the Cambodian Government pardoned him. The 1979 sentence was thus never carried out. *Id.* The 1979 Tribunal suffered from a variety of serious procedural defects, leading many to dismiss it as a "show trial," incapable of providing justice for the Cambodian people. *See* William A. Schabas, *Cambodia: Was It Really Genocide?*, 23 HUM. RTS. Q. 464, 471–72 (2001) (reviewing GENOCIDE IN CAMBODIA: DOCUMENTS FROM THE TRIAL OF POL POT AND IENG SARY, *supra* note 104).

109. Shabas, *supra* note 20, at 293 n.23 (quoting Draft Law on the Repression of Crimes of Genocide and Crimes Against Humanity (unofficial translation from French) (copy on file with Schabas)).

110. Schabas, *supra* note 19, at 171.

111. Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, as amended, No. NS/RKM/1004/006, Oct. 27, 2004, ch. II, art. 4 (Cambodia), *translated in* LAW ON THE ESTABLISHMENT OF THE EXTRAORDINARY CHAMBERS, WITH INCLUSION OF AMENDMENTS AS PROMULGATED ON 27 OCTOBER 2004 (NS/RKM/1004/006) (Council of Jurists & Secretariat of the Task Force trans., 2007), *available at* http://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf.

112. For example, Professor David Luban cites difficulties in applying the Genocide Convention to Cambodian events as an example of "how far the law deviates from common moral classification," and argues that the time has come "to revisit and revise the definition of genocide, to bring it into line with its moral reality." Luban, *supra* note 20, at 317, 319. Similarly,

Cambodian government's attempts to redefine genocide, these appeals mistakenly assume that the law, as written, cannot reach the heinous events in Cambodia. But this assumption that depends on a universalist concept of genocide—one that would tether the application of the law too tightly to the text of the Genocide Convention. Such misapprehension triggers a relativist response, which insists that the universal definition of genocide be sublimated to local cultural imperatives.[113] The universalist approach and the relativist approach both overlook the possibility that judges can employ a "reasonable freedom of interpretation" to preserve "the resonance . . . between the global legal culture and local sentiments."[114]

III. THE TACITLY COMPARATIVE APPROACH TO GENOCIDE

In spite of its perceived limitations, the textual definition of genocide has remained stable since its adoption.[115] It has been transplanted verbatim into the governing statutes of the ICTY, the ICTR, and the ICC.[116] These courts already employ a method similar

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Frank Chalk and Kurt Jonassohn assert that "[t]he genocide in Cambodia represents an explosion of virulent ideologically motivated killing. . . . The definition of genocide must be broad enough to encompass the case of the Khmer Rouge in Kampuchea." CHALK & JONASSOHN, *supra* note 68, at 407. Other scholars have made similar assertions. *See, e.g.*, Bruun, *supra* note 70, at 206–07 (noting that the Genocide Convention is a "weak document" in part because of its omission of political groups); Van Schaack, *supra* note 13, at 2272 ("The application of the Genocide Convention to the atrocities in Cambodia provides a primary example of the critical shortfall of the Convention: the exclusion of political groups.").

113. *Cf.* HASTRUP, *supra* note 45, at 2 (noting that "the paradox of equal rights and different cultures inherent in human rights thinking" is too often portrayed as a dichotomy between universalism and relativism).

114. *Id.* at 16.

115. *See* Schabas, *supra* note 20, at 289 (noting that genocide "has a time-honored definition, first set out in Article II of the 1948 Convention and repeated without significant change in several subsequent instruments").

116. *Compare supra* note 62 and accompanying text, *with* Rome Statute of the International Criminal Court, *supra* note 81, art. 6, 2187 U.N.T.S. at 93 (same), Statute of the International Tribunal for Rwanda, *supra* note 57, Annex art. 2, at 3–4, 33 I.L.M. at 1602–03 (1994) (same), *and* Updated Statute of the International Tribunal Report of Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), *supra* note 57, Annex art. 4(2), 32 I.L.M. at 1193 (1993) (same). The ECCC's definition of genocide is largely the same, and specifically requires interpretation in light of the 1948 definition of the crime. But the ECCC's definition replaces the phrase "as such" with "such as." Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, as amended, No. NS/RKM/1004/006, Oct. 27, 2004, ch. II, art. 4 (Cambodia), *translated in* LAW ON THE ESTABLISHMENT OF THE EXTRAORDINARY

to the comparative analysis that this Note proposes, although neither the current scholarship nor the traditionally universalist assumptions of the international tribunals recognize this comparative approach. As the jurisprudence of the ICTY and ICTR elucidates, both tribunals have tacitly recognized how the meaning of a legal transplant, even an ostensibly universal one like genocide, will ultimately be influenced by the sense that the local user gives it.[117] This shifting of interpretations does not mean that the transplanted law is unmoored from its original meaning. Instead, it allows judicial translators to use the interpretive space created by the natural ambiguity in the law of genocide to tailor the law to "fit the local context" and to resonate with the local culture.[118] Treating the law of genocide as a legal transplant thus obviates the need for a new, different, more precise, or more expansive definition of the law of genocide. Instead, the ambiguities facilitate the comparative process, through which it becomes possible to illuminate and represent the "multiplicity of points of view" that are necessary to make a universal law meaningful in a multiplicity of contexts.[119] This tacit use of legal transplants can be shown by assessing the definitions that have been developed in the tribunals for three of the elements of the crime of genocide: (1) the genocidal actus reus, (2) the phrase "in whole or in part," and (3) the contours of the protected groups.

A. The Genocidal Actus Reus

Article II of the Genocide Convention confines the definition of genocide to five enumerated acts when those acts are committed with the intent to destroy a protected group.[120] Any other acts, even if committed with the requisite intent, do not meet the requirements for

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CHAMBERS, WITH INCLUSION OF AMENDMENTS AS PROMULGATED ON 27 OCTOBER 2004 (NS/RKM/1004/006), *supra* note 111, art. 4; *supra* text accompanying note 111.

117. *Cf.* Graziadei, *supra* note 41, at 470 (noting that "the meaning of law is not fully determined," but "may be manipulated, rearranged, transformed, and distorted as it is passed on," and "each interpreter will [thus] influence how it is understood").

118. *See id.* at 472 ("The process of transplantation and reception is often explained in terms of the supposed 'fit' between the transferred law and the local context.").

119. *See* Graziadei, *supra* note 40, at 732 ("Any serious comparative law study requires an analysis of the concepts and categories that have gained currency in the community which is being studied. But this analysis is carried out in the light of an external point of view, that of the comparativist.").

120. Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note12, art. 2, 78 U.N.T.S. at 280.

genocide.[121] In spite of this constraint, both the ICTY and ICTR have found ways to interpret the text of the Genocide Convention so that it reaches acts that would not otherwise comfortably fall within the plain language of the Genocide Convention's definition. For example, although rape is not one of the genocidal acts enumerated in the Genocide Convention, ICTR's trial chamber nevertheless held in *Prosecutor v. Akayesu*[122] that rape in Rwanda could be an act of genocide.[123] This holding effectively domesticated the crime of genocide to the Rwandan context. The perpetrators of the Rwandan genocide wielded rape variously as a weapon to torture women, as a twisted prologue to murder, or as a devastating tool to inflict humiliation on victims and their families.[124] The Hutu-led government even "released AIDS patients . . . to form battalions of rapists" in order to murder Tutsi women by transmitting the fatal disease.[125]

The trial chamber recognized the devastating physical and mental consequences resulting from the use of rape as a weapon of war.[126] In addition, the chamber emphasized the significance of rape in a patriarchal society: rape becomes a method to prevent births within a group, because a woman who is impregnated by a member of another group will bear a child who belongs to its father's—not its mother's—group.[127] By assessing the legal definition of genocide in light of the cultural and social context in which the allegedly genocidal acts occurred, the chamber recognized "that *certain* women are being raped by *certain* men for *particular* reasons."[128]

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121. *See Draft Code of Crimes Against the Peace and Security of Mankind*, *supra* note 54, art. 17 cmt. 11, at 45 ("[T]he Commission decided to use the wording of article II of the [Genocide] Convention to indicate that the list of prohibited acts contained in article 17 [of the draft code] is exhaustive in nature. The Commission decided in favour of that solution having regard to the need to conform with a text widely accepted by the international community.").

122. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement (Sept. 2, 1998), http://www.unictr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf.

123. *Id.* para. 731.

124. Sherrie L. Russell-Brown, *Rape as an Act of Genocide*, 21 BERKELEY J. INT'L L. 350, 353 (2003).

125. *Id*. at 354.

126. *Akayesu*, Case No. ICTR-96-4-T, para. 731. The chamber recognized that "[s]exual violence was a step in the process of destruction of the tutsi group—destruction of the spirit, of the will to live, and of life itself." *Id.* para. 732.

127. *Id.* para. 507.

128. Russell-Brown, *supra* note 124, at 351.

Similarly, in *Prosecutor v. Krstic*,[129] the ICTY's appellate chamber grappled with whether the term "destroy" could include geographical displacement.[130] In wrestling with this issue, the ICTY judges domesticated the law of genocide by interpreting it to make sense in the context of the former Yugoslavia. The opinion acknowledged Srebrenica's special situation as a vulnerable oasis amid Serb-controlled territory in which an estimated 60,000 Muslims hoped to find safe harbor from the ethnic cleansing programs of the Bosnian-Serb Army.[131] Not to consider whether forced displacement could constitute genocide in such circumstances would have risked rendering the Genocide Convention irrelevant to the Bosnian-Muslim community.

Instead, the appellate chamber recognized that forced displacement was not wholly extraneous to the question of genocide, and it noted that "forcible transfer could be an additional means by which to ensure the physical destruction of the Bosnian Muslim community in Srebrenica. . . . , thereby eliminating even the residual possibility that the Muslim community in the area could reconstitute itself."[132] By narrowly defining the target group as the Bosnian Muslims of Srebrenica, the chamber effectively translated the concept of physical destruction in a way that included forcible transfer, if that transfer had removed or eliminated all Bosnian Muslims from the region in question.[133] Thus, the setting in which the genocidal act occurred became crucial to how the ICTY interpreted and applied the definition of genocide.

B. In Whole or in Part

Genocide does not require that a perpetrator intend to completely annihilate an entire group from the surface of the earth. As defined in the Genocide Convention, it is enough that the

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129. Prosecutor v. Krstic, Case No. IT-98-33-A, Judgement (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004), http://www.icty.org/x/cases/krstic/acjug/en/krs-aj040419e.pdf.

130. *Id.* paras. 24–38.

131. *Id.* para. 15 & n.26.

132. *Id.* para. 31.

133. *See id.* paras. 25, 27 (noting that the trial chamber "expressly acknowledged" that genocide is limited to "physical or biological destruction of a human group" and "eschewed any broader definition," and confirming the trial chamber's finding that "[t]he killing of the military aged men was, assuredly, a physical destruction" from which it was possible to determine genocidal intent).

perpetrator seeks to destroy the group "in part."[134] Although scant guidance is provided as to how "in part" should be interpreted,[135] it has become "well established that where a conviction for genocide relies on the intent to destroy a protected group 'in part,' the part must be . . . substantial."[136] Thus, those tasked with interpreting the crime of genocide have had to flesh out the contours of the "in whole or in part" requirement in practice. Unsurprisingly, this has led to a flexible, highly contextual understanding of the phrase "in part," and, over time, several approaches to this requirement have developed.[137] These approaches demonstrate a judicial willingness to interpret "in part" so that the requirement is meaningful in the context in which it is applied.[138]

The first approach effectively demands that the perpetrator intend to destroy the targeted group in its entirety, but allows prosecution in the event that only partial destruction results.[139] A second approach focuses solely on the number of individual group members the perpetrator intends to destroy.[140] Although this quantitative approach does not stipulate an absolute minimum number of victims required for genocidal intent to be found, it does anticipate an intent to destroy "more than a small number" of individual group members.[141] This was the approach chosen by the

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134. Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 12, art. 2, 78 U.N.T.S. at 280.

135. *See* QUIGLEY, *supra* note 12, at 144 ("[T]he phrase 'in part' was not explained in floor debate. In the debates, no one was thinking in quantitative terms."). The phrase "in part" was included to indicate that the intent to destroy need not extend to an intent to destroy the group in its entirety, but no minimum number of victims was ever stipulated. *Id.*

136. *Krstic*, Case No. IT-98-33-A, para. 8; *see also Draft Code of Crimes Against the Peace and Security of Mankind*, *supra* note 54, art. 17 cmt 8, at 45 ("It is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe. None the less the crime of genocide by its very nature requires the intention to destroy at least a substantial part of a particular group.").

137. *See* Schabas, *supra* note 19, at 179–85 (identifying four approaches to the "in whole or in part" requirement).

138. *See infra* note 170 and accompanying text.

139. Schabas, *supra* note 19, at 179. This approach was embraced by the United States under the Truman administration which adopted it in response to concerns among some senators that the widespread lynching of African Americans in the American South could fall within the "in part" requirement of the Genocide Convention. *Id*. at 179–80.

140. *Id.* at 180.

141. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, June 15–July 17, 1998, *Draft Statute for the International Criminal Court*, pt. 2, art. 5 n.1, UN Doc. A/CONF.183/2/Add.1 (Apr. 14, 1998);

ICTR in *Prosecutor v. Kayishema & Ruzindana*,[142] in which the trial chamber noted that "both proportionate scale and total number are relevant" in determining whether a "substantial part" of a group had been targeted for destruction.[143] A third approach adopts a geographic analysis of the "in whole or in part" requirement, finding genocide to have occurred when all members of a group within a specified geographic region are destroyed, even though the perpetrators never intended the global destruction of the group.[144] The ICTR has embraced this approach in *Prosecutor v. Muhimana*[145] and *Prosecutor v. Gacumbtsi*,[146] stating that "[I]t is not necessary to establish that the perpetrator intended to achieve the complete annihilation of a group from every corner of the globe."[147]

Alternatively, a fourth approach to the "in whole or in part" requirement embraces a qualitative analysis. Under this analysis, the critical question is not how many members of the group were destroyed, but rather what impact the destruction of a certain

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see also Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-T, Judgement, para. 97 (May 21, 1999), http://www.unictr.org/Portals/0/Case/English/kayishema/judgement/990521_judgement.pdf (noting that the "in whole or in part" requirement demands "the intention to destroy a considerable number of individuals").

142. Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-T, Judgement, para. 97 (May 21, 1999), http://www.unictr.org/Portals/0/Case/English/kayishema/judgement/990521_judgement.pdf.

143. *Id.* para. 96. In determining that genocidal acts had been "committed with the special intent to destroy the Tutsi group in whole or in part," *id.* para. 274, the chamber emphasized "[t]he widespread nature of the attacks and the *sheer number* of those who perished within just three months [as] compelling evidence," *id.* para. 289 (emphasis added). The chamber cited reports estimating the number of victims to be 800,000 to one million, or one-seventh of Rwanda's population. *Id.* para. 291.

144. Schabas, *supra* note 19, at 183. Alternatively, Professor Florian Jessberger interprets the jurisprudence related to the "in whole or in part" requirement to necessitate a substantiality element. Florian Jessberger, *The Definition and the Elements of the Crime of Genocide*, *in* THE UN GENOCIDE CONVENTION: A COMMENTARY, 87, 108 (Paola Gaeta ed., 2009). According to Jessberger, a "substantial part" may be defined qualitatively, quantitatively, or geographically. *Id.* Thus, as a practical matter, those tasked with interpreting the law of genocide would still have the requisite flexibility to undertake a contextual approach to analyzing whether alleged perpetrators had the necessary "intent" to destroy a protected group.

145. Prosecutor v. Muhimana, Case No. ICTR-95-1B-T, Judgement and Sentence, (Apr. 28, 2005), http://www.unictr.org/Portals/0/Case/English/Muhimana/decisions/muhimana280505.pdf.

146. Prosecutor v. Gacumbtsi, Case No. ICTR-2001-64-T, Judgment (June 17, 2004), http://www.unictr.org/Portals/0/Case/English/Gacumbitsi/Decision/040617-judgement.pdf.

147. *Id.* para. 253; *accord Muhimana*, Case No. ICTR-95-1B-T, para. 498 (noting that "it is not necessary . . . to establish that the perpetrator intended to achieve the complete annihilation of a group" and eschewing any "numeric threshold," although the scale may be "evidence of the intent to destroy a group in whole or in part").

targeted stratum of society has on the overall group's long-term survival.[148] For example, in *Krstic*, the ICTY's appeals chamber upheld the trial chamber's finding that the Bosnian-Serb Army had committed genocide when they had systematically murdered between 7,000 and 8,000 Bosnian Muslim men in Srebrenica, a supposed safe haven.[149] The appeals chamber noted that the "in whole or in part" requirement "captures genocide's defining character as a crime of massive proportions and reflects the Convention's concern with the impact the destruction of the targeted part will have on the overall survival of the group."[150] In light of this concern with a protected group's survival, the chamber noted that factors beyond mere size were relevant when assessing whether a genocide had been committed.[151]

Specifically, the chamber focused on the "strategic importance" of Srebrenica and the debilitating effect that the capture and ethnic purification of the Muslim population in Srebrenica would have on the viability of a future Bosnian-Muslim state,[152] as well as the symbolic importance of the Muslim enclave. The tribunal noted that "[t]he fate of the Bosnian Muslims of Srebrenica would be emblematic of that of all Bosnian Muslims."[153] Significantly, the chamber considered the cultural context in which the massacre occurred, explaining that although only men of military age had been targeted, the loss of so many men in the Bosnian-Muslim patriarchal society would have dire procreative consequences, "potentially consigning the community to extinction,"[154] which is precisely the "physical destruction the Genocide Convention is designed to prevent."[155]

148. Schabas, *supra* note 19, at 182.

149. Prosecutor v. Krstic, Case No. IT-98-33-A, Judgement, paras. 2, 23 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004), http://www.icty.org/x/cases/krstic/acjug/en/krs-aj040419e.pdf.

150. *Id.* para. 8.

151. *Id.* para. 15.

152. *Id.*

153. *Id*. para. 16.

154. *Id.* para. 28.

155. *Id.* para. 29.

C. Defining Racial, Ethnic, National, and Religious Groups

The Genocide Convention explicitly confines its protections to "national, ethnical, racial or religious group[s]."[156] Tribunals that are tasked with interpreting the law of genocide have struggled to provide precise definitions for the inherently imprecise concepts embodied in the terms "national," "ethnical," "racial," and "religious."[157] As with the overall interpretation of the crime of genocide, the innate ambiguities in the classification of protected groups have enabled the ICTY and ICTR to apply a culturally driven approach to defining the protected groups.

For example, in *Prosecutor v. Jelisic*,[158] the trial chamber of the ICTY explained that any "attempt to define a national, ethnical or racial 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 categorisation."[159] Accordingly, the *Jelisic* chamber determined that a "subjective criterion" provided a more useful tool in analyzing the national, ethnic, or racial status of a group.[160] Similarly, the ICTR in *Prosecutor v. Rutaganda*[161] held "that for the purposes of applying the Genocide Convention, membership of a group is, in essence, a subjective rather than an objective concept."[162] The ICTR subsequently reaffirmed the *Rutaganda* trial chamber's logic, noting that "[a] group may not have precisely defined boundaries," and thus, the determination of whether a victim belonged to a protected group could prove problematic.[163] Further complications could arise if a perpetrator characterized the targeted group differently from "other segments of society."[164] According to the chamber, however, such

156. Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 12, art. 2, 78 U.N.T.S. at 280.

157. *See, e.g.*, SCHABAS, *supra* note 62, at 124–25 ("The difficulties in the application of the four concepts can be seen in the case of Rwanda.").

158. Prosecutor v. Jelisic, Case No. IT-95-10-T, Judgement (Int'l Crim. Trib. for the Former Yugoslavia Dec. 14, 1999), http://www.icty.org/x/cases/jelisic/tjug/en/jel-tj991214e.pdf.

159. *Id.* para. 70.

160. *Id*.

161. Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgement and Sentence (Dec. 6, 1999), http://www.unictr.org/Portals/0/Case/English/Rutaganda/judgement/991206.pdf.

162. *Id.* para. 55.

163. Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T, Judgement, para. 65 (June 7, 2001), http://wwww.unhcr.org/refworld/pdfid/48abd5170.pdf.

164. *Id.*

difficulties should not bar the application of the law of genocide.[165] Rather, in the presence of evidence that the perpetrator had perceived the victim as belonging to a protected group, the chamber could likewise consider the victim to be a member of a protected group, thereby invoking the law of genocide.[166]

Here, too, the Genocide Convention's ambiguity with respect to *how* the protected groups are defined has enabled those that are tasked with interpreting genocide to successfully domesticate the law. The ICTR's reasoning in *Akayesu* illustrates the superiority of this comparative approach. Addressing the question of whether the Tutsi constituted a protected group within the meaning of the Genocide Convention and the ICTR's own statute, the *Akayesu* trial chamber discussed the features of the Tutsi population, noting that the Tutsi had neither a separate language nor a culture distinct from the larger Rwandan population.[167] Nonetheless, the chamber held that the Tutsi were a protected ethnic group.[168] In so holding, the chamber relied on several factors, including customary rules that dictated "the determination of ethnic group[s]" and through which the labels "Hutu" and "Tutsi" had become entrenched in the Rwandan culture.[169] Thus, the trial chamber found that the Tutsi comprised an ethnic group because of the way the Tutsis perceived themselves and the way they were in turn perceived by the Hutus. The trial chamber's logic implicitly recognizes that to be truly meaningful, the universalist notions embodied in the Genocide Convention must be granted different practical meanings after being transplanted into the context of the Rwandan genocide.

Both the ICTY and the ICTR trial chambers have demonstrated their willingness to interpret the elements of the crime of genocide to meet the facts and circumstances of the cases before them. Like judges turning to foreign opinions to apply human rights at the domestic level, the judges at the ICTY and the ICTR relied on precedent not as a source of "discovered truth or . . . higher law," but

165. *Id.*

166. *Id*.

167. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, para. 170 (Sept. 2, 1998), http://www.unictr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf.

168. *Id*.

169. *Id.* paras. 170–71.

as a way to work "through a series of conflicting principles which need to be resolved . . . however different the outcome may be."[170]

IV. EMBRACING AMBIGUITY: THE LAW OF GENOCIDE IN CAMBODIA

In determining whether, as a legal matter, genocide occurred in Cambodia, the ECCC's trial chamber should embrace the comparative approach that has been tacitly adopted by the ICTY and the ICTR. As a hybrid court intimately connected to Cambodian law and Cambodian society, the ECCC is well situated to treat the law of genocide as a legal transplant. This Part begins by suggesting the type of comparative analysis that the ECCC's trial chamber should use in assessing allegations of genocide. It then evaluates the universalist approach that has beenadopted by the co-investigating judges in their closing order and finds that their methodology fails to address the unique concerns raised in the Cambodian context. After discussing some of the distinctly Cambodian concerns implicated in *Case 002*, this Part then evaluates a relativist framework developed by Professor Hurst Hannum, which provides a basis for making the international definition of genocide meaningful in the Cambodian context.[171] This Part concludes that treating genocide as a legal transplant can ensure that the ECCC approaches the law of genocide in a manner that comports with the approaches favored by other international tribunals and respects the needs of the Cambodian people.

A. A Comparative Analysis of Genocide Charges before the ECCC

A comparative approach to the law of genocide would not necessarily compel the ECCC to find that genocide occurred in Cambodia. The value of treating the law of genocide as a legal transplant, instead of employing a universalist approach, lies not in the outcome, but in the analysis it compels. Approaching genocide as a legal transplant requires that the court exercise the interpretive

170. *See* McCrudden, *supra* note 46, at 18 (discussing the role of foreign precedent in human rights law).

171. Hurst Hannum, *International Law and Cambodian Genocide: The Sounds of Silence*, 11 HUM. RTS. Q. 82 (1989); *see also infra* notes 216–220 and accompanying text.

freedom created by the ambiguities[172] in the law of genocide to determine if the crime can make sense in the Cambodian context. This prompts several key questions: What does the law of genocide mean in Cambodia? What are the reasons for the different approaches and interpretations that have been espoused by the ICTY and ICTR—and what do these imply for the ECCC's jurists? To what extent should the ECCC feel constrained by their interpretations? Including these considerations in the ECCC's analysis of the genocide charges in *Case 002* ensures that the their ultimate ruling will be based neither on tenuously drawn extensions of existing doctrine, nor on strict adherence to current genocide jurisprudence,[173] but instead on an understanding that law is and must be mobile to "accommodate a plurality of models" in the global legal culture.[174] For the trial chamber's judges, this has two important ramifications. First, it means that the ECCC should not be overly dependent on the experience of other international tribunals because it faces many novel questions in an entirely exceptional context.[175] Second, it requires that the trial chamber "engage with members of the affected societies and . . . adapt to the local cultural context" to be perceived by the Cambodian people as legitimate.[176]

B. The Appropriate Role of International Genocide Jurisprudence at the ECCC

In contrast to the universalist aspirations of international tribunals like the ICTY and ICTR, the ECCC is distinctly hybrid in nature. The constitution of the court implies that the ECCC's judges are expected to subordinate uniformity to local needs.[177] Nonetheless,

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172. *See* Hastrup, *supra* note 45, at 17 ("To engage with the global culture of rights . . . means to exert the freedom of interpretation at a level of global connections, and to elucidate what is hidden in the discursive silences between them.").

173. *Cf.* Park, *supra* note 11, at 139 (arguing that if the ECCC follows existing international precedent on genocide, a finding of genocide against the Khmer and Buddhist majorities would be unlikely).

174. Graziadei, *supra* note 40, at 727.

175. *See* Heindel, *supra* note 9, at 85 (noting that unlike the ICTY or ICTR, the ECCC was not established by international agreement but rather pursuant to Cambodian domestic law, and "[a]lthough [it] greatly benefits from the prior experience of international criminal tribunals, it must also address many new questions").

176. Ramji-Nogales, *supra* note 33, at 28.

177. *See* Ciorciari, *supra* note 89, at 71–72 (noting that the Cambodian government insisted on and ultimately secured a Cambodian "majority in each of the ECCC's three judicial bodies,"

the jurisprudence of these tribunals may provide a fertile source of guidance for the ECCC.

Here, the comparative use of foreign decisions made by domestic judges approaching human rights issues is instructive.[178] Just as their domestic counterparts employ foreign law "transnationally, as an interpretative source,"[179] the ECCC's trial chamber judges may turn to foreign jurisprudence for guidance in interpreting borrowed rules—like the law of genocide. The opinions of the ICTY and the ICTR thus aid in identifying the "conflicting principles which need to be resolved in conversation with [other] judges . . . however different the outcome may be."[180] Accordingly, the fact that the ICTR defined rape as a genocidal act is less important than the reasons *why* the ICTR came to this conclusion in *Akayesu*.[181] Similarly, *how* the ICTY concluded that the murder of thousands of Bosnian Muslims in Srebrenica satisfied the Genocide Convention's "in whole or in part" requirement in *Krstic* is less instructive than *why* the court adopted its approach.[182]

C. Cambodian Concerns and the Question of Genocide

The ECCC's hybrid nature envisions that the ECCC's judges will be more in tune with Cambodian considerations.[183] The vast majority of the Khmer Rouge's victims express a longing, not for compensation, but for "the closure that only a legal accounting can bring."[184] Meeting this expectation requires that the ECCC judges translate the law of genocide so that it makes sense locally.[185] Most Cambodian survivors "have little doubt that the Khmer Rouge committed genocide" because they were victims of and witnesses to

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and that even the word "extraordinary" in the ECCC's name was chosen because it "was more compatible with . . . [Cambodia's] notion of sovereignty" (internal quotation marks omitted)).

178. *See supra* notes 49–52 and accompanying text.

179. McCrudden, *supra* note 46, at 2, 7 (emphasis added).

180. *Id.* at 18 (footnote omitted).

181. *See supra* text accompanying notes 126–128.

182. *See supra* text accompanying notes 148–155.

183. *See* Ciorciari, *supra* note 86, at 13, 20 ("Proponents of the [ECCC] model believe mixed tribunals will better enfranchise victims, facilitate transfer of expertise, and deliver justice at a lower cost in countries that need money for many other uses.").

184. Chhang, *supra* note 1, at 170.

185. *See* Merry, *supra* note 27, at 39 ("Human rights language is . . . extracted from the universal and adapted to national and local communities.").

the crimes perpetrated by the regime.[186] Still, the Cambodian people believe that "only the Tribunal can help [them] begin to find answers by bringing forward the truth for all to see."[187] Treating the law of genocide as a transplant is crucial to the successful completion of this process. The literature on legal transplants recognizes the mobility of the law and the plurality of models that can comfortably be accommodated within a legal system.[188] Thus, viewing the law of genocide through a Cambodian lens does not risk destabilizing the law—even if the ECCC reaches a conclusion opposite those reached by other international tribunals.[189] In *Case 002*, however, the ECCC's co-investigating judges relied too closely on the holdings of the ICTY and the ICTR and thus risked applying the law of genocide too narrowly to be meaningful in the Cambodian context.

D. The Co-Investigating Judges' Unsatisfactory Universalist Approach to Genocide

In *Case 002* the co-investigating judges assessed the treatment of four different groups—the Cham,[190] Vietnamese, and Buddhist populations in Cambodia, and other members of the Khmer majority[191]—to determine whether genocide occurred in Cambodia. They also analyzed the impact of the Khmer Rouge's policies on the overall population, including the forced displacement of populations,[192] the establishment of labor camps,[193] and the regulation of marriage.[194] In undertaking their analysis, the co-investigating judges looked to the jurisprudence of the ICTY and the ICTR as a source of "discovered truth or interpret[ed] higher law,"[195] rather than as a source for guidance on how to identify and resolve the conflicting principles at issue in the case.

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186. Chhang, *supra* note 1, at 172.

187. *Id.*

188. Graziadei, *supra* note 40, at 727.

189. *Cf. id.* ("[L]egal systems can accommodate a plurality of models . . . .").

190. The Cham, a Muslim group, are a Cambodian ethnic and religious minority. Case 002, Case No. 002/19-09-2007-ECCC-OCIJ, Closing Order, para. 745 (Extraordinary Chambers in the Cts. of Cambodia Sept. 15, 2010), http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D427Eng.pdf.

191. *See id.* para. 205 (noting that these four groups were target populations).

192. *Id.* paras. 160–67.

193. *Id.* paras. 168–77.

194. *Id.* paras. 216–20.

195. *See supra* note 50 and accompanying text.

Echoing the definitions of ethnicities provided by the ICTY and ICTR, the co-investigating judges defined the Cham as an ethnic minority due to their shared language, culture, and religion as well as the popular perception of the Cham as a distinct ethnic group in Cambodia.[196] Adopting a quantitative approach to the question of intent, the CIJs eschewed any minimum numeric threshold necessary to find genocide, focusing instead of the "portion" of the Cham population that was targeted for annihilation during the Khmer Rouge reign.[197]

The co-investigating judges also derived their definition of the Vietnamese as an ethnic group from current international jurisprudence, asserting that the Vietnamese are an "ethnic group" for purposes of the law of genocide due to their shared language, culture, and their self-identification as an ethnic population distinct from the larger Cambodian society.[198] The co-investigating judges relied on the same approach to the "in part" element of the crime of genocide in the case of the Vietnamese[199] as was used by the ICTR in *Muhimana* and in *Gacumbtsi*.[200]

On the basis of these findings, the co-investigating judges ultimately indicted the four accused persons for the crime of genocide against the Cham and the Vietnamese.[201] The co-investigating judges, however, did not indict the accused for genocide against the Buddhist and Khmer populations.[202] Their determinations may be based on an

196. *Case 002*, Case No. 002/19-09-2007-ECCC-OCIJ, Closing Order, para. 745. The definition of ethnicity articulated by the co-investigating judges mirrors that of the ICTR chamber in *Akayesu*: "An ethnic group is generally defined as a group whose members share a common language or culture." Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, paras. 512–13 (Sept. 2, 1998), http://www.unictr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf.

197. *Case 002*, Case No. 002/19-09-2007-ECCC-OCIJ, Closing Order, para. 1342.

198. *Id.* para. 791 (citation omitted).

199. *Id.* para. 1349 (noting that "there is no numeric threshold of victims necessary to establish genocide").

200. *See* Prosecutor v. Muhimana, Case No. ICTR-95-1B-T, Judgement and Sentence, para. 498 (Apr. 28, 2005), http://www.unictr.org/Portals/0/Case/English/Muhimana/decisions/muhimana280505.pdf (eschewing any "numeric threshold of victims necessary to establish genocide"); Prosecutor v. Gacumbtsi, Case No. ICTR-2001-64-T, Judgment, para. 253 (June 17, 2004), http://www.unictr.org/Portals/0/Case/English/Gacumbitsi/Decision/040617-judgement.pdf ("There is no numeric threshold of victims necessary to establish a genocide . . . .").

201. *Case 002*, Case No. 002/19-09-2007-ECCC-OCIJ, Closing Order, para. 1613.

202. *See id.* (finding genocide only for the killing of the Vietnamese and the Cham).

overreliance on the jurisprudence of the ICTY and the ICTR.[203] By adopting the language and logic of the various ICTY and ICTR chambers verbatim,[204] the co-investigating judges embraced a strict universalist approach to the law of genocide and assumed that the ECCC must interpret the law of genocide in the same way that the ICTY and ICTR have done. This approach may have been adequate for the more clear-cut question of genocide vis-à-vis the Cham and Vietnamese minorities. It fails to address, however, whether the reasoning of either the ICTY and ICTR, or alternatively, the ambiguities in the textual definition of genocide provide space to consider the atrocities perpetrated against the Buddhist and Khmer majorities as genocidal.

E. A Better Way—Genocide as a Legal Transplant

Such a restrictive reading of the Genocide Convention is both unwarranted and inadequate. It overlooks the particular context in which the ECCC applies the law of genocide and ignores the concerns of the Cambodian people. This Section describes features of the Khmer Rouge's policies that are particularly relevant to analyzing whether genocide occurred in Cambodia. It then describes a framework developed by Professor Hurst Hannum for applying the law of genocide to the Cambodian context, arguing that Hannum's framework employs an overly restrictivist analysis. This Section

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203. *Cf.* Park, *supra* note 11, at 139 (arguing that "an objective reading of existing international precedent" suggests that "genocide charges are relatively likely to succeed with respect to the Khmer Rouge's persecution of the Cham Muslim and ethnic Vietnamese minorities, but . . . [that] the ECCC would struggle mightily to situate the broader social upheaval wrought by the Khmer Rouge, involving persecution of the Khmer and Buddhist majorities, within the terms of existing genocide jurisprudence"). Like the co-investigating judges' closing order, Park's conclusion relies too heavily on international jurisprudence as mandatory authority, rather than as a guidepost for hybrid tribunals applying a universal principle in a completely novel context.

204. *Compare* Prosecutor v. Jelisic, Case No. IT-95-10-T, Judgement, para. 70 n.95 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 14, 1999), http://www.icty.org/x/cases/jelisic/tjug/en/jel-tj991214e.pdf ("An ethnic group is one whose members share a common language and culture . . . ." (quoting Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-T, Judgement, para. 98 (May 21, 1999), http://www.unictr.org/Portals/0/Case/English/kayishema/judgement/990521_judgement.pdf (internal quotation marks omitted))), *and* Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, para. 513 (Sept. 2, 1998), http://www.unictr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf ("An ethnic group is generally defined as a group whose members share a common language or culture."), *with Case 002*, Case No. 002/19-09-2007-ECCC-OCIJ, Closing Order, para. 791 ("The Vietnamese may be considered to be an ethnic group as they share a common language and culture . . . ." (citation omitted)).

concludes by reframing Hannum's analysis using the notion of legal transplants and demonstrating how this comparative approach creates the interpretive freedom necessary to make the international law of genocide meaningful to the Cambodian people without divesting its definition of all meaning.

1. *The Rise of the Khmer Rouge*. The Communist Party of Kampuchea—also known, more infamously, as the Khmer Rouge—took hold of power during the turmoil of a Vietnamese-Communist invasion, U.S. involvement in the Vietnam War and the chaos of civil war in Cambodia.[205] In a heady push to turn Cambodia into a socialist utopia, the Khmer Rouge abolished money, markets, education, religion, and private ownership.[206] The regime's relentless policies created a gruesome reality in which "Buddhist monks were made to plow fields" and "pagodas were turned into killing centers."[207] Books became fodder for fire, and survivors related horrific tales of slave-labor communes where everyone—including children, the sick, and the elderly—was forced to work from dawn until dusk for the collective.[208] In the ultimate effort to topple traditional Cambodian society, the Khmer Rouge separated families, ripped children from their homes, forced couples to marry, and penalized premarital sex as a capital offense.[209]

The Khmer Rouge's overarching goal was "to establish an atheistic and homogenous society without class divisions, abolishing all ethnic, national, religious, racial, class and cultural differences."[210] Initially, this ambition resulted in particularly vicious policies targeting the Cham, Vietnamese, and Buddhist groups, as well as

205. CHANDLER, *supra* note 3, at 7.

206. *Id.*

207. PETER MAGUIRE, FACING DEATH IN CAMBODIA 50 (2005); *see also* BEN KIERNAN, THE POL POT REGIME: RACE, POWER, AND GENOCIDE IN CAMBODIA UNDER THE KHMER ROUGE, 1975–79, at 8 (3d ed. 2008) ("[A]ll cities were evacuated, hospitals cleared, schools closed, factories emptied, money abolished, monasteries shut, libraries scattered. For nearly four years freedom of the press, of movement, of worship, of organization, and of association, and of discussion all completely disappeared. So did everyday family life. A whole nation was kidnapped and then besieged from within.").

208. MAGUIRE, *supra* note 207, at 50–52.

209. *Id.* at 51.

210. Case 002, Case No. 002/19-09-2007-ECCC-OCIJ, Closing Order, para. 207 (Extraordinary Chambers in the Cts. of Cambodia Sept. 15, 2010), http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D427Eng.pdf.

parts of the Khmer majority.[211] Ultimately, however, the regime's brutal excesses turned inward in a series of massive party purges that resulted in the slaughter of tens of thousands for alleged disloyalty or for having "Cambodian bodies and Vietnamese minds."[212] The staggering consequences of the regime's unchecked power over the Cambodian population shock the conscience: an estimated 36 percent of the Cham population died,[213] 150,000 Vietnamese were expelled and many remained in Cambodia were killed,[214] and between 1,671,000 and 1,871,000 people—21 to 24 percent of the 1975 Cambodian population—lost their lives.[215]

2. *A Framework for Applying the Law of Genocide to the Cambodian Atrocities*. Before the creation of the ECCC, Professor Hurst Hannum developed a framework for applying the existing law of genocide to the atrocities committed in Cambodia.[216] Professor Hannum argued that the Khmer people of Cambodia constitute a national group, and thus fall within the ambit of the Genocide Convention's Article II protections, even though the Khmer constitute a majority of the population.[217] Moreover, Hannum reasoned that the text of the treaty imposes no requirement that the group allegedly committing genocide be distinct from its intended victims.[218] Most critically, the leaders of the Khmer Rouge were

> determined to cleanse, purify, and consolidate the Khmer national group—a grim reminder of the Nazi attempt to purify and propagate the 'master race.' Just as the Nazi determination to purify society extended beyond racial and ethnic groups to include, for example, socialists and homosexuals, so did the national purification program of Democratic Kampuchea go beyond the elimination of ethnic and religious minorities.[219]

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211. *Id.* para. 205.

212. CHANDLER, *supra* note 3, at 7–8.

213. Kiernan, *supra* note 1, at 590.

214. KIERNAN, *supra* note 207, at 296–97.

215. Kiernan, *supra* note 1, at 586–87.

216. *See generally* Hannum, *supra* note 171 (providing an analysis of how the atrocities committed by the Khmer Rouge against the broader Cambodian population could be legally construed as genocide under the Genocide Convention).

217. *Id.* at 104.

218. *Id.* at 105.

219. *Id.* at 88–89.

According to Hannum, if the destruction of "a religious, ethnical, racial or 'tainted' national group" was intended, then "[t]he motivation, excuse, or rationale" driving the decision to destroy the group "is immaterial."[220] Laudably, Hannum uses the ambiguities inherent in the definition of the law of genocide to make the Genocide Convention's application meaningful in the Cambodian context. Yet his approach is too relativist, and therefore risks divesting "the distinct concept of genocide of any real meaning."[221] In contrast, approaching genocide as a legal transplant enables the law to remain uniform while also recognizing the inherent difficulties in transplanting the law into a novel cultural setting, thereby providing the rationale necessary for domesticating the law through a nuanced interpretation.

3. *Genocide as a Legal Transplant in the ECCC.* In *Jelisic*, the ICTY emphasized that it is "the stigmatisation of a group as a distinct national, ethnical or racial unit by the community which allows it to be determined whether a targeted population constitutes a national, ethnical or racial group in the eyes of the alleged perpetrators."[222] This reasoning illustrates the possibilities that are created by the Genocide Convention's ambiguities. Ultimately, the question of whether genocide occurred in Cambodia must not turn on *why* certain groups were identified for annihilation, but on *which* groups were targeted. For example, many characterize the killings of members of the Buddhist and Khmer populations as politically motivated. Accordingly, these groups are classified as "political" rather than "national" or "ethnical."[223] This categorization effectively places the targeted killings of members of the majority Khmer and Buddhist groups beyond the reach of the Genocide Convention's protections. But this approach ignores the significant fact that *motive* is irrelevant under the Genocide Convention; only intent matters.[224]

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220. *Id.* at 110.

221. Schabas, *supra* note 20, at 290.

222. Prosecutor v. Jelisic, Case No. IT-95-10-T, Judgement, para. 70 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 14, 1999), http://www.icty.org/x/cases/jelisic/tjug/en/jel-tj991214e.pdf.

223. *See, e.g.*, Park, *supra* note 11, at 131 ("[I]t is widely accepted that 'most crimes committed by the Khmer Rouge' might not legally constitute genocide because 'they were intended to destroy [the regime's perceived] political enemies.'" (second alteration in original) (quoting Heindel, *supra* note 9, at 90)).

224. *See supra* text accompanying notes 62, 65–66.

The Khmer Rouge deliberately targeted members of a "'tainted' national group" for annihilation, which should invoke the Genocide Convention's protections.[225]

This analysis treats genocide as a legal transplant and acknowledges the discrete context in which the principle is applied, thereby providing a basis for domesticating the law through a nuanced interpretation designed to tailor the law to fit local cultural norms and values. Both the Khmer Rouge's party purges and their fatal social policies may have been politically motivated, but that does not mean that the Khmer Rouge's victims constitute members of a political group. The Khmer Rouge deliberately set out to create a homogenous Khmer society, and anyone who did not fit within their definition of Khmer was targeted for annihilation.[226] Using the subjective analysis embraced by the *Jelisic* court, the Khmer Rouge's victims were members of a tainted national group "in the eyes of the alleged perpetrators."[227] Although no court has specifically interpreted the protections of the Genocide Convention to include a majority national or religious group,[228] that should not be a bar to the ECCC doing so if such an interpretation makes sense in the Cambodian context. Thus, an appropriately comparative consideration of the crime makes it unnecessary to expand, refine, or amend the existing law of genocide. Just as the text provided ample space for the exercise of "reasonable freedom of interpretation" necessary to make the law of genocide applicable in Rwanda and the former Yugoslavia, so too can genocide's textual ambiguities make the definition meaningful in a Cambodian context.

CONCLUSION

The law of genocide, like most other laws designed to define, preserve, and protect human rights, provides ample space for the judges tasked with applying it to exercise the interpretive freedom necessary to make the law locally meaningful. Thus, in their capacity as legal translators, judges can domesticate the law of genocide—like any other human rights principle—so that it makes sense within the

225. *See supra* note 220 and accompanying text.

226. *See supra* Part IV.E.1.

227. *Jelisic*, Case No. IT-95-10-T, para. 70.

228. *See* Luban, *supra* note 20, at 317 & n.64 (noting that the concept of an "auto-genocide" represents a departure from existing genocide jurisprudence).

cultural norms, values, and practices of local communities. Treating the law of genocide as a legal transplant enables judges to acknowledge, through a practice divorced from political considerations, the changes to which the language of the law will inevitably be subjected in the transplant process. Thus, the judge-as-legal-translator can at once tailor the law of genocide to fit the local cultural framework and retain the ideas embedded in the Genocide Convention.