

**BEFORE THE OFFICE OF THE CO-INVESTIGATING JUDGES OF THE
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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**SIXTH INVESTIGATIVE REQUEST OF CO-LAWYERS FOR CIVIL PARTIES
CONCERNING THE CHARGE OF GENOCIDE AGAINST THE KHMER NATIONALS**

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I. INTRODUCTION AND PETITION

1. Pursuant to ECCC Internal Rule 55(10), the Co-Lawyers for Civil Parties, on behalf of our clients the Khmer people, hereby submit a request for investigative action (“Request”) to the Co-Investigating Judges (“OCIJ”) against NUON Chea, IENG Sary, KHIEU Samphan, IENG Thirith and KAING Guek Eav alias Duch.
2. The facts presented by the Office of the Co-Prosecutors (“OCP”) in the Introductory Submission (“IS”) to support the charges of Crimes Against Humanity¹ and violations of the 1956 Penal Code and War Crimes, may also suggest support for the charge of Genocide against the Khmer national group or part thereof.
3. Although subsuming facts under the elements of crimes is the daily business of judges, the circumstances of the Khmer Rouge Regime 1975-1979 (imposed by the Communist Party of Kampuchea (CPK), of which the Defendants were senior leaders), create an unclear legal position in relation to genocide. The CPK implemented a policy to “*cleanse, purify and consolidate the Khmer national group*”². Historians agree that approximately 80% of Khmer nationals were the victims of the alleged Khmer Rouge atrocities³. National and international jurisprudence, limited case law and the fact that the definition of genocide is a highly disputed topic amongst scholars⁴ also denotes uncertainty. Consequently the aim of this Request is to seek expert advice to scrutinize the facts being investigated by the OCIJ

¹ IS, para 122(c) specifies the commission of the following acts that constitute crimes against humanity: “Murder; Extermination; Enslavement; Deportation; Imprisonment; Torture; Rape; Persecutions on political, racial and religious grounds of former officials of the Khmer Republic, feudalists, capitalists and bourgeoisie, ‘new people,’ suspected ‘bad elements,’ Buddhist, Cham, and Vietnamese [...]”.

² Hurst Hannum, International Law and Cambodian Genocide: The Sounds of Silence, Human Rights Quarterly, Vol 11, No1 (Feb 1989), pp82-138. The John Hopkins University Press 1989 page 88-89 “*Democratic Kampuchea’s leadership was 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*”.

³ Ciorciari, John D and Chhang, Youk Documenting the Crimes of Democratic Kampuchea in: Bringing the Khmer Rouge to Justice Eds. Ramji, Jaya; Van Schaack, Beth Edwin Mellen Press (2005), pp261

⁴ For example Beth Van Schaack in Mark Lattimer’s, Genocide and Human Rights Ashgate (2007), Chapter 5 The Crime of Political Genocide: Repairing the Genocide Convention’s Blind Spot, suggests that a higher law exists, stating that the “*prohibition of genocide represents the paradigmatic jus cogens norm, a customary and peremptory norm of international law for which no derogation is permitted*”, p 2261, and (Under the international treaty law doctrine, *ius cogens* norms constrain the substance of treaties because these norms cannot be “opted out of”) fn 14, pp 2261-2262. She also argues strongly that political groups should be included in the Genocide Convention.

and to further determine whether the Defendants committed acts of genocide against a subset⁵ of, or a substantial part⁶ of, the Khmer national group.

4. The charges addressing the crime of genocide are so far limited to acts directed against the Buddhists, Cham, and Vietnamese groups⁷ as adopted by the OCIJ.⁸ However, nothing in the Genocide Convention requires that a protected group constitutes a minority⁹. Further the IS references numerous facts that strongly suggest that the Defendants could be charged with having committed acts of genocide against the Khmer national group. Accordingly, the narrow scope of the genocide charges proposed by the Co-Prosecutors in the IS does not constrain the Co-Investigating Judges' investigation of acts of genocide committed within the Court's temporal and personal jurisdiction.
5. This Request does not seek to attempt to broaden the scope of the legal definition of genocide under the Genocide Convention and the ECCC law, but rather abide by the maxim *nullum crimen sine lege* "no crime without law" which ensures there is a valid existing law at the time the crime is allegedly committed. However, it does not dismiss that the same law is open to interpretation by judges depending on the facts and circumstances of the crime.

*"However clearly drafted a provision of the law may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances"*¹⁰

⁵ Thomas W Simon *"The Laws of Genocide"*, Westport, Conn.: Praeger Security International (2007) Chapter 6: Genocide Victims: Perpetrator Defined stated *"Autogenocide does not entail group suicide. Thus, a targeted genocide group could be a subset of a larger group"*, p. 109.

⁶ *Prosecutor v. Krstic*, IT-98-33-T, Judgement, 2 August 2001 *"[A]n intent to destroy only part of the group must nevertheless concern a substantial part thereof, either numerically or quantitatively."* para 634.

⁷ IS, para 122(b): Genocide of Buddhists, Cham and Vietnamese (37-72). This constitutes a violation of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, punishable under Article 4, 29 (new) and 39 (new) of the ECCC Law.

⁸ New charges of genocide against the Vietnamese and Cham Written Record of Charged Interview of Charged Person Nuon Chea, D257 ERN: 00414545 - 0041455012 December 2009 and also the charges of Khieu Samphan, Ieng Sary, Ieng Thirith on the case file.

⁹ *Supra* note 3, Ciorciari, John D and Chhang, Youk, at p. 261.

¹⁰ Archbold International Criminal Courts Practice and Procedure & Evidence, Thomson Sweet & Maxwell London (2005) Chapter 17, Defences and Procedural Bars to Jurisdiction, quoted from *S.W. v. United Kingdom and C.R. v United Kingdom* quoted in case of *Strelyz* [correct spelling: *Strelitz*], *Kessler and Krenz v. Germany* (Applications nos. 34044/96, 35532/97 and 44801/March 98, 22,2001, para 50). p761.

II. GOVERNING LEGAL STANDARD

Subject-Matter Jurisdiction

6. According to Article 9 of the 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 (“DK Period”), (the “Agreement”), the Extraordinary Chambers of the Courts of Cambodia (“ECCC”) has subject-matter jurisdiction over “the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide” (“Genocide Convention”).¹¹
7. Article II of the Genocide Convention defines genocide as “any of *the following acts* committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such¹²:
- (a) Killing members of the group;
 - (b) Causing serious bodily or mental harm to members of the group;
 - (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
 - (d) Imposing measures intended to prevent births within the group;
 - (e) Forcibly transferring children of the group to another group.
8. As aforementioned, the IS is predicated upon facts that support the charge that the Defendants allegedly committed acts of genocide against a substantial part of the Khmer national group or a subset of it. A three-pronged categorization of the evidence against the leaders of the CPK included therein is appropriate:
- i. **The Acts**, the effects of CPK policies; (evidence that one or more points of Article II of the Genocide Convention *were performed*);
 - ii. **The Group**, alleged groups targeted by CPK policies; (that the acts performed were targeted towards one or more *members of a protected group*, either *national*, ethnic, racial or religious, *as such*); and

¹¹ Art. 9 of the Agreement.

¹² It is imperative to note that article 4(2) of the ECCC Law adopted a definition of genocide that differs slightly from that codified in the Genocide Convention by replacing “as such” with “such as.” Although this variation may imply different legal standards, this submission will rely on the definition of genocide set forth in the Genocide Convention, as required by the Agreement and presumably, the intended meaning of the ECCC Law.

- iii. **The Intent, *dolus specialis*:** the nature and scope of CPK policies; (that the act was performed *with intent to destroy the group*, in whole or *in part*).

III. THE ACTS

9. Under Article II of the Genocide Convention and Article 4 of the ECCC Law, the Defendants allegedly committed the following acts that fall within the definition of genocide: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; and (c) deliberately inflicting on the group conditions of life calculated to bring its physical destruction in whole or in part.
10. As general support for genocide committed against the Khmer national group, the IS states that the policies allegedly implemented by the Defendants “*resulted in widespread starvation, systematic brutality, inhumane living conditions and the deaths of between 1.7 and 2.2 million people.*”¹³
11. Documentary evidence, witness accounts and the following excerpts from the IS, evidence that the Defendants, allegedly, not only deliberately killed and inflicted upon Khmer people conditions of life calculated to physically destroy part of their group, but they also caused serious bodily and mental harm to the Khmer population.¹⁴
12. “The CPK employed systematic discrimination against targeted groups including: former officials of the Khmer Republic; feudalists, capitalists and bourgeoisie; *new people*; Buddhists; the Cham religious and ethnic minority; the Vietnamese; *suspected bad elements.*”¹⁵
13. “The CPK distinguished between “new” people and “old” or “base” people. New people were those evacuated [forcibly transferred]¹⁶ from the cities or other parts of the country formerly controlled by the Khmer Republic government. The “old” or “base” people were

¹³ IS, para 2.

¹⁴ In accordance with the jurisprudence of the International Criminal Tribunal for Rwanda (“ICTR”), the ICTY Trial Chamber accepted “[a] broader notion of the term ‘destroy,’ encompassing also ‘acts which may fall short of causing death, in *Prosecutor v. Blagojevic and Jokic*, IT-02-60-T, Judgement, , 17 January 2005, para 662.

¹⁵ IS para 12 (emphasis added).

¹⁶ The correct phrase to be applied here is ‘forcibly transferred’ rather than ‘evacuated’ because the Khmer people were forced by the Khmer Rouge to leave the cities on the pretence they were being moved to avoid bombing, however it was actually to enforce the CPK’s plans to restructure society.

those who had resided in areas controlled by the CPK during the Khmer Republic period. According to the CPK, even those “new people” who did not belong to other targeted groups were infected with “imperialist-feudalist-capitalist outlooks, and the CPK actively promoted the idea that the ‘old’ or ‘base’ people were superior to the new people”¹⁷

14. “The CPK enforced its policies and rules through a nationwide network of detention and security centers that unlawfully detained, mistreated, tortured and executed vast numbers of the Cambodian population. These crimes resulted from conscious decisions systematically planned and implemented by the CPK leadership and were part of a widespread and systematic attack directed against virtually the entire civilian population.”¹⁸

IV. THE GROUP

15. The Khmer people constitute a national group, the ‘new people’ as defined by the CPK constitute a substantial part or a subset of that group and a targeted genocide group could be a subset of a larger group within the meaning of the Convention.¹⁹ Categorization of the Khmer people as a national group is not contentious. Indeed, various legal experts have recognized that the Khmer people constitute a national group within the meaning of the Convention.²⁰ And, nothing in the Genocide Convention requires that a protected group be a minority group.²¹
16. Furthermore, neither the drafting history of the Convention nor the language of the Convention itself indicates that the definition of genocide excludes cases where the victims

¹⁷ *Id.* para 12(c).

¹⁸ *Id.* para 3.

¹⁹ *Supra* note 5, Thomas W Simon, at p.109.

²⁰ S. Ratner, J. Abrams and J. Bischoff, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, Oxford University Press 3rd Edition (2009) at p.321 stated from Hurst Hannum and David Hawke, *The Case Against the Standing Committee of the Communist Part of Kampuchea*, Sept 15, 1986 at 147 – 49, stating: “The Khmer people of Cambodia clearly constitute a national group within the meaning of the Convention”. See also Hannum, *supra* note 2, at p. 104; In addition, an expert group appointed by the UN Secretary-General recognized that: “[t]he Khmer people of Cambodia do constitute a national group within the meaning of the Convention.” Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135, UN GAOR, 53rd sess., UN Doc. A/53/850, UN Doc. S/1999/231, annex para. 65 (1999).

²¹ *Supra* note 3, Ciorriari, John D. and Chhang, Youk at p. 261.

are part of the perpetrators' own group.²² This situation has been referred to as "autogenocide".²³

17. The Genocide Convention may not have intended to exclude such acts as those performed by the Khmer Rouge against the Khmer people, although it is unlikely to have contemplated the unique circumstances of the DK Regime when drafting in the light of the World War II atrocities. The term "national group" adopted by the Genocide Convention has been defined as "*a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties.*"²⁴
18. In addition, the Trial Chamber of the International Tribunal of the Former Yugoslavia (ICTY) in *Akayesu* established that the intent of the drafters of the Genocide Convention was to protect any *stable and permanent group*.²⁵
19. It is not necessary to establish that the Defendants intended to destroy the Khmer national group in its entirety. Instead, "[i]t is clear from the terms of the Genocide Convention that 'any act committed with intent to destroy part of a group, as such, constitutes an act of genocide within the meaning of the Convention.'"²⁶

²²John Quigley, *The Genocide Convention: An International Law Analysis*, Ashgate (2006), at p. 127, quoting UN-Sub-Commission on Prevention of Discrimination and Protection of Minorities, Ben Whitaker, Revised and updated Report on the question of the prevention and punishment of the crime of genocide, 2 July 1985, (finding: "the definition does not exclude cases where the victims are part of the violator's own group." UN Doc. E/CN.4/Sub.2/1985/6, p. 16 available at: <http://www.preventgenocide.org/prevent/UNdocs/whitaker/section2.htm>); supra note 2, Hannum, at p.105.

²³Remarks from UN rapporteur, Abdelwahab Boudhiba, Commission on Human Rights, 35th sess., 1510th meeting, *Question of the violation of human rights and fundamental freedoms in any part of the world*, p. 7, UN Doc. E/CN.4/SR.1510 (1979). See also, Caroline Fournet, *The Crime of Destruction and the Law of Genocide: Their Impact on Collective Memory*, Ashgate (2007), at p. 49, stating: "[T]he Convention itself, by expressly conferring protection to 'national' groups, does include cases of 'autogenocide.'"; supra note 2, Hannum, at p. 107 "nothing in the *travaux préparatoires* is contrary to or incompatible with the proposition that the Khmer people of Kampuchea constitute a national group within the meaning of Article II".

²⁴*Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Judgement, 2 September 1998, para 512.

²⁵*Id* at para 516. The Trial Chamber found that it was necessary above all to respect the intent of the drafters of the Genocide Convention which according to the *travaux préparatoires* was to protect any stable and permanent group.

²⁶*Prosecutor v. Brdjanin*, IT-99-36-T, Judgement, 1 September 2004, para 700. The Trial Chamber continued: "The Trial Chamber agrees with *Krstic* and *Stakic*, IT-97-24-T "the intent to destroy a group, even if only in part, means seeking to destroy a distinct part of the group as opposed to an accumulation of isolated individuals within it." para 524.

20. During his testimony in Case 001, the witness Him Huy verified that Defendant KAING Guek Eav alias DUCH stated during the DK regime that only 4 million out of the estimated population of 7 million would be allowed to live.²⁷
21. “[A]lthough the perpetrators of genocide need not seek to destroy the entire group protected by the Convention, they must view the part of the group they wish to destroy as a distinct entity which must be eliminated as such”²⁸. The “as such” qualification in Article II of the Genocide Convention suggests that victims must have been targeted “by virtue of their membership in a protected group”²⁹.
22. However, both the *travaux préparatoires* of the Genocide Convention and international jurisprudence indicate that this requirement and other motives are not mutually exclusive.³⁰ According to the ICTY Trial Chamber in *Prosecutor v. Blagojevic and Jokic*: “[t]he victims of the crime must be targeted because of their membership in the protected group, although not necessarily solely because of such membership”³¹. Furthermore, Appeals Chambers of both the ICTY and ICTR have emphasized the critical distinction between motive and intent: “The personal motive of the perpetrator of the crime of genocide may be, for example, to obtain personal economic benefits, or political advantage or some form of power. The existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide”³².
23. The Khmer national group, as it existed prior to 1975, was incompatible with the vision the Defendants had for Cambodia during the DK period. This is evidenced by the CPK’s distinction between “new” people and “old” or “base” people. The IS provides that “the CPK actively promoted the idea that the ‘old’ or ‘base’ people were superior to the new

²⁷ *Case against Kaing Guek Eav*, 001-18-07-2007-ECCC/TC, Transcript 20 July 2009 at p. 61, l. 14-17, Him Huy was asked about an interview he gave in 1990 in which he stated: “In office S-21, I heard Duch exchange conversation that we shall kill everyone except the 4 million people so it means we kill all people.” Him Huy responded: “First, Duch stated—he said everyone had to be killed and leaving only 4 million people and then later on he said everyone shall be smashed to bits to all and the statement I still remember ever since.” The Accused did not contest this statement, T. 20 July 2009, from p. 62, l. 23 through p.65, l. 14.

²⁸ *Supra* note 6, *Prosecutor v Radislav Krstic*, at para 590.

²⁹ See *supra* note 20, S. Ratner, J. Abrams and J. Bischoff, p. 286; see also *supra* note 2, Hannum, p. 107-110 with extensive reference to the *travaux préparatoires* of the Convention.

³⁰ See *supra* note 2, Hannum at p.107.

³¹ See *supra* note 14, *Prosecutor v. Blagojevic and Jokic*, at para. 669.

³² *Prosecutor v. Blaskic*, IT-95-14-A, Judgement, 29 July 2004, para 694 (referencing the Appeal Judgements in the ICTY *Jelusic and Kunarac* and in the ICTR *Kayishema and Ruzindana* “... [a]s far as criminal responsibility is concerned, motive is generally irrelevant in international criminal law”).

people”³³. Implicit in this distinction was the intent to destroy a significant number of “new” people. As the Khmer Rouge slogan went ‘*[k]eeping you is no gain, taking you away, no loss!*’³⁴.

24. The need to purify the Khmer national group by destroying it in part is further indicated by the fact that the CPK arrested and executed the wives and children of suspected bad elements, and considered as enemies “pursuant to a CPK policy of ‘*...[w]hen pulling out weeds, remove them roots and all!*’”³⁵. These facts indicate that the CPK’s intent to destroy was not restricted to perceived opponents of the regime, instead it extended to the part of the Khmer national group that represented elements of the Cambodia that existed prior to the DK period.
25. Moreover, the ‘enemies’³⁶ of the Khmer Rouge were labeled as members of the CIA and the KGB. These labels are absolutely arbitrary and had no real link to any political, social or economic opponent groups. The arbitrariness is demonstrated by the fact that the CIA referred to by witnesses did not mean the US-American ‘CIA’ but the Cambodian ‘CIA’.³⁷, It was a mere fictitious labeling similar to ‘traitor’, ‘bad element’, ‘17th April People’ and/or ‘new people’ to enforce the belief that these persons were enemies and had to be ‘smashed’. Becoming an ‘enemy’ therefore lacks any substance and indicates another tactic used by the CPK to destroy a part of the Khmer national group. This is supported by a statement of Nuon Chea saying that “If we kept these people, they would kill the nation. I have feel have feeling for both the nation and individual, but I clearly distinguish between them. If we must choose one or the other, I choose the nation. The individual cast aside.”³⁸
26. The persecution of “new” people further supports the contention that Defendants intended to destroy the Khmer group in part. The Khmer people did not label or identify themselves

³³ IS para 12(c).

³⁴ Henri Locard, *Pol Pot’s Little Red Book- The Sayings of Angkar*, Silkworm Books (2004) a quote in reference to diseased people, however it is noted in the regime ‘new people’ were considered diseased Also the saying “*The 17 April people are parasitic plants*” suggesting that to new people must be closely watched and eventually eliminated. p.185 and p. 189.

³⁵ *Id.*, at p.77 quoted from Ben Kiernan in, *Pol Pot Regime: Race, Power and Genocide in Cambodia* New Haven: Yale University Press, (1996) p.288.

³⁶ *Supra* note 27, T. 22 June 2009, p. 83, l. 1, The Accused said: “So this person **and the baby** was considered as enemy (emphasis added) and T. 15 June 2009, p. 32, l. 14-15, “They were considered to be enemies. So the wives, the children were also regarded as the enemy.”

³⁷ *Id.*, T. 17 June 2009, p. 11, l. 24-25. The Accused: “*...[m]ade by the S-21 Committee in order to implement the party’s political lines; that is, the enemy had to be smashed.*”

³⁸ Voice of America, 2 February 2010, by Mean Kimseng.

as “new” or “base” people, nor does such a classification correspond to an identifiable group that falls outside of the protection afforded by the Genocide Convention. The IS recognizes that certain “new people” did not belong to “other targeted groups” but were attacked because they harbored “imperialist-feudalist-capitalist” outlooks. This amorphous description represents a *motive* for attack rather than a bona fide social, political, or economic group. The CPK sought to eradicate imperialism, feudalism, and capitalism in Cambodia; the Defendants believed that to do so, it was necessary to destroy part of the Khmer national group.

27. Consequently, if the Defendants intended to destroy part of the Khmer national group as such, other ulterior motives harbored by the Defendants during Democratic Kampuchea are irrelevant.
28. It is also necessary to address that if the widespread deaths of the Khmer people were “caused by random violence or harsh conditions imposed on society at large”, it would be difficult to conclude that the acts committed against them constituted genocide under the Convention.³⁹ However, the mass executions were not a matter of random violence. Executions were orchestrated by the CPK. Nor were the tens of thousands of deaths caused by starvation and overwork unintended consequences of the harsh conditions implemented by the regime. Rather, they were a matter of policies intended to destroy part of the population, which were devised by the CPK intended to purify the Khmer national group.⁴⁰ The Defendants allegedly rejected foreign assistance and set unworkable production expectations thereby creating working conditions that would cause the deaths of hundreds of thousands of Khmer people.⁴¹
29. It is observed by Hurst Hannum that in line with creating a new society or nation the reasoning behind the DK period appears to be that the Khmer people were only accused of treachery because they were going to be eliminated anyway.⁴² They were not merely

³⁹ See supra note 20, S. Ratner, J. Abrams and J. Bischoff at pp. 286-87.

⁴⁰ IS at para 3.

⁴¹ IS at para 11.

⁴² See supra note 2, Hannum, quoting from Barnett, A Highly Centralized Dictatorship, in Chandler and Kiernan, Statement of Ieng Sary, Foreign Minister of Democratic Kampuchea, quoted in Chandler, Perceptions of Cambodian History, in Revolution and its aftermath in Kampuchea: Eight Essays 34, D.P. Chandler & Ben Kiernan eds., (1983) at p. 224, that “[p]eople were not eliminated because they were mistakenly considered traitors, they were accused of treason because they were going to be eliminated” p.89.

regarded as enemies, but rather as sub-human⁴³. During a 6-month period in 1978, the Khmer Rouge executed an estimated minimum of 100,000 people in its purge of the Eastern Zone. Hannum observed:

“While some of those executed in the Eastern Zone belonged to a recognizable political group judged disloyal by Democratic Kampuchea’s central leadership, far larger numbers of people were killed because they were deemed to be tainted merely by having lived under the jurisdiction of the [presumably] disloyal faction.”⁴⁴

30. Both instances indicate that Khmer people were killed by virtue of being members of the Khmer national group. Virtually every Cambodian citizen was vulnerable to attack by the regime, as part of its policy to purify and rebuild the Cambodian nation. The citizens of Cambodia were vulnerable to the CPK’s attacks solely because they were members of the Khmer national group.
31. Those who disagree with categorization of the crimes committed in Cambodia during the DK period as genocide argue that the Khmer Rouge lacked the requisite *dolus specialis*.⁴⁵ They contend that the Khmer Rouge targeted their non-minority victims as social, political, or economic elements that the regime sought to eradicate.⁴⁶ These groups are not protected by the Convention.⁴⁷
32. However, the proposition that the Khmer Rouge’s intent to destroy was limited to defined and identifiable political, social, or economic groups constitutes a critical mischaracterization of the facts.⁴⁸ It is readily apparent that the destruction wrought by the

⁴³ *Id.* at Hannum, p. 89.

⁴⁴ *Id.* Hannum at p. 90.

⁴⁵ This interpretation indicates that to establish that the Defendants harbored the requisite *dolus specialis*, it must be shown that the Khmer Rouge committed acts of genocide against the Khmer people because they intended to destroy part of the Khmer national group itself. According to supra note 2, Hannum: “*With respect to the Khmer national group, there was obviously no intention on the part of the DK authorities to destroy the Khmer group ‘in whole,’ as this would have implied their own demise. Nevertheless, there was a clear intent to destroy the national group ‘in part.’*” at p.111.

⁴⁶ William Schabas, *Universal Jurisdiction: Myths, Realities and Prospects: Problems of International Codification – Were the Atrocities in Cambodia and Kosovo Genocide?*, in: *New England Law Review* (2001), Vol. 35 (2); para. 290.

⁴⁷ Supra note 24, at para 511, holding: “On reading through the *travaux préparatoires* of the Genocide Convention, it appears that the crime of genocide was allegedly perceived as targeting only ‘stable’ groups, constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more ‘mobile’ groups which one joins through individual voluntary commitment, such as political and economic groups.”

⁴⁸ Supra note 2, Hannum, at pp.112-113, stating: “[...] it is not consistent with the purpose, wording, or preparatory work of the Convention simply to define one-seventh to one-third of the population [of Cambodia] as ‘political’ and thus beyond the Convention’s scope.”

Khmer Rouge was not limited to discernable groups.⁴⁹ The IS indicates the regime harbored the intent to destroy a substantial part of the Khmer people as a national group in and of itself.

33. Even the groups listed in the IS as “targeted” appear to reflect motives for discrimination rather than identifiable groups. The IS asserts that suspected “bad elements” were a group that was discriminated against by the CPK. Yet, in reality, absolutely any member of the Khmer national group could be identified as a suspected bad element. Witness statements indicate that anyone identified as a “bad element” for reasons as varied as romantic involvement with other Khmer nationals or “feigning” illness.⁵⁰
34. The myriad of reasons for which Khmer people were killed or subjected to serious bodily harm renders it impossible to categorize the victims that the CPK intended to destroy as anything but part of the Khmer people.
35. Essentially, the Defendants sought to create a new Cambodia by rebuilding the Cambodian nation from “Year Zero,” and they harbored the specific intent to destroy an undesirable part of the Khmer national group who they perceived to pose a threat to the implementation of the CPK agenda.

V. THE INTENT

36. Under the Genocide Convention, the mental element required to establish genocide is “the intent to destroy, in whole or in part, a national, ethnical, racial or religious group.” The requirement for the crime of genocide is considered *dolus specialis* or ‘special intent,’ which is “an aggravated criminal intent that must exist in addition to the criminal intent accompanying the underlying offence.”⁵¹ The Trial Chamber ICTY explained that: “[i]t is

⁴⁹ Supra note 22, Quigley argues that, “...[A]brams sees an obstacle in the fact that the Khmer perpetrators focused on particular strata within the Khmer group, and that those strata are not mentioned in Article II, namely officials of the prior regime, intellectuals, and professional people.[footnote omitted]. Yet one can intend to destroy a group by destroying only certain strata. The absence of a reference to these groups in Article II does not negative genocidal intent. Nothing in Article II or in its intent requirement, precludes liability for acts against a group of which the perpetrator is a member.” At p. 129.

⁵⁰ See e.g. Report on enemy situation inside unit, 4 November 1977, Doc. No. E3/144, ERN 00143564-00143565 (EN).

⁵¹ Antonio Cassese et al., *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 1 (Oxford University Press (2002), at p. 338. See also, *Prosecutor v. Stakic*, IT-97-24-T, Judgement, 31 July 2003, para 520, finding: “Genocide is a unique crime where special emphasis is placed on the specific intent. The crime is, in fact, characterized and distinguished by a ‘surplus’ of intent. The acts proscribed in [the statute] are elevated to genocide

not sufficient that the perpetrator simply knew that the underlying crime would inevitably or likely result in the destruction of the group. The destruction, in whole or in part, must be the aim of the underlying crime(s).”⁵²

37. Hannum underscored the critical distinction between motive and intent by finding that:

*“The wholesale massacres of families, villages and other subgroups of the Khmer people provide that the aim of the DK government was not merely the elimination of political opponents or reform of the socioeconomic structure of the country, but rather the wholesale remaking of the Khmer people according to a deliberately imposed vision. Indeed, these mass killings were a direct consequence of the CPK’s specific intent to purify the Khmer national group. The regime’s intent to purify the group implies their intent to destroy part of group as such.”*⁵³

38. The Trial Chamber of the ICTY ruled in *Prosecutor v. Stakic* that the requirement of intent and *dolus specialis*, special intent, can be inferred:

*“It is generally accepted, particularly in the jurisprudence of both this Tribunal and the Rwanda Tribunal, that genocide dolus specialis can be inferred either from the facts, the concrete circumstances, or a ‘pattern of purposeful action’”*⁵⁴,

and again in *Prosecutor v. Krstic*:

*“Where direct evidence of genocidal intent is absent, the intent may still be inferred from the factual circumstances of the crime”*⁵⁵.

39. In the *Krstic* case, the ICTY held that the necessary intent for genocide arose among other indicia’s from the concealment of bodies in mass grave sites through out the country, and the consequential denial of any decent burial.⁵⁶ The factual circumstances surrounding the mass executions ordered by the CPK are similar, as unmarked mass graves were discovered throughout Cambodia in the wake of the DK period.

when it is proved that the perpetrator not only wanted to commit those acts but also intended to destroy the targeted group in whole or in part as a separate and distinct entity. The level of this intent is the *dolus specialis* or ‘specific intent,’ terms that can be used interchangeably.”

⁵²Supra note 14, *Prosecutor v. Blagojevic and Jovic*, at para 656.

⁵³ Supra note 2, Hannum, at p. 89. He refers to an Amnesty International Report that found that the physical liquidation of undesirables described as ‘worthless ones’ that occurred in Kampuchea included the massacre of entire families and villages and substantial percentages of the population in some geographical areas.

⁵⁴ See supra note 51, *Prosecutor v. Stakic*, para 526.

⁵⁵ *Prosecutor v. Krstic* IT-98-33-A, 19 April 2004, para 34.

⁵⁶ Supra note 6, *Prosecutor v. Krstic*, para 596, “.....[T]here is a strong indication of the intent to destroy the group as such in the concealment of the bodies in mass graves...thereby preventing any decent burial in accord with religious and ethnic customs and causing terrible distress to the mourning survivors, many of whom have been unable to come to a closure until the death of their men is finally verified.”

40. Accordingly, it is not necessary for the IS to contain references to evidence reflecting explicit statements from the Defendants regarding their intent to destroy part of the Khmer national group. The CPK policies, in addition to the subsequent deaths and inhumane treatment of the Khmer national group are powerful indicia that the Defendants harbored the requisite intent.

VI. EXPERT

41. Co-Lawyers for Civil Parties hereby respectfully submit that the circumstances and practice of the DK period are unique, in particular reference to the mass killings of a significant part of the Khmer national group. International law cannot deny reparation for such a heinous crime without careful analysis of the facts and their correct and proper legal qualification by an experienced legal expert to assist OCIJ in this highly debated question.
42. Co-Lawyers for Civil Parties suggest to the OCIJ to appoint an experienced, highly qualified and independent legal expert to obtain expert advice on the question if the genocide charge on the Khmer national group as a target group in and of itself is appropriate in the circumstances. Co-lawyers for the Civil Parties request all parties be consulted in the selection process.

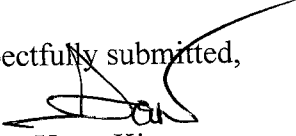
VII. CONCLUSION AND REQUEST

43. The Defendants allegedly implemented a drastic plan to rebuild Cambodia from “Year Zero” and recognized that to do so, it was necessary to destroy a part of the Khmer national group. The claim that the CPK’s intent to destroy was limited to economic, social, or political groups is an overly formalistic interpretation of the Genocide Convention, and blurs the distinction between specific intent and motives. If the OCIJ believes it possible that the Defendants intended to cause the deaths of hundreds of thousands of Khmer nationals by implementing CPK policy, and that this action may be tantamount to genocide, then this is sufficient to obtain an expert opinion as per this Request.
44. For our clients, the Khmer Civil Parties who do not belong to any minority group, it is of utmost importance that the crimes committed against them are properly legally qualified and include the charge of genocide against them, if any.

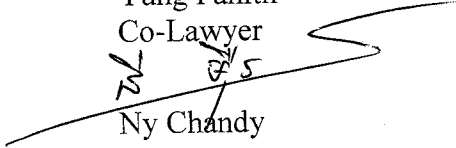
For all foregoing said, Co-Lawyers for Civil Parties request

the appointment of a highly qualified, experienced and independent expert to examine the facts on the case file and to establish whether the charge of genocide against the Khmer national group is justifiable against the Defendants.

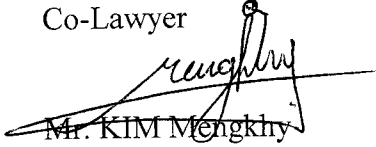
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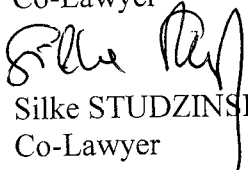
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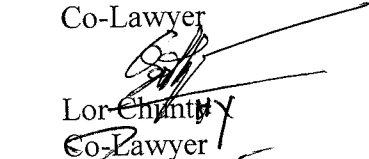
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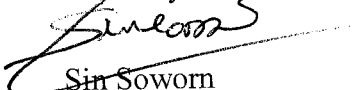
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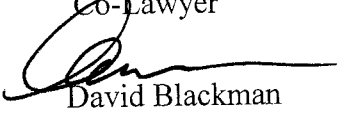

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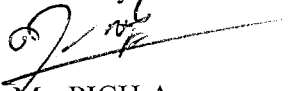

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Signed in Phnom Penh, Kingdom of Cambodia, on this 4 February 2010.