

# CONTROVERSY ON THE CHARACTERIZATION OF THE CAMBODIAN GENOCIDE AT THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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## ABSTRACT

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Crimes committed by the Khmer Rouge in Cambodia in the 1970s are known as being among the most violent massacres of the 20<sup>th</sup> century. Yet, the legal characterization of such acts as genocide has been subjected to important legal and conceptual controversies, both inside and outside the Extraordinary Chambers in the Courts of Cambodia (ECCC) – the court in charge of judging the last surviving Khmer Rouge leaders. In consequence, very restricted genocide charges have been retained in the 2010 indictment issued against these Khmer Rouge leaders. Such a decision indubitably disappointed many victims who considered that their suffering was not recognized. Given the fact that the ECCC trial for genocide started on 17 October 2014, a discussion about the limited scope of that indictment appears particularly appropriate, in order to grasp the issues of the coming debates. This paper analyses the legal constraints of the characterization of the Khmer Rouge crimes as genocide, in the particular context of the ECCC.

## I. INTRODUCTION

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Many international human rights authorities, including the United Nations General Assembly<sup>1</sup> talked about the ‘Cambodian genocide’ to designate the atrocities perpetrated by the Khmer Rouge. In Cambodia particularly, ‘genocide’ - *prolai pouch-sas* in Khmer<sup>2</sup> - has been the term of choice to describe the Democratic Kampuchea<sup>3</sup> regime for nearly four decades.<sup>4</sup> In the rest of the world, those crimes are also seen to exemplify genocide by a large public.<sup>5</sup>

Yet, while the word ‘genocide’ undoubtedly has considerable appeal,<sup>6</sup> it turns out to be legally inappropriate to describe the massacre of 1.5 to 2 million<sup>7</sup> of Cambodians from 1975 to 1979. Thus, the ‘Closing Order’ (indictment) of the last surviving Khmer Rouge senior leaders before the Extraordinary Chambers in the Courts of Cambodia (ECCC) - the court which has jurisdiction to judge the Khmer Rouge crimes - known as ‘Case 002’, includes very limited genocide charges.

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<sup>1</sup> United Nations General Assembly Resolution 52/135, 27 February 1998.

<sup>2</sup> S. Giry, ‘The Genocide That Wasn’t’, *The New York Review of Books* (NYR Blog), 25 August 2014, available online at <http://www.nybooks.com/blogs/nyrblog/2014/aug/25/khmer-rouge-genocide-wasnt/> (visited 18 October 2014).

<sup>3</sup> Democratic Kampuchea was the name of Khmer Rouge regime in Cambodia from 17 April 1975 to 6 January 1979.

<sup>4</sup> D. Boyle, ‘*Les Nations Unies et le Cambodge, 1979-2003: Autodétermination, démocratie, justice pénale internationale*’ (PhD Thesis, Panthéon-Assas Paris University II, on file with the author), § 227: the Popular Republic of Kampuchea – the regime which succeeded to the Khmer Rouge’s fall in 1979 - developed the idea that Democratic Kampuchea was a ‘genocidal regime’ (unofficial translation).

<sup>5</sup> See T. Forster, *The Khmer Rouge and the Crime of Genocide – Issues of Genocidal Intent With Regard to the Khmer Rouge Mass Atrocities*, International Law Series (Dike Verlag AG, 2012), at 39.

<sup>6</sup> W. Schabas, ‘Problems of International Codification – Were the Atrocities in Cambodia and Kosovo Genocide?’, *35 New England Law Review* (2000) 287, at 293.

<sup>7</sup> Case 002/01 Judgment, *Nuon Chea et al.* (002/19-09-2007/ECCC/TC), Trial Chamber, 7 August 2014, § 523.

Those charges only encompass crimes committed against two minority groups, the Cham and the Vietnamese, whereas the vast majority of Khmer Rouge victims were ethnic Khmer and national Cambodian.<sup>8</sup> Predictably, such a decision has disappointed many victims of the crimes that have not been characterized as genocide.<sup>9</sup>

The ECCC example shows how tricky it is to get from general allegations of genocide to institutionalized judicial proceedings.<sup>10</sup> The aim of this paper is then to establish the elements of analysis regarding the legal constraints which may have motivated such restricted genocide charges, while taking into account that the Khmer Rouge atrocities are considered by many as a very example of genocide.

As a first step, this requires a short introduction about the ECCC and Case 002 in order to put the Khmer Rouge crimes into that particular judicial context **(2)**. The founding texts of the ECCC provide for its jurisdiction over the crime of genocide. However, the exact definition of the crime of genocide to be applied before the ECCC was subjected to discussion owing to discrepancies between the different founding texts. The second part of the paper will then point out some discrepancies between the different versions of the definition of genocide at the ECCC, and determine their implications on the scope of the genocide liability. The ECCC judges have finally retained the definition of the 1948 international 'Convention on the Prevention and Repression of the Crime of Genocide'.<sup>11</sup> Thus, the paper will also analyze the legal factors that led to the decision to apply the international definition of genocide at the ECCC **(3)**. This definition, however, is extremely restrictive as it requires the intentional destruction of 'national, racial, ethnical or religious group as such'.<sup>12</sup> Those specific requirements make the legal characterization of criminal facts as genocide particularly difficult. This paper will show in its third part that the Khmer Rouge atrocities - whether the crimes committed against the minority groups or those perpetrated against the Khmer majority of the population - do not meet the Genocide Convention's requirements easily. After having discussed the various conceivable interpretations of the facts **(4)**, this paper will finally conclude that the legal characterization of the Khmer Rouge atrocities has been built on the evidence gathered, but that other considerations may also have played some role in the final decision to exclude a great number of crimes from the genocide charges **(5)**.

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<sup>8</sup> H. Jarvis and T. Fawthrop, *Getting Away With Genocide?* (Ann Arbor and London, Pluto Press, 2004), at 224: 'The vast majority of the atrocities were carried out by Khmers against Khmers.'

<sup>9</sup> T. Forster, *supra* note 5, at 31.

<sup>10</sup> *Ibid.*, at 39.

<sup>11</sup> Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 (hereafter the 'Genocide Convention').

<sup>12</sup> *Ibid.*, Article II.

## II. PUTTING THE KHMER ROUGE CRIMES INTO THE JUDICIAL CONTEXT OF THE ECCC

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The ECCC is the result of several years of tough negotiations between the United Nations (UN) and Cambodia.<sup>13</sup> It was created by a Cambodian Law adopted in 2001. This Law was then amended in 2004<sup>14</sup> (the ECCC Law) to conform with the international agreement finally reached between the UN and Cambodia in 2003 (the ECCC Agreement).<sup>15</sup>

Although integrated into the Cambodian judiciary,<sup>16</sup> the ECCC is considered to be an 'internationalized' court<sup>17</sup> as its structure provides for significant international participation.<sup>18</sup> The ECCC Agreement provides that its procedure is in accordance with Cambodian law.<sup>19</sup> Thus, the pre-trial investigations are not carried out by the parties in the proceedings (i.e. the prosecutor and the defense) but by two Co-Investigating Judges (CIJ). The CIJ are responsible for collecting evidence with a view to determine, if the facts set out by the Co-Prosecutors in the 'Introductory Submission'<sup>20</sup> constitute a crime within the jurisdiction of the ECCC and if defendants are to be indicted and sent to trial before the Trial Chamber. Once the investigation has been concluded, the CIJ issue a 'Closing Order' containing an indictment with an order to send the case to trial, or a dismissal order terminating the proceedings.<sup>21</sup> The pre-trial phase of the proceedings is strictly confidential.<sup>22</sup> Thus, the reasons which have motivated the CIJ to take any particular decision (for instance, to characterize such crimes as genocide or as crimes against humanity) might not be evident with the sole reading of the Closing Order. The general aim of a thorough investigation of cases is to simplify and shorten the phase of the trial.<sup>23</sup> Consequently, defendants will only be sent

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<sup>13</sup> See e.g. Cambodia Tribunal Monitor, 'Composite Chronology of the Evolution and Operation of the Extraordinary Chambers in the Courts of Cambodia', available online at [http://www.cambodiatribunal.org/wp-content/uploads/2013/08/history\\_composite-chronology\\_english.pdf](http://www.cambodiatribunal.org/wp-content/uploads/2013/08/history_composite-chronology_english.pdf) (visited 30 September 2014).

<sup>14</sup> Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006) (hereafter ECCC Law), Article 2.

<sup>15</sup> 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 (signed 6 June 2003, promulgated as Law on 19 October 2004 and entered into force on 29 April 2005) (hereafter ECCC Agreement).

<sup>16</sup> ECCC Law, *supra* note 14.

<sup>17</sup> Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav alias Duch, *Kaing Guek Eav alias Duch* (001/18-07-2007/ECCC/PTC), Pre-Trial Chamber, 3 December 2007, § 18-19; Decision on Request for Release, *Kaing Guek Eav alias Duch* (001/18-07-2007/ECCC/TC), Trial Chamber, 15 June 2009, §§ 10-11.

<sup>18</sup> ECCC Agreement, *supra* note 15, Articles 3 (Judges), 5 (Investigating Judges) and 6 (Prosecutors); ECCC Law, Articles 9 new (Chambers), 16 (Co-Prosecutors) and 23 new (Co-Investigating Judges).

<sup>19</sup> ECCC Agreement, *supra* note 15, Article 12.

<sup>20</sup> Internal Rules of the Extraordinary Chambers in the Courts of Cambodia, as revised on 3 August 2001 (Rev. 8) (hereafter ECCC Internal Rules), Rule 53: 'If the Co-Prosecutors have reason to believe that crimes within the jurisdiction of the ECCC have been committed, they shall open a judicial investigation by sending an 'Introductory Submission' to the [CIJ].'

<sup>21</sup> *Ibid.*, Rule 67(1).

<sup>22</sup> *Ibid.*, Rule 56(1).

<sup>23</sup> J. De Hamptinne, F. Roux and M. Lemonde, 'Pour des juges d'instruction internationaux', *Libération Monde*, 16 April 2009.

to trial on the basis of the charges for which ‘the evidentiary material in the case file [is] sufficiently serious and corroborative to provide a certain level of probative force.’<sup>24</sup>

The Closing Order in Case 002 was issued on 15 September 2010.<sup>25</sup> It originally indicted four accused, including Khieu Samphan, former Head of State of Democratic Kampuchea,<sup>26</sup> Nuon Chea, former Deputy Secretary of the Communist Party of Kampuchea,<sup>27</sup> Ieng Sary, former Deputy Minister for Foreign Affairs<sup>28</sup> (who died on 14 March 2013), and his wife, Ieng Thirith, former Minister of Social Affairs<sup>29</sup> (who was declared unfit to stand trial due to mental illness on 13 September 2012). On 13 January 2011, the Pre-Trial Chamber<sup>30</sup> confirmed the indictment, with minor changes, and ordered that those four people be sent for trial for crimes against humanity, war crimes, genocide and other counts of crimes under Cambodian law (homicide, torture and religious persecutions).<sup>31</sup>

Case 002’s trial began in June 2011. However, in September 2011, the Trial Chamber decided to sever the Case into smaller trials. It limited the scope of the first trial to the evacuation of cities and the forced movements of the population.<sup>32</sup> The genocide charges were therefore excluded from the scope of this first trial. On 7 August 2014, the Trial Chamber convicted Khieu Samphan and Nuon Chea for crimes against humanity of murder, political persecution and other inhumane acts through their participation in policies to forcibly displace people. It sentenced them to life imprisonment.<sup>33</sup>

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<sup>24</sup> Closing Order, *Nuon Chea et al.* (002/19-09-2007-ECCC-OCIJ), Co-Investigating Judges, 15 September 2010 (hereafter ‘Closing Order’), § 1323.

<sup>25</sup> See ‘Co-Investigating Judges indict Khieu Samphan, Nuon Chea, Ieng Sary and Ieng Thirith’, Extraordinary Chambers in the Courts of Cambodia (ECCC)’s official website, 16 September 2010, available online at <http://www.eccc.gov.kh/en/articles/co-investigating-judges-indict-khieu-samphan-nuon-chea-ieng-sary-and-ieng-thirith> (visited 18 October 2014).

<sup>26</sup> See ‘KHIEU SAMPHAN, Profile’, ECCC’s official website, available online at <http://www.eccc.gov.kh/en/indicted-person/khieu-samphan> (visited 18 October 2014).

<sup>27</sup> See ‘NUON CHEA, Profile’, ECCC’s official website, available online at <http://www.eccc.gov.kh/en/indicted-person/nuon-chea> (visited 18 October 2014).

<sup>28</sup> See ‘IENG SARY, Profile’, ECCC’s official website, available online at <http://www.eccc.gov.kh/en/indicted-person/ieng-sary> (visited 18 October 2014).

<sup>29</sup> See ‘IENG THIRITH, Profile’, ECCC’s official website, available online at <http://www.eccc.gov.kh/en/indicted-person/ieng-thirith> (visited 18 October 2014).

<sup>30</sup> The Pre-Trial Chamber hears motions and appeals against orders issued by the Co-Investigating Judges while the case is under investigation.

<sup>31</sup> See ‘Case 002 sent for trial’, ECCC’s official website, 13 January 2011, available online at <http://www.eccc.gov.kh/fr/node/10480> (visited 18 October 2014).

<sup>32</sup> Severance Order Pursuant to Internal Rule 89ter, *Nuon Chea et al.* (002/19-09-2007/ECCC/TC), Trial Chamber, 22 September 2011.

<sup>33</sup> Case 002/01 Judgment, *Nuon Chea et al.* (002/19-09-2007/ECCC/TC), Trial Chamber, 7 August 2014.

The accused are currently being tried in Case 002's second trial<sup>34</sup> whose scope includes the genocide charges.<sup>35</sup> Since evidentiary hearings began on 17 October 2014,<sup>36</sup> it seems particularly appropriate to discuss the difficulties of the genocide characterization in the context of the Khmer Rouge crimes. The first of these difficulties is related to the definition of the crime of genocide applicable at the ECCC, since the ECCC legal texts do not provide for one definition only.

### III. APPLYING THE CONVENTION'S DEFINITION OF GENOCIDE AT THE ECCC

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Both the ECCC Law and Agreement provide for the ECCC's jurisdiction over the crime of genocide 'as defined in the 1948 Convention on the Prevention and Repression of the Crime of Genocide'.<sup>37</sup> However, the Genocide Convention's definition has not been designed for being applied by national courts directly. By ratifying the Convention, the state parties merely committed themselves to 'enact (...) the necessary [domestic] legislation to give effect to the provisions of the Convention.'<sup>38</sup>

Under the Khmer Rouge, the Convention had not been incorporated into Cambodian law. This only occurred in 2001, with the Law creating the ECCC. But Article 4 of the ECCC Law contains a different definition of genocide from the Convention's one.<sup>39</sup> Adopting a broader national definition of genocide is not prohibited. The Convention basically confirmed a principle which already existed in customary international law.<sup>40</sup> Thus, the incorporation of the Convention into national legal orders has often resulted in a broadening of its definition. France, for instance, has gone further by adding the 'group determined by any (...) arbitrary criterion' to the four groups protected by the Convention.<sup>41</sup> Such discrepancies have important consequences on the scope of the liability for genocide.

In the English version of the ECCC Law, with regard to the Article II's list of underlying crimes,<sup>42</sup> the Law replaces the expression 'any of the following acts' with 'any acts' and the phrase 'as such' referring to 'group' in the Genocide Convention with 'such as' but referring to 'acts':

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<sup>34</sup> See 'Case 002/02', ECCC's official website, available online at <http://www.eccc.gov.kh/en/case/topic/1299> (visited 29 September 2014).

<sup>35</sup> Decision on Additional Severance of Case 002 and Scope of Case 002/02, *Nuon Chea et al.* (002/19-09-2007/ECCC/TC), Trial Chamber, 4 April 2014.

<sup>36</sup> See 'Case 002/02 trial to commence on 17 October 2014', ECCC's official website, 19 September 2014, available online at <http://www.eccc.gov.kh/en/articles/case-00202-trial-commence-17-october-2014> (visited 29 September 2014).

<sup>37</sup> ECCC Agreement, *supra* note 15, Article 9; ECCC Law, *supra* note 14, Article 4.

<sup>38</sup> Genocide Convention, *supra* note 11, Article V.

<sup>39</sup> ECCC Agreement, *supra* note 15, Article 9 and ECCC Law, *supra* note 14, Article 4.

<sup>40</sup> D. Boyle, *supra* note 4, § 224.

<sup>41</sup> *Code pénal* (Paris: Dalloz, 2014), Article 211-1.

<sup>42</sup> Genocide Convention, *supra* note 11, Article II: '(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.'

## Genocide Convention, Article II

Genocide means **any of the following acts** committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, **as such** : ...

## ECCC Law, Article 4

The acts of genocide ... mean **any acts** committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, **such as** : ...

These two differences have two major implications. First, while the list of enumerated acts found in the Convention is exhaustive, the list of acts found in the Law is not.<sup>43</sup> Secondly, in the Convention, the words 'as such' refer to 'group' in a way that creates an additional burden of proof. It indeed has to be shown that the intent of the perpetrator was to destroy the group as a distinct entity, and not (only) to target members of the group based on their membership. Consequently, the change of the phrase 'such as' lowers the intent required, as a perpetrator would still be held liable for genocide, even if the acts he committed with the intent to destroy the group were perpetrated without intending to destroy the group 'as such'.<sup>44</sup>

Further differences of Article 4 exist between each of the working language versions of the ECCC Law itself. The French version does not contain any discrepancy with the Convention. The Khmer one includes a phrase which translates to 'any of the following acts', but ends with 'such as'.<sup>45</sup> This generates uncertainty in regard to the choice of the version to apply<sup>46</sup> and suggests that those discrepancies are the result of a simple scrivener's error.<sup>47</sup> Another element also speaks in favor of careless mistakes. The previous English version of the Law adopted in 2001<sup>48</sup> used the words 'as such'. Actually, when the Law was amended in 2004, only a certain number of provisions were modified. In the 2004 version, the amended articles are easy to find because the word 'new' follows the relevant articles. Yet, this is not the case for Article 4 on the ECCC's jurisdiction over genocide.

Neither the Agreement nor the Law defines the procedure to be followed in such a case. However, Article 2 of the ECCC Agreement provides that the Vienna Convention on the Law of Treaties, and

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<sup>43</sup> Closing Order, *supra* note 24, § 1311; Ieng Sary's Supplemental Alternative Submission to His Motion Against the Applicability of Genocide at the ECCC, *Nuon et al.* (002/19-09-2007-ECCC/OCIJ), Ieng Sary's Defense, 21 December 2009 (hereafter the 'Ieng Sary's Supplemental Submission'), § 11.

<sup>44</sup> Ieng Sary's Supplemental Submission, *ibid.*, §. 12.

<sup>45</sup> A. Olivie and H. Muwero, 'Textual Discrepancies in the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea and their Legal Consequences' (International Human Rights Clinic, Seattle University), at 6.

<sup>46</sup> T. Forster, *supra* note 5, at 31.

<sup>47</sup> Ieng Sary's Supplemental Submission, *supra* note 43, § 14.

<sup>48</sup> Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, adopted 10 August 2001 (NS/RKM/0801/12) (translation by the Council of Jurists, 6 September 2001), Article 4; A. Olivie and H. Muwero, *supra* note 33, at 11.

in particular its Articles 26 and 27, applies to the Agreement.<sup>49</sup> Those articles establish two fundamental principles: on the one hand, that a treaty must be performed in good faith by the parties, and on the other hand, that the parties may not invoke the provisions of their internal law to justify a failure to perform a treaty. Article 31 of the ECCC Agreement further provides that it shall apply as law within Cambodia. It follows from both provisions of the ECCC Agreement that the relevant Cambodian authorities were required to ensure that the domestic ECCC Law was in conformity with the Agreement.<sup>50</sup> Since, owing to the aforementioned discrepancies, the ECCC Law creates uncertainty, it should have been further amended. But as it did not occur, the ECCC judges had to determine the applicable version of the definition of genocide.

Applying the legal definition of genocide adopted in 2001 to acts committed between 1975 and 1979 raises a further issue. It may violate the *nullum crimen sine lege* principle according to which a person cannot be convicted of a crime that did not exist at the time of the commission of the acts in question. Article 12 of the ECCC Agreement provides that ‘where there is *uncertainty* regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the *consistency of such rule with international standards*, guidance may ... be sought in procedural rules established at the international level.’<sup>51</sup> Article 15 of the International Covenant on Civil and Political Rights<sup>52</sup> includes the prohibition of retroactive offenses. The ECCC Agreement<sup>53</sup> and Law<sup>54</sup> both refer to that Article 15.

On the basis of this principle, an ECCC defense team argued that the crime of genocide did not apply before the ECCC at all. It claimed that genocide was not penalized under domestic law at the time of the Khmer Rouge’s regime,<sup>55</sup> and that substantive international criminal law could not be directly applied in Cambodian courts.<sup>56</sup> As noted in the Closing Order however, when Cambodia acquired sovereign autonomy in 1949 by joining the ‘French Union’, it acceded to the Genocide Convention.<sup>57</sup> The Convention entered into force in 1951 following the twentieth required ratification. Consequently, under the Khmer Rouge regime, the Convention had already been part of the international law which applied to Cambodia. The CIJ decided that the Genocide

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<sup>49</sup> Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 115 UNTS 331.

<sup>50</sup> *Report of the Secretary-General on Khmer Rouge trials*, UN Doc. A/57/769, 31 March 2003, § 25.

<sup>51</sup> ECCC Agreement, *supra* note 15, Article 12 (emphasis added).

<sup>52</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Article 15(1): “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.”

<sup>53</sup> ECCC Agreement, *supra* note 15, Article 12.

<sup>54</sup> ECCC Law, *supra* note 14, Article 33(new).

<sup>55</sup> Ieng Sary’s Motion Against the Applicability of the Crime of Genocide at the ECCC, *Nuon Chea et al.* (002/19-09-2007-ECCC/OCIJ), Ieng Sary Defense, 30 October 2009 (hereafter Ieng Sary’s Motion on Genocide’), § 13.

<sup>56</sup> *Ibid.*, § 17.

<sup>57</sup> Closing Order, *supra* note 24, § 1310.

Convention's definition could be applied at the ECCC. Case 002's Closing Order provides that 'the Co-Investigating Judges will (...) apply the international definition of genocide'.<sup>58</sup>

Although reasoned, the CIJ's decision led the ECCC to remain confined to a relatively restricted definition of genocide. That choice has important consequences in the ECCC's context because such a definition appears to mirror only partially the Khmer Rouge complex criminal phenomenon.

#### **IV. APPLYING THE CONVENTION'S DEFINITION OF GENOCIDE TO THE KHMER ROUGE CRIMES**

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The Genocide Convention includes two requirements in the definition of genocide, the interpretation of which crucially determines the scope of genocide liability. It requires firstly, a special intent to destroy a group, and secondly, that that group be constituted along ethnic, racial, national or religious lines.

It took a long time before jurisprudence about those requirements was issued. The first courts to convict individuals under the Convention's definition were the International Criminal Tribunals (ICT) for Rwanda (ICTR)<sup>59</sup> in 1998 and for the former Yugoslavia (ICTY)<sup>60</sup> in 2001. The Statutes of both courts contain a definition of genocide which was taken verbatim from the Genocide Convention.<sup>61</sup> First, a quick glance at the ICT's main decisions on Article II's requirements proves to be essential **(A)**. Indeed, the jurisprudence of the ICT has undoubtedly influenced the ECCC CIJ's decision to exclude crimes committed against minority groups other than the Cham and the Vietnamese **(B)**, and crimes committed on the Khmer majority **(C)** from the genocide charges in Case 002. In all those situations, the genocidal intent of the Khmer Rouge remains the most difficult element to be demonstrated **(D)**.

##### ***A. Jurisprudential Applications of the Requirements of the Convention's Definition***

As mentioned, Article II of the Genocide Convention only protects ethnic, racial, national or religious groups. The limitation to these four factors of differentiation is the result of a diplomatic compromise reached during the negotiations of the Convention and justified by the idea that only 'stable and permanent groups' should be protected.<sup>62</sup> In consequence, acts of equivalent severity to those

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<sup>58</sup> *Ibid.*, § 1311.

<sup>59</sup> See e.g. Judgment, *Akayesu* (ICTR-96-5-T), Trial Chamber I, 2 September 1998.

<sup>60</sup> See e.g. Judgment, *Krstic* (IT-98-33-T), Trial Chamber I, 2 August 2001.

<sup>61</sup> Article 6(1) ICTY St. and Article 7(1) ICTR St.

<sup>62</sup> W. Schabas, *Genocide in International Law, The Crime of Crimes* (Cambridge, New York: Cambridge University Press, 2000), at 132.

covered by Article II's underlying acts cannot be characterized as genocide, when committed against, for example, a political group<sup>63</sup> or a social class.<sup>64</sup>

In practice, faced with technical difficulties in relation to the identification of the protected group, both already-mentioned ICT have preferred to apply a case-by-case analysis of the stigmatized groups, using a combination of both objective and subjective criteria.<sup>65</sup> As the subjective criterion, the tribunals stressed the importance of the perpetrator's perception of the group.<sup>66</sup>

Article II also requires that a perpetrator, in addition to seeking to commit one or more of the underlying acts,<sup>67</sup> has sought to destroy the protected group, in whole or in part. This last element of the genocide definition is known as the 'special intent'. It is considered that the special intent 'gives genocide its specialty and distinguishes it from ordinary crimes'<sup>68</sup> and from the 'general' crimes against humanity.<sup>69</sup> It affords genocide its status as 'the crime of the crimes'.<sup>70</sup>

The notion of intent, however, includes several dimensions.<sup>71</sup> As raised by one ECCC defense team, there has been an ongoing debate amongst academics as to whether the 'intent to destroy' has to be interpreted according to a 'purpose-based' standard or a 'knowledge-based' standard.<sup>72</sup> Both ICT have always decided to follow the 'purpose-based' approach, rejecting the 'knowledge-based' one.<sup>73</sup> It was held that '[s]pecial intent of a crime is a specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged.'<sup>74</sup> Consequently, it is 'not sufficient that the perpetrator simply knew that the underlying crime would inevitably or likely result in the destruction of the group.'<sup>75</sup>

The enumeration of specific groups and the required special intent imply two things. On the one hand, the perpetrators' conception of the victim group shall bear some relation to one of the

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<sup>63</sup> The political groups were expressly excluded following the USSR representative's intervention during the negotiations. See *Continuation of the Consideration of the Draft Convention on Genocide: Report of the Economic and Social Council*, UN Doc. A/C.6/SR74, 18 October 1948, at 103-106.

<sup>64</sup> H. Ascensio, 'Les groupes protégés par la Convention sur le Génocide', in A. Yotopoulos-Marangopoulos and P. Pazartzis (eds), *Le génocide revisité/Genocide Revisited*, Ant. N. Sakkoulas (Athènes/Bruxelles: Bruylant, 2010) 45-61, at 45.

<sup>65</sup> See e.g., Judgment and Sentence, *Semanza* (ICTR-97-20-T), Trial Chamber III, 15 May 2003, § 317; Judgment and Sentence, *Musema* (ICTR-96-13-A), Trial Chamber I, 27 January 2000, §§ 161-163; Judgment, *Blagojevic and Jokic* (IT-02-60-T), Trial Chamber I, 17 January 2005, § 667.

<sup>66</sup> Judgment, *Krstic* (IT-98-33-T), Trial Chamber I, 2 August 2001, para. 557; Judgment, *Bagilishema* (ICTR-95-1A-T), Trial Chamber I, 7 June 2001, para. 65.

<sup>67</sup> See at note 42.

<sup>68</sup> Judgment, *Jelusic* (IT-95-10), Trial Chamber, 14 December 1999, § 66.

<sup>69</sup> K. Ambos, 'What does 'intent to destroy' in genocide mean?', 91 *International Review of the Red Cross* 876 (2009) 833-858, at 846.

<sup>70</sup> Ieng Sary's Supplemental Submission, *supra* note 43, § 29

<sup>71</sup> K. Ambos, *supra* note 69, at 834-835.

<sup>72</sup> Ieng Sary's Supplemental Submission, *supra* note 43, § 29.

<sup>73</sup> A softening of both ICT's position has to be noted in cases of accessorial forms of liability, in particular, complicity in genocide, aiding and abetting, superior responsibility and joint criminal enterprise (in its third form), where the knowledge of the principal's genocidal intent is required only, see e.g. Ambos, *supra* note 69, at 851-853.

<sup>74</sup> Judgment, *Akayesu* (ICTR-96-4-T) Trial Chamber I, 2 September 1998, § 498.

<sup>75</sup> Judgment, *Blagojevic and Jokic* (IT-02-60-T), Trial Chamber, 17 January 2005, § 656.

protected groups. And on the other hand, the perpetrator shall choose the victims by reason of their membership in the group whose destruction was sought.<sup>76</sup>

Yet, the living conditions during the Democratic Kampuchea regime were so extreme that a substantial part of the population died by execution, starvation, malnutrition, or disease. However, that may be the result of the system of apparent arbitrariness established by the Khmer Rouge authorities rather than persecutions targeted against particular groups.<sup>77</sup> In such a context of generalized violence, differences in treatment of distinct groups may have been difficult to establish.

However, indications of the targeting of particular groups by the Khmer Rouge authorities exist,<sup>78</sup> both in regard to minorities and with respect to groups identified within the national/ethnic<sup>79</sup> Khmer majority. As noted in the Closing Order, the targeting of groups was a key means by which the Khmer Rouge did 'whatever can be done that is a gain for the[ir] revolution'.<sup>80</sup>

### **B. Crimes Committed Against Minority Groups**

One of the policies of the Khmer Rouge authorities was the killing of 'enemies', both inside and outside the Party ranks, who truly or supposedly were the regime's opponents.<sup>81</sup> As some witnesses questioned by the CIJ explained, in fact, if a person did not simply adapt himself or herself to the regime's rules, then he or she was automatically considered an enemy.<sup>82</sup>

Such a consideration raises questions in regard to crimes committed on minority groups, in particular the Cham population. It is a known fact that members of this group suffered disproportionately under the regime's rule,<sup>83</sup> but much of this may be incidental. Their stigmatization could actually stem from their disproportionate resistance to the regime's political and social plans, and not obviously from deliberate targeting on the basis of their race, religion or ethnicity.<sup>84</sup> In such circumstances, the Khmer Rouge would not have had the genocidal intent to destroy the Cham group 'as such'.<sup>85</sup> The CIJ, however, decided to retain genocide charges for crimes committed on

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<sup>76</sup> Judgment, *Krstic* (IT-98-33-T), ICTY Judgment, 2 August 2001, § 561.

<sup>77</sup> T. Forster, *supra* note 5, at 189.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*, at 143: The group meant is either that of the Cambodian nationals as defined by their nationality or the ethnic Khmer majority as defined to a current definition of ethnicity.

<sup>80</sup> Closing Order, *supra* note 24, § 207.

<sup>81</sup> Closing Order, *ibid.*, § 178; T. W. Simon, *The Law of Genocide: Prescriptions For a Just World* (Praeger, 2007), at 119: '[T]he Khmer Rouge clearly did target a group type not found on the legal list. A key understanding of the Cambodian killings lies in recognizing that the Khmer Rouge targeted a specific group, namely, its *political enemies*.'

<sup>82</sup> Closing Order, *supra* note 24, § 103.

<sup>83</sup> *Ibid.*, § 1342: '36% of the Cham people died during the Khmer Rouge regime which is compared to the average rate of Khmer deaths being an estimated 18.7%.'

<sup>84</sup> F. Ponchaud, *L'impertinent du Cambodge, entretiens avec Dane Cuypers* (Paris: Magellan & Cie, 2013), at 207-208; M. Lemonde, former international Co-Investigating Judge at the ECCC, 'Juger, après le régime des Khmers rouges' (Conférence exceptionnelle du séminaire public de recherche, Enfermement, Justice et Libertés, Paris, 19 February 2013).

<sup>85</sup> Thus, the deletion of the phrase 'as such' in the ECCC Law (mentioned earlier in part 3) would have made easier the characterization of those crimes as genocide.

the Cham group.<sup>86</sup> They considered that a certain number of ‘troubling facts’ allowed them to think that the Khmer Rouge ‘may have intended to destroy the Cham as Cham rather than as political opponents’.<sup>87</sup>

Similar questions arise concerning the massacre of the Vietnamese. From the beginning of the Democratic Kampuchea regime, the Khmer Rouge engaged in an ever-escalating military conflict with Vietnam, rendering the Vietnamese, ‘the prime national enemy for the Khmer Rouge’.<sup>88</sup> This would explain why that population was particularly targeted.<sup>89</sup> The existence of an international armed conflict between Vietnam and Cambodia from April 1975 to January 1979 was confirmed by the ECCC Trial Chamber in the 26 July 2010 Judgment in the ECCC’s first case.<sup>90</sup> The CIJ reached the same conclusion in Case 002.<sup>91</sup> As for the Cham however, several elements,<sup>92</sup> including explicit reported statements from former cadres of the regime,<sup>93</sup> led the CIJ to think that the Khmer Rouge may have intended ‘to destroy the Vietnamese as Vietnamese rather than because the regime was at war with Vietnam.’<sup>94</sup>

However, the Cham and Vietnamese populations were not the only minorities in Cambodia to suffer under the Democratic Kampuchea period. On 3 December 2009, civil parties’ lawyers<sup>95</sup> submitted to the CIJ a request for supplementary investigations<sup>96</sup> regarding genocide of the Khmer Krom.<sup>97</sup> These people have traditionally inhabited the lowlands around the Mekong Delta.<sup>98</sup> In consequence, they have geographic and cultural ties to Vietnam, and seem to have been, because of these connections, submitted to acts of particular violence under the Khmer Rouge regime.<sup>99</sup> It is held that an estimated 125,000 Khmer Krom were massacred during that period, which is

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<sup>86</sup> Closing Order, *supra* note 24, §§ 1335-1342.

<sup>87</sup> S. Giry, *supra* note 2.

<sup>88</sup> R. Park, ‘Proving Genocidal Intent: International Precedent and ECCC Case 002’, 63:1 *Rutgers Law Review* 130 (2011), at 145.

<sup>89</sup> Closing Order, *supra* note 26, §§ 792 and 1349: Almost ‘all [remaining Vietnamese] died from the hands of the Khmer Rouge during the years from April 1975 to January 1979.’

<sup>90</sup> Judgment, *Kaing Guek Eav alias Duch* (001/18-07-2007/ECCC/TC), Trial Chamber, 26 July 2010, §§ 66-81.

<sup>91</sup> Closing Order, *supra* note 24, §§ 150-152.

<sup>92</sup> *Ibid.*, §§ 791-840.

<sup>93</sup> *Ibid.*, §§ 814-818.

<sup>94</sup> S. Giry, *supra* note 2.

<sup>95</sup> At the ECCC, the Khmer Rouge victims are given the opportunity to directly participate in the criminal proceedings as ‘civil party’, see Internal Rules, *supra* note 23, Rule 23 and ff. Civil parties are parties in the proceedings and more or less enjoy rights similar to the prosecution and the defense. In particular, they are represented by civil party lawyers during the investigative stage of the proceedings.

<sup>96</sup> Internal Rules, *supra* note 19, Rule 55(10) which allows parties in the proceeding (prosecutors, defense and civil parties) to request the CIJ to undertake investigative actions they consider useful.

<sup>97</sup> 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 & Vietnamese, *Nuon Chea et al.* (002/19-09-2007-ECCC-OCIJ), Co-Investigating Judges, 13 January 2010 (hereafter ‘Combined Order on Khmer Krom’).

<sup>98</sup> M. Mohan, ‘Reconstituting the “UN-Person”: the Khmer Krom & the Khmer Rouge Tribunal’, 12 *Singapore Year Book of International Law and Contributors* 43 (2008), at 46.

<sup>99</sup> V. Sathisan and J. Holligan, ‘Have a Trial by Relevance, not Severance – The ECCC’s Case 002’, i-Lawyer Blog. Asian Business & Rule of Law Initiative, 4 May 2013, available online at [http://ink.library.smu.edu.sg/sol\\_april/17](http://ink.library.smu.edu.sg/sol_april/17) (last visited 30 September 2014).

considered to be a majority proportion of their population in Cambodia.<sup>100</sup> In their request, the civil parties' lawyers expounded a certain number of facts<sup>101</sup> which suggested that genocide could have been committed on the Khmer Krom in Takeo and Pursat provinces. These allegations were further supported by the fact that the Co-Prosecutors also filed two investigative requests which referred to crimes committed against the Khmer Krom population in the Bakan district of Pursat province.<sup>102</sup>

As noted by the CIJ however, civil parties' lawyers and Co-Prosecutors' requests related to facts of which they had not properly been seized.<sup>103</sup> According to the ECCC Internal Rules, the CIJ may only investigate facts which have either been set out in the Co-Prosecutors' introductory submission<sup>104</sup> or in a supplementary submission.<sup>105</sup> The Co-Prosecutors' requests concerning the Khmer Krom did not satisfy the Internal Rules' requirements. Thus, they could not be considered to be supplementary submissions<sup>106</sup> and were rejected. The request of the civil parties' lawyers was also dismissed.<sup>107</sup>

However, at that time of the investigation, this did not exclude that the facts of which the CIJ had properly been seized, might still be characterized as a crime of genocide against the Khmer Krom. As noted by the CIJ in their order, 'the investigation of Khmer Krom as a group is ... relevant in determining jurisdictional elements of the crimes charged'.<sup>108</sup> Yet, in the Closing Order, nothing shows that the Khmer Krom group was subjected to a particular treatment as Khmer Krom. To the contrary, the CIJ have considered that they were persecuted as enemies for the same reasons as the rest of the Khmer majority.

### **C. Crimes Committed Against the Khmer Majority**

The Khmer Rouge authorities also identified several groups as 'enemies'<sup>109</sup> within the Khmer majority group. The Closing Order mentioned for instance the entire population remaining in towns after the Khmer Rouge came to power on 17 April 1975. This group was labeled as 'new people' or '17 April people'. Its members were often targeted and subjected to harsher treatment based on this identity.<sup>110</sup>

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<sup>100</sup> Combined Order on Khmer Krom, *supra* note 97, § 6.

<sup>101</sup> *Ibid.*, §§ 27-39.

<sup>102</sup> *Ibid.*, § 3.

<sup>103</sup> *Ibid.*, §§ 6-7.

<sup>104</sup> Internal Rules, *supra* note 20, Rule 53.

<sup>105</sup> *Ibid.*, Rule 55(2). 'Supplementary Submission' refers to a written submission by the Co-Prosecutors requesting the CIJ to undertake further action on new facts in an *ongoing* investigation.

<sup>106</sup> Combined Order on Khmer Krom, *supra* note 97, §§ 7-8.

<sup>107</sup> *Ibid.*, § 9.

<sup>108</sup> *Ibid.*, §§ 10-11.

<sup>109</sup> Closing Order, *supra* note 24, § 1417.

<sup>110</sup> *Ibid.*, §§ 227, 1417.

The CIJ upheld that ‘such treatment, based on official pronouncements and documentary records [...], confirms that the perpetrators had the *specific intent* to cause the victims harm because they belonged to these ‘enemy’ groups.’<sup>111</sup> However, they did retain for these crimes the charge of crime against humanity of persecution on political grounds.

That legal characterization may appear justified. Neither the ‘enemies’ nor the ‘new people’ constitutes a group that can be related to one of the four groups protected by the Genocide Convention. The Convention’s definition is confined to racial, national, ethnical and religious groups whereas the Khmer Rouge authorities seem to have targeted their non-minority Cambodian victims as members of political, professional, or economic groups.<sup>112</sup>

One of the CIJ explained later to a journalist that ‘to establish that a genocide occurred, a group needs to have been identified ... and that group cannot be the quasi-entirety of the population – otherwise the notion no longer makes sense.’<sup>113</sup> However, that point of view is not shared by some eminent specialists. It has been affirmed that nothing in the Genocide Convention requires that a protected group constitutes a minority,<sup>114</sup> and that nothing excludes cases where victims are part of the perpetrators’ own group.<sup>115</sup> Several academics spoke in favor of the characterization of genocide for the crimes committed by the Khmer Rouge against the Khmer majority referring to the case as ‘autogenocide’.<sup>116</sup>

The group of experts appointed by the Secretary General of the United Nations in 1998 to assess, among other things, the feasibility of a Khmer Rouge trial in Cambodia, held in its final report that ‘the Khmer people of Cambodia do constitute a national group within the meaning of the Convention.’<sup>117</sup> But if the question of the group did not appear too contentious, the experts also raised that ‘whether the Khmer Rouge committed genocide with respect to part of the Khmer national group, turns on complex interpretive issues, especially concerning the Khmer Rouge’s intent.’<sup>118</sup>

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<sup>111</sup> *Ibid.*, § 1424 (emphasis added).

<sup>112</sup> J. Abrams, ‘The Atrocities in Cambodia and Kosovo: Observations in the Codification of Genocide’, 35:2 *New England Law Review* 303 (2001), at 307; W. Schabas, ‘Were the Atrocities in Cambodia and Kosovo Genocide?’, (2001), 35:2 *New England Law Review* 287 (2001), at 290.

<sup>113</sup> S. Giry, *supra* note 2; see for a similar point of view, Schabas, *ibid.*, at 291: ‘the fundamental difficulty with using the term genocide to describe the Cambodian atrocities lies with the group that is victim of genocide. Destruction of Khmers by Khmers simply stretches the definition too much.’

<sup>114</sup> J.D. Ciorciari and Y. Chhang, ‘Documenting the Crimes of Democratic Kampuchea’, in J. Ramji and B. Van Schaack (eds), *Bringing the Khmer Rouge to Justice, Prosecuting Mass Violence Before the Cambodian Courts* (Lewinston, NY: Edwin Mellen Pr, 2005) 222-307, at 263.

<sup>115</sup> J. B. Quigley, *The Genocide Convention: An International Law Analysis* (Aldershot UK: Ashgate, 2006), at 127.

<sup>116</sup> See e.g. *Commission on Human Rights, Question of the violation of human rights and fundamental freedoms in any part of the world*, UN Doc. E/CN.4/SR.1510 (1979), at 7; H. Hannum, ‘International Law and Cambodian Genocide: The Sounds of Silence’, 11 *Human Rights Quarterly* (1989) 82, at 111-112.

<sup>117</sup> *Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135*, UN Doc. S/1999/231, A/53/850, 16 March 1999, Annex, § 65; to be noted however, that contrary to the ICT, the group of experts used a rather ‘objective’ group definition here, namely group conception defined from an outside perspective.

<sup>118</sup> *Ibid.*

The ICT jurisprudence made a rather unclear distinction<sup>119</sup> between intent and motive.<sup>120</sup> If intent is commonly seen as an essential factor in establishing genocide, motive on the contrary, is often considered irrelevant in this context. The personal motive of the perpetrator of genocide may be, for example, to obtain personal economic benefits, or political advantage or some form of power. However, the existence of this personal motive does not preclude the perpetrator from also having the specific intent to commit genocide.<sup>121</sup> The ICT have further specified that ‘the victims of the crime must be targeted because of their membership in the protected group, although not necessarily solely because of such membership’.<sup>122</sup> That led commentators to deduce that if one intends to destroy a protected group, it is not necessary that the perpetrator performs the criminal act out of a motivation related to the distinguishing feature of the group. Thus, the political and economic background of the ‘new people’ may be seen as ‘mere’ features of that group<sup>123</sup> which actually constituted a motive for attack.<sup>124</sup> The specific intent of the Khmer Rouge authorities would therefore not be the destruction of the ‘new people’ as a bona fide social, political or economic group, but rather the *purification* of the Khmer group by eliminating its undesirable elements.<sup>125</sup> If such an interpretation has some consistency, it remains controversial. Several authors do not share such a point of view.<sup>126</sup> Neither did the CIJ establish the genocidal intent of the Khmer Rouge in regard to the Khmer group.

#### **D. Proving the Genocidal Intent of the Khmer Rouge**

For the Khmer majority as for the minority groups, the main issue remains the proof of the genocidal intent. In *Akayesu*, the first-ever decision of an international tribunal on genocide, one ICTR Trial Chamber noted ‘that intent is a mental factor which is difficult, even impossible, to determine’ directly. It further held, however, that ‘the genocidal intent inherent in a particular act’ may ‘be inferred (...) from the general context’ in which the act occurred.<sup>127</sup> Therefore, ICT almost always

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<sup>119</sup> T. Forster, *supra* note 5, at 84-85.

<sup>120</sup> See e.g., Judgment, *Jelisić* (IT-95-10-A), Appeals Chamber, 5 July 2001, § 49; Judgment, *Kayishema and Ruzindana* (ICTR-95-1-A), Appeals Chamber, 1 June 2001, § 161; Judgment, *Blaskić* (IT-95-14-A), Appeals Chamber, 29 July 2004, § 694.

<sup>121</sup> Judgment, *Krstić* (IT-98-33-T), Trial Chamber, 2 August 2001, § 572: ‘It is conceivable that, although the intention at the outset of an operation was the destruction of a group, it may become the goal at some later point during the implementation of the operation.’

<sup>122</sup> Judgment, *Blagojević and Jokić* (IT-02-60-T), Trial Chamber I, 17 January 2005, § 669.

<sup>123</sup> J. B. Quigley, *supra* note 115, at 128-129; H. Hannum, *supra* note 116 at 108-109.

<sup>124</sup> Sixth Investigative Request of Co-Lawyers for Civil Parties Concerning the Charge of Genocide Against the Khmer Nationals, *Nuon Chea et al.* (002/19-09-2007-ECCC-OCIJ), Co-Lawyers for Civil Parties, 4 February 2010 (hereafter the ‘Request on Genocide Against the Khmer Nationals’), § 26.

<sup>125</sup> See e.g. B. Kiernan, *The Pol Pot Regime: Race, Power and Genocide in Cambodia Under the Khmer Rouge, 1975-79* (New Heaven and London: Yale University Press, 1996). According to B. Kiernan, the ideology forged by Pol Pot and his group was to restore the historical grandeur of the Khmer race. The exaltation of the race was at the heart of the Pol Pot regime and dictated its policy.

<sup>126</sup> See e.g. T.W. Simon, *supra* note 81, at 119: ‘The Khmer Rouge did not set out to eliminate impure races or despised ethnicities from their land. Rather, they became obsessed with the elimination of any political impurity, of any individual who belonged to *the enemy*.’

<sup>127</sup> Judgment, *Akayesu* (ICTR-96-4-T), Trial Chamber I, § 523.

rely on inferences from the surrounding factual circumstances to determine whether a defendant acted with the requisite genocidal intent.<sup>128</sup>

The ICT have further determined a list of factors that they deem relevant in establishing the genocidal intent: statements, political and administrative documents, propaganda indicating genocidal intent, the scale and the nature of the atrocities committed, a pattern of conduct and the systematic targeting of the protected group, and evidence suggesting that commission of the genocidal *actus reus* was consciously planned.<sup>129</sup> However, no particular combination of those factors can be identified as necessary or sufficient to prove genocidal intent.<sup>130</sup> Consequently, such an appreciation of the facts exclusively falls within the judges' power.

On 4 February 2010, several civil parties' lawyers filed an investigative request concerning the charge of genocide against the Khmer nationals, demanding the CIJ to appoint an expert who may have advised them on that matter.<sup>131</sup> As the investigating stage of the ECCC proceedings, is confidential, the CIJ's order in response to that request has not been made public yet. Nevertheless, since it is a question of legal characterization of the facts, which is strictly speaking the judges' responsibility, such a request might have little chance to succeed.

Eventually, the CIJ referred to the Trial Chamber the crimes committed on the Khmer majority as crimes against humanity of persecution on religious<sup>132</sup> and political grounds.<sup>133</sup> The genocide charges were restricted to crimes committed against the Cham and Vietnamese minorities, despite the fact that those cases also present some difficulties.<sup>134</sup>

## V. CONCLUSION

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ICT's interpretation of the Genocide Convention's definition has maybe clarified some aspects of Article II's requirements but has not broadened the definition in a way which allows characterizing the Khmer Rouge crimes as genocide more easily. The choice of the CIJ to apply that definition of the crime resulted in the exclusion of most Khmer Rouge victims to the genocide charges, due to the difficulties of applying its requirements to the Cambodian case. As a relatively high level of proof

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<sup>128</sup> Judgment and Sentence, *Musema* (ICTR-96-13-A), Trial Chamber I, 27 January 2000, § 167; Judgment and Sentence, *Rutaganda* (ICTR-96-3-T), Trial Chamber, 6 December 1999, § 63: The genocidal intent is therefore 'inferred on a case-by-case basis from evidence at trial'.

<sup>129</sup> For a more comprehensive review of those factors and the corresponding jurisprudence, see in particular, T. Forster, *supra* note 5, at 91-107 and R. Park, *supra* note 88, at 153-175.

<sup>130</sup> R. Park, *ibid.*, at 152.

<sup>131</sup> Request on Genocide Against the Khmer Nationals, *supra* note 124, § 42.

<sup>132</sup> Closing Order, *supra* note 24, § 1421.

<sup>133</sup> *Ibid.*, §§ 1416-1418.

<sup>134</sup> See Section IV. A.

is required at the end of the CIJ's investigation for a case to be sent to trial,<sup>135</sup> in regard to the crimes committed against the Khmer majority and minority groups other than the Cham and the Vietnamese, it may be that the collected evidentiary material was not sufficiently serious and of enough corroborative character to include them in the genocide charges.

However, in the particular context of the Cambodian case, another set of factors may also have influenced the CIJ's decision. As highlighted by a commentator, a failure of genocide charges, due to controversy about the definition of the crime at the ECCC and its application to the Khmer Rouge atrocities, will lead to the acquittal of the accused in this respect. This may have been seen as a great risk by the CIJ, particularly because of the important symbolic value of genocide. Genocide would therefore have been charged only with regard to crimes presenting *the least difficulties*.<sup>136</sup> Such a decision indubitably disappointed many victims<sup>137</sup> who considered that their suffering was not recognized. Nevertheless, it also allows that genocide charges be publicly debated at hearing during the current trial of Case 002.<sup>138</sup> But, if the scope of the debates on genocide is as limited as the charges, some of the issues mentioned in this paper will remain unaddressed.<sup>139</sup>

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<sup>135</sup> See Section II.

<sup>136</sup> T. Forster, *supra* note 5, at 173 (emphasis added).

<sup>137</sup> See e.g. S. Giry, *supra* note 2; T. Forster, *supra* note 5, at 31; M. Mohan, *supra* note 98, at 49.

<sup>138</sup> M. Lemonde, *supra* note 84.

<sup>139</sup> T. Forster, *supra* note 5, at 190: 'It seems that the [CIJ] and the Co-Prosecutors deliberately passed on bringing [the issues concerning the targeting of groups within the Khmer majority] up. ... It can be assumed that charges involving these issues have not been brought in order to avoid ... controversial questions largely unexplored in the jurisprudence of other international criminal tribunals.'