

# **Prosecuting the Crime of Destruction of Cultural Property**

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## **Introduction to the Destruction of Cultural Property in the Cambodian Context**

### *Historical Background and Importance of Cultural Property*

Following its seizure of power in April 1975, the Khmer Rouge regime proclaimed a return to “Year Zero” and set about demolishing links to the past, to the outside world and to religion. As part of their systematic attack upon Buddhism, the Khmer Rouge desecrated or destroyed most of Cambodia’s 3,369 temples, inflicting irreparable damage on statues, sacred literature, and other religious items. Similar damage was inflicted on the mosques of the Cham, some 130 of which were destroyed. The Khmer Rouge regime attacked Christian places of worship, even disassembling the Catholic cathedral of Phnom Penh stone by stone until only a vacant lot remained. The Khmer Rouge destroyed all 73 Catholic churches in existence in 1975.

Although less shocking than acts of murder, torture, beating or rape, looting or destruction of cultural property is of considerable importance as such acts may have significant long term effects upon the identity of cultural groups. Destruction of cultural property affects not only the people of that cultural group, but serves to decrease the cultural diversity of the world. History has witnessed the poignant fate of many nations and peoples following brutal and intensive cultural mutilation. Some have ceased to exist while others have had their identity deeply and irreversibly altered. As such, it is important to prosecute the crime of destruction of cultural property.

### *The ECCC Law and Potential Prosecution of the Crime of Destruction of Cultural Property*

The ECCC Law, as amended in 2004, sets forth the provisions governing the trials of former senior Khmer Rouge leaders set to commence in 2007. Cognizant of the importance of punishing those alleged to have destroyed cultural property, the drafters included in Article 7 destruction of cultural property as one of eight crimes falling under the Extraordinary Chambers’ jurisdiction, along with torture, genocide, grave breaches of the Geneva Conventions, crimes against humanity, religious persecution, and breaches of the 1961 Vienna Convention on Diplomatic Relations. The ECCC Law cites as the source of law for this crime the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (the “1954 Hague Convention”) and fails to provide its own definition.

Between 1975 and 1979, the Khmer Rouge undoubtedly wreaked havoc on the cultural heritage of Cambodia and engaged in the destruction of cultural property. It is, however, likely that the Co-Prosecutors will experience considerable difficulties in establishing the criminal responsibility of senior Khmer Rouge leaders for destruction of cultural property pursuant to Article 7. In addition to the evidentiary difficulties faced in establishing

criminal responsibility, the Co-Prosecutors will likely have to establish either that the 1954 Hague Convention establishes and defines a crime of destruction of cultural property or that prosecution is possible on another legal basis.

This article briefly introduces the crime of destruction of cultural property as found in Article 7 of the ECCC Law, discusses the potential legal difficulties faced in the prosecuting such a crime pursuant to the 1954 Hague Convention, and highlights alternative sources of law upon which to base prosecutions of those alleged to have destroyed cultural property.

## **Cultural Property and the 1954 Hague Convention**

### *Definition of “Cultural Property” and Protections for Cultural Property*

The source of law for the crime of destruction of cultural property, the 1954 Hague Convention, defines “cultural property” so as to include, “movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections or books or archives or of reproductions of [such] property” (Article 1(a)). As such, this definition would appear to encompass much of the property destroyed by the Khmer Rouge.

The 1954 Hague Convention constitutes the most important tool for the protection of cultural property in contemporary international humanitarian law. It places an affirmative duty on state parties to take measures during peace time to protect cultural property situated within their territory (Article 3). The Convention places a duty on all state parties to respect cultural property situated both in their own territory and in the territory of other states, requiring them to refrain from all acts of hostility against such property (Article 4). These obligations may only be waived in cases of military necessity (Article 4(2)). The obligation to respect cultural property applies in the event of declared war or of any other armed conflict (Article 18), whether internal or international in character (Article 19).

## **Difficulties Faced in Applying the 1954 Hague Convention in the Cambodian Context**

### *Absence of Provision for Individual Criminal Responsibility*

As a traditional multilateral treaty binding upon state parties only, the 1954 Hague Convention does not provide for direct enforcement of treaty obligations vis-à-vis individuals. The Convention does, however, seek to address the issue of individual criminal responsibility by requesting each state party to “take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon these persons, of whatever nationality, who commit or order

to be committed a breach of the present Convention” (Article 28). Accordingly, Cambodia possesses the right, having been a state party to the Convention since 1961, to oversee and enforce Convention obligations against individuals within its jurisdiction.

The 1954 Hague Convention itself does not, however, provide for individual criminal responsibility and defers to domestic criminal justice systems in this regard. In fact, the Convention has not been extensively absorbed into domestic criminal law. Rather, the majority of laws addressing cultural property issues operating on the national level involve the regulation of the export of artistic and historical monuments and artifacts.

In prosecuting the crime of destruction of cultural property pursuant to Article 7 of the ECCC Law and the 1954 Hague Convention, the Co-Prosecutors will likely face considerable difficulties. The language of Article 4 of the Convention cannot be used for prosecution of a crime of destruction of cultural property as it does not expressly create a crime or indicate the requisite intent for such a crime. While the judges may seek to derive a definition of the crime of destruction of cultural property from Article 4, conviction on such a basis would likely violate the maxim of *nullum crimen sine lege* (Latin: “no crime without law”). As such, the judges may be reluctant to convict on the basis of a treaty that fails to establish or define a crime.

#### Possible Absence of a Nexus to Armed Conflict

Similarly problematic in connection with the prosecution of the crime of destruction of cultural property found in Article 7 of the ECCC Law is the required nexus under the 1954 Hague Convention to an armed conflict. Apart from certain provisions which take effect in times of peace, the Convention applies only in the event of declared war or of any other armed conflict which may arise between two or more of the state parties to the Convention, even if the state of war is not recognized by one or more of them, or in the event of partial or total occupation of the territory of a state party (Article 18). In the event of an internal armed conflict, the Article 4 provisions relating to respect for cultural property apply as a minimum, requiring all parties to the conflict to refrain from acts of hostility against cultural property (Article 19).

The Convention’s requirement of a nexus to armed conflict means that, in order to trigger the applicability of the Convention, such destruction must have occurred in connection with an internal or international armed conflict. It is unclear whether a prosecution on the basis of Article 7 of the ECCC Law would prove successful as it is uncertain whether the judges will find the existence of an internal or international armed conflict. Potentially, the judges may find that Cambodia’s border conflict with Vietnam in 1977/78 constituted an international armed conflict and/or the entire Khmer Rouge period or, at least, the 1978 rebellion in the Eastern Zone constitutes a non-international armed conflict within the meaning of the 1954 Hague Convention.

#### **Grave Breaches of the Geneva Conventions as an Alternative Basis for Prosecution of Destruction of Cultural Property**

### Article 6 of the ECCC Law: Grave Breaches of the Geneva Conventions

Article 6 of the ECCC Law empowers the Extraordinary Chambers to hear cases involving grave breaches of the Geneva Conventions perpetrated between 17 April 1975 and 6 January 1979. Article 6 imports the list of grave breaches enumerated in the Geneva Conventions into the ECCC Law. Although the grave breaches enumerated in Article 6 do not include the destruction of cultural property, they do include “destruction and serious damage to property, not justified by military necessity and carried out unlawfully and wantonly.” As such, it is possible that the Co-Prosecutors may prosecute destruction of cultural property as a war crime, provided that such destruction was not justified by military necessity and was carried out unlawfully and wantonly.

Due to the nature of such crimes as *war* crimes, the Co-Prosecutors are likely to experience difficulties similar to those found in Article 7 prosecutions. In order to secure a conviction, the Co-Prosecutors must satisfy the requirement in the Geneva Conventions that the alleged crime bore a nexus to an armed conflict. The Co-Prosecutors must prove both that an armed conflict was taking place at the time of the alleged destruction of serious damage to property and that the destruction or serious damage was linked to the conflict. As this article indicates, it is unclear whether the ECCC judges will find the existence of either an internal or an international armed conflict in the Cambodian context.

Even if the Co-Prosecutors are able to prove the existence of an armed conflict, it is likely that they would face further difficulties if that conflict were internal, or “non-international,” in nature. Today, many scholars hold that violations of Common Article 3, which governs internal conflicts, constitute grave breaches of the Geneva Conventions. There is, however, consensus amongst most scholars that, as of the late 1970s, such violations did *not* constitute grave breaches. Such consensus, in combination with the maxim of *nullum crimen sine lege*, may considerably limit the application of international humanitarian law before the Extraordinary Chambers.

Similarly, the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) supports the conclusion that violations of Common Article 3 of the Geneva Conventions, which governs internal conflicts, should not be prosecuted as grave breaches. In interpreting Article 2 of the ICTY Statute, the language of which is very similar to Article 6 of the ECCC Law, the ICTY has refrained from allowing prosecutions for violations of Common Article 3 as war crimes. In *Prosecutor v. Naletilic and Martinovic*, the ICTY Trial Chamber required the existence of an international armed conflict. Unless the judges find the existence of an international armed conflict, it is unlikely that prosecutions on this basis will prove successful.

### **Law and Customs of War as an Alternative Basis for Prosecution of Destruction of Cultural Property**

#### Article 2 of the ECCC Law: International Humanitarian Law and Custom

Although Article 2 of the ECCC Law outlines its competence “to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of...(*inter alia*) international humanitarian law and custom...,” it remains to be seen whether the Extraordinary Chambers has jurisdiction to hear the trials of defendants prosecuted for violations of the laws and customs of war. Unlike, for example, genocide, crimes against humanity, and grave breaches of the Geneva Conventions as enumerated in Articles 3 to 8, the ECCC Law does not dedicate an Article to violations of the laws and customs of war as a crime within the jurisdiction of the Extraordinary Chambers.

The cursory reference contained in Article 2 of the ECCC Law to the laws and customs of war is in stark contrast to the ICTY Statute, which provides in detail in Article 3 for jurisdiction over violations of the laws and customs of war. The inclusion of such a reference in Article 2 is, as such, somewhat mysterious and begs the question whether the ECCC judges will interpret this provision in such a way as to give themselves jurisdiction over violations of the laws and customs of war. It is possible that the judges may interpret Article 2 be a residual clause – in same way that that the Appeals Chamber interpreted Article 3 of the ICTY Statute in *Prosecutor v. Tadic* – covering any serious violation of international humanitarian law not covered by other Articles of the Law.

The creation of jurisdiction over the laws and customs of war would allow the Extraordinary Chambers jurisdiction over all serious violations of international humanitarian which do not constitute grave breaches of the Geneva Conventions. In determining the scope of such violations, the judges would likely find useful guidance in Article 3 of the ICTY Statute. Article 3 provides a non-exhaustive list of such violations, which includes the “wanton destruction of cities, towns or villages, or devastation not justified by military necessity” and “the seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science.”

If the ECCC judges were to interpret Article 2 in such a way as to give themselves jurisdiction over the laws and customs of war, the laws and customs of war would likely prove a more useful basis for prosecutions of violations of international humanitarian law as the requisite armed conflict may be internal or international in nature. As found by the ICTY Appeals Chamber in *Prosecutor v. Tadic*, the laws and customs of war apply regardless of whether the acts alleged occurred within an internal or an international armed conflict. Prosecutions on the basis of the laws and customs of war are, therefore, likely to prove more effective as they may be successful both in the case of international and/or internal armed conflict.

### **Crimes Against Humanity as an Alternative Basis for Prosecution of Destruction of Cultural Property**

*Article 5 of the ECCC Law: Persecution on Political, Racial or Religious Grounds as a Crime Against Humanity*

Article 5 of the ECCC Law empowers the Extraordinary Chambers to “to bring to trial all Suspects who committed crimes against humanity during the period 17 April 1975 to 6 January 1979.” It further provides that, “[c]rimes against humanity...are any acts committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds.” According to the ICTY Trial Chamber in *Prosecutor v. Kordic and Cerkez*, destruction and damage of religious or educational institutions may constitute persecution rising to the level of crimes against humanity, provided that such acts of destruction are “widespread or systematic” in nature and perpetrated with the requisite discriminatory intent.

Most international instruments, such as Article 3 of the International Criminal Tribunal for Rwanda (ICTR) Statute and Article 7 of the International Criminal Court (ICC) Statute, do not require the existence of an armed conflict as an element of the definition of a crime against humanity. It remains to be seen, however, whether the ECCC judges will find this to have been the case during the 1975-1979 period. Although the ICTY Statute lists the existence of an armed conflict as a prerequisite for jurisdiction, the absence of an analogous requirement in other international instruments suggests that there is a distinct possibility that the judges may find crimes against humanity to have occurred outside the context of an armed conflict.

The Co-Prosecutors may, therefore, have more success in prosecuting destruction of cultural property as a crime against humanity, rather than as the Article 7 crime of destruction of cultural property or as a war crime, provided that they are able to demonstrate the “widespread or systematic” nature and the political, racial or religious motivation of such acts. In the Cambodian context, the requirement of discriminatory intent is unlikely to prove problematic, because such acts were largely motivated by anti-religious sentiment. According to Étienne Clément and Farice Quinio of UNESCO, items of cultural heritage which were not considered to have religious significance, rather than being destroyed, were left to fall into decay during the Khmer Rouge period.

## **Conclusion**

In spite of the systematic nature of destruction of cultural property – in particular, religious cultural property – by the Khmer Rouge, the Co-Prosecutors will likely face difficulties in establishing the criminal responsibility of former leaders for destruction of such property. As this article highlights, the reliance of Article 7 of the ECCC Law upon the 1954 Hague Convention casts doubt upon the very existence of such a crime of destruction of cultural property. In light of the Convention’s failure to establish or define such a crime and the uncertainty surrounding the existence of armed conflicts during the period the period in question, the Co-Prosecutors may need to consider alternative sources of law in prosecuting those alleged to have destroyed cultural property.

As this article shows, there are a number of alternative crimes upon which the Co-Prosecutors may base prosecutions for destruction of cultural property. All the options open to the Co-Prosecutors are somewhat problematic. Prosecutions based upon grave breaches of the Geneva Conventions (Article 6 of the ECCC Law) require the Co-

Prosecutors to show the existence of an international armed conflict. Prosecutions based upon the laws and customs of war (Article 2) require the Co-Prosecutors to show the existence of an international and/or internal armed conflict. While less problematic than prosecutions based upon Article 7, prosecutions on these bases may prove ineffective as it is uncertain as to whether the judges will find the existence of an armed conflict.

The Co-Prosecutors will likely find prosecutions for crimes against humanity to be most effective. First, as this article indicates, the Co-Prosecutors will likely encounter difficulties in establishing the existence of an armed conflict and should, as such, base their prosecutions upon crimes which do not apply only in times of armed conflict. That crimes against humanity may occur in times of war and peace alike makes it an attractive basis for prosecution. Second, anti-religious sentiment motivated many of the acts of destruction of cultural property during the Khmer Rouge period. The requirement that political, racial, or religious grounds have motivated acts of persecution is, as such, unlikely to prove problematic.