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APPEAL AGAINST COMBINED ORDER ON CO-PROSECUTORS' TWO REQUESTS FOR INVESTIGATIVE ACTION REGARDING KHMER KROM AND THE CIVIL PARTIES REQUEST FOR SUPPLEMENTARY INVESTIGATIONS REGARDING GENOCIDE OF THE KHMER KROM & THE VIETNAMESE

Filed by:

Distribution to:

Co-Lawyers for Civil Parties:

The Pre-Trial Chamber:

Mr. NY Chandy
Mr. Mahdev MOHAN
Ms. Lyma NGUYEN
Joined by:
Ms. Silke STUDZINSKY

Judge PRAK Kimsan
Judge NEY Thol
Judge HUOT Vuthy
Judge Katinka LAHUIS
Judge Rowan DOWNING

Legal Associates:
Prof. Laurel E. FLETCHER
Mr. Jeffrey BAE
Mr. Levon KEVORKIAN
Ms. Sari AZIZ

Co-Lawyers for the Charged Person:
IENG Sary
Mr. ANG Udom
Mr. Michael G. KARNAVAS

ឯកសារបញ្ជាក់ថាជាកម្រិតបញ្ជាក់តាមច្បាប់ដើម	
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IENG Thirith

Mr. PHAT Pouv Seang

Ms. Diana ELLIS

NUON Chea

Mr. SON Arun

Mr. Michel PESTMAN

Mr. Victor KOPPE

KHIEU Samphan

Mr. SA Sovan

Mr. Jacques VERGES

KAING Guek Eav alias DUCH

Mr. KAR Savuth

Mr François ROUX.

Ms. Marie-Paule CANIZARES

Co-Prosecutors

Ms. CHEA Leang

Mr. Andrew T. CAYLEY

Co-Lawyers for Civil Parties

Mr. HONG Kimsuon

Mr. LOR Chunty

Mr. KIM Mengkhy

Mr. KONG Pisey

Mr. YUNG Panith

Ms. SIN Soworn

Ms. MOCH Sovannary

Ms. Martine JACQUIN

Mr. Philippe CANONNE

Ms. Elizabeth RABESANDRATANA

Ms. Annie DELAHAIE

Mr. Olivier BAHOUGNE

Mr. Patrick BAUDOIN

Ms. Fabienne TRUSSES-NAPROUS

Mr. David BLACKMAN

Mr. Patrick BAUDOIN

Ms. Marie GUIRAUD

Unrepresented Civil Parties

I. INTRODUCTION AND PETITION

Pursuant to Rules 55(10), 74(4)(a) and 75 of the ECCC Internal Rules (“IRs”), the Co-Lawyers for the 9 Khmer Krom Civil Parties¹ and 17 Khmer Krom Civil Party Applicants² and the 16 ethnic Vietnamese Civil Party Applicants (collectively “the Civil Parties and Civil Party Applicants”),³ appeal the Co-Investigating Judges’ (“CIJs or OCIJ”) Combined Order on Co-Prosecutors’ Two Requests for Investigative Action Regarding Khmer Krom and Mass Executions in Bakan District (Pursat) and the Civil Parties Request for Supplementary Investigations Regarding Genocide of the Khmer Krom & the Vietnamese (“Combined Order”),⁴ which rejects separate and independent requests for investigative action submitted by both the Office of the Co-Prosecutors

¹ **KK01** Civil Party 09-VU-02140 (accepted as a Civil Party on 14 January 2010,); **KK02** Civil Party 09-VU-02139 (accepted as a Civil Party on 14 January 2010); **KK04** Civil Party 09-VU-02137 (accepted as a Civil Party on 14 January 2010); **KK06** Civil Party 09-VU-02135 (accepted as a Civil Party on 14 January 2010); **KK07** Civil Party 09-VU-02134 (accepted as a Civil Party on 14 January 2010); **KK08** Civil Party 09-VU-02133 [08-VU-02103] (accepted as a Civil Party 14 January 2010); **KK25** Civil Party 08-VU-02131 (accepted as a Civil Party 14 January 2010, D22/0132); **KK12** Civil Party 09-VU-02149 [08-VU-01574] (accepted as a Civil Party on 14 January 2010); **KK27** Civil Party 09-VU-04266 (accepted as a Civil Party on 14 January 2010).

² **KK03** Civil Party application 09-VU-02138, D22/0260; **KK05** Civil Party application 09-VU-02136, D22/0260; **KK10** Civil Party application 09-VU-02151, D22/0273; **KK11** Civil Party application 09-VU-02150; **KK13** Civil Party application 09-VU-02148, D22/0270; **KK14** Civil Party application 09-VU-02147, D22/0269; **KK15** Civil Party application 09-VU-02145, D22/0267; **KK16** Civil Party application 09-VU-02146, D22/0268; **KK17** Civil Party application 09-VU-02144, D22/0268; **KK18** Civil Party application 09-VU-02143, D22/0265; **KK19** Civil Party application 09-VU-02142, D22/0264; **KK 20** Civil Party application 09-VU-02141, D22/0263; **KK21** Civil Party application 09-VU-00638, D22/0134; **KK22** Civil Party application 09-VU-02267, D22/0135; **KK23** Civil Party application 09-VU-00641, D22/0101; **KK24** Civil Party application 09-VU-02130, D22/0102; **KK26** Civil Party application 09-VU-04265, D22/0274.

³ **VN01** Civil Party application 08-VU-02379 (accepted as a Civil Party on 18 August 2009 Ref: D22/125/3); **VN02** Civil Party application 08-VU-02380 (accepted as a Civil Party on 1 September 2009 Ref: D22/171/4); **VN03** Civil Party application 08-VU-02378; **VN04** Civil Party application 08-VU-02116 (accepted as a Civil Party on 2 October 2009 Ref: D22/171/2); **VN05** Civil Party application 09-VU-01723; **VN06** Civil Party application 09-VU-01722; **VN07** Civil Party application 09-VU-02241; **VN08** Civil Party application 09-VU-02242; **VN09** Civil Party application 09-VU02243; **VN10** Civil Party application 09-VU-02291 (accepted as a Civil Party on 4 December 2009 Ref: D22/205/2); **VN11** Civil Party application 09-VU-02239; **VN12** Civil Party application 09-VU-02240; **VN13** Civil Party application 09-VU-00687; **VN14** Civil Party application 09-VU-00686; **VN15** Civil Party application 09-VU-00688; **VN16** Civil Party application 09-VU-00685.

⁴ Combined Order on Co-Prosecutors’ Two Requests for Investigative Action Regarding Khmer Krom and Mass Executions in Bakan District (Pursat) and the Civil Parties Request for Supplementary Investigations Regarding Genocide of the Khmer Krom & the Vietnamese, dated 13 January 2010, D250/3/3.

(“OCP”)⁵ and the Co-Lawyers.⁶ The OCIJ erred as a matter of law and fact in rejecting these requests, which are crucial to support the ongoing investigation concerning Case No. 002/19-09-2007/ECCC/OCIJ (“Case 002”). The present appeal incorporates by reference the arguments made in the Co-Lawyers’ separate but related appeal against the OCIJ’s Order on the Admissibility of Civil Party Applications Related to Request D250/3 (“Admissibility Order”).⁷

These appeals are joined by International Co-Lawyer Ms. Silke STUDZINSKY on behalf of her recognized Civil Party/Civil Party Applicant clients who are at risk of being similarly deprived of their extant Civil Party status or denied an opportunity to become Civil Parties, as the case may be, in the event they too are adjudged to fall outside the scope of investigation as determined by the CIJs. Her clients thus have a particular interest in the appeal outcome, which is the first appeal under IR 74 (4) (a) in respect of an investigative request by Civil Party/Civil Party Applicant clients.

Pursuant to IR 77(6), the Co-Lawyers respectfully request that both appeals be joined and heard in a public oral hearing before the Pre-Trial Chamber, for the following compelling reasons:

- (a) the appeals are unprecedented – they are the first of their kind under IR 74(4)(a) in respect of an order by the CIJs rejecting an investigative request concerning genocide of targeted groups, and under IR 74(4)(b) in respect of an order by the CIJs revoking extant Civil Parties’ status and rendering Civil Party Applicants applications inadmissible;
- (b) the appeals raise issues of public interest that have been widely covered by the local media;
- (c) considering the significance the appeals hold to the Civil Parties and Civil Party Applicants from far away provinces, a public hearing which can be audio-visually relayed to these Applicants is in the interests of justice;

⁵ Co-Prosecutors’ Request for Investigative Actions Regarding Khmer Krom and Mass Executions in Bakan District (Pursat), dated 11 December 2009, D274; Co-Prosecutors’ Further Investigative Request Regarding the Khmer Krom (collectively “OCP’s Requests”), dated 6 January 2009, D274/2.

⁶ Civil Parties’ Request for Supplementary Investigations Regarding Genocide of the Khmer Krom & the Vietnamese (Co-Lawyers’ Request), dated 3 December 2009, D250/3.

- (d) considering that the Chamber's decision will conclusively determine the role of the Civil Party Applicants in Case 002, a public hearing is in the interests of justice;
- (e) the issues raised by the appeals will be brought to an end by the Chamber's decision;
- (f) a public hearing would not affect public order or any protective measures authorized by the court.

II. SUMMARY OF ARGUMENT

1. To avoid repetition, the Vietnamese Civil Party Applicants adopt and incorporate arguments raised by the Khmer Krom Civil Party Applicants in relation to the OCP's Introductory Submission ("IS") and any other facts raised in relation to crimes against the Vietnamese, and *vice versa*.
2. Khmer Krom Civil Party Applicants and Civil Parties will show that, contrary to the Combined Order:
 - a. The Co-Prosecutors' and/or the Co-Lawyers' Requests fall within the scope of the judicial investigation.
 - i. The OCIJ is cognizant of crimes against the Vietnamese and (by association) the Khmer Krom in light of the IS; the OCIJ's interviews with Vietnamese and Khmer Krom persons in the course of the investigation; and new facts in the form of empirical and ethnographic data that the OCIJ has received from the Co-Lawyers.
 - ii. The Co-Lawyers' Request supports the OCIJ's investigation into the "clear and consistent evidence" regarding the Communist Party of Kampuchea's ("CPK") policy to discriminate and eradicate all Vietnamese and those connected to them.⁸

⁷ Order on the Admissibility of Civil Party Applications Related to Request D250/3, dated 13 January 2010, D274/3.

⁸ *Id.* at para. 4.

- iii. The scope of the investigation for the crimes of genocide and other crimes against humanity premised on an element of persecution of a targeted group (such as the Vietnamese and the Khmer Krom) should not be limited to certain geographic regions. In such cases, the far-reaching nature and scope of the crimes should inform the investigation.
- b. The OCIJ can investigate the facts set out in the OCP's Requests as they, individually and/or together, constitute a Supplementary Submission ("SS").
 - i. The Requests are consistent with the formal definition of a SS under the IR.
 - ii. The OCIJ erred as a matter of law in ruling that Article 3.2(h) of Practice Direction on filing of documents ECCC/01/2007/Rev.4 ("Practice Direction")⁹ precludes the Requests from being an SS.
 - iii. The Requests satisfy the substantive requirements for a SS under IR53(1) and Article 4.1 of the Practice Direction.
 - iv. The OCIJ was formally seized of the crimes committed against Khmer Krom Civil Parties and Civil Party Applicants in Bakan District by the Requests.
 - c. The OCIJ can investigate the facts set out in the Co-Lawyers' Request, which is separate and independent from the OCP's Requests.
 - i. The Co-Lawyers' Request establishes crimes "within the jurisdiction of the ECCC," which the OCIJ must investigate pursuant to IR 23(1)(a) and IR 55(1).
 - ii. The OCIJ misapplied IR 55 when it ruled that it did not have the legal authority to investigate facts set forth in the Request.
 - iii. The Co-Lawyers separately submitted "new facts" in the form of empirical reports and audio-visual data, which the OCIJ has not

⁹ Combined Order, para. 6.

- investigated and/or referred to the OCP for investigation under IR 55(3),
- iv. New facts were further submitted by the OCP *proprio motu* through the its Requests, which constitute a Supplementary Submission.
 - v. The OCIJ concedes it has encountered “new facts” in the course of witness interviews with Khmer Krom persons, yet has not reviewed this evidence nor considered further investigative action in light of the OCP’s or Co-Lawyers’ Requests.
 - vi. The OCIJ’s arbitrary determination of the scope of judicial investigation as being limited by the scope of the prosecutorial investigation, rather than the OCIJ’s judicial investigation which is only determined by the Closing Order issued under IR 67 has prejudiced the rights of the Civil Parties and Civil Party Applicants.
 - vii. The OCP’s unexplained decision to title its submission as an “investigative request” rather than a “supplementary submission” is a formalistic difference and should not be allowed to prejudice the rights of Civil Parties.
- d. By limiting the participation of the Civil Parties and Civil Party Applicants at the ECCC, the ECCC undermines the foundational principles of the ECCC.
- i. The Combined Order curtails the rights of the Civil Parties and Civil Party Applicants, contrary to their inherent rights to truth and justice.
 - ii. The Combined Order contravenes the ECCC’s stated purpose of permitting civil party action as a means of recognizing the need for national healing and reconciliation.
 - iii. The Combined Order gives the impression that the civil party process is selective and arbitrary, with little resonance for the

victim participants who have bravely come forward to relate their suffering.

- iv. The Combined Order erases the Khmer Krom from the ECCC historical/legal record of the ECCC, effectively denying their suffering as a group during the Democratic Kampuchea (“DK”) period.
- v. The Combined order violates international human rights standards that protect victims’ rights.

III. ARGUMENT

A. The Co-Prosecutors’ and/or the Co-Lawyers’ Requests Fall within the Scope of the Judicial Investigation

1. The OCIJ is cognizant of crimes against the Vietnamese and, by association, the Khmer Krom in light of the IS. The IS avers that the Charged Persons carried out “a policy of discriminating and killing ethnic Vietnamese... [which] evolved into one of eliminating all those with any connections to Vietnam.”¹⁰
2. The OCP’s and Co-Lawyers’ Requests emphasize that the Khmer Krom, who hail from South Vietnam (Kampuchea Krom) were targeted for elimination based on their association with Vietnam, and that charges should be brought in respect of the crimes they have suffered. Specifically, the OCP added that the “Khmer Krom were killed by the CPK because of their connection to the Youn (Vietnamese).”¹¹ In their Request, the Co-Lawyers adduced evidence indicating that the Khmer Rouge (“KR”) perceived the Khmer Krom “to be nationally and/or ethnically linked to the Vietnamese,”¹² and suffered under the very same genocidal policies that led the OCP in its IS to request, *inter alia*, charges of genocide and

¹⁰ Co-Prosecutors’ Introductory Submission, dated 18 July 2007, D2, para 12(f).

¹¹ D274, para 5.

¹² Civil Parties’ Request for Supplementary Investigations Regarding Genocide of the Khmer Krom & the Vietnamese, dated 3 December 2009, D250/3, para. 3.

crimes against humanity on behalf of the Vietnamese ethnic/national group against the Charged Persons.¹³

3. The matters raised by the Co-Lawyers and/or the OCP establish crimes within the jurisdiction of the ECCC, including crimes against humanity,¹⁴ grave breaches of the 1949 Geneva Conventions, crimes of genocide,¹⁵ and national crimes.¹⁶ Not only has the OCIJ confirmed such charges,¹⁷ but the OCIJ has not disputed the fact that the Khmer Krom are a separate “targeted group”¹⁸ and/or a group with strong real or perceived links to Vietnam – rather, it has expressly referred to the Khmer Krom as an “ethnic group.”¹⁹
4. It follows that the crimes established by the OCP’s and the Co-Lawyers’ evidence compulsorily requires a “judicial investigation.”²⁰ Yet, OCIJ has refused to undertake investigative action in respect of the Civil Parties and Civil Party Applicants or consider whether it is necessary for the conduct of their judicial investigation under IR 55(10)²¹, despite indicting the Charged Persons with committing these crimes against the Vietnamese ethnic/national group to which the Civil Parties and Civil Party Applicants belong.²²

¹³ Introductory Submission para 122(b)-(c).

¹⁴ Law on the ECCC, Articles 5, 29 (new), and 39 (new).

¹⁵ Law on the ECCC, Articles 4, 29 (new), and 39 (new).

¹⁶ Law on the ECCC, Articles 3, 29 (new), and 39 (new).

¹⁷ See Written Record of Interview of Charged Person (Nuon Chea) (“Written Record”), dated 15 December 2009, D275, paras 4 & 13.

¹⁸ Written Record of Interview of Charged Person (Nuon Chea) (“Written Record”), dated 15 December 2009, D275, para 4 (“Following a review of the evidence of the co-operatives and work-sites, security centers and execution sites, the incidents of displacement of persons and the treatment of specific groups including Chan, *Vietnamese*, *Buddhists and other targeted groups*, we consider that there is clear and consistent evidence that acts constituting crimes against humanity, grave breaches of the 1949 Geneva Conventions, crimes of genocide and national crimes were committed”) (emphasis added).

¹⁹ Order on Civil Party Request for Extension of Page Limit for Filing of Submission Seeking Supplementary Investigation, dated 3 December 2009, D250/2, para. 5.

²⁰ Internal Rules ECCC/09/2009/Rev.4 (“IR”), 53(1).

²¹ IR 55(10) (“At any time during an investigation, ... a Civil Party may request the Co-Investigating Judges to make such orders or undertake such investigative action as they consider necessary for the conduct of the investigation...”).

²² Written Record of Interview of Charged Person (Nuon Chea) (“Written Record”), dated 15 December 2009, D275, para 13.

5. The Co-Lawyers' Request supports the OCIJ's investigation into the clear and consistent evidence regarding the CPK's policy to discriminate and eradicate all Vietnamese and those connected to them.²³ The IS merely identifies areas in which some of the acts of genocide and crimes against humanity took place; the evidence of the underlying policy is far broader and is not confined to specific regions which the OCP happened to have investigated as of 18 July 2007. For this reason, the additional instances of crimes raised by the Vietnamese and Khmer Krom Civil Party Applicants, respectively, are within the scope of investigation precisely because they serve to prove persecution against the Vietnamese and Khmer Krom. Further, as the evidence of the atrocities committed against the Khmer Krom speaks to the existence of the genocidal/persecutory policy, the OCP's Requests and the Co-Lawyers' Request falls within the scope of the investigation.
6. The scope of the investigation for the crimes of genocide and other crimes premised on an element of persecution of a targeted group should not be limited to the provinces listed in the IS. In these cases, the nature and scope of the crime should inform the investigation. The OCIJ therefore erred in holding that "investigations into the treatment of Khmer Krom and ethnic Vietnamese people in geographic regions which do not fall within the scope of the Introductory ... Submission[]"²⁴ are outside its jurisdiction. The IS is not exhaustive, but merely raises instances of *specific crimes*²⁵ as evidence of the CPK's national genocidal policy against such targeted groups.
7. Mass persecution crimes such as genocide and crimes against humanity are, by definition, crimes directed against targeted groups of persons rather than against a particular swathe of territory. Probative evidence of a plan to target such groups cannot be delimited geographically. In *Prosecutor v.*

²³ Introductory Submission, para. 12(f)

²⁴ Combined Order, para. 9.

Milosevic, for example, the International Criminal Tribunal for the Former Yugoslavia ('ICTY') Trial Chamber noted that the genocidal intent of the Bosnian Serb leadership could be inferred from the evidence collected from seven different municipalities.²⁶ Similarly, a geographical limitation on areas where crimes against humanity were committed would run counter to the legal requirement that acts amounting to such crimes occurred in a widespread or systematic manner.²⁷ The OCIJ erred as a matter of fact and law by dismissing the OCP's and the Co-lawyers' Requests on the basis that they did not fall within the scope of the OCP's own IS.

B. The OCIJ Can Conduct Further Investigative Action pursuant to the OCP's Requests as they Constitute a Supplementary Submission

8. The OCP's Requests, read individually or together, constitute an SS (in form and in substance) that expands the scope of the IS to include the Khmer Krom minority in Bakan District, Pursat Province. The OCP's Requests are consistent with the formal definition of an SS under the IR. According to the IR's Glossary, an SS "refer[s] to a written submission by the Co-Prosecutors requesting the Co-Investigating Judges to issue an order or undertake further action in an ongoing investigation."²⁸ The OCP's Requests fit this description perfectly, expressly urging the OCIJ to conduct further investigative action in respect of the ongoing judicial investigation.²⁹
9. The OCIJ conceded as much in its Combined Order, noting that the OCP submitted a "further investigative request under Internal Rule 55(10) requesting the Co-Investigating Judges to take certain actions related to

²⁵ Introductory Submission, para. 69, 70

²⁶ *Prosecutor v. Milosevic*, "Decision on Motion for Judgment of Acquittal," Case No. IT-02-54-T, 16 June 2004, para. 246.

²⁷ Law on the ECCC, art. 5.

²⁸ IR, Glossary.

²⁹ Co-Prosecutors' Request for Investigative Actions Regarding Khmer Krom and Mass Executions in Bakan District (Pursat), dated 11 December 2009, D274, para. 1.

alleged crimes committed against the Khmer Krom population in the Bakan District of Pursat Province.”³⁰ However, the OCIJ did not go on to consider whether this description comports with the formal definition of an SS. It is therefore not altogether clear how the OCIJ arrived at the conclusion that the OCP’s Requests “cannot be considered to be a Supplementary Submission”.³¹

10. The OCIJ misdirected itself in ruling that Article 3.2(h) of the Practice Direction requires that “filings [by the OCP] which purport to be Introductory or Supplementary Submissions must be stated as such.”³² Article 3.2(h) simply states that all documents should have “the short title of the document, which shall be as concise as possible.”³³ Neither Article 3.2(h) nor any other procedural rule suggests that the title of a submission is dispositive in the CIJs’ determination of the nature and character of the document. Had the OCIJ scrutinized the substance of the OCP’s Requests, rather than the mere form of their respective cover-pages, it would have recognized that the Requests constituted an SS that ought to be investigated.
11. Indeed, the OCP’s Requests satisfy the substantive requirements for an SS under IR53 (1) and Article 4.1 of the Practice Direction. In the Combined Order, the OCIJ noted that IR 53(1), which deals with an IS, also applies to a SS.³⁴ Under this rule, each submission must include “a summary of facts,” “the type of offence(s) alleged,” “the relevant provisions of the law that defines and punishes the crimes,” “the name of any person to be investigated, if applicable,” and “the date and signature of both Co-Prosecutors.”³⁵ Further, the OCP’s Requests also satisfy the criteria set forth in Article 4.1 of the Practice Direction for Filing Document, which

³⁰ Combined Order, para. 3.

³¹ D250/3/3, para 7.

³² D250/3/3, para 6.

³³ Practice Direction ECCC/01/2007/Rev.4 (“Practice Direction for Filing Documents), art. 3.2(h).

³⁴ Combined Order, para. 6.

³⁵ IR 53(1).

sets out the elements that all documents filed before the Co-Investigating Judges or a Chamber must include.³⁶ Under Article 4.1, documents filed before the OCIJ or a Chamber must contain the following where appropriate: “an introduction containing the legal basis and a petition for the action or relief sought,” “a summary of the grounds of argument,” “an outline of relevant facts, including a chronology where appropriate,” “a summary of the relevant law, including extracts of relevant legal sources,” and “the detailed legal argument.”³⁷ The OCP’s Requests include all of these elements and effectively operate, individually and/or together, as an SS.

C. The OCIJ Can Conduct Further Investigative Action pursuant to the Co-Lawyer’s Request, which is Separate and Independent from the OCP’s Requests

12. In any event, the OCIJ erred in assuming that its rejection of the OCP’s Requests would necessitate a rejection of the Co-Lawyers’ Request as well.³⁸ With respect, this error stems from a misapprehension of the schema of IR 55 concerning investigations, both judicial and prosecutorial.
13. Regardless of the OCP’s Requests, the Co-Lawyers’ Request in itself established several crimes “within the jurisdiction of the ECCC,” which the OCIJ was obliged to investigate pursuant to IRs 23(1)(a) and 55(1). IR 23(1)(a) states the purpose of allowing Civil Party action at the ECCC is to allow these individuals to “participate in criminal proceedings against those responsible for crimes *within the jurisdiction* of the ECCC.”³⁹ The crimes alleged in the investigative requests fall within the jurisdiction of the ECCC.⁴⁰ IR 55(1) states that “a judicial investigation is compulsory for

³⁶ Practice Direction for Filing Documents, art. 4.1.

³⁷ *Id.*

³⁸ See D250/3/3, para 9.

³⁹ IR 23(1)(a) (emphasis added).

⁴⁰ Civil Parties’ Request, para. 76.

crimes within the jurisdiction of the ECCC.”⁴¹ The OCIJ was thus required to consider the crimes and facts raised by the Co-Lawyers’ Request in the context in which they were raised – i.e. as evincing a pattern of genocide– and investigate these crimes which come within the jurisdiction, refer them to the OCP for their action, or explain why investigative action was not “necessary for the conduct of the (OCIJ’s) investigation” (IR 55(10) in the event it chose to reject the Request. The OCIJ failed to do any of this.

14. The OCIJ misapplied IR 55 when it ruled that it did not have the authority pursuant to IRs 55(2) and (3) to investigate facts set out in the Co-Lawyers’ Request. IRs 55(2) and (3) make no mention of Civil Parties or Charged Persons because they cannot conduct “investigations” within the meaning of the IRs, but only request further investigative action. IRs 55(2) and (3) therefore govern the investigative relationship of the OCP and OCIJ alone. They are not designed to limit Civil Party participation, undermine the Civil Parties’ right to independently request investigative action, or affect the OCIJ’s discretion to take cognizance of new facts adduced by Civil Parties or otherwise extraneously obtained, and to undertake further investigative action “necessary for the conduct of the investigation” under IR 55(10) by way of their investigative powers under IR 55(5),(8), (9).
15. Properly construed, IRs 55(2) and (3) suggest that insofar as its judicial investigation of extant facts if concerned, the OCIJ is supposed to take its cue from the IS or an SS that the OCP places before it⁴². On the other hand, “new facts” that come to the OCIJ’s knowledge must be referred to the OCP for prosecutorial investigation, possibly resulting in an SS

⁴¹ IR 55(1).

⁴² IR 55(2) (“The Co-Investigating Judges shall only investigate the facts set out in an Introductory Submission or a Supplementary Submission.”)

requesting the OCIJ's further judicial investigation.⁴³ "Where such new facts have been referred to the [OCP], the [CIJs] shall not investigate them unless they receive a Supplementary Submission".⁴⁴ In the present appeal, the OCIJ failed in its obligation under IR 55 (3) to refer the following "new facts" that it had received in relation to the Khmer Krom Civil Parties and Civil Party Applicants and/or the Khmer Krom ethnic group generally, to the OCP to file an SS:

- a. Victim Information Forms (VIFs), maps and signed affidavits from the Civil Parties and Civil Party Applicants, *inter alia*, "containing detailed information of the crimes they suffered, as requested in Article 3.5 of the ECCC's practice Direction on Victim Participation".⁴⁵
- b. A 109-page conducted by the Khmer Krom Human Rights Association ('KKKHRA') and Access to Justice Asia LLP ('AJA') in Pursat, Takeo, and Kampong Chhnang Provinces through interviews and ethnographic research with Khmer Krom and Vietnamese survivors resident in these provinces, "for the purpose of assisting the Co-investigating Judges ongoing and further investigations".⁴⁶
- c. Two Data CDs containing photographs and video recordings pertaining to mass crime and grave-sites in Bakan District, Pursat Province, and Kiri Vong District, Takeo Province, "for the purpose

⁴³ IR 55(3) (If, during an investigation, new facts come to the knowledge of the Co-Investigating Judges, they shall inform the Co-Prosecutors, unless the new facts are limited to aggravating circumstances relating to an existing submission...)

⁴⁴ IR 55(3).

⁴⁵ Letter from Co-Lawyer Mahdev Mohan to Victim's Unit ('VU'), entitled "Civil Party Victim Information Form Applications of (and Evidence Regarding) Khmer Krom Victims from Pursat and Takeo", submitted to VU on 23 October 2009 and filed by VU with OCIJ 13 January 2010 ("Khmer Krom VIFs and Affidavits").

⁴⁶ Letter from Co-Lawyer Mahdev Mohan to VU, entitled "Audio-Visual Data & AJA/KKKHRA Investigative Report Relating to Khmer Krom Survivors of Democratic Kampuchea", submitted to VU on 7 December 2009 and filed by VU with the OCIJ on 13 January 2010.

of assisting the Co-investigating Judges ongoing and further investigations”.⁴⁷

- d. The Co-Lawyers’ Request, replete with 55 primary and secondary sources relating to the case advanced by the Civil Parties and Civil Party Applicants.
 - e. “New facts” that the OCIJ concedes it has encountered in the course of interviews with Khmer Krom persons.⁴⁸ In interviewing these persons, the OCIJ is cognizant of the relevance of the Khmer Krom case in determining jurisdictional elements and potential applicable modes of liability, yet has arbitrarily disregarded evidence regarding the substantive crimes committed against the Khmer Krom as a group and has refused investigation on these grounds.⁴⁹
16. Given that the OCIJ did not refer these “new facts” to the OCP for its investigation, the OCIJ is not required to limit its judicial investigation under IR 55(3) to an SS from the OCP. However, the OCIJ’s Combined Order disregarded the Co-lawyer’s 50-page Request, disposing of it in a single paragraph without adequately “set[ting] out the reasons for the rejection”⁵⁰, apart from stating that it raised “substantively the same matter as in the OCP’s Requests” and thus did not fall within the scope of the Introductory or Supplementary Submissions”.⁵¹ The OCIJ misdirected itself regarding the scope of its own discretion under IR 55 in the absence of a referral of “new facts” to the OCP. Not only is this misdirection unnecessarily restrictive, but it contravenes IR 21(1)(c), which requires that “victims are kept informed and that rights are respected throughout the proceedings”.⁵²

⁴⁷ *Id.*

⁴⁸ *Combined Order*, para. 9.

⁴⁹ *Combined Order*, para. 11.

⁵⁰ IR 55(10).

⁵¹ *Combined Order*, para. 9.

⁵² IR 21(1).

17. The OCIJ's arbitrary determination of the scope of judicial investigation as being limited by the scope of the prosecutorial investigation as set out in the IS and SS has prejudiced the rights of the Civil Parties and Civil Party Applicants. The title of the OCP's submission – an “investigative request” rather than a “supplementary submission” – is a formalistic difference and should not have been allowed to exclude Civil Parties or otherwise prejudice their rights. The OCIJ could have easily avoided such prejudice by directing the OCP to reconsider amending the cover-page of their Requests and file them as an SS. The OCIJ chose not to do so, and has left the Civil Parties, Civil Party Applicants and the (international) public to speculate as to why the OCP selected to file an investigative request and not an IR.⁵³ Surely, a matter as important as the Khmer Krom case for genocide and persecution against the Charged Persons should not be left to turn on such legal pontification, lest victims and the international community lose faith in the civil party process altogether and label it a failed experiment.
18. For the OCIJ to state that it had no choice to but to reach the conclusion it did is untenable. If the OCIJ had any doubt as to how it should approach the Co-Lawyers' Request on behalf of the Civil Parties and Civil Parties applicants, it should have sought to interpret the relevant IRs in a manner consistent with human rights standards. The 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (“1985 Victims Declaration”) states that the “views and concerns of victims . . . be presented and considered at appropriate stages of the proceedings where their personal interests are affected.”⁵⁴

⁵³ See Julia Wallace, KR Tribunal Judges Will Not Pursue K Krom Genocide Charges, Cambodia Daily, 20 January 2010. When asked about the OCP's technical decision to label their submissions as investigative requests, ECCC legal affairs spokesperson Lars Olsen made the following statement: “I would assume the co-prosecutors know well the difference between a supplementary submission and a request for investigative action. It was not a mistake. There was a reason why they didn't do it. I know that reason, but I can't tell you”.

⁵⁴ *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, Adopted by U.N. General Assembly resolution 40/34, 29 November 1985, principle 6(a).

19. Further, the OCIJ failed to consider precedent at other international tribunals, such as the decision of the International Criminal Tribunal for Rwanda (‘ICTR’) Trial Chamber in *Muhimana* to grant leave to the prosecution to include by way of an amended indictment a sexual violence charge was not originally contemplated. In arriving at its decision, the Trial Chamber held that it must consider “the general complexity and difficulties necessarily inherent in the investigation of [war crimes]” which requires “reasonable judicial flexibility in relation to such amendments”.⁵⁵ The OCIJ too should have considered the difficulties associated with gathering the new facts that were presented by the Civil Party Applicants and Civil Parties and acceded to the Co-Lawyers’ and OCP’s Requests for investigative action in the spirit of reasonable judicial flexibility.
20. Recognizing the importance of the Civil Parties’ right to participate fully in proceedings, the European Court of Human Rights noted that “limitations [to Civil Party participation] must not restrict or reduce a person’s access [to court proceedings] in such a way or to such an extent that the very essence of the right is impaired[.]”⁵⁶ This Chamber has been mindful of the importance of preserving Civil Parties’ rights and “considers... it clear that Civil Parties have active rights to participate starting from the investigative phase of the procedure” and that “the inclusion of Civil Parties in proceedings is in recognition of the stated pursuit of national reconciliation.”⁵⁷ This Chamber has also acknowledged that the IRs were designed to “provide the Pre-Trial Chamber with the means of ensuring that any apparent imbalance and unfairness can be

⁵⁵ *The Prosecutor v Mikaeli Muhimana*, ICTR-1995-1B-I, *Decision on Motion tot Amend indictment*, 21 January 2004, para 4.

⁵⁶ *Berger v. Fr.*, ECHR App. No. 48221/99, 3 December 2002, para. 38.

⁵⁷ *Decision on Civil Party Participation in Provisional Detention Appeals*, dated 20 March 2008, C11/53, para. 36-7.

addressed.”⁵⁸ The present appeal is an opportunity to honor these principles.

D. Limiting the Participation of the Civil Parties and Civil Party Applicants Undermines the Foundational Principles of the ECCC.

21. If excluded from the proceedings, the Civil Party Applicants will be denied participation in the determination of the facts, the identification of those responsible and the declaration of the perpetrators’ responsibility for crimes within the jurisdiction of the ECCC. These interests are central to the well-established right to truth for victims of human rights violations.⁵⁹ The Civil Party Applicants will also be denied participation in the identification, prosecution, and punishment of those who have victimized them, interests that form the internationally recognized right to justice for victims.⁶⁰ This Chamber has acknowledged that “a victim’s interest in participating in pre-trial proceedings stems from two core rights: the right to truth and the right to justice,” and that these critical interests are relevant to the exercise of its discretion.⁶¹ At the expense of fairness for victims, the Combined Order deprives the Civil Parties and Civil Party Applicants of their fundamental rights to truth and justice by excluding their narrative surrounding the genocide that they suffered due to the Charged Persons.

22. The Combined Order also contravenes the ECCC’s stated purpose of permitting civil party action as a means of recognizing the need for national reconciliation. In establishing the ECCC, the goal of the United Nations and the Royal Government of Cambodia was to pursue legal

⁵⁸ *Decision on Civil Party Participation in Provisional Detention Appeals* at para. 43.

⁵⁹ *Prosecutor v. Katanga*, “Decision on the Set of Procedural Rights Attached to the Procedural Status of Victim at the Pre-Trial Stage of the Case,” ICC-01/04-01/07-474, 13 May 2008, para. 32.

⁶⁰ *Id.* at para. 39.

⁶¹ *Directions on Unrepresented Civil Parties’ Right to Address the Pre-Trial Chamber in Person*, dated 29 August 2008, C22/I/69, para. 8.

accountability as a remedy for victims and to ensure reconciliation and stability.”⁶²

23. The Combined Order strips the Vietnamese and Khmer Krom of their rights to justice and participation in the reconciliation process, and vitiates their sense of and stability. It suggests that justice at the ECCC is selective; that genocide can be committed against them with impunity or without adequate recognition if they do not happen to belong to a preferred geographical region. Such an impression would be unfortunate, especially since the ECCC possesses the potential to make a positive contribution to the reconciliation process between Vietnamese and Khmer Cambodian survivors of the Khmer Rouge. Consequently, if excluded from the proceedings, victims from both Vietnamese and Khmer Krom groups will remain an unhealed scar in Cambodian history and the ECCC would not be fulfilling its truth-telling function, or its role in bringing about national healing.
24. The Combined Order not only impedes national reconciliation, but it also gives the impression that the civil party process is selective and arbitrary, with little resonance for the victim participants who have bravely come forward to tell their stories. The civil law system was designed to allow victims to play an active role in criminal proceedings.⁶³ Rule 23(2) states that “the right to take civil action may be exercised by Victims of a crime coming *within the jurisdiction of the ECCC* (emphasis added). However, the Combined Order deemed only 9 Khmer Krom Civil Party Applicants admissible based narrowly on the geographical nexus of their claims to

⁶² Preamble, Resolution adopted by the General Assembly – the Khmer Rouge Trials, GA Resolution A/RES/57/228, 27, February 2003 (“accountability of individual perpetrators of grave human rights violations is one of the central elements of any effective remedy for victims of human rights violations and a key factor in ensuring a fair and equitable justice system and, ultimately, reconciliation and stability.”)

⁶³ Sarah Thomas & Terith Chy, Including the Survivors in the Tribunal Process, On Trial: The Khmer Rouge Accountability Process, 217, Eds. John Ciorciari and Anne Heindel, Documentation Center of Cambodia, 2009.

ongoing judicial investigations, and dismissed all other Civil Applicants, including all 16 ethnic Vietnamese Civil Party Applicants (after four had been previously admitted as Civil Parties by the OCIJ, and as recently as in December 2009), and without any regard to the actual merit of their claims, including, in some instances, consideration of the applicants' Supplementary Affidavits provided by the Co-Lawyers. In doing so, the Combined Order has rendered victim participation an arbitrary exercise, allowing certain victims the right to remedy while denying others access to justice, and in some instances, arbitrarily admitting applicants as civil parties and subsequently rejecting them, without any clear basis as to the differences in reasoning which led to the second outcome, or the basis of the first decision.

25. The OCIJ's ambivalent decisions to accept, reject or revoke an applicant's civil party status can have a chilling effect on him/her, in light of what s/he puts at stake in coming forward. The Co-Lawyers note a growing sentiment among victims and Civil Parties/Applicants that their rights have been whittled away through the ECCCC's insensitive and legalistic rules and procedures.⁶⁴
26. The Combined Order strips the right of the Vietnamese victims of the Khmer Rouge to assert that crimes were committed against them, with a devastating effect of silencing their voices in a context where very few ethnic Vietnamese survivors of genocide remain in Cambodia. Few, if any ethnic Vietnamese survivors in Prey Veng or Svay Rieng have applied to become civil parties, and rejection of the Vietnamese on the basis that they suffered crimes in Kampong Chhnang silences this victim group as a whole.
27. The Combined Order erases the Khmer Krom from the ECCC historical

⁶⁴ See Guy De Launey, Khmer Rouge survivors feel justice denied, BBC, December 11, 2009, <http://news.bbc.co.uk/2/hi/8406427.stm>; see also Mahdev Mohan, The Paradox of Victim-Centrism: Victim Participation at the Khmer Rouge Tribunal, *International Criminal Law Review* 9 (2009) 1-43; see

and legal record, effectively denying their suffering as a group during the Democratic Kampuchea (“DK”) period. Already considered a forgotten people, the Khmer Krom people have taken incredible risks in seeking recognition for the abuses they suffered at the hands of the Khmer Rouge. Their exclusion from the proceedings would silence their history and essentially write them out of the national narrative about the DK atrocities.

28. Moreover, the Khmer Krom people were targeted by the Khmer Rouge as a group for their perceived Vietnamese nationality, making the crimes committed against them acts of genocide.⁶⁵ The crime of genocide occupies a privileged place among international crimes. It is uniquely capable of acknowledging and conveying global condemnation for acts of unfathomable horror: the intentional extermination of a people. The scale and nature of human suffering represented by genocide has led it to be called “the supreme crime, in the view of the international community, of history, of victims, and of generations of their descendants.”⁶⁶ The CPK’s attempt to destroy the Khmer Krom as a people constitutes the gravest of international crimes, the prohibition of which is a *jus cogens* norm. It is critically important to the Civil Parties and Civil Party Applicants, the historical/legal record, and the ECCC’s legacy that the OCIJ acknowledge that these crimes occurred; investigate the animus, nature and scope of these crimes; and include them in fresh charges to be brought against the Charged Persons.

IV. CONCLUSION AND RELIEF REQUESTED

generally Mahdev Mohan, *Re-constituting the ‘Un-Person’: The Khmer Krom and the Khmer Rouge Tribunal* (2009) 12 SYBIL 1–13.

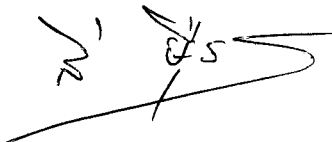
⁶⁵ Convention on the Prevention and Punishment of the Crime of Genocide, Adopted by the U.N. General Assembly Resolution 260 (III) A of the U.N. General Assembly, 9 December 1948. Entry into force: 12 January 1951.

⁶⁶ Diane Marie Amann, Group Mentality, Expressivism, and Genocide, 2 Int’l. Crim. L. Rev. 93, 118, D250 3.1, 2002.

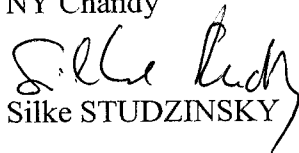
WHEREFORE, for all the reasons stated herein, the Co- Lawyers request the Pre-Trial Chamber to:

- (a) Grant a public oral hearing to determine this appeal;
- (b) Set aside the OCIJ's Combined Order ;
- (c) Order the CIJs to undertake further and necessary investigative action in respect of the Khmer Krom and Vietnamese Civil Parties and Civil Party Applicants pursuant to IR 55(10), as originally requested in the Co-Lawyers' Request (D250/3); and
- (d) Order the CIJs to charge the Charged Persons with crimes of genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions, and national crimes based on the facts and evidence presented by the Khmer Krom and Vietnamese Civil Parties and Civil Party Applicants, the Co-Lawyers and/or the OCP.

Respectfully submitted,



NY Chandy



Silke STUDZINSKY

Sgd.

Mahdev MOHAN

Sgd.

Lyma NGUYEN

Signed in Phnom Penh on 12 February 2010.