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BEFORE THE TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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IENG SARY'S MOTION TO STRIKE PORTIONS OF THE CLOSING ORDER DUE TO DEFECTS

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Mr. IENG Sary, through his Co-Lawyers ("the Defence"), hereby moves the Trial Chamber to strike portions of the Closing Order due to defects. This motion is made necessary because the Closing Order contains several defects, specifically in its application of national crimes, genocide, crimes against humanity, command responsibility, joint criminal enterprise ("JCE"), and planning, instigating, aiding and abetting, and ordering.

I. ADMISSIBILITY

1. Cambodian law and the ECCC Internal Rules ("Rules") are silent on the timing and procedure for moving to strike or amend portions of the Closing Order due to procedural defect. However, the Pre-Trial Chamber has stated that "with respect to challenges alleging defects in the form of the indictment, the Pre-Trial Chamber finds that they are clearly non-jurisdictional in nature and are therefore inadmissible at the pre-trial stage of the proceedings... As such, these arguments may be brought before the Trial Chamber to be considered on the merits at trial..."[1]

2. The Defence considers that the appropriate time to address these issues is now, before the trial begins. This is because Mr. IENG Sary has the right to be informed in detail of the nature of the charges against him.[2] It would also be most efficient to strike any defective portions of the Closing Order now, before the trial begins. This will help to respect Mr. IENG Sary's right to be tried without undue delay.[3]

II. ARGUMENT

A. National Crimes

3. The Trial Chamber must strike references to national crimes from the Closing Order because no facts are set out to support its inclusion and no forms of liability are listed as applying to these crimes. The Closing Order sets out the facts which the OCIJ found to support the crimes of genocide, crimes against humanity, and grave breaches of the Geneva Conventions, but fails to set out the facts which the OCIJ considered to support the charges under Article 3 new of murder, torture, and religious persecution. This does not inform Mr. IENG Sary in sufficient detail of the nature and cause of the charge against him.

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[1] *Case of NUON Chea*, 002/19-09-2007-ECCC/TC, Decision on Appeals by Nuon Chea and Ieng Thirith against the Closing Order, 15 February 2011, D427/3/15, ERN: 00644462-00644571, para. 63.
[2] *See* Establishment Law, Art. 35 new.
[3] *Id.*

4. The Closing Order further failed to set out the form(s) of liability through which Mr. IENG Sary could be charged with murder, torture, or religious persecution. In the Closing Order's discussion of applicable forms of liability, the OCIJ only discussed JCE, planning, instigating, aiding and abetting, ordering, and command responsibility.[4] The OCIJ held that these forms of liability could be applied to genocide, crimes against humanity, and grave breaches, but it did not state that these applied to Article 3 new crimes.[5] National crimes were conspicuously excluded. The OCIJ previously held that international forms of liability cannot apply to domestic crimes[6] and this holding was not overturned by the Pre-Trial Chamber.[7]

5. Since international forms of liability cannot be applied to national crimes, the Closing Order should have set out which domestic form of liability the OCIJ considered to be applicable. It then should have explained how the facts would fit such a legal qualification. If the OCIJ considered that Mr. IENG Sary personally committed murder, torture, or religious persecution, for example, it was required to have set out certain information in the Closing Order. The Pre-Trial Chamber has stated, "When alleging that the accused personally carried out the acts underlying the crime in question, the identity of the victim, the place and approximate date of the alleged criminal acts, the means by which they were committed shall be set out 'with the greatest precision.'"[8]

6. Because the Closing Order fails to set out the facts which would support charges of murder, torture, and religious persecution, and further fails to set out the relevant form of liability and the facts which would support the application of such a form of liability, the portion of the Closing Order referring to Article 3 new crimes is void for procedural defect.

B. Genocide

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[4] *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Closing Order, 15 September 2010, D427, ERN: 00604508-00605246 ("Closing Order"), paras. 1521-63.
[5] *Id.*, paras. 1525, 1545, 1546, 1548, 1549, 1551, 1552, 1554, 1555.
[6] *See Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, 8 December 2009, D97/13, ERN: 00411047-00411056, para. 22: "modes of liability for international crimes can only be applied to the international crimes."
[7] *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC 35), Decision on the Appeals Against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/14/15, ERN: 00486521-00486589 ("PTC JCE Decision"), para. 102.
[8] *Case of Kaing Guek Eav*, 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 ("PTC Decision on *Duch* Closing Order"), para. 49 (emphasis added).

7. The Trial Chamber must strike all reference to genocide from the Closing Order because it was not applied correctly. The Closing Order correctly sets out the applicable definition of genocide,[9] but it then applies the definition incorrectly. The Closing Order states, *inter alia*,[10] that "the intention of the senior leaders of the CPK is inferred from the fact that the genocide of the Cham occurred in the general context of an escalating persecutory attack against the Cham directed by the CPK Centre"[11] and that "the intention of the senior leaders of the CPK is inferred from the fact that the genocide of the Vietnamese occurred in the general context of escalating deportations, persecution, incitement of hatred and anti-Vietnamese war propaganda directed by the CPK Centre."[12] The OCIJ erred in finding that genocidal intent was inferred without finding that this was the only reasonable inference available on the evidence.

8. Genocidal intent, according to ICTY jurisprudence, "may, in the absence of direct explicit evidence, be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts."[13] However, such an inference is allowed only when it is "the only reasonable inference available on the evidence."[14] This is a very high standard. In the ICTY *Jelisić* case, the Trial Chamber could not conclude that Jelisić possessed the requisite genocidal intent[15] even though it found:

> Goran Jelisić presented himself as the 'Serbian Adolf' and claimed to have gone to Brčko to kill Muslims. He also presented himself as 'Adolf' at his initial hearing before the Trial Chamber on 26 January 1998. He allegedly said to the detainees at Luka camp that he held their lives in his hands and that only between 5 to 10% of them would leave there. According to another witness, Goran Jelisić told the Muslim detainees in Luka camp that 70% of them were to be killed, 30% beaten and that barely 4% of the 30% might not be badly beaten. Goran Jelisić remarked to one witness that he hated the Muslims and wanted to kill them all, whilst the surviving Muslims could be slaves for cleaning the toilets but never have a professional job. He reportedly added that he wanted 'to cleanse' the Muslims and would enjoy doing so, that the 'balijas' had proliferated too much

[9] Closing Order, para. 1312.
[10] *See id.*, paras. 1340, 1347.
[11] *Id.*, para. 1341 (emphasis added).
[12] *Id.*, para. 1348 (emphasis added).
[13] *Prosecutor v. Jelisić*, IT-95-10-A, Judgement, 5 July 2001, para. 47.
[14] *Prosecutor v. Krstić*, IT-98-33-A, Judgement, 19 April 2004, para. 42 ("*Krstić* Appeal Judgement"). *See also Prosecutor v. Vasiljević*, IT-98-32-A, Judgement, 25 February 2004, para. 120.
[15] *Prosecutor v. Jelisić*, IT-95-10-T, Judgement, 14 December 1999, paras. 107-08.

> and that he had to rid the world of them. Goran Jelisić also purportedly said that he hated Muslim women, that he found them highly dirty and that he wanted to sterilise them all in order to prevent an increase in the number of Muslims but that before exterminating them he would begin with the men in order prevent any proliferation.[16]

9. The Defence acknowledges the "Standard of Evidence" discussion in the Closing Order,[17] in which the OCIJ held that it must merely determine whether there is a "'probability' of guilt" at this stage, rather than to determine whether guilt has been established "beyond a reasonable doubt."[18] This cannot be confused with a determination as to whether an inference is the only reasonable inference available on the evidence. According to ICTY jurisprudence, which the OCIJ cited favorably, "a *prima facie* case ... is understood to be a credible case which would (if not contradicted by the Defence) be a sufficient basis to convict the accused on the charge."[19] The OCIJ's inferences would not be sufficient to convict Mr. IENG Sary, since the OCIJ has not demonstrated or even attempted to demonstrate that they were the only reasonable inferences which could be drawn. The OCIJ was at a minimum, according to its stated standard of evidence, required to set out that on the balance of probabilities, the only reasonable inference available is that Mr. IENG Sary possessed the specific intent to destroy, in whole or in part, a protected group, as such. It has not done so. There is no *prima facie* case for applying a charge of genocide against Mr. IENG Sary and any reference to genocide must therefore be struck from the Closing Order.

10. Should the Trial Chamber determine that the above paragraphs need not be struck, the Closing Order must be amended in order to provide sufficient notice to Mr. IENG Sary. The OCIJ erred in failing to set out which punishable act of genocide Mr. IENG Sary has been indicted for. The Establishment Law states that attempts to commit acts of genocide, conspiracy to commit acts of genocide, and participation in acts of genocide are punishable acts of genocide at the ECCC. Each of these forms of participation has certain elements which must be established. Conspiracy to commit acts of genocide, for example, "comprises two elements, which must be pleaded in the indictment: (i) an agreement between individuals aimed at the commission of genocide; and (ii) the fact that

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[16] *Id.*, para. 102.
[17] Closing Order, paras. 1320-26.
[18] *Id.*, para.1323.
[19] *Id.*, para. 1325, *quoting Kordić et al.*, Review of the Indictment, 1995 (no page or paragraph number or exact date or case number provided by the OCIJ) (emphasis added).

the individuals taking part in the agreement possessed the intent to destroy in whole or in part, a national, ethnical, racial or religious group, as such."[20] The Closing Order does not state that there was an actual agreement to commit genocide, although it states that JCE members, who agreed to a common purpose which did not include genocide, were aware that implementation of their common purpose expanded to include genocide.[21] The Closing Order also makes no mention of an attempt to commit genocide. The Closing Order must be amended to make clear that Mr. IENG Sary is not charged with attempt to commit genocide or conspiracy to commit genocide.

C. Crimes Against Humanity

11. The Closing Order is defective in stating that "[t]he legal elements of the crime against humanity of deportation have been established in Prey Veng and Svay Rieng as well as in the Tram Kok Cooperatives."[22] Further, "a large number of Vietnamese living in Cambodia were forced to leave the places where they had been residing legally and to cross the Vietnamese border."[23] Rule 55(2) requires that: "[t]he Co-Investigating Judges shall only investigate the facts set out in an Introductory Submission or a Supplementary Submission."[24] The sections of the Introductory Submission and Supplementary Submissions which consider crimes allegedly committed in Prey Veng,[25] Svay Rieng,[26] and in the Tram Kok Cooperatives[27] do not set out facts which suggest that "a large number of Vietnamese living in Cambodia were forced to leave the places where they had been residing legally and to cross the Vietnamese border." The OCIJ had no jurisdiction to investigate the alleged deportation of the Vietnamese in Prey Veng, Svay Rieng and in the Tram Kok Cooperatives and paragraphs 1397-1401 of the Closing Order must be struck out accordingly.

12. The Closing Order states that in "cooperatives and worksites, and during population movements, real or perceived enemies of CPK were subjected to harsher treatment and

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[20] *Prosecutor v. Nahimana et al.*, ICTR-99-52-A, Judgement, 28 November 2007, para. 344 (emphasis added). *See also Prosecutor v. Ntagerura et al.*, ICTR-99-46-A, Judgement, 7 July 2006, para. 92: "conspiracy to commit genocide consists of an agreement between two or more persons to commit the crime of genocide. The existence of such an agreement ... should thus have been pleaded in the ... Indictment as a material fact."
[21] Closing Order, para. 1527.
[22] *Id.*, para. 1398.
[23] *Id.*
[24] Rule 55(2).
[25] *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Introductory Submission, 18 July 2007, D3, ERN: 00141011-00141166, paras. 11, 42, 69-70.
[26] *Id.*, paras. 42, 66, 69, 72.
[27] *Id.*, para. 43.

living conditions than the rest of the population."[28] Similarly, it states that "new people" were "subjected to harsher treatment than the old people, with a view to reeducating them or identifying 'enemies' among them."[29] This pleading does not charge particular acts or omissions amounting to persecution and lacks sufficient specificity.[30] This is because:

> Persecution cannot, because of its nebulous character, be used as a catch-all charge. Pursuant to elementary principles of criminal pleading, it is not sufficient for an indictment to charge a crime in generic terms. An indictment must delve into particulars. This does not mean, however, as correctly noted in the jurisprudence of this Tribunal, that the Prosecution is required to lay a separate charge in respect of each basic crime that makes up the general charge of persecution. What the Prosecution must do, as with any other offence under the Statue, is to particularize the material facts of the alleged criminal conduct of the accused that, in its view, goes to the accused's role in the alleged crime. Failure to do so results in the indictment being unacceptably vague since such an omission would impact negatively on the ability of the accused to prepare his defence.[31]

13. The OCIJ does not specify how "new people" were treated differently, and it does not specify how conditions experienced by real or perceived enemies were harsher than those experienced by others. The OCIJ has failed to particularize the material facts of the alleged criminal conduct of Mr. IENG Sary that, in its view, go to his role in the alleged crime of persecution on political grounds.

14. As regards the *mens rea* of religious persecution, the OCIJ failed to specify how "the context of the attack and the circumstances surrounding the commission of the acts" reflect a specific intent to discriminate on religious grounds.[32] This pleading does not charge particular acts or omissions amounting to the specific intent required to establish religious persecution; it therefore lacks sufficient specificity.

15. As regards the *mens rea* of persecution on racial grounds, the OCIJ does not specify how "the context of the attack and the circumstances surrounding the commission of the acts" reflects a specific intent to discriminate on racial grounds.[33] This pleading does not charge particular acts or omissions amounting to the specific intent required to establish

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[28] Closing Order, para. 1418.
[29] *Id.*, para. 1417.
[30] *Prosecutor v. Blaškić*, IT-95-14-A, Judgement, 29 July 2004 ("*Blaškić* Appeal Judgement"), para. 139: "The Appeals Chamber notes that the Prosecution is required to charge particular acts as persecutions." *See also Prosecutor v. Blagojević & Jokić*, IT-02-60-T, Judgement, 17 January 2005, para. 581; *Prosecutor v. Brđanin*, IT-99-36-T, Judgement, 1 September 2004 ("*Brđanin* Trial Judgement"), para. 994; *Prosecutor v. Stakić*, IT-97-24-T, Judgement, 31 July 2003 ("*Stakić* Trial Judgement"), para. 735.
[31] *Prosecutor v. Kupreškić et al*, IT-95-16-A, Judgement, 23 October 2001, para. 98.
[32] *See* Closing Order, para. 1423.
[33] *Id.*

racial persecution; it therefore lacks sufficient specificity. All references to persecution in the Closing Order must be struck as procedurally void.

D. Command Responsibility

16. The Trial Chamber must strike all references to command responsibility from the Closing Order, because this form of liability was not set out with sufficient particularity. According to the *Duch* Pre-Trial Chamber, "An allegation of superior responsibility requires that not only what is alleged to have been the superior's own conduct, but also what is alleged to have been the conduct of those persons for whom the superior bears responsibility be specified with as many particulars as possible."[34]

17. According to ICTR jurisprudence (the Pre-Trial Chamber has previously stated that the jurisprudence of the *ad hoc* tribunals concerning the form of the indictment is relevant at the ECCC[35]):

> If the Prosecution intends to rely on the theory of superior responsibility to hold an accused criminally responsible for a crime under Article 6(3) of the Statute, the Indictment should plead the following: (1) that the accused is the superior of subordinates sufficiently identified, over whom he had effective control – in the sense of a material ability to prevent or punish criminal conduct – and for whose acts he is alleged to be responsible; (2) the criminal conduct of those others for whom he is alleged to be responsible; (3) the conduct of the accused by which he may be found to have known or had reason to know that the crimes were about to be committed or had been committed by his subordinates; and (4) the conduct of the accused by which he may be found to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who committed them.36

18. The Closing Order does not comply with this requirement of specificity. It simply states:

> there is sufficient evidence that **Nuon Chea**, **Ieng Sary**, and **Khieu Samphan** are responsible by virtue of superior responsibility by their effective control over their subordinates (the RAK; Zone, Sector, District Committee members; local militia and cadre; security office staff; and supervisors and unit chiefs of worksites and co-operatives) who committed the following crimes: GENOCIDE, by killing ... specifically, genocide of: (a) Cham (b) Vietnamese GRAVE BREACHES OF THE GENEVA CONVENTIONS OF 12 AUGUST 1949 ... specifically: (a) wilful killing (b) torture or inhumane treatment (c) wilfully causing great suffering or serious injury to body or health (d) wilfully depriving a prisoner of war or civilian the rights of fair and regular trial (e) unlawful confinement of a civilian (f) unlawful deportation of a civilian CRIMES AGAINST HUMANITY ... specifically: (a) murder (b) extermination (c) enslavement (d) deportation (e)

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[34] PTC Decision on *Duch* Closing Order, para. 49 (emphasis added).
[35] PTC JCE Decision, para. 93.
[36] *Prosecutor v. Muvunyi*, ICTR-2000-55A-A, Judgement, 29 August 2008, para. 19 (emphasis added).

> imprisonment (f) torture (g) rape in the context of forced marriage (h) persecution on political grounds (i) persecution on racial grounds of the Vietnamese (j) persecution on religious grounds of the Cham (k) persecution on religious grounds of Buddhists (1) other inhumane acts through 'attacks against human dignity', forced marriage, forced transfer and enforced disappearances. **Nuon Chea, Ieng Sary**, and **Khieu Samphan** knew or had reason to know that the commission of the crimes listed above, by their subordinates was imminent, and they failed in their duty to take the necessary measures to prevent the below crimes. Moreover, **Nuon Chea, Ieng Sary** and **Khieu Samphan** knew or had reason to know that these crimes had been effectively committed by their subordinates and they failed to fulfil their obligation to punish the perpetrators of these crimes.[37]

19. This statement fails to specify any particulars at all as to: **a.** Mr. IENG Sary's conduct, **b.** who his subordinates were, **c.** the nature of the superior/subordinate relationship, **d.** evidence that Mr. IENG Sary exercised effective control over subordinates, **e.** evidence that Mr. IENG Sary possessed any legal duty to prevent or punish the crimes of his subordinates; **f.** what particular acts his subordinates committed which amounted to genocide, grave breaches, and crimes against humanity, **g.** what evidence supports Mr. IENG Sary's knowledge of these crimes by his subordinates, or **h.** what evidence supports a contention that he failed to prevent these crimes or punish the perpetrators. This statement in the Closing Order is not specific enough to provide proper notice to Mr. IENG Sary of the way in which command responsibility will be applied in his case. Because the Closing Order fails to set out the particular acts or particular course of conduct which would support the application of this form of liability, all references to command responsibility in the Closing Order must be struck as procedurally void.

E. JCE

20. The Trial Chamber must strike all reference to JCE from the Closing Order because the OCIJ has incorrectly: **a.** applied the incorrect *mens rea* concerning Mr. IENG Sary's participation in a common criminal plan; and **b.** stated that the common criminal plan expanded to include genocide, absent a showing of specific intent.

21. According to the Pre-Trial Chamber, "The basic form of JCE (JCE I) exists where the participants act on the basis of a common design or enterprise, sharing the intent to commit a crime."[38] The Closing Order fails to demonstrate that Mr. IENG Sary participated in a JCE sharing the intent to commit a crime within the jurisdiction of the

[37] Closing Order, para. 1559-60.
[38] PTC JCE Decision, para. 37 (emphasis added).

ECCC and appears to have misapplied JCE based on a misunderstanding of the requisite *mens rea* for JCE I. It states:

> The common purpose of the CPK leaders was to implement rapid socialist revolution by in Cambodia through a 'great leap forward' and to defend the Party against internal and external enemies, by whatever means necessary. The purpose itself was not entirely criminal in nature but its implementation resulted in and/or involved the commission of crimes within the jurisdiction of the ECCC. To achieve this common purpose, the CPK leaders designed and implemented five policies. Their implementation resulted in and/or involved the commission of the following crimes which were committed by members and non-members of the JCE...[39]

22. The Closing Order seems to acknowledge that the common purpose may not have been criminal and that this common purpose may not have even been intended to be implemented through policies which were necessarily criminal; only the result of the implementation of the policies involved the commission of crimes. It states, "[b]y his words, his actions and his omissions **Ieng Sary** intended this result."[40] However, "[t]he first form of the JCE exists where the common objective amounts to, or involves the commission of a crime provided for in the Statute. The mens rea required for the first form is that the JCE participants, including the accused, had a common state of mind, namely the state of mind that the statutory crime(s) forming part of the objective should be carried out."[41] The existence of a common plan which merely "resulted in" the commission of crimes is inconsistent with the requirement that Mr. IENG Sary must have entered into a common criminal plan with the shared intent to commit crimes within the jurisdiction of the ECCC.[42] Claiming that he intended this result – especially without providing any evidence of this intent – is not enough to support a *prima facie* case of JCE I.[43]

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[39] Closing Order, paras. 1524-25 (emphasis added).
[40] *Id.*, para. 1535.
[41] *Prosecutor v. Krajišnik*, IT-00-39-T, Judgement, 27 September 2006, para. 883. *See also Prosecutor v. Brđanin*, IT-99-36-A, Judgement, 3 April 2007 ("*Brđanin* Appeal Judgement"), para. 418: "What JCE requires in any case is the existence of a common purpose which amounts to, or involves, the commission of a crime.... [A]s far as the basic form of JCE is concerned, an essential requirement in order to impute to any accused member of the JCE liability for a crime committed by another person is that the crime in question *forms part of the common criminal purpose*." (underlined emphasis added, italicized emphasis in original). *See also* PTC JCE Decision, para. 38.
[42] *See* PTC JCE Decision, para. 39. "JCE I requires a shared intent to perpetrate the crime(s)."
[43] "[A] *prima facie* case ... is understood to be a credible case which would (if not contradicted by the Defence) be a sufficient basis to convict the accused on the charge." Closing Order, para. 1325, *quoting Kordić et al.*, Review of the Indictment, 1995 (no page or paragraph number or exact date or case number provided) (emphasis added).

23. 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 common plan departs from established jurisprudence at the *ad hoc* tribunals. This standard appears to be lower even than the heavily criticized[44] standard which has developed at the SCSL – that the criminal plan must merely "contemplate" the commission of crimes within the SCSL's Statute as the means of achieving an objective.[45] As observed by Judge Fisher in her partially dissenting opinion in the *Sesay et al.* Appeal Judgement, "The doctrine of JCE, since its articulation by the ICTY Appeals Chamber in *Tadić*, has drawn criticism for its potentially overreaching application. International criminal tribunals must take such warnings seriously, and ensure that the strictly construed legal elements of JCE are consistently applied to safeguard against JCE being overreaching or lapsing into guilt by association."[46]

24. If the OCIJ found through inference that Mr. IENG Sary did actually participate in a common criminal plan with the shared intent to commit crimes, not only must this have been the only reasonable inference that could be drawn,[47] the OCIJ was required to set out "the facts and circumstances from which the inference is sought to be drawn."[48] It did not do so. The "facts" and circumstances it sets 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.[49] They simply support an inference that he intended to participate in a plan which was not inherently criminal and which was intended to be implemented through policies which were not inherently criminal.

25. Furthermore, as crimes against humanity and genocide require specific intent, the Closing Order is required to set out the facts and circumstances from which the OCIJ inferred that Mr. IENG Sary possessed this specific intent. As explained by the ICTY *Kvočka* Trial Chamber and affirmed by the Appeals Chamber, "[w]here the crime requires special

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[44] *See, e.g.*, Wayne Jordash & Penelope Van Tuyl, *Failure to Carry the Burden of Proof: How Joint Criminal Enterprise Lost its Way at the Special Court for Sierra Leone*, 8 J. INT'L CRIM. JUST. 591 (2010); Cecily Rose, *Troubled Indictments at the Special Court for Sierra Leone: The Pleading of Joint Criminal Enterprise and Sex-Based Crimes*, 7(2) J. INT'L CRIM. JUST. 353 (2009).

[45] *Prosecutor v. Brima et al.*, SCSL-2004-16-A, Judgement, 22 February 2008, para. 76.

[46] *Prosecutor v. Sesay et al.*, SCSL-04-15-A, Judgement, 26 October 2009, Partially Dissenting and Concurring Opinion of Justice Shireen Avis Fisher, para. 44.

[47] *Brđanin* Appeal Judgement, para. 429.

[48] *Prosecutor v. Krnojelac*, IT-97-25-T, Decision on Form of Second Amended Indictment, 11 May 2000, para. 16.

[49] *See* Closing Order, para. 1534.

intent ... the accused must also satisfy the additional requirements imposed by the crime, such as the intent to discriminate on political, racial, or religious grounds if he is a co-perpetrator."[50] The OCIJ did not explain what evidence it found to support such intent on the part of Mr. IENG Sary. All paragraphs referring to JCE must be struck from the Closing Order.

26. Should the Trial Chamber find that reference to JCE should not be struck from the Closing Order, alternatively all reference to JCE expanding to include genocide must be struck. The Closing Order states:

> With regard to the policies targeting Chams and Vietnamese, the plan to eliminate these groups may not have existed until April 1977 for the Vietnamese and from 1977 for the Cham. From that moment the members of the JCE knew that the implementation of the common purpose expanded to include the commission of genocide of these protected groups. Acceptance of this greater range of criminal means, coupled with persistence in implementation, amounted to an intention of the JCE members to pursue the common purpose through genocide.[51]

27. ICTY jurisprudence allows for the possibility that the common criminal plan at the heart of a JCE may expand and that acceptance of this expansion on the part of the JCE members may be determined by inference.[52] The problem with this statement in the Closing Order lies in the fact that genocide is a specific intent crime. Knowledge and acceptance of genocide do not amount to the specific intent to destroy, in whole or in part, a group, as such. This was explained by the ICTY *Krstić* Appeals Chamber. It found:

> all that the evidence can establish is that Krstić was aware of the intent to commit genocide on the part of some members of the VRS Main Staff, and with that knowledge, he did nothing to prevent the use of Drina Corps personnel and resources to facilitate those killings. This knowledge on his part alone cannot support an inference of genocidal intent. Genocide is one of the worst crimes known to humankind, and its gravity is reflected in the stringent requirement of specific intent. Convictions for genocide can be entered only where that intent has been unequivocally established.[53]

28. This is not an issue of sufficient evidence to support an inference of genocidal intent. The problem lies in the fact that the OCIJ erroneously concluded that the specific genocidal intent required for a JCE I participant may be inferred from mere knowledge of the JCE's

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[50] *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Judgement, 28 February 2005 ("*Kvočka* Appeal Judgement"), paras. 109-10.
[51] Closing Order, para. 1527 (emphasis added).
[52] *Prosecutor v. Krajišnik*, IT-00-39-A, Judgement, 17 March 2009, para. 163.
[53] *Krstić* Appeal Judgement, para. 134 (emphasis added).

expansion and acceptance of that knowledge. It may not. Therefore, all reference to a joint criminal plan to commit genocide must be struck from the Closing Order.

F. Planning, instigating, aiding and abetting, and ordering

29. The Trial Chamber must strike all reference to planning, instigating, aiding and abetting, and ordering because the Closing Order fails to set out a sufficient legal characterization of the facts in order to support liability for these forms of liability. According to the Pre-Trial Chamber, "Where it is alleged that the accused planned, instigated, ordered, or aided and abetted in the commission of the alleged crimes, the 'particular acts' or 'the particular course of conduct' on the part of the accused which forms the basis for the charges in question must be identified."[54] The OCIJ did not do this, but simply stated in each relevant section of the heading "Legal Findings on Modes of Responsibility" that:

> Pursuant to the evidence set out in the 'Roles of the Charged Persons' section of this Closing Order, there is sufficient evidence that **Nuon Chea**, **Ieng Sary**, and **Khieu Samphan**, planned through their acts of knowingly and willingly participating in designing the commission of the following crimes:
> ...
> Pursuant to the evidence set out in the 'Roles of the Charged Persons' section of this Closing Order, there is sufficient evidence that **Nuon Chea**, **Ieng Sary**, and **Khieu Samphan** instigated others in the commission of the following crimes:
> ...
> Pursuant to the evidence set out in the 'Roles of the Charged Persons' section of this Closing Order, there is sufficient evidence that **Nuon Chea**, **Ieng Sary**, and **Khieu Samphan**, aided and abetted the commission of the following crimes:
> ...
> Pursuant to the evidence set out in the 'Roles of the Charged Persons' section of this Closing Order, there is sufficient evidence that **Nuon Chea**, **Ieng Sary**, and **Khieu Samphan** ordered their subordinates (the RAK; Zone, sector, district members; local militia and cadre; security office staff; and supervisors and unit chiefs of worksites and cooperatives) which contributed to the commission of the following crimes...[55]

30. The particular acts or particular course of conduct that would satisfy each different form of liability applied was not alleged. The "Roles of the Charged Person" section of the Closing Order does not explain with any clarity or precision how these forms of responsibility apply. It does not, for example, explain the way in which Mr. IENG Sary allegedly fulfilled the necessary criteria for ordering: "Criminal responsibility for ordering results when person in a position of authority gives or transmits implicitly or explicitly, the order to commit a crime, with the intention or the awareness of the real

[54] PTC Decision on *Duch* Closing Order, para. 49 (emphasis added).
[55] Closing Order, paras. 1545, 1548, 1551, 1554.

probability that the crime may be committed during the execution of the order."[56] Nor does it ever claim that Mr. IENG Sary instigated any crimes. Because the Closing Order fails to set out the particular acts or particular course of conduct which would support the application of planning, instigating, aiding and abetting, or ordering, the portion of the Closing Order applying these forms of liability must be struck as procedurally void.

31. Furthermore, these forms of liability must be struck from the Closing Order because the Closing Order states, after discussing JCE, that "[a]dditionally or in the alternative, one or more of the modes of responsibility described below [planning, instigating, ordering, and aiding and abetting] apply to the instant case."[57] It is erroneous to state that these forms of liability may be applied in addition to commission via JCE. A person may not be held liable for both committing a crime and for planning the same crime. "Where an accused is found guilty of having committed a crime, he or she cannot at the same time be convicted of having planned the same crime. Involvement in the planning may however be considered an aggravating factor."[58] This is likewise true for instigating,[59] ordering[60] and for aiding and abetting.[61] If the OCIJ intended to find that Mr. IENG Sary committed a certain crime or crimes while only planning, instigating, ordering, or aiding and abetting another crime or crimes, this should have been set out clearly and with specificity. Instead, the Closing Order erroneously states that Mr. IENG Sary has committed each crime in the Closing Order through his participation in a JCE[62] (failing to note that JCE is not a valid form of commission for the national crimes charged) and also that he may be liable for genocide, crimes against humanity, and grave breaches through planning, instigating, ordering, and aiding and abetting.[63]

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[56] *Id.*, para. 1553.
[57] *Id.*, para. 1542 (emphasis added).
[58] *Brđanin* Trial Judgement, para. 268. *See also Prosecutor v. Kordić & Čerkez*, IT-95-14/2-T, Judgement, 26 February 2001, para. 386: "[A] person found to have committed a crime will not be found responsible for planning the same crime."
[59] *Blaškić* Appeal Judgement, paras. 91–92; *Kvočka* Appeal Judgement, para. 104; *Prosecutor v. Kordić & Čerkez* IT-95-14/2-A, Judgement, 17 December 2004, paras. 33–35; *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgement, 20 February 2001, para. 745; *Prosecutor v. Kajelijeli*, ICTR-98-44A-A, Appeal Judgement, 23 May 2005, paras. 81–82, 91; *Prosecutor v. Milutinović et al.*, IT-05-87-T, Judgement, 26 February 2009, para. 77.
[60] *Stakić* Trial Judgement, para. 445.
[61] *Prosecutor v. Simić et al.*, IT-95-9-T, Judgement, 17 October 2003, para. 138: "The Appeals Chamber recently confirmed that an accused found criminally liable for his participation in a joint criminal enterprise should be regarded as having 'committed' that crime, as opposed to having aided and abetted the crime; in other words, participation in a joint criminal enterprise is a form of co-perpetration."
[62] Closing Order, para. 1540.
[63] *Id.*, paras. 1545, 1548, 1551, 1554.

III. RELIEF REQUESTED

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the Trial Chamber to STRIKE the following portions of the Closing Order:

a. All references to National Crimes;

b. All references to Genocide, or alternatively AMEND the Closing Order to reflect that genocide through commission and complicity are excluded;

c. Paragraphs 1397-1401 relating to crimes against humanity and all references to persecution as a crime against humanity;

d. All references to Command Responsibility;

e. All references to Joint Criminal Enterprise;

f. All references to planning, instigating, aiding and abetting, and ordering.

Respectfully submitted,

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Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this **24th** day of **February, 2011**