Civil Party Lawyers' Training Program

- *"Joint Criminal Enterprise" (JCE) as Applied to Genocide at the ECCC in Case 002*

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Presentation I: Genocide Definition & Element Analysis
3 December 2010

Presentation Overview

- 2 part presentation:
  - Presentation I: (3 December 2010)
    - **Genocide**:
      - Background of ECCC law, modes of liability, and historical context providing foundation for genocide charges in case 002
      - Defining Genocide
      - Exploring the specific intent requirement
  - Presentation II: (17 December 2010)
    - Modes of Liability & Participation relative to Genocide
    - Exploring Joint Criminal Enterprise
    - Applying Joint criminal enterprise (JCE) to Genocide in case 002

Presentation I
Introduction & Context

- BACKGROUND

  - 1975-1979: The Khmer Rouge regime, under the Communist Party of Kampuchea (CPK) took power:
    - Pursued objective of returning Cambodia to "Year Zero" by implementing a radical Maoist/Marxist-Leninist program to transform the entire Cambodian population into a mass agricultural workforce.
    - Common purpose of CPK leaders was to implement rapid socialist revolution in Cambodia through a "great leap forward" and to defend the Party against internal and external enemies, by whatever means necessary.

    - To achieve a common purpose, CPK leaders designed and implemented five policies
      - (i) Repeated movements of the population from towns and cities to rural areas;
      - (ii) Establishment and operation of cooperatives and worksites
      - (iii) Reeducation of "bad elements" and "enemies", both inside and outside the Party ranks;
      - (iv) The targeting of specific groups, in particular the Cham, Vietnamese, Buddhists, and former officials of the Khmer Republic, including both civil servants and former military personnel and their families;
      - (v) Regulation of marriage

RESULT:

- Under the KR regime, 1.7-2.2 million people died as a result of enslavement, forced labour, starvation, torture, and summary and mass executions in "the killing fields"
- Zero Ethnic Vietnamese remained in Cambodia

Presentation I
ESTABLISHMENT OF ECCC

- Establishment of Extraordinary Chambers in the Courts of Cambodia (ECCC)
  - 21 June 1997:
    - Kingdom of Cambodia submitted official request for judicial assistance of United Nations
  - 6 June 2003:
    - Royal Government of Cambodia signed Agreement with United Nations to trial senior leaders of Democratic Kampuchea (DK) and those most responsible for national and international crimes committed in DK between 17 April 1975 – 6 January 1979 (ECCC Agreement)
  - 3 July 2006:
    - ECCC Agreement officially inaugurated
  - 16 August 2010
    - Co-Prosecutors filed Final Submission and requested Co-Investigation Judges to indict Nuon Chea, Ieng Sary, Ieng Thirith and Khieu Samphan

    15 September 2010

    Co-Investigating Judges signed Closing Order, indicting the four defendants for crimes against humanity, graves breaches of the 1949 Geneva Conventions, genocide and offences under the Cambodian Criminal Code 1956

Presentation I
JURISDICTION OF ECCC

- ECCC Law:
  - ***Nullum Crimen Sine Lege:***
    - Art 33(2) (new) references Art 15 of International Covenant on Civil and Political Rights, "***no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed***."
  - Crimes within the jurisdiction of ECCC:
    - Genocide
    - Crimes Against Humanity:
      - Murder, Extermination, Enslavement, Deportation, Imprisonment, Torture, Persecution on Political, Racial or Religious Grounds, Rape in the Context of Forced Marriage
    - Grave Breaches of the Geneva Conventions
    - Crimes under the Cambodian Penal Code 1956
      - Homicide, torture, religious persecution

Presentation I
JURISDICTION OF ECCC

- **Genocide Liability within the jurisdiction of ECCC: (Art. 4)**
  - **Attempts** to commit genocide
  - **Conspiracy** to commit genocide
  - **Participation** to commit Genocide
  - No statute of limitation for the crime of genocide

- *Modes of Liability will be further discussed in Presentation II*
- **ECCC Law:**
  - **Modes of Liability within the jurisdiction of ECCC:**
    - Individual Liability:
      - Commission
      - Joint Criminal Enterprise
      - Planning
      - Instigating
      - Ordering
      - Aiding and Abetting
    - Superior Responsibility

Presentation I
Genocide: Definition

- "The specific intent, to destroy, in whole or in part, a national, ethnic, racial, or religious group, as such, by any of the following acts:

  - **Killing** of members of the group,
  - **Causing serious bodily harm, or mental harm**, to members of the group;
  - Deliberately **inflicting on the group conditions of life** calculated to bring about its physical destruction in whole or in part;
  - Imposing measures intended to **prevent births** within the group or forcibly transferring children from one group to another group

Offence Elements of Genocide

- To convict on genocide, it must be proven that the perpetrator:
- 1) Committed one of the **acts** constituting genocide
- 2) Against members of a racial, ethnic, national or religious **group**
- 3) With **specific intent** to destroy that group, in whole or in part.

Definition: Protected Groups

- **Categories of Protected Groups:**
  - National, Ethnic, Racial, Religious groups
  - Prevailing approach: subjective and objective factors
    - Objective: characteristics common to a group
    - Subjective: how victim / perpetrator perceive the membership
  - Exclusion of Political Groups (and Social groups):
    - Reasoning: Preparatory works of Genocide Convention indicate that groups must be stable, and permanently constituted eg. Through:
      - Membership by birth, as opposed to groups such as political and economic groups, where membership is voluntary
      - Characteristics core to a person's identity that they cannot have control over (race, ethnicity)

Definition: Protected Groups

- Akayesu, ICTR, 1998:
  - **National group**: "a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties"
  - **Ethnic group**: "a group whose members share a common language or culture"
  - **Religious group**: "one whose members share the same religion, denomination or mode of worship"
  - **Racial group**: defined by "hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors"

Genocide charges in Case 002 (against members of Vietnamese and Cham group)

OCIJ Closing Order (15 September 2010) indicts Ieng Sary, Ieng Thirith, Khieu Samphan and Nuon Chea with Genocide of the Cham Muslims and Genocide of the ethnic Vietnamese

- Crimes against Cambodian population not legally characterised as "genocide" because:
  - Must have an element of intention to destroy a protected group
  - Controversy over whether genocide could apply against members of the same group (as the perpetrators)

- Arguments supporting Genocide Charges in case 002:
  - Historians such as Ben Kiernan argue Cham Muslims and ethnic Vietnamese were targeted specifically because of their religious and ethnic background, which would qualify as a genocide

- Arguments against Genocide Charges in case 002:
  - Historians such as David Chandler and Philip Short maintain no genocide occurred in Cambodia because groups targeted by KR (Vietnamese and Cham Muslim) fell into the category of those who "disobeyed, seemed to disobey, or might disobey strict orders of Angkar" and were therefore considered to be a political threat to the establishment of goals of the KR regime (ie they were considered to be political enemies)

Genocide of Vietnamese "by Killing"

- Group: Vietnamese (VN) considered racial, ethnic & national group
- Method of Killing: "deliberate and systematic identifying, targeting, gathering and killing of people due to their membership of the Vietnamese group"
- Mens Rea: perpetrators intended to destroy, in whole or in part, the VN group (evidenced by):
  - Statements about the objective of physically destroying the group in its entirety eg. Revolutionary Flag publications calling for the killing of VN civilians in Cambodia
  - Theory of lineage through matrilineal descent (mixed marriage policies)
  - Killings and transfers in the Eastern Zones
  - Escalating deportations, persecution, incitement of hatred and anti-VN war propaganda
  - Systematic nature, scale, pattern, repetition and timing of killing VN indicate planning and coordination by CPK leaders in the framework of a common purpose
  - Demographic Expert Report: almost all VN remaining in Cambodia were killed during CPK regime (100% elimination rate by deportations or killings)

Genocide of Cham "by Killing"

- Group: Cham are an ethnic and religious group
- Method of Killing: "deliberate and systematic identifying, targeting, gathering and killing of people due to their membership of the Cham group"
- Mens Rea: perpetrators intended to destroy, in whole or in part, the Cham group (evidenced by):
  - Systematic nature, scale, pattern, repetition and timing of killing Chams in East and Central (Old North) Zones (and other zones), indicating central coordination by CPK leaders within the framework of a common purpose
  - Context of escalating persecutory attacks against the Cam directed by the CPK
  - CPK Centre directed a country-wide suppression of Cham culture, traditions and language and forcibly moved Cham communities to break them up
  - Extermination Centres eg. security centres in Trea Village and Wat Au Trakuon
  - Demographic Expert Report: 36% of Cham people in Cambodia died (average rate of Khmer deaths is estimated at 18.7%)

Definition: "Destroy"

- Destruction of a group by:
  - **Killing**
    - eg. through execution centres where members of the group were targeted
  - **Causing serious bodily/mental harm to members of group**
    - Eg. by enslavement, starvation, deportation, persecution, detention, transit or concentration camps in conditions of degradation, deprivation of human rights, inhumane suffering and torture, including sexual violence and rape
  - **Deliberately inflicting conditions of life calculated to destroy the group**
  - **Preventing births within the group**
  - eg. mixed marriage policies in Cambodia; sexual mutilation, sterilisation, forced birth control, separation of male/female populations, prohibition of marriages, deliberate impregnation during rape by a man not of the group
  - **Forcibly transferring children from the group**
    - effectively destroying the cultural memory and language by assimilation at a very young age, to eliminate the group's existence

Definition: "In whole or in part"

- "In whole or in part" refers to genocidal intent
- Question is how many victims perpetrator *intended* to attack, rather than how many were actually killed
  - Vietnamese: 100% elimination rate (killing or deportation)
  - Cham: 36% died (average Cambodian deaths was 18.7%)
- Attempt to commit: genocide conviction can still be obtained where genocidal intent is present (but act is not completed)

- Whitaker's 1985 Report to UN Sub-Commission for the Protection and Promotion of Human Rights:
  - "in part" has both a quantitative dimension and a qualitative dimension (eg. destroying the leadership of a group)

Case Law: "In whole or in part"

- **Krstic, ICTY:**
  - 7000 men from Bosnian Muslim society in Srebrenica killed – impact on future existence of the community as women could not remarry and consequently to have children
  - Attempt to destroy Bosnian Muslim community in Srebrenica constituted a "substantial part" of the Bosnian Muslims as a whole, such that it amounted to genocide
  - Intention to destroy a group may apply to a limited geographical area
  - "in part" means "in *substantial part*"

Challenges in Prosecuting Genocide: Specific Intent
Dolus Specialis

- Genocide Defined:
  - "The ***specific intent***, to destroy, in whole or in part, a national, ethnic, racial, or religious group, as such, by any of the following acts…"
- *Dolus Specialis (*Specific Intent) Requirement:
  - Subjective (purposive) element, which characterizes a crime as genocide
  - Requirement entails TWO fault elements
    - In addition to proving the *mens rea* of the *actus reus* of the genocidal act, must prove the underlying (ulterior) purpose of the genocidal act
    - Eg – for Genocide by Killing members of a group
      - Perpetrator intended to kill members of the group PLUS
      - Perpetrator specifically engaged that act with an intent of destroying, in whole or in part, a protected group
  - Ie. Killing a person without specific intent of destroying a group is murder and not genocide
  - In practice, genocide is a State act, rather than individual act

Genocide: *Dolus Specialis* interpreted
Case Law – Presumptions of Facts

Case Law: INFERRING GENOCIDAL INTENT FROM PRESUMPTIONS OF FACTS

- *Akayesu* ICTR 1998: Issue: Specific intent may be impossible to prove without admission by the accused
  - **Decision**: Genocidal intent, in relation to a particular act, may be inferred by presumptions of facts, including general context of perpetration of other criminal acts systematically directed against particular group (whether committed by the same offenders or others)
  - **Application**: Genocidal Intent may be inferred by presumption of facts eg:
    - Combined effect of speeches or projects laying the groundwork for and justifying acts
    - Scale of atrocities committed in a region or country
    - Nature of the crimes committed
    - Deliberate & systematic targeting of victims on the basis of their membership of a particular group
    - Exclusion of members of other groups

Genocide: *Dolus Specialis* interpreted
Case Law: Circumstantial Evidence

- ***Ruzindana* ICTR 1999: SPECIFIC INTENT INFERRED FROM CIRCUMSTANTIAL EVIDENCE**
  - Found: Inference of genocidal intent may be formed based on Policy or Plan to commit genocide:
    - Policy or plan to commit genocide may be inferred from the relevant circumstances,
    - Circumstantial evidence of a "pattern of purposeful action" may be used to infer genocidal intent, including:
      - Physical targeting of the group or their property;
      - The use of derogatory language toward members of the targeted group;
      - The weapons employed
      - The extent of bodily injury;
      - The methodical way of planning,
      - The systematic manner of killing: and
      - The number of victims from the group

Genocide: *Dolus Specialis* interpreted Case Law: Political Doctrine

- ***Seromba* ICTR 2008: SPECIFIC INTENT INFERRED FROM POLITICAL DOCTRINE**
  - Found: specific intent required for genocide may be inferred from:
    - Political doctrine which gave rise to the acts referred to,
    - The repetition of destructive and discriminatory acts,
    - The perpetration of acts which violate (or were considered by the perpetrators to violate) the very foundation of the group

Presentation I
Summary & Conclusion

- Summary:
  - Definition of Genocide
    - "The specific intent, to destroy, in whole or in part, a national, ethnic, racial, or religious group, as such, by any of the following acts:
      - Killing of members of the group,
      - Causing serious bodily harm, or mental harm, to members of the group;
      - Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
      - Imposing measures intended to prevent births within the group or forcibly transferring children from one group to another group
  - Specific Intent Requirement:
    - *Akayesu*: specific facts may be used to form presumption used to infer genocidal intent
    - *Ruzindana*: genocidal intent may be infered from circumstantial evidence such as policy, plan, or pattern of "purposeful action"
    - *Seromba*: inference of genocidal intent may be drawn from political doctrine
  - Liability for Genocide in Case 002:
    - Will depend on finding of specific intent by the charged persons to destroy, in whole or in part, a protected group: Ethnic Vietnamese and Cham Muslims
- Conclusion
  - Issues foreseen in prosecuting the charged persons in Case 002
    - Questions, Comments, Discussion…
  - Next presentation will look at the modes of liability, specifically Joint Criminal Enterprise that apply to the charged persons in Case 002 linking the charged persons to genocide of the ethnic Vietnamese and Cham Muslims