E58/1

BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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CO-PROSECUTORS' RESPONSE TO "IENG SARY'S MOTION TO STRIKE PORTIONS OF THE CLOSING ORDER DUE TO DEFECTS"

Filed by:

Co-Prosecutors
CHEA Leang
Andrew CAYLEY

Distributed to:

Trial Chamber
Judge NIL Nonn. President
Judge Silvia CARTWRIGHT
Judge YA Sokhan
Judge Jean-Marc LAVERGNE
Judge THOU Mony

Copied to:

Accused
IENG Sary

Lawyers for the Defence
ANG Udom
Michael G. KARNAVAS

Civil Party Lead Co-Lawyers
PICH Ang
Elisabeth SIMONNEAU FORT

I. INTRODUCTION

1. On 24 January 2011, IENG Sary through his Defence (the "Defence") filed his Motion to Strike Portions of the Closing Order due to Defects[1] (the "Motion to Strike") in English with the Khmer version filed on 1 March 2011. The Defence alleges that certain portions of the Closing Order[2] are defective and requests that the Trial Chamber strike these passages from the order. For the reasons set out below the Co-Prosecutors request that the Motion to Strike be rejected as inadmissible and alternatively if admissible it should be rejected on its merits.

2. In the merits of the Motion to Strike, the Defence argue that the Closing Order contains several defects specifically in relation to most of the crimes charged and all of the modes of criminal liability alleged.[3] They argue that these crimes and modes of liability lack sufficient factual particulars to support the charges, that the crimes and modes of liability are wrongly characterised, that alternative modes of liability should not be pleaded, that inferences supporting material facts of crimes and modes of liability are not made out to the appropriate standard and that parts of the Closing Order exceeded the jurisdiction of the Co-Investigating Judges. These assertions should be rejected as they are based on: (1) misrepresentations of factual findings in the Closing Order; (2) misrepresentations of the relevant law relating to Indictments; and (3) a selective and partial assessment of the factual findings contained in the Closing Order.

II. MOTION IS INADMISSABLE

3. This Motion to Strike is inadmissible as the ECCC Internal Rules do not allow for a Motion to strike or amend portions of the Closing Order once it has become final. Challenges to the Closing Order can be made by the Defence through an appeal to the Pre-Trial Chamber pursuant to Rule 74 (3) or after the Closing Order has become final through preliminary objections to the Trial Chamber pursuant to Rule 89. A preliminary objection can only be raised concerning: (a) the jurisdiction of the Chamber, (b) any issue which requires the termination of the prosecution; and (c) the nullity of procedural acts made after the indictment is filed.[4]

4. As the Defence have filed their definitive list of preliminary objections to the Closing Order entitled "Summary of Ieng Sary's Rule 89 Preliminary Objections and Notice of Intent of Non-Compliance with Future Informal Memoranda Issued in Lieu of Reasoned Judicial Decisions

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1 Document No. **E58**, "Ieng Sary's Motion to Strike Portions of the Closing Order Due to Defects", 24 January 2011, ERN 00647801-7815 ["Motion to Strike"].
2 Document No. **D427**, "Closing Order", 15 September 2010, ERN 00604508-5246 ["Closing Order"].
3 Motion to Strike, page 1.
4 Rule 89, Internal Rules.

Subject to Appellate Review" (the "Preliminary Objection Motion") on 25 February 2011 and the Motion to Strike is not asserted to be a preliminary objection it is requested that the Motion to Strike should be dismissed. Although Rule 98 (2) allows for the re-characterisation of the charges by the Trial Chamber, through their judgement, it does not allow for amendments via additions or removal or "striking" of the facts contained in the Indictment – "The judgement shall be limited to the facts set out in the Indictment...." In the alternative, if the Trial Chamber finds this Motion to Strike admissible the Co-Prosecutors submit it should be rejected on its merits.

III. LAW

A. VALIDITY OF THE INDICTMENT

Essential Components

5. Under Rule 67(2) an Indictment is valid if the following essential components are present: (1) "the identity of the Accused;" (2) "a description of the material facts;" and (3) "the legal characterisation" of such facts. Rule 67(3) (c) implies that the Co-Investigating Judges shall issue a Closing Order when there is, *inter alia*, "sufficient evidence" against the charged person.

Sufficiency of Particulars

6. A material fact is defined as one upon which the verdict is critically dependent.[5] It is therefore necessary "to plead in the indictment the material facts underpinning the charges."[6] The evidence which supports those material facts is not pleaded in the Indictment but is used to prove those facts at trial.[7] The description of material facts in an Indictment must have sufficient particularity: "to inform a defendant clearly of the nature and cause of the charges against him/her[8] to enable him/her to prepare a defence effectively and efficiently."[9] The primary purpose of the Indictment, aside from being the basis of the case before the court, is to provide the Accused with adequate notice of the case against him pursuant to his rights under Article 14(3) ICCPR.

7. Sufficient particularity of material facts in an indictment is determined by: (i) the nature of the allegations; (ii) the nature of the specific crimes charged; (iii) the scale or magnitude on which the acts or events allegedly took place; (iv) the circumstances under which the crimes were

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5 *Prosecutor v. Kupreškić et al,* Case No. IT-95-16-A, Judgment, 23 October 2001, para. 99.

6 Document No. **D97/14/15**, Public Decision on the Appeals Against the Co-Investigating Judges Order on Joint Criminal Enterprise, 20 May 2010, ERN00486521-00486589 at para. 32 (*quoting inter alia, Prosecutor v. Kupreškić, id.* at para. 88).

7 *Prosecutor v. Norman,* Case No. SCSL-04-14-T, Decision on the First Accused's Motion for Service and Arraingment on the Consolidated Indictment, 29 November 2004, para. 24; *see also* Document No. **D97/14/15**, Public Decision on the Appeals Against the Co-Investigating Judges Order on Joint Criminal Enterprise, 20 May 2010, ERN00486521-00486589, at para. 32 (*quoting Prosecutor v. Kupreškić, supra* note 5, at para. 88).

8 Article 14(3)(a), International Covenant on Civil and Political Rights.

9 Document No. **D97/14/15**, Public Decision on the Appeals Against the Co-Investigating Judges Order on Joint Criminal Enterprise, 20 May 2010, ERN00486521-00486589, at para. 32 (*quoting Prosecutor v. Hadžihasanović, Alagić and Kubura,* Case No. IT-01-47-PT, Decision on Form of Indictment, 7 December 2001, at para. 8).

allegedly committed; (v) the duration of time over which the said acts or events constituting the crimes occurred; (vi) the time span between the occurrence of the events and the filing of the indictment; and (vii) the totality of the circumstances surrounding the commission of the alleged crimes.[10] The greater the scale of the alleged crimes the more impracticable it may be to require a high degree of specificity as to the identity of the victims and the time and place of the events alleged.[11] The perpetrators of the crimes may be identified by reference to their category or group where the Accused is greatly removed from events.[12]

Material Facts Based on Inference

8. Material facts can be proved by inference from circumstantial evidence. For proof of that fact *at trial* the inference must be the only reasonable conclusion based on that evidence. An inferential approach has been used to prove the requisite state of mind of an Accused.[13] In particular, proof of an Accused's superior-subordinate relationship[14] and actual knowledge of their subordinate's criminal acts[15] may be established through direct or circumstantial evidence.

9. The ICTR in *Prosecutor v. Ntagerura* explained that a "circumstantial case consists of evidence of a number of different circumstances which, taken in combination, point to the guilt of the accused person because they would usually exist in combination only because the accused did what is alleged against him."[16] According to the court, the "conclusion of guilt can be inferred from circumstantial evidence"[17] so long as the conclusion "is the *only* reasonable conclusion available from the facts" and "[is] established beyond reasonable doubt."[18]

10. In the *Al Bashir* case the Prosecution were appealing the Pre-trial Chamber's failure to issue an arrest warrant where the required evidential standard at this preliminary stage of the proceedings was "reasonable grounds to believe" that the accused had committed the offence within the jurisdiction of the court.[19] The Pre-Trial Chamber misinterpreted this standard in respect of the genocidal intent of the accused relying on evidence of "proof by inference."[20]

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10 *Prosecutor v. Sesay,* Case No. SCSL-2003-05-PT, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, 13 October 2003, para. 8.

11 *Id.*, at para. 7(v) (*quoting* Ntakirutimana, Judgement and Sentence, Case No. ICTR-96-10 and 196-17-T, 2 February 2003).

12 *Id.*, at para. 7(v) (*quoting* Nahimana, Case No. ICTR-96-11-T, Decision on the Defence Motion on Defects in the Form of the Amended Indictment, 17 November 1998).

13 *Prosecutor v. Ntagerura, supra* note 3, at paras. 304, 399 (*citing Vasiljevic* Appeal Judgement, para. 120; *Krstic* Appeal Judgement, para. 41; *Kvocka et al.* Appeal Judgement, para. 237; and *Stakic* Appeal Judgement, para. 219).

14 *Prosecutor v. Kordic,* Case No. IT-95-14/2-T, Judgement, 26 February 2001, para. 13.

15 *Prosecutor v. Ntagerura,* IT-99-46-A; Appeal Judgment, 7 July 2006, at para. 427.

16 *Prosecutor v. Ntagerura, supra* note 3, at para. 304.

17 *Prosecutor v. Ntagerura, supra* note 3, at para. 306.

18 *Prosecutor v. Ntagerura, supra* note 3, at paras. 304-6.

19 Article 51, Internal Rules.

20 *Prosecutor v. Omar Hassan Ahmad Al Bashir,* ICC-02/05-01/09-OA, Situation in Dafur, Sudan, Judgment on the Appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad al Bashir", 3 February 2010, at para. 39

The Pre-Trial Chamber wrongly found that an arrest warrant could only be issued if the evidence provided by the Prosecutor "show[s] that the only reasonable conclusion to be drawn therefrom is the existence of reasonable grounds to believe in the existence of the requisite specific genocidal intent."[21]

11. The Appeals Chamber held that:

> "Requiring the existence of genocidal intent must be the only reasonable conclusion amounts to requiring the Prosecutor to disprove any other reasonable conclusions and to eliminate any reasonable doubt. If the only reasonable conclusion based on the evidence is the existence of genocidal intent, then it cannot be said that such a finding establishes merely "reasonable grounds to believe." *Rather, it establishes genocidal intent "beyond reasonable doubt* (emphasis added)."[22]

12. Requiring proof "beyond reasonable doubt" at the ECCC is the evidential standard required to find guilt at the conclusion of the proceedings when all the evidence has been heard - not before the substantive trial proceedings have begun.[23] The Defence argument is therefore wrong that where genocidal intent, based on circumstantial evidence, is pleaded in an Indictment it must be the "*only reasonable inference.*" This standard applies at the end of the trial when all of the evidence has been heard and the guilt of the Accused is being determined - not when determining the validity of the Indictment. All that is required in respect of the Closing Order is that the genocidal intent is a reasonable inference that could be drawn from the evidence in the case.

Alternative Charging

13. Alternative charging in an Indictment, in relation to crimes and specifically modes of criminal liability has been the practice at the ECCC in the Closing Order of Kaing Guek Eav alias "Duch." This practice endorsed by the Pre-Trial Chamber on appeal[24] is also the practice at

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21 Id. at para. 32

22 Id. at para. 33.

23 Rule 87(1), Internal Rules.

24 Document Number **D99**, "Closing Order Indicting Kaing Guek Eav alias Duch", 8 August 2008, ERN 00210783-0860 at page 44 where the Trial Chamber indicted Duch for having "planned, instigated, ordered, committed or aided and abetted, or is responsible by virtue of superior responsibility for .....Crimes against Humanity.....[and] Grave Breaches of the Geneva Conventions 1949"; Approved by the Pre-Trial Chamber in the case of *Kaing Guek Eav*, stating that "86.....that neither the Internal Rules nor Cambodian law contain provisions related to the possibility to set out different legal offences for the same acts in an indictment. As prescribed in Article 12 of the Agreement, the Pre-Trial Chamber will therefore seek guidance in procedural rules established at the international level. 87. The jurisprudence of the *ad hoc* international tribunals holds that it is permissible In international criminal proceedings to include in indictments different legal offences In relation to the same acts *[footnote removed]* Both the ICTY and ICTR have considerable jurisprudence supporting the use of cumulative charging. The Special Court for Sierra Leone (SCSL) has also upheld this practice *[footnote removed]* It is observed that the Co-Investigating Judges have included in the Closing Order both crimes against humanity and grave breaches of the Geneva Convention in relation to the same acts. 88. The Pre-Trial Chamber further notes that including more than one legal offence in relation to the same acts in an indictment does not inherently threaten the ne bis in idem principle because it does not involve the actual assignment of liability or punishment *[footnote removed]*." (Case

other international courts, similar to the ECCC, and also addressing massive human rights abuses.[25] Cumulative charging is to be allowed in light of the fact that, prior to the presentation of all of the evidence, it is not possible to determine to a certainty which of the charges brought against an accused will be proven.[26] Pleading different modes of criminal liability in the alternative has been well accepted at the international level.[27]

Contextual Interpretation Required

14. When assessing the validity of an indictment it is fundamental that Indictment paragraphs "*...should not be read in isolation but rather should be considered in the context of the other paragraphs in the indictment.*"[28] This stems from the general principle of legal interpretation that terms within documents are to be interpreted in good faith in accordance with their ordinary meaning in their context and in light of their object and purpose.[29]

B. RE-CHARACTERISATION OF CHARGES

15. Rule 98 (2) allows the Trial Chamber to re-characterise the crimes set out in the Indictment as long as such re-characterisation is limited to the facts contained within the Indictment:

> "2. The judgement shall be limited to the facts set out in the Indictment. The Chamber may, however, change the legal characterisation of the crime as set out in the Indictment, as long as no new constitutive elements are introduced. The Chamber shall only pass judgement on the Accused."[30]

16. The Trial Chamber in Duch held that the ability to re-characterise the crimes pursuant to Rule 92 also included the ability to re-characterise the mode of liability charged:

> "492. As a preliminary matter, the Chamber notes that it is not bound by the legal characterisations adopted by the Co-Investigating Judges or the Pre-Trial Chamber in the Amended Closing Order. [.....] 496. The Chamber thus considers that Internal Rule 98(2) enables it to change the legal characterisation of facts contained in the Amended Closing Order to accord with a new form of responsibility provided that it does not go beyond those facts. In doing so, the Chamber must also ensure that (i) no violation of the fair trial rights of the Accused is entailed and (ii) the form of responsibility in question is applicable before the ECCC."[31]

No. 001/18-07-2007-ECCC/OCIJ(PTC02), Decision on Appeal against Closing Order Indicting KAING Guek Eav Alias "Duch", 5 December 2008, D99/3/42, ERN: 00249846-00249887, paras. 86-88).

25 **ICTY**: *Prosecutor v. Stanisic and Zupljanin*, Case No. IT-08-91-PT, Second Amended Consolidated Indictment, at pp. 1-3 (10 September 2009); **SCSL**: *Prosecutor v. Taylor*, Case No. SCSL-03-01-PT, Prosecution's Second Amended Indictment, at pp. 2-7, 9 (29 May 2007). In both cases, participating in JCE is pleaded in the alternative to all other modes of liability, namely planning, instigating, ordering, and aiding and abetting.

26 *Delalic et al.*, Appeals Chamber, Judgement, 20 February 2001 (ICTY).

27 *Rasevic*, Decision Regarding Defence Preliminary Motion on the Form of the Indictment (ICTY), 28 April 2004, par 29; *Mrksic*, Decision on Form of the Indictment (ICTY), 19 June 2003, par 62.

28 *Prosecutor v. Ntagerura,* Case No. ICTR-99-46-T, Judgement and Sentence, 25 February 2004, para. 30; *see also, Rutaganda v. Prosecutor,* Case No. ICTR-96-3-A, Judgement, 26 May 2003, para. 304.

29 Article 31(1), Vienna Convention on the Law of Treaties, 1969.

30 *See* Article 98(2) of the Internal Rules.

31 Document No. **E188**, Case No. 001/18-07-2007/ECCC/TC, KAING Guek Eav alias Duch, Trial Chamber.

17. The ability of the Trial Chamber to re-characterise crimes including the modes of liability charged is consistent with the practice of the French criminal justice system[32] and the procedures at the ICC.[33]

IV. NATIONAL CRIMES

18. The Defence argues that all references to domestic Cambodian crimes should be struck from the Closing Order because "no facts are set out to support its inclusion."[34] This is patently incorrect. Each of the domestic crimes is a constitutive element of one of the crimes against humanity with which the Accused is charged: they are "elements intrinsic"[35] to these crimes. Thus, the crime of "murder" is set out as an "underlying offence" constituting a crime against humanity[36] or a "grave breach,"[37] as is "torture,"[38] whilst "religious persecution" is limited to a crime against humanity.[39]

19. The Defence also contends that "no forms of liability are listed as applying to these [National] crimes."[40] In this respect, it is somewhat of a non-sequitur to argue that the inapplicability of international modes of responsibility to domestic crimes[41] affects the validity of these charges. It is clear that some of the modes of criminal responsibility applicable in Cambodia, at the relevant time, are analogous to certain modes of responsibility at the international level. Thus, for example incitement or provocation[42] is analogous to "Instigating,"[43] whilst "aiding and abetting" or "assisting and abetting"[44] is directly analogous to "Aiding and Abetting."[45] This being the case, the argument as to a "lack" of specification of modes of liability for the National Crimes is the same as regards the crimes themselves. There is no restriction upon using the same factual elements to demonstrate alternate charges and the Trial Chamber is empowered to re-characterise the crimes accordingly. As the domestic crimes are 'elements intrinsic' to the

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32 *See* Article 351 of the Code of Criminal Procedure, "If the debates demonstrate that the fact consists of another legal characterization than the one set up in the indictment order, the presiding shall ask one or several subsidiary questions."

33 *See* ICC's Regulation 55 (Authority of the Chamber to modify the legal characterisation of facts) "2. If, at any time during the trial, it appears to the Chamber that the legal characterisation of facts may be subject to change, the Chamber shall give notice to the participants of such a possibility and having heard the evidence, shall, at an appropriate stage of the proceedings, give the participants the opportunity to make oral or written submissions."

34 Motion, para. 3.

35 *De Salvador Torres v. Spain*, (1997) 23 E.H.R.R. 601, para. 33; *Block v. Hungary*, ECHR No. 56282/09, 25 January 2011, para. 24.

36 Closing Order, paras. 1373-1380.

37 Closing Order, paras. 1491-1497 and 1498-1500.

38 Closing Order, paras. 1408-1414.

39 Closing Order, paras. 1419-1421.

40 Motion to Strike, para. 3.

41 Motion to Strike, para. 4.

42 Articles 83, 84 and 299, Cambodian Penal Code 1956.

43 Closing Order, paras. 1547-1549.

44 Articles 83 and 87, Cambodian Penal Code of 1956.

45 Closing Order, paras. 1550-1552.

international crimes and the domestic modes of liability are analogous to international modes already specified, there is no prejudice to the Accused in not setting out in detail their application to the material facts.[46]

V. GENOCIDE

20. The Defence argues that the Indictment lacks specificity as to the Accused's specific intent to commit genocide. They argue that the Co-Investigating Judges erred in finding that genocidal intent was "inferred" without finding that such inferences were the "*only reasonable inference[s] available on the evidence.*"[47] As discussed above, this argument is erroneous. It is permissible to draw inferences from the evidence in an Indictment provided that such inferences are reasonable. The Defence does not argue that these inferences are unreasonable; no further specification is required.

21. The Defence further argues that the Co-Investigating Judges have failed to provide sufficient particulars to show that there was "actual agreement to commit genocide,"[48] if this is to be charged in the alternative. This is incorrect as the facts necessary to establish the common plan required for a joint criminal enterprise necessarily imply an "agreement to commit genocide."[49] Thus, as the Closing Order refers to a "plan to destroy the Cham"[50] and a "policy to destroy the Vietnamese"[51] and the involvement of the Accused in these plans, the existence of an agreement is axiomatic.[52]

22. The Defence refers to the *Krstić* Appeal[53] as demonstrating that "knowledge and acceptance of genocide do not amount to the specific intent to destroy, in whole or in part, a group."[54] However, the *Krstić* Appeal says nothing of 'acceptance' and deals rather with 'knowledge' alone. This is made explicit even in the sentence the Defence chooses to support their proposition, which states that "...knowledge...alone cannot support an inference of genocidal intent."[55]

23. Indeed, the preceding paragraphs of the *Krstić* Appeal Judgement demonstrate that his mental state was quite the opposite of agreement: he attempted to ensure the safety of Bosnian

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46 *De Salvador Torres v. Spain*, *supra* note 29, at para. 33; *Block v. Hungary*, *supra* note 29, at para. 24.
47 Motion to Strike, para. 7.
48 Motion to Strike, para. 10.
49 *Prosecutor v. Milutinović, Šainović, and Ojdanić*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003, para. 23.
50 Closing Order, para. 1339.
51 Closing Order, para. 1346.
52 *Brdjanin & Talić*, Case No. IT-99-36-PT, Decision on Form of Fourth Amended Indictment, 23 November 2001, para. 12.
53 *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgment, Appeal Chamber, 19 April 2004.
54 Motion to Strike, para. 27.
55 *Prosecutor v. Krstić*, *supra* note 49, at para. 134.

Muslims;[56] he ordered that a convoy of civilians be treated in a civilised manner so as to prevent "the kind of problem that we had before;"[57] and became angry when informed of the execution of Muslims.[58] The situation is quite the opposite in the instant case: there is nothing in the Closing Order to suggest that the Accused disagreed with the genocidal policy. The Closing Order refers to the Accused's "[a]cceptance of this greater range of criminal means, coupled with persistence in implementation...."[59] It is reasonable to infer specific genocidal intent from these circumstances. As previously discussed, if an inference is reasonable it is sufficient to establish intent to a prima facie standard.

24. The Defence argues that the Closing Order does not sufficiently characterise "*which punishable act of genocide Mr. Ieng Sary has been indicted for*"[60] and does not set out their individual elements. In this regard, the Co-Prosecutors submit that, in the first place, it is clear from the terms of paragraph 1525(iv) of the Closing Order that the Accused are charged primarily with participation in genocide through their involvement in a joint criminal enterprise. In the second place, the Co-Prosecutors submit that "attempt" and "conspiracy to commit" genocide are "elements intrinsic" in the participation in genocide through the joint criminal enterprise. One cannot commit genocide without attempting to commit genocide.

25. Similarly, the elements necessary to establish "conspiracy to commit" genocide are intrinsic to the participation through JCE.[61] As set out in more detail above, it is permissible to apply alternate characterisations to the same set of facts and, in any case, it is open to the Trial Chamber to change the legal characterisation of a set of facts. Since "attempt" and "conspiracy to commit" are lesser charges, the elements of which are intrinsic to the charge of perpetration through a joint criminal enterprise, there would be no prejudice to the Accused if the Co-Prosecutors were to argue these in the alternative at trial. The Trial Chamber should not, therefore, amend the Closing Order in this respect.

VI. PERSECUTION

26. The Defence argue that the Closing Order does not specify the discriminatory element of the persecution charge to a sufficient degree of particularity. They state that the Closing Order does not specify how "new people" were treated differently and how "real or perceived" enemies were treated more harshly than others. This again is incorrect. By way of example, a review of the "Co-operatives and Worksites and Co-operatives" section of the factual findings

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56 *Prosecutor v. Krstić*, *supra* note 49, at para. 132.
57 *Prosecutor v. Krstić*, *supra* note 49, at para. 132.
58 *Prosecutor v. Krstić*, *supra* note 49, at para. 104.
59 Motion to Strike, para. 26, *quoting* Closing Order, para. 1527.
60 Motion to Strike, para. 10.
61 *Prosecutor v. Milutinović, Šainović, and Ojdanić*, *supra* note 45, at para. 23.

in the Closing Order provides particulars of the different treatment of these political groups. Examples of the particulars of the different treatment of the new people[62] and CPK enemies[63] are numerous – thereby confirming the discriminatory element of the crime of persecution.

27. With regards to the *mens rea* of religious and racial persecution,[64] the Closing Order sets out the "context of the attack" and the surrounding "circumstances" referred to as reflecting the necessary intent in the four paragraphs preceding the quote selected by the Defence.[65] As explained above, it is perfectly acceptable to establish intent in the Indictment on the basis of a reasonable inference.

VII. DEPORTATION

28. The Defence argues that references to the deportation of the Vietnamese minority from Prey Veng, Svay Rieng and the Tram Kok Co-Operatives render the Closing Order defective because the Introductory and Supplementary Submissions do not set out facts in support of such a conclusion.[66] They argue that this renders the Co-Investigating judges in breach of Rule 55(2) and that, resultantly, "[t]*he OCIJ had no jurisdiction to investigate the alleged deportation...*"

29. It is submitted that there is an adequate basis in the Introductory Submission to allow the Co-Investigating Judges to investigate the impugned facts. The Introductory Submission specifically authorises the Co-Investigating Judges to open a judicial investigation into deportation.[67] It also sets out the fact that "...tens of thousands of people living in the Eastern Zone..." were "forcibly relocated"[68] and that these included people from Prey Veng and Svay Rieng.[69] Furthermore, the Co-Prosecutors specifically alleged a policy of targeting the

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62 **New People**: (**Tram Kok Cooperatives**: lacked political rights, para. 305-06; specifically identified to determine work and rights classification, para. 306; evacuated from homes, para. 310; experienced health problems, para. 313; arrested and taken away, para. 319) (**Trapeang Thma Dam Worksite**: given larger working quotas, para. 343; suffered from unjustified punishments, para. 343; arrested and killed once identified, para. 343; arrested for "reeducation meetings," para. 346; disappeared, para. 346; arrested even if work quotas were met, para. 346; arrested and brought to the execution place once identified, para. 346) (**1st January Dam Worksite**: less food, para. 360; worse clothing and housing, para. 360; withheld of certain positions, para. 360; disappeared, para. 366; executed, para. 366).

63 **Enemies of CPK**: (**Tram Kok Cooperatives**: targeted for purging, para. 309; identified for arrests and reeducation, para. 315; sent to Kraing Ta Chan Security Centre, para. 309; disappeared, para. 318; arrested and taken away, para. 319) (**1st January Dam**: disappeared, para. 366; executed, para. 366) (**Kampong Chhnang Airport Construction Site**: purged, para. 387; tempered, paras. 387-89; eliminated, para. 387; arrested, para. 387; refashioned, para. 389; forced to work day and night, 7 days a week, paras. 389-90; sent to S-21, para. 389; suffered from dangerous working conditions, para. 391; given insufficient food rations, para. 392; died from starvation, illness, overwork and exhaustion, para. 392; disappeared, separated, and executed, paras. 395-98) (**Prey Sar Worksite**: suffered from the harshest tempering, para. 405; forced to work for reeducation, para. 406; suffered from the harshest detention conditions, para. 406).

64 Motion, paras, 14 and 15

65 Closing Order, paras. 1419 to 1422.

66 Motion to Strike, para. 11.

67 Introductory Submission, para. 122(c).

68 Introductory Submission, para. 42.

69 Introductory Submission, para. 42.

Vietnamese.[70] Resultantly, there was sufficient scope in the facts alleged in the Introductory Submission for the Co-Investigating Judges to return a finding that large numbers Vietnamese had been deported.

30. At the same time this complaint is inadmissible. As the Closing Order is now final, the Trial Chamber's jurisdiction is unaffected by this complaint by virtue of Rule 76 (7):

> "Subject to any appeal, the Closing Order shall cure any procedural defects in the judicial investigation. No issues concerning such procedural defects may be raised before the Trial Chamber or the Supreme Court Chamber."

31. Furthermore, no prejudice is caused to the Accused as a result of the action of the Co-Investigating Judges. The Accused has received prompt and detailed notice of these charges by virtue of their inclusion in the Closing Order, pursuant to his ICCPR rights.[71] It is therefore not permissible for him to challenge the alleged defects.[72]

VIII. JOINT CRIMINAL ENTERPRISE

32. In attempting to remove all references of joint criminal enterprise from the Closing Order the Defence grossly misrepresent the material facts contained in the Indictment which support the existence of a joint criminal enterprise. The Defence claim that the Closing Order states that: *"the Closing Order's conclusion that a JCE can exist when crimes were merely the result of the non-criminal policies used to implement a non-criminal plan..."*[73] Nowhere in the Closing Order is it stated that either the common purpose or the policies implemented pursuant to the joint criminal enterprise are "non-criminal." In fact it says, in the paragraph quoted by the Defence, that the "*...purpose itself was not entirely criminal in nature...*"[74] The plain implication of this text is that the purpose was at least partly criminal, rather than "non-criminal."

33. Similarly, there is nothing to substantiate the claim that the Closing Order describes the five policies implemented by CPK as "non-criminal." Indeed, the Closing Order makes it clear that these policies required the commission of the crimes charged. For example: the policy of "establishment and operation of cooperatives and worksites"[75] necessarily required the commission of, *inter alia,* "enslavement" as a crime against humanity;[76] "re-education of bad elements and the *killing of* enemies *(emphasis added)*"[77] required as an integral part of its

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70 Introductory Submission, para. 69.
71 Article 14(3)(a) ICCPR.
72 Rule 48, Internal Rules.
73 Motion to Strike, para. 23.
74 See, for example: Closing Order, paras. 1524-1525, as quoted in the Motion, para. 21
75 See, for example: Closing Order, para. 157.
76 See, for example: Closing Order, paras, 1391-1396, particularly 1393.
77 See, for example: Closing Order, para. 157.

implementation the commission of crimes of, *inter alia,* murder,[78] extermination,[79] imprisonment,[80] and torture[81] as a crime against humanity; whilst "targeting of specific groups"[82] inherently involved, *inter alia* persecution on political,[83] racial[84] or religious[85] grounds as a crime against humanity and wilful killing[86] and unlawful deportation[87] and confinement[88] of civilians as grave breaches of the Geneva Conventions.

34. It is made clear over the 401 pages of substantive text of the Closing Order that these policies were inherently criminal. The fact that they may also have had some non-criminal aims is irrelevant and it is disingenuous to suggest that either the common plan or the policies of CPK are anywhere in the Closing Order characterised as "non-criminal."

35. The Defence alleges that the "facts and circumstances...set out in relation to Mr. Ieng Sary's participation or contribution to the common plan do not support an inference that he shared the intent to perpetrate a crime."[89] Again, the Defence's allegation stands in sharp contrast to the detailed facts contained in the Closing Order. The criminality of the common plan and policies has already been addressed. That Ieng Sary shared the criminal intent for the commission of the crimes can be established or inferred from: (1) his voluntary acceptance of and willing participation in senior positions and roles which enabled him to participate in the joint criminal enterprise;[90] (2) his actions in conceiving the crimes together with his co-perpetrators[91] and furthering their commission by, *inter alia*, meeting with and issuing instructions to lower-level CPK cadres,[92] visiting crime sites[93] and personally taking part in the crimes;[94] (3) his speeches and statements, encouraging the commission of the crimes[95] and defending CPK's policies prior to and during the period under investigation;[96] (4) CPK's propaganda to which he contributed and which he agreed with and supported;[97] (5) his statements during political indoctrination and

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78 See, for example: Closing Order, paras. 1373-1380, particularly 1377.
79 See, for example: Closing Order, para. 1390.
80 See, for example: Closing Order, 1407.
81 See, for example: Closing Order, para. 1425.
82 See, for example: Closing Order, para. 157.
83 See, for example: Closing Order, para. 1417.
84 See, for example: Closing Order, para. 1422.
85 See, for example: Closing Order, para. 1419.
86 See, for example: Closing Order, paras. 1491-1497.
87 See, for example: Closing Order, paras. 1515-1517.
88 See, for example: Closing Order, paras. 1518-1520.
89 Motion to Strike, para. 24
90 See for example: Closing Order, paras. 1001, 1008.
91 See for example: Closing Order, paras. 1022, 1024, 1029, 1049.
92 See, for example: Closing Order, para. 1011, 1050
93 See, for example: Closing Order, paras. 1045.
94 See, for example: Closing Order, paras. 1049, 1062, 1072, 1073, 1074
95 See, for example: Closing Order, paras. 1108.
96 See, for example: Closing Order, paras. 1020, 1021, 1023, 1030-1042, 1052-1060, 1117, 1121.
97 See, for example: Closing Order, paras. 1015, 1024, 1119.

tempering of CPK cadres;[98] and (6) his actions, writings and statements,[99] including those in which he sought to prevent the discovery of the crimes.[100]

36. The Defence assertion that, where findings in relation to the participation and intent of the Accused in relation to the JCE are arrived at by way of inference, such inference must be the only reasonable inference that could be drawn,[101] has already been addressed. This is the requirement for establishing inferences to the standard necessary to convict the Accused at trial. For the purposes of the Indictment, it is sufficient that the participation and intent of Ieng Sary and the other defendants may reasonably be inferred from the facts and circumstances.

IX. OTHER MODES OF LIABILITY

37. The Defence alleges that the Closing Order fails to set out "sufficient legal characterisation of the facts in order to support liability" for planning, instigating, aiding and abetting, and ordering.[102] Contrary to this assertion, the Closing Order specifically details facts which support all these forms of liability. In the "Role of the Accused" section, the Indictment provides 33 pages of precise details and particulars of his position, role, and participation in all of the crimes charged.[103] By way of illustration, reference to the "Role of the Accused" section in the Closing Order reveals that the factual allegations relevant to all modes of liability are made with specific particularity.

38. **Planning:** The Closing Order sets out how, as a member of the Standing Committee, Ieng Sary[104] possessed the power to contribute to the establishment of CPK policies[105] and used that power to take part in the design of the crimes.[106] He took part in deliberations and decisions which led to the formulation of criminal objectives and creation of mechanisms for the implementation of the Party Centre's criminal directives.[107] In addition, the Closing Order explains how Ieng Sary, as head of MFA took part in the planning of arrests of MFA cadres[108] and recalled intellectuals, ambassadors and diplomatic staff who subsequently became victims of various crimes.[109]

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98 See, for example: Closing Order, paras. 1030, 1094, 1534.
99 See, for example: Closing Order, paras. 1030-1042.
100 See, for example: Closing Order, paras. 1110-1113.
101 Motion to Strike, para. 24.
102 Motion to Strike, para. 29.
103 Motion, pp. 250-284.
104 See, for example: Closing Order, paras. 1001.
105 See, for example: Closing Order, paras. 41, 46, 171, 184, 1028, 1049.
106 See, for example: Closing Order, paras. 1066.
107 See, for example: Closing Order, paras. 1001, 1029, 1073.
108 See, for example: Closing Order, paras. 1072, 1073.
109 See, for example: Closing Order, paras. 1093, 1096, 1417, 1534.

39. **Instigating:** The Closing Order explains how Ieng Sary encouraged and prompted CPK cadres to commit the crimes through acts including: conducting and presiding over political indoctrination sessions[110] and other meetings with MFA and CPK cadres during which attendees were urged to commit crimes;[111] and visiting crime sites.[112] It further sets out how Ieng Sary provoked the purges, arrests, torture and executions of MFA cadres[113] and further encouraged the commission of crimes by publicly justifying and endorsing the CPK's criminal policies.[114]

40. **Ordering:** The Closing Order describes how Ieng Sary, exercised his authority, both formal and informal, and acted in concert with other senior leaders of the CPK, formulated and issued orders and directives instructing CPK cadres to commit crimes.[115] As a member of the Party Centre, he participated in these joint orders and received reports on their implementation.[116]

41. **Aiding and Abetting:** The Closing Order sets out the material facts necessary to demonstrate that Ieng Sary aided and abetted the commission of the crimes. It demonstrates that he gave practical assistance to and support for the crimes that took place at **S-21** by approving the arrests and transfer of MFA cadres to that security office,[117] and by encouraging and lending moral support to MFA cadres involved in the arrests.[118] He similarly aided and abetted the crimes at **S-21** by taking part in the process of recalling diplomats, intellectuals and students from abroad.[119] He also encouraged the commission of crimes taking place as part of the CPK's enslavement and forced labour policies by visiting worksites[120] and by giving speeches and making statements endorsing those policies in international fora, such as the UN.[121]

42. Aside from alleging a lack of particularity with regards to modes of liability, the Defence additionally argues that pleading them in the alternative is impermissible. As already asserted by the Co-Prosecutors, charging alternative modes of liability is an accepted and appropriate practice in courts addressing crimes of similar magnitude.

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110 See, for example: Closing Order, paras. 1030, 1094, 1534.
111 See, for example: Closing Order, paras. 1003, 1010, 1020, 1061.
112 See, for example: Closing Order, paras. 1045.
113 See, for example: Closing Order, paras. 1086, 1087, 1088.
114 See, for example: Closing Order, paras. 1020, 1021, 1023, 1030-1042, 1052-1060, 1117, 1121.
115 See, for example: Closing Order, paras. 1011, 1022, 1024, 1029, 1049, 1050.
116 See, for example: Closing Order, paras. 46, 72, 575, 827, 837,1020, 1044, 1063.
117 See, for example: Closing Order, paras. 1072 and 1073
118 See, for example: Closing Order, para. 1087
119 See, for example: Closing Order, paras. 1093, 1096, 1417, 1534
120 See, for example: Closing Order, paras. 1045
121 See, for example: Closing Order, paras. 1034, 1039, 1054

X. COMMAND RESPONSIBILITY

43. Finally, the Defence argues that all references to superior, or command, responsibility should be struck from the Closing Order, as the requisite elements are not set out with sufficient particularity. In an attempt to demonstrate this, they selectively quote paragraphs 1559-1560 of the Closing Order, saying that it "*simply states*" that "*there is sufficient evidence.*"[122] In fact, the Closing Order states "*...as set out in the "Roles of the Charged Person" section of this Closing Order, there is sufficient evidence...*"[123] This is a perfectly acceptable means of referring to material facts without repeating them wholesale: as set out above, each paragraph must be considered in the context of the whole of the indictment.

44. Specifically, material facts sufficient to establish each of the requirements of superior responsibility are particularised in the section concerning the "Roles of the Charged Person" and other sections of the Closing Order. Ieng Sary's position within the CPK as, *inter alia,* a full rights member of the Central and Standing Committees[124] and Minister of Foreign Affairs,[125] meant that direct, indirect or *de facto* superior-subordinate relationships existed between him and all CPK cadres directly involved in the crimes. His effective control over these cadres is demonstrated by; (1) his ability, as a member of the Standing Committee to issue directives to all CPK units within the DK;[126] (2) his participation in Standing Committee decisions to investigate and/or punish senior CPK cadres suspected of indiscipline or disloyalty;[127] and (3) his role in personally approving purges of within the Ministry of Foreign Affairs.[128]

45. The CPK cadres over whom Ieng Sary exerted effective control as a member of the Standing Committee were the principal perpetrators of the crimes charged in the Closing Order. Their conduct is set out in great detail throughout the Closing Order.[129] Ieng Sary's knowledge of the commission of crimes is established as a consequence of his position within the Party Centre. As a member of the Standing Committee, he was at the centre of a system of constant transmission of information from each part of the DK administrative hierarchy.[130] In addition, there are numerous instances of telegrams, being copied specifically to Ieng Sary, containing information concerning various crimes.[131] Finally, there is nothing to suggest that Ieng Sary, as

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122 Motion to Strike, para. 18.
123 Closing Order, para. 1559.
124 Closing Order, para. 1001.
125 Closing Order, para. 1008.
126 Closing Order, paras. 41, 43, 46.
127 Closing Order, paras. 943, 1185.
128 Closing Order, paras. 1072, 1073.
129 *See, inter alia,* Closing Order, paras. 298, 300, 378, 386, 478, 696, 785, 787, 828.
130 Closing Order, paras. 46 and 72.
131 For example, *see* Closing Order, paras. 575, 827, 837, 1020, 1044, 1063.

one of the principal architects of the crimes, sought to prevent or punish his subordinates for carrying out these crimes.

46. Consequently, it cannot be said that the Closing Order lacks the particularity necessary to establish individual criminal responsibility by way of superior responsibility.

XI. RELIEF REQUESTED

47. In view of the reasoning provided, it is respectfully submitted that the Motion to Strike be dismissed as inadmissible and in the alternative that it be dismissed on its merits in any event.

Respectfully submitted,

Date	Name	Place	Signature
16 March 2011	CHEA Leang Co-Prosecutor	Phnom Penh	
	Andrew CAYLEY Co-Prosecutor		