

**BEFORE THE PRE-TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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**INTERNATIONAL CO-PROSECUTOR'S REPLY TO MEAS MUTH'S RESPONSE TO
THE APPEAL OF THE ORDER DISMISSING THE CASE AGAINST MEAS MUTH
(D266)**

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I. INTRODUCTION

1. On 28 November 2018, the International Co-Investigating Judge (“ICIJ”) issued a closing order (“Indictment”) indicting Meas Muth for genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions, and violations of the 1956 Cambodian Penal Code, and committing him for trial.¹ On the same day, the National Co-Investigating Judge (“NCIJ”) issued a closing order (“Dismissal Order”) dismissing all charges against Meas Muth on the basis that he does not fall within the personal jurisdiction of the ECCC.² The Indictment was appealed by the National Co-Prosecutor,³ and Meas Muth filed a request for the case to be dismissed unless the Pre-Trial Chamber (“PTC”), by supermajority, both overturned the Dismissal Order and upheld the Indictment,⁴ to which the International Co-Prosecutor (“ICP”) responded on 28 June 2019.⁵
2. The ICP appealed the Dismissal Order on the basis that it was premised on factual and legal errors that invalidated its personal jurisdiction finding (“ICP’s Appeal”).⁶ In response,⁷ Meas Muth now argues that (i) a dismissal order requires less justification than an indictment; (ii) the Case 003 investigation was complete on 29 April 2011 and its reopening by Reserve ICIJ (“RICIJ”) Kasper-Ansermet did not void the earlier Notice of Conclusion; (iii) the NCIJ considered and issued a decision on all the facts within the scope of Case 003; (iv) the Dismissal Order did not err in its treatment of coercion, duress and superior orders; (v) the NCIJ properly considered direct perpetration and proximity to crimes; (vi) the Dismissal Order’s factual findings regarding Meas Muth’s roles during the DK regime were sound; (vii) the NCIJ’s treatment of victims contained no factual errors; and (viii) the NCIJ did not hold that Duch was the only “most responsible” person. Finally, the Response contends that progressing Case 003 to trial if neither the Dismissal Order nor Indictment is overturned by a PTC supermajority was not envisaged by the ECCC Agreement and would be unconstitutional.
3. The ICP relies on the submissions in the ICP’s Appeal and the Response to Meas Muth’s

¹ **D267** Closing Order, 28 Nov 2018 (“Indictment”), pp. 256-64.

² **D266** Order Dismissing the Case Against Meas Muth, 28 Nov 2018 (“Dismissal Order”), paras 427-30.

³ **D267/3** National Co-Prosecutor’s Appeal Against the International Co-Investigating Judge’s Closing Order in Case 003, 5 Apr 2019 (“NCP Appeal”).

⁴ **D267/4** Meas Muth’s Appeal Against the International Co-Investigating Judge’s Indictment, 8 Apr 2019.

⁵ **D267/10** International Co-Prosecutor’s Response to Meas Muth’s Appeal Against the International Co-Investigating Judge’s Indictment (D267), 28 Jun 2019 (“ICP Response to MM Appeal”).

⁶ **D266/2** International Co-Prosecutor’s Appeal of the Order Dismissing the Case Against Meas Muth, 8 Apr 2019 (“ICP Appeal”).

⁷ **D266/5** Meas Muth’s Response to the International Co-Prosecutor’s Appeal of the Dismissal Order, 24 Jun 2019 (“MM Response”).

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Appeal, and replies below to specific errors and misrepresentations in Meas Muth's Response.

II. PROCEDURAL HISTORY

4. The ICP incorporates by reference the procedural history set out in Annex I to the ICP's Appeal⁸ and the appellate pleading history set out above. The applicable law is set out in the relevant sections below.
5. On 10 May 2019, the PTC extended the time and page limits for the parties' responses and replies to the appeals of both closing orders, instructing them, *inter alia*, to file their replies in one language within 25 days of the notification of the translation for the response to which they are responding.⁹ The Khmer translation of Meas Muth's Response was notified on 15 July 2019,¹⁰ making this Reply due on 9 August 2019.

III. SUBMISSIONS

ICTY Referral Factors are relevant in assessing personal jurisdiction

6. Meas Muth incorrectly asserts that the ICP relied on inappropriate factors for assessing personal jurisdiction.¹¹ In reality, the CIJs' factors for "most responsible" are those outlined by the ICP and consistent with the factors relied on by the ICTY and other ECCC chambers.
7. As the ICP set out¹² and then applied throughout the Appeal, and as Meas Muth himself concedes,¹³ determining whether Meas Muth falls within the ECCC's personal jurisdiction requires assessing the gravity of the crimes for which he is criminally responsible and his level of responsibility. This is the standard applied by both CIJs – individually and together – in Cases 004/1,¹⁴ 004/2¹⁵ and Case 003,¹⁶ as well as by the Trial Chamber ("TC") and Supreme Court Chamber ("SCC") in Case 001.¹⁷
8. The ICTY was mandated as part of its completion strategy to focus on "the most senior leaders

⁸ **D266/2.2** Annex I: Procedural History, 8 Apr 2019.

⁹ **D266/4** & **D267/6** Decision on Requests for Extension of Time and Page Limits for Responses and Replies Relating to the Appeals Against the Closing Orders in Case 003, 10 May 2019 ("Extension Decision"), p. 5.

¹⁰ See Notification email from the Case File Officer, 15 Jul 2019, 2.31 p.m.

¹¹ **D266/5** MM Response, paras 7-14.

¹² **D266/2** ICP Appeal, paras 9-12.

¹³ **D266/5** MM Response, para. 8d. Meas Muth then applies these factors throughout his Response: *see, e.g.*, **D266/5** MM Response, paras 48, 55-6, 64-5, 67, 71, 77-8, 89-90, 92, 97.

¹⁴ **D261** Closing Order (Reasons) in Case 004/1, 10 Jul 2017 ("Case 004/1 Closing Order"), paras 38-9, 317.

¹⁵ Case 004/2-**D360** Closing Order (Indictment), 16 Aug 2018 ("Indictment"), para. 699, applied in paras 700-12; Case 004/2-**D359** Order Dismissing the Case Against Ao An, 16 Aug 2018 ("Dismissal Order"), paras 424-5.

¹⁶ **D266** Dismissal Order, paras 3, 365-7; **D267** Indictment, para. 460, applied in paras 461-9. *See also* **D48** Personal Jurisdiction Decision, para. 15.

¹⁷ Case 001-**F28** *Duch* AJ, paras 71, 80; Case 001-**E188** *Duch* TJ, paras 22-24.

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suspected of being most responsible for crimes”.¹⁸ In evaluating those most responsible, the ICTY Referral Bench considered the “gravity of the crimes charged” and the “level of responsibility of the accused”.¹⁹ It is appropriate, when exercising their discretion, for the CIJs to look to international jurisprudence,²⁰ including that of the ICTY, to determine which factors are relevant to applying this standard, as they,²¹ the TC and SCC,²² have consistently done.

9. Moreover, these are not exclusively “ICTY referral factors”. Without referring to them as such, the CIJs in Case 004/1 together applied the factors,²³ including *inter alia*, victim numbers,²⁴ Im Chaem’s authority and responsibilities, including her participation in policy implementation and crimes;²⁵ the number of people under her control;²⁶ and her hierarchical position.²⁷ As Meas Muth concedes, the exercise of discretion in determining personal jurisdiction is similar to that during sentencing,²⁸ when chambers look to the gravity of the criminal conduct including “consideration of the particular circumstances of the case” and the “form and degree of the participation of the Accused in the crime”,²⁹ and examine comparable factors.³⁰
10. These factors are clearly not “inapposite [or] impossible to apply”.³¹ Meas Muth miscites the CIJs here, who were correctly observing that when assessing gravity, the victim numbers used by the ICTY could not be transplanted in absolute terms to the ECCC context, since the total

¹⁸ United Nations Security Council Resolution 1503, 28 Aug 2003, UN Doc. No. S/Res/1503, preamble recital 7; United Nations Security Council Resolution 1534 (2004), 26 Mar 2004, UN Doc. No. S/Res/1534, paras 5-6;

¹⁹ ICTY RPE, Rule 11bis(C) references Security Council Resolution 1534 and states that the ICTY will consider the “gravity of the crimes charged” and the “level of responsibility of the accused” in deciding whether to transfer cases. The ICTY Referral Bench has adopted these standards: *see Milošević (Dragomir) Referral Decision*, paras 1-3, 17-24; *Lukić & Lukić Referral Decision*, paras 26-8.

²⁰ ECCC Agreement, art. 12(1); ECCC Law, art. 33*new*; Case 001-F28 *Duch* AJ, para. 59.

²¹ **D266** Dismissal Order, paras 366-7; Case 004/2-D359 Dismissal Order, paras 425-6; **D48** Personal Jurisdiction Decision, paras 15-16, 24. *See also* Case 004/1-D308/3/1/20 Im Chaem PTC Closing Order Considerations, para. 327, 332 (Judges Beauvallet and Baik); **D266/5** MM Response, para. 31 citing ICIJ Blunk with approval that he “developed factors ‘based on the ECCC Law, and the jurisprudence of international tribunals’”.

²² Case 001-E188 *Duch* TJ, para. 22; Case 001-F28 *Duch* AJ, para. 375.

²³ **D266/2** ICP Appeal, paras 10-12.

²⁴ **D261** Case 004/1 Closing Order, paras 125-35, 197, 199, 211-21, 230, 270, 276, 314, 317-22. *See also* Case 004/1-D308/3/1/20 Im Chaem PTC Closing Order Considerations, paras 327-8, 330 (Judges Beauvallet and Baik).

²⁵ **D261** Case 004/1 Closing Order, paras 173-5, 307-11. *See also* Case 004/1-D308/3/1/20 Im Chaem PTC Closing Order Considerations, paras 332, 334-5.

²⁶ **D261** Case 004/1 Closing Order, para. 156.

²⁷ **D261** Case 004/1 Closing Order, paras 161, 315. *See also* Case 004/1-D308/3/1/20 Im Chaem PTC Closing Order Considerations, paras 332, 335-7.

²⁸ **D266/5** MM Response, paras 55, 65. *See also* **D261** Case 004/1 Closing Order, para. 38; **D266** Dismissal Order, para. 368.

²⁹ *See, e.g.* Case 001-E188 *Duch* TJ, para. 582; Case 002-E313 Case 002/01 TJ, para. 1068.

³⁰ Including: (a) the number and the vulnerability of victims; (b) the impact of the crimes upon them and their relatives; (c) the scale and brutality of the offences; (d) the role played by the convicted person; and (e) the geographic and temporal scope of the victimisation. *See e.g.* Case 002-F36 Case 002/01 AJ, paras 1118-20; Case 001-F28 *Duch* AJ, para. 375.

³¹ **D266/5** MM Response, para. 14, *citing* **D261** Case 004/1 Closing Order, para. 19.

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number of deaths during the DK regime were higher than in the former Yugoslavia.³²

11. Finally, as Meas Muth acknowledges, the “most responsible” category found in the ECCC Agreement and ECCC Law³³ is - by its text and by the intention of the Royal Government of Cambodia (“RGC”) and the United Nations (“UN”) - an open category whose membership may only be determined by the Co-Prosecutors and Judges of the ECCC based on the totality of the evidence.³⁴ Contrary to Meas Muth’s assertion,³⁵ the ICP has not ignored the negotiation history. It is reflected in the text of the ECCC Agreement limiting personal jurisdiction to those “most responsible” for DK-era crimes.³⁶ Nothing in Meas Muth’s recitations of the “Intent of the Parties to the Agreement”³⁷ changes this or constitutes “factors for identifying those most responsible”³⁸ that provide concrete guidance to the CIJs on exercising their discretion.

A. The Dismissal Order erred in law by failing to make required factual and legal findings

12. Meas Muth fails to substantiate his claims that the Dismissal Order was not required to legally characterise its factual findings, and misstates the impact that this error had on the Dismissal Order’s personal jurisdiction findings. Meas Muth further misrepresents the Dismissal Order’s failure to reach the required factual findings, by (i) overlooking the full scope of Case 003; (ii) incorrectly equating recitation of evidence with factual findings; and (iii) making unwarranted and misleading comparisons with the ICIJ’s Indictment.
13. Contrary to Meas Muth’s assertion,³⁹ the Dismissal Order was required to contain findings as to the characterisation of the crimes and modes of responsibility. Instead, it concluded that Meas Muth was not a “most responsible” person for the crimes committed during the DK regime without regard to whether (i) crimes were committed; or (ii) Meas Muth was criminally responsible for them.⁴⁰ The error is self-evident, both as a matter of law⁴¹ and common sense: without legal findings, the jurisdiction of a criminal tribunal is to be determined without

³² D261 Case 004/1 Closing Order, paras 18-19. See also D266/5 MM Response, para. 8a.

³³ D266/5 MM Response, para. 11.

³⁴ D266/5 MM Response, paras 9, 11. See D266/2 ICP Appeal, paras 114, 173-87.

³⁵ D266/5 MM Response, para. 14.

³⁶ The text of the ECCC Agreement is presumed to be an authentic expression of the intent of both parties. See Vienna Convention, art. 31(1). See also D266/2.1.45 Territorial Dispute (*Libyan Arab Jamahiriya v. Chad*), para. 41; D266/2.1.44 Legality of the Use of Force (*Serbia and Montenegro v. Belgium*), Preliminary Objections, para. 100; D266/2.1.43 Interpretation of Peace Treaties (second phase), Advisory Opinion, p. 229; ILC Draft Articles on the Law of Treaties with Commentaries, p. 220, para. 11. See also *Čelebići* AJ, para. 68; Case 002-E350/8 Decision on Evidence Obtained Through Torture, 5 Feb 2016, para. 27.

³⁷ D266/5 MM Response, paras 8a, 9-11.

³⁸ D266/5 MM Response, paras 8-9.

³⁹ D266/5 MM Response, paras 45-8, 53-4, 89-90, 92.

⁴⁰ D266 Dismissal Order, para. 3.

⁴¹ See Case 004/1-D308/3/1/20 Im Chaem PTC Closing Order Considerations, para. 26 (unanimous).

reference to criminal responsibility.

14. Although the Dismissal Order correctly recited the legal requirement that “most responsible” status be assessed based on the “gravity of the crimes” and “level of responsibility,”⁴² in practice it adopted a new test which (i) artificially restricted the scope of the assessment by supplanting “gravity of the crimes” with “[t]he number of victims” of “Meas Muth’s direct acts”;⁴³ and (ii) excised any consideration of Meas Muth’s *criminal* responsibility for the crimes from the assessment of his “level” of responsibility for them.⁴⁴
15. Meas Muth’s primary defence to these errors is circular: that they were not “fundamentally determinative” of the personal jurisdiction assessment because the Dismissal Order in any event restricted its “gravity analysis” to victims of Meas Muth’s so-called “direct acts”.⁴⁵ This ignores that the restriction itself constituted a legal error.⁴⁶ His remaining arguments likewise fail. While he claims the Dismissal Order made the “requisite findings”,⁴⁷ he points to no findings on the gravity of the crimes for which Meas Muth is responsible, for example, since the Dismissal Order contains none.⁴⁸ Contrary to his claims,⁴⁹ the PTC treated findings on the existence of crimes and criminal responsibility as so indispensable to a dismissal order as to be a foregone conclusion.⁵⁰ His reliance on the Case 004/1 Closing Order is thus confusing, given that the CIJs both made legal findings (albeit insufficient) on both crimes and modes of responsibility and expressly considered them in their personal jurisdiction assessment.⁵¹
16. Meas Muth confuses two distinct concepts when he argues that the precise crimes committed have no bearing on the “gravity of the crimes” assessment because there is no “inherent

⁴² **D266** Dismissal Order, para. 365. *See also* Case 001-**E188** Duch TJ, para. 22.

⁴³ **D266** Dismissal Order, para. 428. *See also* paras 368, 374, 397, 405, 426.

⁴⁴ **D266** Dismissal Order, paras 3, 368. *See also* paras 369, 373, 397, 405, 428. The Dismissal Order appears to erroneously treat only physical perpetration or close proximity thereto as “participation”.

⁴⁵ *Contra* **D266/5** MM Response, paras 45 (*cross-referencing* paras 89-92), 48, 54.

⁴⁶ While the Dismissal Order never clarifies what it means by “direct acts” or “direct victims”, it appears to be limiting the gravity limb to crimes in which an accused was a physical perpetrator or standing nearby. This is flatly contrary to international criminal law and would also mean that members of a leadership JCE could almost never be found “most responsible”. *See* **D266/2** ICP Appeal, paras 112-20; *infra*, paras 44-9.

⁴⁷ **D266/5** MM Response, paras 45, 54.

⁴⁸ The limited factual findings in the Dismissal Order do not constitute legal findings and do not suffice to constitute a reasoned opinion. *Contra* **D266/5** MM Response, para. 51.

⁴⁹ **D266** Dismissal Order, paras 46-7, 54.

⁵⁰ Case 004/1-**D308/3/1/20** Im Chaem PTC Closing Order Considerations, para. 26 (unanimous). Contrary to Meas Muth’s attempted semantic distinctions, findings on “the existence of crimes” and “criminal responsibility” are legal characterisations, requiring identification of the specific crime and mode of liability to determine whether the requisite elements have been met.

⁵¹ **D266/5** MM Response, para. 48 *citing* **D261** Case 004/01 Closing Order. While the CIJs discretionarily considered additional factors relevant to “level of responsibility”, they did not *exclude* criminal responsibility from the analysis. There is no discretion to ignore a charged person’s legal responsibility for crimes when determining whether he is a “most responsible” person for those crimes.

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hierarchy” among crimes.⁵² While there may be no “inherent hierarchy” in the abstract,⁵³ the specific crime at issue is a relevant consideration in every gravity assessment, as demonstrated by the very cases on which Meas Muth relies.⁵⁴ Moreover, the specific crime at issue may impact *both* limbs of the “most responsible” assessment: a finding that an accused is criminally liable for extermination, for example, would be relevant to both gravity of the crimes (killing on a mass scale) and level of responsibility (intent to kill on a mass scale).⁵⁵

17. There is patently no requirement that a person be charged before facts can be legally characterised.⁵⁶ This not only defies common sense, but ignores, for example, that the Co-Prosecutors are required to suggest legal characterisations in their introductory submissions in order to seize the CIJs in the first place.⁵⁷ In any event, Meas Muth was charged by both ICIJ Harmon and ICIJ Bohlander before the Dismissal Order was issued,⁵⁸ and is thus a “Charged Person” within the meaning of Internal Rule 67.
18. Finally, Meas Muth misrepresents the Dismissal Order’s discussion of Wat Enta Nhien security centre,⁵⁹ which consisted almost entirely of quotes of a narrow selection of evidence, not findings.⁶⁰ This approach deprives the parties of the ability to appeal and obstructs the PTC in its duty to review the findings that led to the personal jurisdiction determination.⁶¹ The Dismissal Order’s two-page discussion of Wat Enta Nhien evidence is a far cry from “almost

⁵² *Contra* **D266/5** MM Response, para. 48. *See also* para. 92.

⁵³ *Stakić* AJ, para.375.

⁵⁴ *Contra* **D266/5** MM Response, fn 217, 404-5 (*see e.g. Rutaganda* AJ, paras 590-1; *Kayishema and Ruzindana* AJ, para. 367; *Stakić* AJ, para. 375). Contrary to Meas Muth’s misrepresentation at **D266/5** MM Response, para. 92, the ICTY Referral Bench in *Trbić* considered the specific crimes at issue, as well as the underlying conduct and surrounding circumstances, and found them sufficiently grave. It nevertheless referred the case due to the accused’s low level of responsibility. The lack of an abstract “inherent hierarchy” among crimes had nothing to do with the referral decision. *See Trbić* Referral Decision, paras 18-20, 22-3.

⁵⁵ *See* **D266/2** ICP Appeal, para. 24.

⁵⁶ *Contra* **D266/5** MM Response, para. 53.

⁵⁷ Internal Rule 53(1) [“If the Co-Prosecutors have reason to believe that crimes within the jurisdiction have been committed. [...] The submission shall contain the following information: [...] the relevant provisions of law that defines and punishes the crimes”].

⁵⁸ **D128** Decision to Charge Meas Muth *in Absentia*, 3 Mar 2015; **D128.1** Annex: Notification of Charges Against Meas Muth, 3 Mar 2015; **D174** Written Record of Initial Appearance, 14 Dec 2015. In Case 004/1, the NCIJ participated in the joint Dismissal Order, including making legal characterisation of the facts, even though he had not participated in the decision to charge Im Chaem and made legal findings on crimes with which Im Chaem had not been charged by either CIJ. *See* **D261** Case 004/1 Closing Order, paras 281-305.

⁵⁹ **D266/5** MM Response, paras 49-50. The ICP gave this as just one example of the Dismissal Order’s failure to make the requisite factual findings. Others include the failure to provide *any* findings on a host of crimes sites and criminal events falling within the scope of Case 003. *See* **D266/2** ICP Appeal, paras 63-82; *infra*, paras 31-6.

⁶⁰ **D266** Dismissal Order, paras 288-97.

⁶¹ *See* Case 004/1-**D308/3/1/20** Im Chaem PTC Closing Order Considerations, para. 26 (unanimous). It is unclear how one could appeal the Dismissal Order’s recounting of witness testimony that prisoners were or were not subjected to inhumane conditions, given the lack of any resulting findings (**D266** Dismissal Order, paras 294-5).

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identical”⁶² to the ICIJ’s fourteen pages of factual and legal findings,⁶³ which include express findings that Meas Muth was criminally responsible for extermination, murder, imprisonment and other inhumane acts committed at that security centre under four different modes of liability, as well as for committing pre-meditated homicide.⁶⁴ Contrary to Meas Muth’s misrepresentation,⁶⁵ the ICIJ never said that the evidence of Meas Muth’s control over Wat Enta Nhien was “inconclusive”. To the contrary, the ICIJ found that the units Meas Muth commanded were in control the entire period, and thus found Meas Muth responsible for the crimes committed there.⁶⁶

B. The Dismissal Order erred in law in failing to consider evidence gathered after 29 April 2011

19. Meas Muth incorrectly asserts that the ICP misconstrued the CIJs’ investigative duties.⁶⁷ Rather, it is he who misconceives the concept and requirements of “complete” investigations, and fails to substantiate his arguments that the Rule 66(1) Notice of Conclusion⁶⁸ issued by ICIJ Blunk and the NCIJ on 29 April 2011 was final and validly closed the investigation.
20. The Dismissal Order misunderstood the CIJs’ investigation obligations, and Meas Muth has followed suit. Whilst Meas Muth concedes that “[i]n conducting a genuine and effective investigation, the CIJs were required to not only establish the facts, but also identify those responsible”,⁶⁹ his arguments rest on a mistaken assertion that “any investigative action”⁷⁰ the CIJs subjectively deemed necessary in relation to the facts of which they are seised suffices. He wrongly suggests that if there is *some* material on the case file relating to a fact, there is no minimum threshold standard for an “effective” investigation since the CIJs have an unfettered discretion as to how they conduct the investigation.⁷¹
21. As the ICP explained in the Appeal,⁷² whilst the judges do enjoy a considerable degree of latitude in deciding how to conduct their investigations,⁷³ this discretion is not unlimited and it does not allow them to derogate from their obligation to exercise due diligence in conducting

⁶² *Contra* D266/5 MM Response, para. 49.

⁶³ D267 Indictment, paras 426-43, 552-9, 562-71, 573-4, 576-7, 581, pp. 262, 264.

⁶⁴ D267 Indictment, pp. 262, 264.

⁶⁵ D266/5 MM Response, fn. 230.

⁶⁶ D267 Indictment, paras 155, 429, 459, 564.

⁶⁷ D266/5 MM Response, para. 21.

⁶⁸ D13 Notice of Conclusion of Judicial Investigation, 29 Apr 2011 (“Notice of Conclusion”).

⁶⁹ D266/5 MM Response, para. 31.

⁷⁰ D266/5 MM Response, para. 27 (emphasis in the original).

⁷¹ D266/5 MM Response, paras 23-4, 27.

⁷² D266/2 ICP Appeal, paras 43-8.

⁷³ *See e.g.* Case 002-D164/3/6 SMD Decision, para. 21; D134/1/6.1.4 Decision on the Charged Person’s Application for Disqualification of Drs. Stephen Heder and David Boyle, 22 Sep 2009, para. 20.

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a genuine and effective investigation to ascertain the truth.⁷⁴ The ICP never contended that this created an “absolute right [...] to obtain a prosecution or conviction”:⁷⁵ the requirement of an effective investigation is one of means, not result.⁷⁶ However, the investigation cannot resemble “a mere formality preordained to be ineffective”,⁷⁷ and the CIJs were required “not [to] rely on hasty or ill-founded conclusions to close their investigation or to use as the basis of their decisions.”⁷⁸

22. The CIJs’ agreement on investigative methods⁷⁹ is irrelevant if those methods failed to produce a “serious, objective and effective”⁸⁰ investigation that was “adequate”⁸¹ and *capable* of “leading to the establishment of the facts [...] and of identifying and – if appropriate – punishing those responsible.”⁸² Such an investigation must be “wide, systematic and detailed”,⁸³ meaning that the CIJs “must take *whatever reasonable steps they can* to secure the evidence”⁸⁴ concerning the facts of which they are seized. The investigation’s conclusions must be based on a thorough and objective analysis of *all relevant elements*.⁸⁵
23. Thus, an investigation *is* incomplete if it fails to: (i) investigate issues at the heart of the case;⁸⁶ (ii) follow an obvious line of inquiry;⁸⁷ (iii) find and interview key witnesses;⁸⁸ or (iv) sufficiently assess the credibility of conflicting statements made.⁸⁹ In contravention of these standards,⁹⁰ no meaningful field investigations were undertaken in Case 003 before 29 April 2011. Contrary to Meas Muth’s assertions,⁹¹ other than the 14 witnesses interviewed by Judge

⁷⁴ See e.g. Case 002-D164/3/6 SMD Decision, para. 35; Case 002-D365/2/17 Evidentiary Material Appeal Decision, para. 61.

⁷⁵ *Contra* D266/5 MM Response, para. 22, citing *Brecknell v. UK*, para. 66.

⁷⁶ See, e.g. *Armani v. UK*, para. 233; *Mustafa Tunç and Fecire Tunç v. Turkey*, para. 173.

⁷⁷ *Velásquez-Rodríguez v. Honduras*, para. 177; *Vereda La Esperanza v Colombia*, para. 185 (unofficial translation).

⁷⁸ *El Masri v. Macedonia*, para. 183.

⁷⁹ D266/5 MM Response, para. 24, citing D266 Dismissal Order, paras 41, 48.

⁸⁰ *Vereda La Esperanza v Colombia*, para. 185 (unofficial translation).

⁸¹ *Ramsahai v. The Netherlands*, para. 324; *Mustafa Tunç and Fecire Tunç v. Turkey*, para. 172; *Armani v. UK*, paras 230, 233.

⁸² D266/5 MM Response, para. 22 (emphasis added), citing *Armani Da Silva v. UK*, para. 233. See also para. 243. See further, *Kolevi v. Bulgaria*, para. 192; *Vereda La Esperanza v Colombia*, para. 185 [(Unofficial translation) “The entire investigation should be oriented at a specific purpose: the determination of the truth and the investigation, finding, arrest, prosecution and, if applicable, punishment of those responsible for the events. [...] the investigation must be conducted by all legal means available”].

⁸³ *Vereda La Esperanza v Colombia*, para. 268 (unofficial translation).

⁸⁴ *Armani v. UK*, para. 233; *Isayeva v. Russia*, para. 212; *Vereda La Esperanza v Colombia*, para. 185.

⁸⁵ *Giuliani and Gaggio v. Italy*, para. 302; *Kolevi v. Bulgaria*, paras 192, 201.

⁸⁶ *Hugh Jordan v. UK*, para. 107 [In case regarding breach of Art. 2 (Right to Life) “Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard.”]; *Isayeva v. Russia*, paras 212, 218-224.

⁸⁷ *Armani v. UK*, para. 234; *Giuliani and Gaggio v. Italy*, para. 302; *Kolevi v. Bulgaria*, para. 201.

⁸⁸ *Hugh Jordan v. UK*, para. 107; *Tanrikulu v. Turkey*, para. 109; *Isayeva v. Russia*, para. 212.

⁸⁹ *Case of M.C. v. Bulgaria*, para. 178.

⁹⁰ *Contra* D266/5 MM Response, para. 27.

⁹¹ D266/5 MM Response, para. 27, relying on a statement by ICIJ Blunk that “key witnesses were questioned, ICP’s Reply to Meas Muth’s Response to the Appeal of the Dismissal Order (D266)

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Lemonde, and the three witnesses interviewed by CIJs Blunk and You Bunleng⁹² the key Case 003 witnesses were not interviewed,⁹³ following the CIJs' conscious choice to halt witness interviews in favour of documentary review.⁹⁴ It is highly relevant⁹⁵ that while both site identification reports for Wat Enta Nhien security centre and Stung Hav worksites were marked "preliminary", the sites were not revisited before 29 April 2011,⁹⁶ and that the CIJs had not sought Case 003-relevant statements from DC-Cam.⁹⁷

24. Whilst claiming that "statistical comparisons are irrelevant",⁹⁸ Meas Muth supports his contention that the investigation was complete by reference to "more than 430"⁹⁹ WRIs placed on Case File 003 before 29 April 2011. However, as the ICP was referring to,¹⁰⁰ only 20 of these had been generated in Case 003. 18 of them were already attached to the Introductory Submission, not produced by the Case 003 investigation.¹⁰¹ Many WRIs transferred from Cases 001 and 002 related to issues common between Cases 001, 002 and 003 (as at 29 April 2011),¹⁰² but they were not primarily focused on Case 003 specific issues, such as, for example: (i) military personnel (especially from Division 164), and Vietnamese, Thai and other foreign prisoners captured at sea and sent to S-21; and (ii) Meas Muth (and Sou Met)'s roles in the crimes. Contrary to Meas Muth's assertion,¹⁰³ an effective investigation required the CIJs to reinterview many of these witnesses to elicit evidence directly relevant to Case 003.
25. Five WRIs had relevance to central issues in Case 003.¹⁰⁴ A mere handful more dealt with

including Duch."

⁹² **D266/2** ICP Appeal, fn. 157. One of these, **D8** Sam Bung Leng WRI, 25 Mar 2011 was considered irrelevant to Case 003 by the Dismissal Order: **D266** Dismissal Order, fn. 5.

⁹³ See **D266/2** ICP Appeal, paras 51, 56, fn. 193.

⁹⁴ **D2/1** Rogatory Letter Completion Report, 10 Feb 2011, EN 00649195.

⁹⁵ *Contra* **D266/5** MM Response, para. 27.

⁹⁶ **D2/22** Wat Enta Nhien Site ID Report, EN 00634139; **D2/23** Stung Hav Site ID Report, EN 00644148, 54.

⁹⁷ **D266/2** ICP Appeal, paras 51, 56, fn. 194.

⁹⁸ **D266/5** MM Response, para. 26.

⁹⁹ The OCP re-ran the Zylab search detailed in **D266/5** MM Response, fn. 135. It retrieved 453 WRIs with the prefixes **D1**, **D2** (the 17 interviews conducted by ICIJ Lemonde), **D4**, **D10**, as well as the 3 interviews, **D6**, **D8** and **D12** conducted by ICIJ Blunk and the NCIJ. A further 21 WRIs were recovered by including those (with prefixes **D1**, **D4** and **D10**) whose English translation was added on 30 May 2011, but which were available in Khmer before 29 April 2011.

¹⁰⁰ **D266/2** ICP Appeal, para. 50.

¹⁰¹ **D1.3.32.17**; **D1.3.32.21**; **D1.3.32.36**; **D1.3.32.43**; **D1.3.32.44**; **D1.3.32.49**; **D1.3.32.9**; **D1.3.33.3**; **D1.3.33.4**; **D1.3.33.5**; **D1.3.33.6**; **D1.3.33.8**; **D1.3.33.9**; **D1.3.33.10**; **D1.3.33.11**; **D1.3.33.12**; **D1.3.33.13**; **D1.3.33.15**.

¹⁰² Since S-21, Kampong Chhnang Airfield worksite and Au Kanseng Security Centre had already been investigated for the purposes of Cases 001 and 002, the CIJs had access to materials about the crimes committed there, which they correctly transferred.

¹⁰³ **D266/5** MM Response, para. 28.

¹⁰⁴ **D4.1.408** Chhouk Rin WRI; **D4.1.409** Chhouk Rin WRI [both dealing with Meas Muth's role in contributing to the decision to purge the East Zone and sending naval forces from Kampong Som to implement the plan]; **D4.1.851** Meas Vooun WRI [Meas Muth was a division commander in Kampong Som protecting Koh Tang and Koh Poulo Wai]; **D4.1.477** Hem Sambath WRI [prisoners taken to Toek Sap security centre]; **D4.1.810** Seng Soeun WRI [Meas Muth's role in the Kratie purge and takeover].

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issues that were tangential to its main focus. For example, some WRIs touched on Kampong Som technical operations,¹⁰⁵ Kampong Som port under Ta Krin,¹⁰⁶ the evacuation of Kampong Som in April 1975,¹⁰⁷ and Meas Muth's pre-1975 role.¹⁰⁸ Others deal with relevant CPK policy *outside* Meas Muth's areas of authority.¹⁰⁹

26. However, a large proportion of the WRIs relate to issues entirely outside the scope of Case 003. The Dismissal Order itself determined that 123¹¹⁰ were irrelevant,¹¹¹ as are, for example, those relating to (i) Duch's time at M-13;¹¹² (ii) the Ministry of Social Affairs and hospitals;¹¹³ (iii) the Ministry of Foreign Affairs;¹¹⁴ (iv) the treatment of the Cham;¹¹⁵ (v) Siem Reap;¹¹⁶ (vi) the Central Zone;¹¹⁷ (vii) Northwest Zone;¹¹⁸ (viii) East Zone;¹¹⁹ (ix) Southwest Zone,¹²⁰ including Kraing Ta Chan Security Centre;¹²¹ and (x) Party Centre operations and officials.¹²²
27. Most importantly, these Case 001 and 002 WRIs did not deal with the very heart of the case against Meas Muth: crimes committed in Kampong Som security centres and worksites and the DK territorial waters and islands, and during the purge of Division 164 (besides those victims sent to S-21). Indeed, they played no part in the Dismissal Order's analysis of the portion of those crimes it discussed.¹²³ Had the investigation been complete, the Dismissal

¹⁰⁵ D4.1.616; D10.1.57.

¹⁰⁶ D4.1.431; D4.1.432; D4.1.434.

¹⁰⁷ D4.1.466; D4.1.476; D4.1.795; D10.1.45.

¹⁰⁸ D4.1.786; D4.1.819; D4.1.846; D4.1.911.

¹⁰⁹ See, e.g. evidence of genocidal CPK policy against the Vietnamese: D4.1.512; D4.1.528; D4.1.545; D4.1.550; D4.1.559; D4.1.564; D4.1.621; D4.1.927. The ICP notes that though some WRIs are now relevant to establish a nationwide forced marriage policy, this was not within the scope of Case 003 on 29 April 2011. See D4.1.426; D4.1.433; D4.1.453; D4.1.461; D4.1.565; D4.1.740; D4.1.806; D4.1.818; D4.1.926; D10.1.28; D10.1.40; D10.1.60.

¹¹⁰ With prefixes D4 and D10. The other 8 are D1 or D2.

¹¹¹ D266 Dismissal Order, fn. 5.

¹¹² D4.1.367; D4.1.369.

¹¹³ D4.1.538; D4.1.775; D4.1.778; D4.1.936; D4.1.940; D4.1.941; D4.1.1055; D4.1.1047; D4.1.938.

¹¹⁴ D4.1.488; D4.1.838; D4.1.1131; D10.1.50.

¹¹⁵ D4.1.410; D4.1.411; D4.1.412; D4.1.413; D4.1.417; D4.1.424; D4.1.482; D4.1.519.

¹¹⁶ D4.1.456; D4.1.460; D4.1.470; D4.1.567; D4.1.568; D4.1.569.

¹¹⁷ D4.1.514; D4.1.515; D4.1.516; D4.1.520; D4.1.521; D4.1.523; D4.1.539; D4.1.557; D4.1.560; D4.1.562; D4.1.792; D4.1.807; D4.1.825; D4.1.843; D4.1.844; D4.1.853; D10.1.56.

¹¹⁸ D4.1.422; D4.1.423; D4.1.438; D4.1.440; D4.1.447; D4.1.448; D4.1.462; D4.1.464; D4.1.478; D4.1.551; D4.1.815; D4.1.1059; D4.1.421.

¹¹⁹ D4.1.526; D4.1.534; D4.1.543; D4.1.544; D4.1.546; D4.1.890; D4.1.449.

¹²⁰ D4.1.536; D4.1.540; D4.1.812; D4.1.912; D4.1.1045.

¹²¹ D4.1.427; D4.1.820; D4.1.816.

¹²² D4.1.628; D4.1.769; D4.1.833; D4.1.850; D4.1.856; D4.1.924; D4.1.928; D4.1.1132; D4.1.1133; D4.1.1135; D4.1.1136; D4.1.1137; D4.1.1149; D4.1.1154.

¹²³ See D266 Dismissal Order, fns 888-913 (Wat Enta Nhien); fns 915-36 (Stung Hav); fns 500-5, 688, 701, 715-6, 803, 817-8, 821, 823-4, 871, 881, 882-3 (Division 164 purge); fns 938-72 (Crimes at sea). Only three Case 001/002 WRIs are cited here: D4.1.849 Khun Kim WRI; D4.1.244 Him Huy WRI; D4.1.1127 Loth Nitya WRI. Only one of these (D4.1.244 Him Huy WRI) relates to the capture or fate of foreigners captured at sea at all and this is at S-21.

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Order could have eliminated many contradictions and missing findings, such as those regarding Wat Enta Nhien's use as a security centre and the role of Battalion 450 there.¹²⁴ The pre-29 April 2011 evidence available was extremely limited and unsuited to a proper understanding of the nature and functioning of the security centre.¹²⁵ Based on the evidence placed on the case file after 29 April 2011,¹²⁶ and four other site identification reports,¹²⁷ there can be no doubt that Wat Enta Nhien was a security centre managed by Division 164 (Battalion 165/450), an elite special forces unit under Meas Muth's direct control,¹²⁸ and that he is responsible for the crimes there.

28. Without this information, which is essential for assessing the gravity of the crimes and level of Meas Muth's responsibility, the view formed by the CIJs when they issued the Notice of Conclusion that it was "doubtful" that Meas Muth fell within the ECCC's personal jurisdiction¹²⁹ can only have been "preliminary".¹³⁰ Contrary to Meas Muth's contention,¹³¹ the 20 months spent reaching this point, and the time the NCIJ had spent investigating Duch and the charged persons in Case 002 are irrelevant. The only relevant considerations are the investigative acts undertaken and the content of the Case 003 case file, both of which were manifestly inadequate, with the result that the CIJs did not have the "necessary materials allowing them to decide whether or not to issue an indictment".¹³²
29. Nothing in Meas Muth's submissions¹³³ contradicts the ICP's position that: (i) a Rule 66(1) Notice of Conclusion is merely a procedural notification, and does not itself close an

¹²⁴ **D266** Dismissal Order, paras 291-3, 297. *See further* **D266/2** ICP Appeal, paras 21, 122-4.

¹²⁵ The relevant pre-29 April 2011 documents comprised: Five OCP interviews attached to the Introductory Submission [**D1.3.13.1** Pauch Koy OCP Statement; **D1.3.13.8** Pen Sarin OCP Statement; **D1.3.13.11** Sieng OCP Statement; **D1.3.13.12** Sok Lang OCP Statement; **D1.3.13.13** Touch Soeuli OCP Statement]; one temporary Site Identification Report [**D2/22** Site ID Report]; two WRIs collected pursuant to the rogatory letter D2 issued by ICIJ Lemonde [**D2/4** Pauch Koy WRI; **D2/15** Touch Soeuli WRI]; one document transferred from Case 002 [**D4.1.745** Unknown male US POW/MIA Statement regarding Battalion 386, 8 Dec 1998].

¹²⁶ In particular the WRIs of Soem Ny, Pak Sok, Em Sun, Din Chum, Nuon Yoem, Heang Ret, Ek Ny, Sam Phin, Moul Chhin, Neak Khoeurn: **D54/30**; **D54/32**; **D54/37**; **D54/88** (Soem Ny); **D54/25**; **D54/26** (Pak Sok); **D54/46**; **D54/48** (Em Sun); **D54/64** I; **D54/65** (Din Chum); **D54/66** Nuon Yoem; **D54/102** Ek Ny WRI; **D54/98** Heang Ret WRI; **D54/111** Sam Phin WRI; **D114/31**; **D114/39**; **D114/40** (Moul Chhin); **D114/217** Neak Khoeurn WRI.

¹²⁷ **D114/30** Site ID Report for Wat Enta Nhien with witnesses Din Chum and Nuon Yoem, 22 Dec 2014; **D114/46** Site ID Report for Division 164 Kampong Som Sites with witness Soem Ny, 12 Feb 2015; **D114/54** Site ID Report for Wat Enta Nhien and other Division 164 sites with witness Moul Chhin, 6 Mar 2015; **D114/291** Site ID Report for various Division 164 sites with witness Touch Soeuly, 21 Dec 2016.

¹²⁸ *See* **D256/7** ICP Final Submission, paras 153, 155, 252-5, 366, 432, 425, 432, 441-480; **D266/2** ICP Appeal, paras 122-124, 167-168.

¹²⁹ **D266** Dismissal Order, paras 52-3. *See also* **D266/5** MM Response, para. 32.

¹³⁰ **D266/2** ICP Appeal, para. 46.

¹³¹ **D266/5** MM Response, paras 30-2.

¹³² *Contra* **D266/5** MM Response, para. 32.

¹³³ **D266/5** MM Response, paras 33-9.

investigation;¹³⁴ (ii) a judicial investigation is concluded only by a closing order issued pursuant to Internal Rule 67(1) and until that time, the CIJs remain seized of the investigation;¹³⁵ and (iii) since RICIJ Kasper-Ansermet and ICIJs Harmon and Bohlander re-opened and continued the Case 003 investigation prior to the issuance of any closing order, the prior Rule 66(1) notice simply lapsed.¹³⁶

30. Meas Muth creates an artificial distinction between the CIJs when he asserts that the Rule 66(1) notice did not lapse with respect to the NCIJ. The CIJs are not divisible in this way: what matters is the conduct of investigative acts in Case 003, including the placement of evidence on the case file.¹³⁷ Indeed in Cases 004/1 and 004/2, the NCIJ issued dismissal orders based on the evidence collected by the ICIJs. In any event, inherent in the requirement to conduct an effective investigation is the obligation to reopen an incomplete investigation.¹³⁸ After 29 April 2011, the ICP's investigative requests and clarifications of the scope of Case 003,¹³⁹ the ICP's Supplementary Submission,¹⁴⁰ and the new evidence itself were sufficient to provide notice to the NCIJ that the investigation was incomplete.

¹³⁴ See **D266/2** ICP Appeal, para. 36. See also J. Pradel, *Procédure Pénale*, 14^e éd 2008-09, Ed. Cujas (“Pradel”), para. 665 (subparas 1, 3) [(Unofficial translation) “Article 175-1 of the [French Code of Criminal Procedure] states “as soon as he considers the investigation complete, the investigating judge sends the case file to the Prosecutor and at the same time notifies the parties and their lawyers” [...] The case file is forwarded to the Prosecutor through an order from the judge called an “ordonnance de soit-communiqué”. The “ordonnance de soit-communiqué” does not render the judge *functus officio*.”].

¹³⁵ See **D266/2** ICP Appeal, para. 37. See also Pradel, para. 669 (subpara. 5) [(Unofficial translation) “The closing order renders the judge *functus officio* and that is why it constitutes the end of the investigation.”]; Cass. Crim., 23 Dec 1969, No. 69-91.612 [(Unofficial translation) “This closing order, which decided that the investigation was complete and terminated it, rendered the investigating judge *functus officio* with respect to the entire investigation”].

¹³⁶ **D266/2** ICP Appeal, paras 38, 40.

¹³⁷ **D235/2** Order on Request for Adoption of Certain Procedural Measures, 25 Nov 2009, para. 9 [“no further evidence may be placed on the case file after Rule 66 notice has been given. Indeed, should the [CIJs] decide that, despite having given Rule 66 notice, it has become necessary to place further inculpatory or exculpatory material on the case file, they would then be required to file a new Rule 66 notice”]; Guéry & Chambon, *Droit et Pratique de l’Instruction préparatoire* (7th edition), 2010-2011, p. 855, para. 212.21 [(Unofficial translation) “a new investigative act accomplished after issuing this first notice of conclusion of the investigation renders it void”]; Cass. Crim., 29 Feb 1996, No. 95-82.325.

¹³⁸ *Brecknell v UK*, paras 66-71. See also, Internal Rule 70 [“Re-opening Investigations: When new evidence becomes available after a Dismissal Order by the Co-Investigating Judges comes into force, the judicial investigation may be re-opened by the Co-Investigating Judges at the initiative of the Co-Prosecutors.”].

¹³⁹ Considering the investigation manifestly incomplete as at 29 April 2011, the ICP submitted three requests for investigative action on 18 May 2011: **D17** ICP’s First Investigative Request; **D18** ICP’s Second Investigative Request; **D19** ICP’s Third Investigative Request. The requests were rejected on an alleged procedural deficiency in **D20/3** Decision on Time Extension Request and Investigative Requests by the International Co-Prosecutor Regarding Case 003, 7 Jun 2011. They were re-filed by the ICP after remedying the alleged deficiency on 10 June 2011. See **D22** ICP’s First Investigative Request; **D23** ICP’s Second Investigative Request; **D24** ICP’s Third Investigative Request. These requests were also rejected by the CIJs: see **D26** Decision on International Co-Prosecutor’s Re-Filing of Three Investigative Requests in Case 003, 27 Jul 2011; **D102/1** [ICP’s] Response to Forwarding Order Regarding Toek Sab Prison, 20 Jun 2014; **D47/1** [ICP’s] Response to Forwarding Order of 24 Apr 2012, para. 6.

¹⁴⁰ **D120** Supplementary Submission, 31 Oct 2014.

C. The Dismissal Order erred in law by failing to consider and issue a decision on all facts within the scope of Case 003

31. Meas Muth misstates the law and misrepresents the Dismissal Order's findings in an attempt to defend its failure to issue *any* decision on a raft of crime sites and events.¹⁴¹ In fact, the Dismissal Order breached its obligations to issue *complete* factual and legal¹⁴² findings on all facts¹⁴³ of which the CIJs were seized in the Introductory and Supplementary Submissions,¹⁴⁴ *including* all places where those facts occurred and which were inextricably linked to them.¹⁴⁵
32. Contrary to his previous position,¹⁴⁶ Meas Muth now accepts that these crime sites and events, with the exception of forced marriage and rape in Kampong Som Sector,¹⁴⁷ fell within the facts set out in the Introductory Submission.¹⁴⁸ He further concedes that the NCIJ was required to “consider[] [each individual crime site forming part of the facts] in deciding on the facts of which he was seized.”¹⁴⁹ Yet he argues that the Dismissal Order fulfilled its obligation to issue a decision on all the “facts” since it listed and made findings on all the facts of which Meas Muth claims the NCIJ was seized,¹⁵⁰ and it “was not required to make explicit findings on each individual crime site forming part of [those] facts”.¹⁵¹
33. However, the Dismissal Order's list did not even cover all the relevant facts, omitting those pertaining to forced marriage and rape in Kampong Som Sector. Moreover, the obligation on the Dismissal Order to make *full* findings on *all* facts included an obligation to make factual and legal findings on all crime sites that fell within these facts.¹⁵² Making some findings on

¹⁴¹ (i) Toek Sap security centre; (ii) Ream Area Worksites and Cooperatives (including Bet Trang, Kang Keng and related execution sites); (iii) the purge of Division 117 and Sector 505 cadres in Kratie; (iv) purges of other military divisions, including those sent to S-21; and (v) forced marriage (and rape within forced marriage).

¹⁴² With regard to the Dismissal Order's obligation to legally characterise factual findings, see further *supra*, paras 12-17.

¹⁴³ **D266/2** ICP Appeal, paras 13-14, 20-5, 63 and citations therein.

¹⁴⁴ **D266/2** ICP Appeal, para. 64 and citations therein.

¹⁴⁵ **D266/2** ICP Appeal, para. 64; Cass. Crim., 10 Mar 1977, No. 75-91.224; Cass. Crim., 24 Apr 2013, No. 12-80.750; **D134/1/10** PTC Decision on Two Annulment Applications, paras 14, 19 (Judges Beauvallet and Bwana); **D165/2/26** PTC Decision on Nine Annulment Applications, para. 152 (Judges Beauvallet and Baik).

¹⁴⁶ **(1) D103/1.6** [regarding the durian plantation in Ream Commune, and the Bet Trang worksite]; **(2) D137** [regarding the purges in Kratie (Sector 505) in Late 1978]; **(3) D138** [Regarding Toek Sap Security Centre]; **(4) D139** [Kang Keng Forced Labour and Reeducation Sites]; **(5) D141** [regarding Ream].

¹⁴⁷ The CIJs were seized of forced marriage and rape by **D120** Supplementary Submission, 31 Oct 2014, paras 20-4.

¹⁴⁸ **D266/5** MM Response, paras 41-2.

¹⁴⁹ **D266/5** MM Response, paras 40-1, 44.

¹⁵⁰ **D266/5** MM Response, para. 42, *citing* **D266** Dismissal Order, para. 54, fn. 64 [Listing “1. S-21 Security Centre/ 2. S-22 Security Centre/ 3. Kampong Chnang Airfield Worksite/ 4. Wat Enta Nhlen Security Centre/ 5. Stung Hav Quarry/ 6. Crimes Committed by the DK Navy in the Waters and on the Islands/ 7. Armed Conflict with Vietnam/ 8. Division 801 and Detention Centre 810/ 9. Other RAK Security Centres and Locations/ 10. Purge within Division 164.”].

¹⁵¹ **D266/5** MM Response, para. 40.

¹⁵² *See supra*, para. 31.

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discrete aspects does not suffice since it fails to fully appreciate either the gravity of the criminal activity or the level of Meas Muth's responsibility. Meas Muth's assertion that "it would be impracticable for the CIJs to make explicit findings on each individual crime site forming part of the facts"¹⁵³ overlooks the clear obligation on the CIJs to do so, as well as the various clarifications made by the ICP as to the scope of the investigation.¹⁵⁴ Any ambiguity regarding the scope was removed when the ICP filed the Supplementary Submission.¹⁵⁵

34. Despite Meas Muth's arguments to the contrary,¹⁵⁶ it is not sufficient to meet the standard of a reasoned opinion for a CIJ to "consider" the missing crime sites in the abstract, without capturing such reasoning in writing or through *any* express acknowledgement of the relevant evidence. For Meas Muth, the Dismissal Order's 'sufficient consideration' of evidence concerning the missing crime sites and events consists in total of seven WRIs, one OCP interview and one DK telegram,¹⁵⁷ containing evidence relating to the Durian Plantation, Toek Sap security centre and the Ream Area worksites. He makes no pretence that the Dismissal Order even considered evidence relating to forced marriages in Kampong Som or to purges of other military divisions, including those victims sent to S-21.
35. Such *de minimis* consideration of evidence – with no associated reasoning - could never constitute a reasoned opinion or provide clear and consistent evidence of all the crimes taking place at such a wide collection of crime sites. Indeed, as of 29 April 2011, the case file contained almost no specific relevant evidence. More importantly, the Dismissal Order relies on these documents for other purposes, not with reference to *these* missing crime sites.¹⁵⁸ The fact that the Dismissal Order deemed evidence¹⁵⁹ of Thai captives killed at the Durian I plantation irrelevant¹⁶⁰ demonstrates that it did not even "consider" evidence related to these crime sites.

¹⁵³ **D266/5** MM Response, para. 42.

¹⁵⁴ See **D1/2/1** Response of the [ICP] to Request for Clarification, 16 Feb 2011 [confirming that the CIJs were not seized of security centres run by other RAK Divisions outside Division 164], except to the extent that they went to the establishment of a JCE or the occurrence of widespread or systematic crimes]; **D102/1** [ICP's] Response to Forwarding Order Regarding Toek Sab Prison, 20 Jun 2014 [confirming that Toek Sap prison fell within the scope of Case 003]; **D47/1** [ICP's] Response to Forwarding Order of 24 April 2012, para. 6 [confirming that Bet Trang and Kang Keng airfield worksites and related execution sites and the Durian I Plantation fell within the scope of Case 003.].

¹⁵⁵ **D120** Supplementary Submission, 31 Oct 2014.

¹⁵⁶ **D266/5** MM Response, paras 40, 42.

¹⁵⁷ **D266/5** MM Response, para. 42, fn. 204.

¹⁵⁸ Annex 1: Table of Dismissal Order References cited in **D266/5** Meas Muth Response, fn. 204.

¹⁵⁹ **D2/17** In Saroeun WRI, A7, 10, 11, 43.

¹⁶⁰ **D266** Dismissal Order, fn. 5.

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36. The ICP defers to the PTC¹⁶¹ to decide whether to review the evidence and enter the missing factual and legal findings itself, or instead remit the matter to the CIJs.¹⁶² In either case, the parties' final submissions,¹⁶³ and the ICIJ's Indictment,¹⁶⁴ provide a comprehensive overview of the relevant evidence pertaining to those missing sites and events.

D. The Dismissal Order erred in law and fact in treating superior orders, coercion, and duress as reducing Meas Muth's level of responsibility

37. In his attempts to justify the Dismissal Order's heavy reliance on duress, coercion and superior orders in its personal jurisdiction assessment,¹⁶⁵ Meas Muth misapprehends the law and fails to establish any circumstances in which these factors could possibly reduce the level of his responsibility. He misrepresents the evidence of his willing involvement in the commission of crimes, as well as the level of autonomy and protection he enjoyed during the DK regime.

38. Duress requires a showing that the accused *in particular* faced an imminent threat, that this threat was the reason for his actions, and that the threat did not result from policies in which the accused himself willingly and actively participated.¹⁶⁶ Similarly, there is no mitigation of responsibility when an accused follows manifestly unlawful superior orders, such as those for acts constituting crimes against humanity and genocide, unaccompanied by actual duress,¹⁶⁷ and/or willing participated in the commission of the crime such that the order had no influence.¹⁶⁸ The mere presence of a coercive environment¹⁶⁹ justifies at most minimal

¹⁶¹ Cf **D266/5** MM Response, paras 43, 52.

¹⁶² It is well established in international law that when it is shown that a discretionary decision was premised on erroneous legal reasoning or factual findings, the appeal chamber must annul that decision and either send it back to the lower court to apply the correct standard or substitute its own judgment on the matter. See **D266/2** ICP Appeal, fn. 7 and citations therein.

¹⁶³ **D256/7** [ICP's] Rule 66 Final Submission, 14 Nov 2017 ("ICP Final Submission"); **D256/11** Meas Muth's Response to the International Co-Prosecutor's Final Submission, 12 Apr 2018.

¹⁶⁴ **D267** Indictment.

¹⁶⁵ See e.g. **D266** Dismissal Order, Chapter 6 "Reasons and Conclusions", paras 415, 418, 420, 424, 428. See also **D266/2** ICP Appeal, fns 330-332, 354. In his Sub-ground D Response, Meas Muth does not contest that the Dismissal Order based its conclusion that he was not a "most responsible" person in significant part on these findings.

¹⁶⁶ **D266/2** ICP Appeal, paras 89, 93; Case 001-**E188** Duch TJ, paras 553, 557-8; Case 001-**F28** Duch AJ, para. 364. *Contra* **D266/5** MM Response, paras 55-6, 58, 64.

¹⁶⁷ **D266/2** ICP Appeal, para. 85; Case 001-**F28** Duch AJ, para. 365 *citing* Mrđa SJ, para. 67 ("[t]he fact that he obeyed such orders, as opposed to acting on his own initiative, does not merit mitigation of punishment" without some evidence of duress); Case 001-**E188** Duch TJ, para. 607 (superior orders only mitigate responsibility where the accused was not otherwise prepared to carry out the unlawful behaviour, such that the orders "effectively reduc[ed] the degree of his guilt") *citing* Erdemović SJ, para. 53. *Contra* **D266/5** MM Response, paras 55-7, 61, 64.

¹⁶⁸ **D266/2** ICP Appeal, para. 92.

¹⁶⁹ See e.g. **D266** Dismissal Order, Chapter 6 "Reasons and Conclusions", paras 415, 420. See also **D266/2** ICP Appeal, fn. 354.

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mitigation, and giving it undue weight constitutes an error of law invalidating the decision.¹⁷⁰ Contrary to Meas Muth's misunderstanding,¹⁷¹ it is *his* burden of proof to establish mitigating circumstances, not the ICP's burden to show their absence.¹⁷²

39. Contrary to his assertions,¹⁷³ Meas Muth was not acting under duress or coercion. He was not a passive foot soldier of the regime merely following orders and doing the minimum necessary to avoid reprisal. Meas Muth was a well-connected and well-protected cadre who implemented CPK policy by all possible means and whose industriousness at killing and purging earned him frequent promotions and material privileges.¹⁷⁴ Far from being coerced to commit crimes against humanity and genocide to serve the CPK leaders, he *was* one of the CPK's highest-ranking cadres and one of its most faithful adherents and defenders. He operationalised and enforced CPK policies with more than 8,500 troops under his command,¹⁷⁵ exercising significant autonomy in selecting whom to kill and where to kill them, whom to send to S-21,¹⁷⁶ whom to arrest and question in Kampong Som security centres, and whom to enslave at his worksites.¹⁷⁷ He used his power to conduct internal purges clinically.¹⁷⁸ Meas Muth did not flee the CPK like many of his high-ranking peers but was instead one of the last Khmer Rouge commanders to defect in 1999.¹⁷⁹
40. Meas Muth is unable to point to any evidence he ever *claimed* to be under duress or to have had reservations about his actions – for example, that he was personally threatened or attempted to dissociate himself from his criminal conduct.¹⁸⁰ To the contrary, in 2008 he freely admitted

¹⁷⁰ Case 001-F28 *Duch* AJ, paras 364, 371-3. *See also e.g. Tadić* SAJ para. 48 (giving undue weight to relevant factor in making discretionary decision may constitute error); *Mejakić* Referral Appeal, para. 10 (error to give undue weight to relevant considerations). *Contra* D266/5 MM Response, paras 55, 58-9, 61, 64.

¹⁷¹ D266/5 MM Response, para. 61.

¹⁷² Case 002-E313 Case 002/01 TJ, para. 1070; Case 002-E465 Case 002/02 TJ, para. 4352. *Contra* D266/5 MM Response, paras 61-62.

¹⁷³ *Contra* D266/5 MM Response, paras 55, 58-9, 61-2, 64.

¹⁷⁴ D266/2 ICP Appeal, paras 90-1, 94 (particularly fn. 374), 95-7, 100-7, 109. *See* Case 001-F28 *Duch* AJ, para. 364.

¹⁷⁵ D267 Indictment, para. 155. D256/7 ICP Final Submission, paras 64, 1082.

¹⁷⁶ Contrary to Meas Muth's claim at D266/5 MM Response, para. 63, the ICP substantiated in detail Meas Muth's involvement in identifying enemies and sending them to S-21. *See* D266/2 ICP Appeal, paras 104-7. The ICIJ expressly found that Meas Muth was "directly involved in arrests and transfers to S-21". D267 Indictment, para. 567. The total number was small because Meas Muth elected to have most killed directly. *See* D266/2 ICP Appeal, para. 96.

¹⁷⁷ *See* D266/2 ICP Appeal, paras 30-1, 90, 94, 96, 100-2, 104-6, 109, 121, 125, 129-30, 157-8, 165.

¹⁷⁸ *See* D266/2 ICP Appeal, paras 95-6.

¹⁷⁹ *See* D266/2 ICP Appeal, paras 91, 97.

¹⁸⁰ *See* Case 001-F28 *Duch* AJ, para. 364. Contrary to Meas Muth's claim at D266/5 MM Response, para. 58, the Dismissal Order *did* cite only one statement by him supporting – albeit very weakly – any claim that he was merely implementing orders. *See* D266 Dismissal Order, para. 256 *citing* D1.3.33.16 Meas Muth Statement, Interview by C. Chaumeau and B. Saroeun (Phnom Penh Post), 20 Jul 2001, EN 00089662, p.2 (stating "The low ranks had to respect the orders"). Meas Muth points to no other examples, instead merely citing generic evidence of a coercive environment.

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that his only regret was that the DK regime was not ultimately successful.¹⁸¹ In 2013, he continued to defend the regime.¹⁸² These are not the words or actions of a man under duress or coercion, and no reasonable trier of fact considering all of the evidence could have found the contrary. The generic evidence relied on by the Dismissal Order¹⁸³ and Meas Muth¹⁸⁴ regarding the coercive environment is insufficient as a matter of law to mitigate responsibility.¹⁸⁵

41. The Dismissal Order's contradictory treatment of Meas Muth and Duch¹⁸⁶ only serves to highlight these errors. The Dismissal Order acknowledged the degree to which Duch carried out his work under superior orders,¹⁸⁷ and in fact, Duch was micromanaged to a far greater extent than Meas Muth.¹⁸⁸ Moreover, unlike here, there was significant evidence in Case 001 that Duch feared for his life and the lives of his family if he disobeyed superior orders.¹⁸⁹ Nevertheless, after considering all of this evidence,¹⁹⁰ the CIJs in Case 001 still found Duch to be a "most responsible" person,¹⁹¹ with no reduction in his level of responsibility. Considering this same evidence, the TC found any claim to mitigation in sentencing based on duress or superior orders to be unsubstantiated.¹⁹² While the Trial Chamber did grant "limited" mitigating weight to the generally coercive environment,¹⁹³ the SCC concluded the TC erred in law by doing so, as any such mitigation could only be "minimal".¹⁹⁴
42. Even Meas Muth is unable to muster a principled defence of the Dismissal Order's approach, instead attempting to justify it because Duch was "an anomaly" who "confessed to [his] crimes" and a "failure to indict" "would have raised questions" because he was already "detained" and thus "readily available for trial".¹⁹⁵ These factors are not relevant to – and do not explain – the disparity in treatment between Duch and Meas Muth. His attempted comparison of the relative strength of the Dismissal Order's findings with the Case 001

¹⁸¹ See **D266/2** ICP Appeal, fn. 390, *citing* **D1.3.7.8** Meas Muth Statement, *Let Bygones be Bygones* (Cambodia Daily), 1-2 Mar 2008, EN 00165821.

¹⁸² See **D266/2** ICP Appeal, fn. 391, *citing* **D114/307.5** Meas Muth Statement, Transcript of "Brother Number One" (Journeyman.tv), 2013, EN 01389356.

¹⁸³ See e.g. **D266** Dismissal Order, paras. 415, 420, 424.

¹⁸⁴ See e.g. **D266/5** MM Response, paras 55, 58-9, 61, 64.

¹⁸⁵ See *supra*, para. 38.

¹⁸⁶ See e.g. **D266** Dismissal Order, paras 371-4, 397, 427-8.

¹⁸⁷ See e.g. **D266** Dismissal Order, paras 268-9, 272.

¹⁸⁸ See **D266/2** ICP Appeal, paras 108-9.

¹⁸⁹ See e.g. **D266/2** ICP Appeal, para. 110; Case 001-**D99** Duch Closing Order, paras 169-170; Case 001-**E188** Duch TJ, paras 555, 557; Case 001-**F28** Duch AJ, paras 364-5.

¹⁹⁰ See e.g. Case 001-**D99** Duch Closing Order, paras 33, 44, 51-3, 68, 70, 85, 99, 107, 111, 122, 169-70.

¹⁹¹ Case 001-**D99** Duch Closing Order, para. 129. See also, para. 155.

¹⁹² Case 001-**E188** Duch TJ, paras 176, 555-8, 607-8.

¹⁹³ Case 001-**E188** Duch TJ, paras 558, 608.

¹⁹⁴ Case 001-**F28** Duch AJ, paras 364, 373.

¹⁹⁵ **D266/5** MM Response, para. 57.

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findings on Duch¹⁹⁶ ignores that: (i) the Dismissal Order refused to consider the vast majority of evidence specific to Meas Muth and neglected to enter findings on much of the evidence it did consider;¹⁹⁷ and (ii) the ICIJ, who *did* consider the relevant evidence, entered findings showing Meas Muth in fact had more discretion and power than Duch.¹⁹⁸

43. Finally, Meas Muth's attempts to draw parallels between the Dismissal Order and the Indictment¹⁹⁹ do not withstand scrutiny. He argues points not in dispute and relies on generic findings insufficient to show that he personally acted under duress²⁰⁰ – and he simply ignores Indictment findings that contradict his claims, such as those detailing his significant power, autonomy and discretion.²⁰¹ He further implies the Indictment contains findings it does not;²⁰² misleadingly states “both CIJs found” when relying on generic findings from Case 004/01, *not* Meas Muth-specific findings in Case 003;²⁰³ and claims the ICIJ did not find Son Sen delegated *any* authority to Meas Muth before effectively conceding that, in fact, he did.²⁰⁴

E. The Dismissal Order erred in law and fact by ignoring relevant evidence of Meas Muth's participation while giving undue weight to direct perpetration and physical proximity

44. Meas Muth incorrectly asserts that the Dismissal Order fully assessed his participation in crimes for the purposes of its personal jurisdiction determination. On the contrary, the Dismissal Order failed to consider anything other than Meas Muth's participation in “direct

¹⁹⁶ D266/5 MM Response, para. 60.

¹⁹⁷ See *supra*, paras 12-36. For example, no reasonable trier of fact considering all of the evidence could have concluded that Meas Muth lacked the delegated authority to arrest internal and external enemies and determine their fate. See D266/2 ICP Appeal, paras 100-7. *Contra* D266/5 MM Response, paras 62-3. Contrary to Meas Muth's claim, the Indictment made numerous findings showing his authority to arrest enemies and to transfer them to S-21. See e.g. D267 Indictment, paras 186-9, 221-3, 250, 283-4, 316, 318-9, 321, 324-7, 467, 555, 567-9, 571, 573. *Contra* D266/5 MM Response, para. 63.

¹⁹⁸ See e.g. D267 Indictment, paras 150, 159, 186-9, 221-3, 250, 283-4, 316, 318-9, 321, 324-7, 461, 464-5, 467, 469, 555, 565, 567-9, 571, 573. For example, unlike Duch, Meas Muth had in most cases the authority to decide *whether* to kill a soldier or civilian in Kampong Som or a foreigner captured at sea, not just *when* to kill them. See D266/2 ICP Appeal, paras 90, 94, 96, 100-2, 104-6, 109. *Contra* D266/5 MM Response, para. 60.

¹⁹⁹ See e.g. D266/5 MM Response, paras 55, 59, 61-3.

²⁰⁰ See e.g. D266/5 MM Response, paras 55, 59, 61. There is no dispute, for example, that in general lower levels received orders from higher levels, as in all hierarchical organisations. The question is whether Meas Muth – not a low-ranking cadre in any event – met his burden of showing that he personally was under duress, that this duress was the reason for his crimes, and that the duress did not arise from a system he willingly played a role in. See *supra* para. 38.

²⁰¹ See e.g. D267 Indictment, paras 150, 156, 158-9, 161, 163, 168, 186-9, 221-3, 250, 283-4, 316, 318-9, 321, 324-7, 461, 464-5, 467, 469, 555, 565, 567-9, 571, 573.

²⁰² D266/5 MM Response, fns 244, 279-80 *citing* D267 Indictment, para. 39.

²⁰³ D266/5 MM Response, fns 267-8.

²⁰⁴ D266/5 MM Response, para. 62 *citing* D267 Indictment, paras 163, 573. See also paras 157, 324-7. Meas Muth's contention that assigning him to command specific military operations and conduct purges did not constitute a delegation of authority is unworthy of response. See also D267 Indictment, para. 163, fn.334 *relying on* D54/29 Liet Lan WRI (explaining that Meas Muth's role as “assistant” included providing support in mobilising forces, formulating combat strategies, and providing logistics support, food supplies and ammunition). *Contra* D266/5 MM Response, fn.284.

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acts”, and overlooked evidence of his committed and active participation in implementing the CPK’s enemies, enslavement, and forced marriage policies in his areas of authority.

45. While the Dismissal Order never clarified what it meant by “direct acts”,²⁰⁵ it is evident from a holistic reading of the Dismissal Order that it largely restricted its personal jurisdiction assessment to consideration of direct perpetration or crimes committed while Meas Muth was in close proximity.²⁰⁶ This is an error of law.²⁰⁷ Contrary to Meas Muth’s assertions, since legal findings as to the applicable mode of responsibility are relevant both to determining which crimes Meas Muth is criminally “responsible” for, and to assess his level of his participation,²⁰⁸ the ICP did not “misleadingly cite inapposite jurisprudence”²⁰⁹ on criminal responsibility to demonstrate that the Dismissal Order erred in disregarding anything other than physical participation or proximity.²¹⁰ If conduct by any mode of responsibility other than physical participation precluded a finding that a suspect was “most responsible”, it would preclude the prosecution of almost anyone but the lowest-ranking tools of a criminal regime like the DK.
46. Meas Muth attempts to deny the Dismissal Order’s error by equating its illegitimate requirement for physical participation and/or proximity to the crimes with an analysis of Meas Muth’s “actual participation” in the crimes.²¹¹ He defines “actual participation” as “his or her underlying acts and conduct”, which he correctly confirms is relevant to determining personal jurisdiction.²¹² By doing so, Meas Muth seeks to confer a legitimacy on the Dismissal Order’s conclusions by attributing to it an analysis which it never undertook and to smoothe over the contradictions between the NCIJ’s treatment of personal jurisdiction in Cases 002 and 003. As he concedes, the CIJs had found that the Case 002 charged persons fell within the ECCC’s personal jurisdiction because of their participation in a joint criminal enterprise (“JCE”), not because of their direct perpetration of crimes or attendance at any crime site.²¹³
47. The Dismissal Order’s actual approach creates an “illogical dichotomy”²¹⁴ because under this

²⁰⁵ **D266** Dismissal Order, para. 428 [Concluding that Meas Muth was not among those most responsible for the DK crimes because his participation was “inactive, unimportant, and not proximate to the commission of the crimes” and because the number of victims resulting from Meas Muth’s “direct acts” is lower than in Duch’s case.]

²⁰⁶ **D266** Dismissal Order, paras 297, 305, 311, 368, 373, 396-7, 405, 428.

²⁰⁷ **D266/2** ICP Appeal, paras 114-9.

²⁰⁸ **D266/2** ICP Appeal, paras 23, 116.

²⁰⁹ **D266/5** MM Response, para. 65 referring to **D266/2** ICP Appeal, paras 113-6.

²¹⁰ Indeed, Meas Muth concedes that criminal liability for participation in crimes does not require physical proximity: **D266/5** MM Response, paras 65-6.

²¹¹ **D266/5** MM Response, paras 65, 67, 69, 71.

²¹² **D266/5** MM Response, paras 65, 69.

²¹³ **D266/5** MM Response, para. 68. See **D266/2** ICP Appeal, para. 118.

²¹⁴ **D266/5** MM Response, para. 67, citing **D266/2** ICP Appeal, para. 117. Meas Muth misquotes the ICP: The ICP stated that the Dismissal Order has created an “illogical dichotomy”, not an “illegal dichotomy”, between “senior

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rubric, only “senior leaders” and direct perpetrators would fall under the ECCC’s jurisdiction, while those inbetween who significantly contributed to the crimes through other forms of participation, such as playing an indispensable role in a JCE by contributing to the design and implementation policies with significant local autonomy, or by planning or instigating crimes from a central or regional command centre, would be excluded.²¹⁵ As a result of these errors, the Dismissal Order focused only on a narrow selection of Meas Muth’s relevant acts and conduct,²¹⁶ and overlooked that Meas Muth was exactly this kind of perpetrator, who wielded immense power at both a central and local level, which he used to commit genocide, crimes against humanity and grave breaches of the Geneva Conventions.

48. Far from fully assessing Meas Muth’s “actual participation”, the Dismissal Order failed to take into account evidence that Meas Muth actively participated in the design and implementation of a JCE to purge, detain and execute internal and external enemies, and to create and operate cooperatives and forced labour worksites where military and civilians were enslaved.²¹⁷ He had the full power to arrest and smash foreigners captured at sea, soldiers within the Division 164 ranks, and perceived enemies in Kampong Som Autonomous Sector. It was Meas Muth who established and participated in mechanisms for identifying perceived enemies, whereafter he ordered their arrests and transferred some to S-21.²¹⁸ Throughout the regime, he visited and played a direct and active role in the operation of the Kampong Som Sector security centres and worksites, and oversaw the enforcement of forced marriages and forced consummation policies.²¹⁹ After his promotion to Deputy Secretary of the General Staff he personally conducted the purge of Sector 505 and RAK Centre Division 117 cadres before taking control of the Sector and Division and installing his Division 164 forces there.²²⁰
49. For these and other reasons outlined below,²²¹ the Dismissal Order’s finding that his role as Division 164 secretary was limited to “political affairs” and “disseminating CPK policy” is manifestly erroneous and Meas Muth’s reliance on it here is misplaced.²²² Moreover, despite

leaders” and “those most responsible”.

²¹⁵ **D266** Dismissal Order, para. 405 [“the number of the persons who fall under the jurisdiction of the ECCC is limited, referring only to powerful senior leaders and those who were most responsible for participating actively in the commission of the crimes or proximate to the commission through their de facto power.”]. See also **D266/2** ICP Appeal, paras 115-8.

²¹⁶ *Contra* **D266/5** MM Response, paras 66, 70.

²¹⁷ **D266/2** ICP Appeal, paras 26-34, 96, 98-107 121-34.

²¹⁸ **D266/2** ICP Appeal, paras 96, 98-107.

²¹⁹ **D266/2** ICP Appeal, paras 122-33.

²²⁰ **D266/2** ICP Appeal, paras 79, 100, 104, 132-3, 146, 169.

²²¹ See *infra*, para. 51.

²²² *Contra* **D266/5** MM Response, para. 66, citing **D266** Dismissal Order, paras 416, 422.

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Meas Muth's attempts to portray the ICIJ's findings in a negative light to accord with the Dismissal Order's conclusions,²²³ the ICIJ made numerous findings regarding Meas Muth's direct or active role in crimes and his presence at various crime sites and criminal events,²²⁴ as well as his participation in the design and implementation of JCE policies.²²⁵

F. The Dismissal Order made erroneous factual findings with a determinative impact on personal jurisdiction

Secretary of Division 164 and Kampong Som Autonomous Sector

50. Meas Muth acknowledges that the Dismissal Order found that he was Division 164 commander "at least between January 1976 and April 1978 and Chairman of Kampong Som City",²²⁶ and that it did not specify an end date for Meas Muth's positions.²²⁷ He admits that, at best, the Dismissal Order made no finding that Meas Muth was not in charge of Division 164's subordinate regiments beyond April 1978,²²⁸ and "did not conclude with certainty" Meas Muth's period of control in Kampong Som.²²⁹ Meas Muth thus concedes that the Dismissal Order fails to provide a coherent and reasoned opinion, and *made no finding* that Meas Muth's period of control in Kampong Som began before January 1976 or continued after April 1978. The evidence cited elsewhere in the Dismissal Order, together with that added to the case file after 29 April 2011, is unequivocal that Meas Muth was the Division 3/164 and Kampong Som Sector Secretary for the *entire* DK regime,²³⁰ and the Dismissal Order thus erred in fact.
51. In his Response, Meas Muth attempts to diminish this role through the Dismissal Order's finding that he was "in charge of political affairs" and that his activities consisted of disseminating CPK policy".²³¹ Yet he overlooks that this too is a factual error.²³² The terms "division commander", "secretary" or "chairman", and "political commissar", "political secretary" or "person in charge of the political affairs" were used interchangeably by the witnesses to designate Meas Muth as the cadre with the highest formal and *effective* authority

²²³ D266/5 MM Response, para. 70.

²²⁴ See, e.g. D267 Indictment, paras 156-63, 171, 188, 192, 195, 205, 218-21, 230, 238-9, 250, 268, 273-5, 286, 324-7, 336, 354, 361-3, 365, 402, 463-8, 477, 562-77.

²²⁵ See, e.g. D267 Indictment, paras 178, 180, 186, 188, 195, 201.

²²⁶ D266/5 MM Response, paras 137-8 citing D266 Dismissal Order, para. 188 [No period is mentioned for his role as chairman of the Kampong Som City].

²²⁷ D266/5 MM Response, para. 76.

²²⁸ D266/5 MM Response, para. 76.

²²⁹ D266/5 MM Response, para. 74.

²³⁰ D266/2 ICP Appeal, paras 138-40.

²³¹ D266/5 MM Response, para. 66, citing D266 Dismissal Order, paras 416, 422. No sources are mentioned in the Dismissal Order in support of para. 422.

²³² D266/2 ICP Appeal, paras 137, 141.

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in the RAK Centre Division 164.²³³ Meas Muth controlled all decisions affecting Division 164's area of operation,²³⁴ and the Dismissal Order's reliance on evidence that before his arrest Hoeng Doeun *alias* Dim was Meas Muth's deputy in charge of the Division 164 military²³⁵ is inapt: Case 003 witnesses all recalled that Dim always acted under the instructions and authority of Meas Muth.²³⁶

52. In assessing both the “gravity” of and Meas Muth's “level of responsibility” for the crimes, including genocide, extermination, imprisonment, and enslavement, committed against thousands of military personnel and civilians in Kampong Som and DK territorial waters and islands, the impact of reducing the temporal scope of Meas Muth's responsibility for those crimes by almost 18 months²³⁷ is indisputable.²³⁸ Moreover, omitting the period before January 1976 overlooks Meas Muth's JCE participation through *establishing* the worksites and security centres in Kampong Som, as well as other monitoring systems, to identify enemies, particularly among his own Division 164 forces.
53. It also impacts the Dismissal Order's appreciation of Meas Muth's position in the DK hierarchy as simultaneously secretary of the largest RAK Division and an autonomous sector for the entire regime. This was already an unprecedented position in DK, but as the CPK leaders purged their ranks, only an elite few were promoted and given increasing responsibility for larger swathes of DK territory. The fact that Meas Muth maintained control of Kampong Som, while being appointed to command Sector 505 and Division 117 in November 1978²³⁹ demonstrates that he was one such trusted cadre.

²³³ Cf **D266/5** MM Response, para. 66. *See e.g.*, **D2/8** Say Born WRI, A27, 32, 35-6 [especially A36: In the leadership committee the highest ranking person was the commissar/chairman, who was called the party secretary in charge of the entire unit.”]; **D54/23** Pak Sok WRI, A1, 19 [explicitly mentions that Meas Muth was both political commissar and division commander]; **D2/6** Nhong Chrong WRI, A10; **D114/79** Kang Sum WRI, A135; **D54/102** Ek Ny WRI, A45.

²³⁴ **D54/43** Lon Seng WRI, A4 [“As political commissar, Meas Mut was generally in charge of all matters concerning Division 3, including providing political indoctrination to soldiers, making assignments, commanding the regiment chiefs on the battlefield and being responsible for food supplies and the logistics of the division”]; **D54/24** Pak Sok WRI, A20; **D54/10** Meu Ret WRI, A12; **D114/89** Seng Sin WRI, A15, 66.

²³⁵ **D266** Dismissal Order, para. 190. The underlying sources cited in fn. 586 mention that Dim was from the East Zone and deputy of Meas Muth, not that he was in charge of the military]. Note that paragraph 416 of the Dismissal Order (which is cited in **D266/5** MM Response, para. 66) directly refers to this paragraph 190.

²³⁶ *See e.g.*, **D114/95** Yoem Sroeng WRI, A66 [“They were all under Meas Muth. [...] Dim was under Meas Muth at the division level.”]; **D54/97** Khoem Yat WRI, A14 [“They worked together, but Meas Muth was the commander of the division, and Dim was his deputy”]; **D54/87** Prum Sarat WRI, A86 [“Meas Mut, was Division 164 Commander for Political Affairs. Dim was Division Deputy Commander for Military Affairs. Chhan was a Deputy Commander”]; **D114/103** Liet Lan (Nam Lan) WRI, A44; **D114/79** Kang Sum WRI, A33; **D114/230.1.1** OCIJ S-21 Prisoner List, No. 1624 [Deputy Secretary of Division 164].

²³⁷ 17 April 1975 to 31 December 1975 is 8.5 months. April 1978 to 6 January 1979 is another 9 months. The DK regime lasted 44.5 months.

²³⁸ *Contra* **D266/5** MM Response, para. 77.

²³⁹ *See* **D266/2** ICP Appeal, para. 133.

Meas Muth's positions and roles at the General Staff

54. Meas Muth fails to substantiate his claims²⁴⁰ that the Dismissal Order did not err in relation to his roles at the General Staff when it: (i) determined that Meas Muth was not a member of the General Staff since the creation of the RAK Central Divisions in July-August 1975;²⁴¹ and (ii) failed to make *any* finding regarding his role as Deputy Secretary of the General Staff from late 1978.²⁴²
55. Meas Muth's reference to one speculative statement in the Dismissal Order that Meas Muth *may* have been appointed as a political assistant to the General Staff,²⁴³ that is in any event contradicted elsewhere in the Dismissal Order,²⁴⁴ ignores,²⁴⁵ as the Dismissal Order did, the overwhelming evidence that, as a Central Division commander and chief of the Navy, Meas Muth was undoubtedly a member of the General Staff from July or August 1975.²⁴⁶ The fact that Meas Muth was omitted from the record of the 1978 Party Congress²⁴⁷ is not dispositive. Moreover, Meas Muth mischaracterises this document: it is not an official "DK document issued" in November 1978. It is the transcription of a "handwritten document in the notebook of a person suspected to be Ieng Sary",²⁴⁸ and more likely to contain accidental omissions.
56. The evidence regarding Meas Muth's appointment as deputy chief of the General Staff cannot be limited, as Meas Muth does,²⁴⁹ to one WRI from Duch in which he discusses only his role as a *member* of the General Staff. Contrary to Meas Muth's assertion,²⁵⁰ the ICIJ did not do likewise. Like the ICP,²⁵¹ he cited to a raft of post-29 April 2011 evidence confirming Meas Muth's promotion to the Deputy Secretary of the General Staff.²⁵² Neither the ICP (nor the ICIJ) has claimed that Meas Muth was only Deputy of the General Staff for only 50 days.²⁵³

²⁴⁰ **D266/5** MM Response, paras 79-81.

²⁴¹ **D266** Dismissal Order, paras 163, 418; **D266/2** ICP Appeal, paras 142-5.

²⁴² **D266** Dismissal Order, paras 163, 418; **D266/2** ICP Appeal, paras 146-7.

²⁴³ **D266/5** MM Response, para. 80, *citing* **D266** Dismissal Order, para. 162. For discussion of this statement, *see* **D266/2** ICP Appeal, para. 145.

²⁴⁴ **D266** Dismissal Order, para. 157 ["Those who could be selected as assistants to the General Staff were cadres at only 'battalion and regiment levels,' and Son Sen and *division secretaries* could help educate them" (emphasis added)].

²⁴⁵ **D266/5** MM Response, para. 80 ["absent credible evidence to the contrary"].

²⁴⁶ **D256/7** ICP Final Submission, fns 158, 166-7; **D266/2** ICP Appeal, paras 142-5, fns 581, 583-5, 587, 590, 596.

²⁴⁷ **D266/5** MM Response, para. 80, *citing* **D266** Dismissal Order, para. 163 and its reliance on **D4.1.649** Document on the 5th Pol Pot-Ieng Sary Congress, 2 Nov 1978.

²⁴⁸ **D4.1.649** Document on the 5th Pol Pot-Ieng Sary Congress, 2 Nov 1978, EN 00281339.

²⁴⁹ **D266/5** MM Response, para. 81.

²⁵⁰ **D266/5** MM Response, para. 81.

²⁵¹ **D266/2** ICP Appeal, fns 588, 597, *citing* **D256/7** ICP Final Submission, paras 52-3, 56-8 (esp. fns 160-1, 168, 172-7).

²⁵² **D267** Indictment, para. 163, fn. 333.

²⁵³ *Contra* **D266/5** MM Response, para. 81 and **D266** Dismissal Order, paras 163, 418.

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Meas Muth overlooks a considerable body of evidence confirming that Meas Muth was appointed to this position no later than September or October *i.e.* late 1978.²⁵⁴

57. Meas Muth's role as a member and then deputy chief undoubtedly had a determinative impact on the level of his responsibility.²⁵⁵ Within the General Staff, all members, including Meas Muth, participated in the design of the JCEs to purge enemies and enslave military personnel and civilians.²⁵⁶ With his appointment as Deputy Secretary in late 1978, Meas Muth's influence in the RAK reached its peak: another sign of his ever-expanding power and influence within the CPK. In this role, he was entrusted with the control over three branches of the RAK²⁵⁷ and placed in a strategic decision-making role over the land border with Vietnam.²⁵⁸ Pursuant to the 30 March 1976 Central Committee directives,²⁵⁹ he could make decisions to "smash" inside and outside the ranks of the *entire* RAK, and in November 1978, he indeed used this power to purge Division 117 and Sector 505.²⁶⁰

Meas Muth's membership of the Central Committee

58. Meas Muth misrepresents the applicable law in his request for summary dismissal of this sub-ground of the ICP's Appeal.²⁶¹ In the Appeal, the ICP explained that the presumption that the NCIJ considered all the relevant evidence is *rebuttable*. While the factfinder has discretion to find some pieces of evidence more persuasive than others, it must be clear how each factual finding was made. There is no discretion to ignore a body of contradictory evidence with no explanation why the selected evidence was preferred.²⁶²
59. In finding that Meas Muth was not a member of the CPK Central Committee from January 1976, but rather an assistant to the Central Committee with no voting or participatory rights,²⁶³ the Dismissal Order fails to explain why it preferred Duch's indirect evidence,²⁶⁴ some of it

²⁵⁴ **D266/5** ICP Appeal, para. 146.

²⁵⁵ *Contra* **D266/5** MM Response, para. 81.

²⁵⁶ **D266/2** ICP Appeal, paras 29-30.

²⁵⁷ **D266/2** ICP Appeal, paras 146-7.

²⁵⁸ **D266/2** ICP Appeal, para. 146. *See also* **D54/54** Meas Voeun WRI, A26 ["During that time in 1978 [...] the conflict on the eastern border was escalating. The General Staff held meetings and gave instructions through Ta Mut and Ta Soeung"]; **D54/63** Moeng Vet WRI, A19 ["Meas Mut began to be involved in responsibility for the eastern border in 1978 when the Vietnamese soldiers were striking strongly"]; **D54/62** Moeng Vet WRI, A22, 25; **D54/60.2** Moeng (Meung) Vet DC-Cam Statement, EN 00992989-90.

²⁵⁹ **D266/2** ICP Appeal, paras 100, 152 [*see also* paras 83, 98].

²⁶⁰ **D266/2** ICP Appeal,

²⁶¹ **D266/5** MM Response, paras 6, 82.

²⁶² **D266/2** ICP Appeal, para. 136; Internal Rule 67(4); Case 002-F36 Case 002/01 AJ, para. 304; *Muvunyi I* AJ, paras 144, 147; *Bemba* AJ, para. 52; *Kordić & Čerkez* AJ, para. 385; *Kunarac* AJ, para. 41.

²⁶³ **D266** Dismissal Order, paras 108-15, 117-22.

²⁶⁴ As the Dismissal Order noted (**D266** Dismissal Order, para. 111) and Meas Muth concedes (**D266/5** MM Response, para. 84).

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the product of S-21 confessions,²⁶⁵ over the unequivocal and first-hand evidence of Khieu Samphan,²⁶⁶ himself a member of the Central Committee.²⁶⁷ The Dismissal Order's reliance on Khieu Samphan's statements as regards to the other members of the Central Committee, Doeun, Koy Thuon, Ke Pauk and Pang, highlights the error.²⁶⁸

60. Khieu Samphan did not "passingly state[] that Division commanders, including Meas Muth, were members of the Central Committee".²⁶⁹ He named Meas Muth first, to the exclusion of other Division commanders²⁷⁰ and confirmed the power Meas Muth wielded in this role.²⁷¹ Although Khieu Samphan does not explicitly mention a date or period of membership for Meas Muth, he clearly refers to the period he was himself a full-rights member (January 1976 until the end of the regime).²⁷² Moreover, contrary to Meas Muth's contention,²⁷³ Khieu Samphan's evidence is corroborated by other sources confirming that zone and sector secretaries were members of the Central Committee.²⁷⁴ Meas Muth himself acknowledged that he would meet with Son Sen "in order to carry out the work of the Central Committee".²⁷⁵ By contrast, the Dismissal Order failed to consider that Duch's evidence is uncorroborated, and contradicted

²⁶⁵ See **D1.3.33.10** Duch WRI, EN 00195577 [In late 1975 "Nat told me he was disappointed because he had not been promoted himself. I tended not to believe Nat and, thus, I interrogated Koy Thuon on this issue, *when he was detained at S-21*, and Koy Thuon confirmed. Pang himself also confirmed this information one day *when he came to S-21*" (emphasis added)]; **D12** Duch WRI, EN 00680796-97.

²⁶⁶ **D266** Dismissal Order, para. 115, fn. 307.

²⁶⁷ **D1.3.33.15** Khieu Samphan WRI, EN 00156751 ["I was also a member of this central committee, first as an intern member in 1971 until 1976 when I became a full-rights member."]. See also e.g. **D98/1.2.27** Kaing Guek Eav, T. 10 Apr 2012, 14.31.27-14.34.25 ["Khieu Samphan [...] was a member of the Central Committee, a full fledged member"].

²⁶⁸ **D266/2** ICP Appeal, para. 149.

²⁶⁹ **D266/5** MM Response, para. 83.

²⁷⁰ **D1.3.33.15** Khieu Samphan WRI, EN 00156751 ["The central committee consisted of more than 30 members, but I don't remember the names of all those members. Among them was Meas Mut, Ta Mok's son-in-law, the secretary of one of the military sectors attached to Kampot province. Afterwards it was transformed into the marine force. [...] There was another member named Soeu Va Sy, alias Doeun (he was the chairman of Office 870), and another member of the central committee was Koy Thuon, and Ke Pork."]

²⁷¹ **D1.3.33.15** Khieu Samphan WRI, EN 00156750 ["In the central committee, the only persons who had real power were the chairman of the military unit and the zone secretary and sector secretaries."]. *Contra* **D266/5** MM Response, para. 83.

²⁷² This is confirmed by the fact that two other members he cited (Koy Thuon and Soeu Vasy alias Doeun) were purged and executed at S-21 after January 1976 but before the fifth Party Congress of late 1978. See **D4.1.950** OCP Revised S-21 Prisoner List (Koy Thuon, No. 4114, entry on 25 Jan 1977; Doeun, No. 9546, entry on 16 Feb 1977; Pang, No. 1117); **D114/230.1.1** OCIJ S-21 Prisoner List (Koy Thuon, No. 14027; Doeun, Nos 2183, 14596 entry on 16-7 Feb 1977; Pang, No. 14157).

²⁷³ **D266/5** MM Response, paras 6b, 85.

²⁷⁴ **D1.3.30.29** M. Matsushita and S. Heder, *Interviews with Kampuchean Refugees at Thai-Cambodia Border*, EN 00170750; **D4.1.4** T. Carney, *The Organization of Power*, EN 00105140-41; **D1.3.17.6** S. Heder and B. Tittlemore, *Seven Candidates for Prosecution*, EN 00393581. See also **D4.1.405** Duch WRI, EN 00244242 ["Meas Mut and Sam were nominated to the Central Committee in 1975"]; **D10.1.64** Duch Final Written Submission, EN 00412107, fn. 33.

²⁷⁵ **D1.3.7.8** The Cambodia Daily, *Let Bygones Be Bygones*, 1 Mar 2008, EN 00165821 ["Meas Muth acknowledged that he met with Son Sen 'a few times,' in order to carry out the work of the Central Committee"].

by the terms of the CPK Statute.²⁷⁶

61. In view of the Dismissal Order’s findings that (i) membership of the Central Committee would be sufficient to establish Meas Muth as a DK “senior leader”;²⁷⁷ (ii) “[a]mong the top institutions [was] the Party Central Committee having over 30 (thirty) members – the highest [CPK] body for carrying out important affairs of the country”;²⁷⁸ and (iii) Meas Muth’s position as assistant to the Central Committee, without power to participate in decision-making within the Committee, placed him “under around 50 (fifty) cadres and held the same positions as many other cadres, including zone and division secretaries”;²⁷⁹ the determinative impact of this finding on the Dismissal Order’s conclusion that Meas Muth fell outside the ECCC’s personal jurisdiction since, *inter alia*, he “did not exercise much power”,²⁸⁰ is clear.

G. The Dismissal Order factually erred in its treatment of the number of victims

62. Meas Muth concedes that the Dismissal Order erred in fact in underestimating the number of victims for which he is responsible.²⁸¹ However, he wrongly asserts that the ICP cannot present evidence on the extent of the error on the basis that the ICP is bound by the findings in the ICIJ’s Indictment. The ICIJ’s findings on victim numbers have no bearing on whether the NCIJ erred in excluding extensive numbers of victims from his gravity assessment, nor does it undermine the evidence presented by the ICP to substantiate the error.²⁸² The ICP is not bound by every finding in the Indictment because of a choice not to appeal it. Given that the ICIJ found sufficient gravity to establish personal jurisdiction,²⁸³ any underestimate in its calculation of victim numbers did not invalidate the ICIJ’s decision to indict. Should the PTC ultimately find that the Dismissal Order erred in fact, the PTC may substitute its own judgement²⁸⁴ to assess whether the victim numbers meet the gravity threshold.
63. In any event, Meas Muth’s use of cherry-picked quotes of the ICIJ’s victim estimates to suggest that no reasonable factual findings were possible are a wild distortion of the ICIJ’s findings

²⁷⁶ **D266/2** ICP Appeal, para. 148, *citing* **D1.3.22.1** CPK Statute, Jan 1976, art. 24 [mentions “full-rights members and candidate members”]. *See* **D12** Duch WRI, EN 00680796 [Duch claims that the Statute was abused by the creation of the assisting committee]. *See further* **D266** Dismissal Order, para. 116.

²⁷⁷ **D266** Dismissal Order, para. 395.

²⁷⁸ **D266** Dismissal Order, para. 410.

²⁷⁹ **D266** Dismissal Order, para. 419.

²⁸⁰ **D266** Dismissal Order, para. 428.

²⁸¹ **D266/5** MM Response, para. 89.

²⁸² It is well established that accurate and precise victim numbers are not required in cases of mass crimes, “particularly in view of the evidential standard applicable at the pre-trial stage of proceedings.” *See* Case 004/1-**D308/3/1/20** Im Chaem PTC Closing Order Considerations, para. 214 (Judges Beauvallet and Baik) and the cases cited in fns 506-7 therein.

²⁸³ **D267** Indictment, paras 462-9.

²⁸⁴ **D266/2** ICP Appeal, para. 7. *See also* Case 001-**F28** Duch AJ, para. 17.

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that thousands were victims to Meas Muth's crimes.²⁸⁵ Moreover, the ICIJ's victim numbers were a freely acknowledged *underestimate*,²⁸⁶ explicitly based solely on evidence generated by the OCIJ.²⁸⁷

64. Given the clarity of the error²⁸⁸ and its impact,²⁸⁹ the remainder of Meas Muth's arguments seek to obfuscate and diminish the error, largely by focusing on other aspects of the gravity assessment.²⁹⁰

H. The Dismissal Order erred in law by holding Duch to be the only most responsible person

65. Meas Muth contradicts himself by first denying that the Dismissal Order found Duch to be the only "most responsible" person,²⁹¹ then admitting the Dismissal Order was mistaken in so holding²⁹² and then arguing that this erroneous holding had no impact on the finding that Meas Muth was not a most responsible person.²⁹³ In fact, Meas Muth agrees with the ICP²⁹⁴ that the category of "most responsible" is not, and was never intended to be, limited to Duch or to mean "that Duch should be used as a benchmark in determining whether others are most responsible".²⁹⁵ He freely concedes that the Dismissal Order erred in holding that (i) the term "most responsible" in the ECCC Law specifically referred to Duch; and (ii) no one except senior leaders and Duch could be prosecuted before the ECCC.²⁹⁶
66. Having acknowledged these legal errors, Meas Muth simply claims – without citation or argument - that the Dismissal Order's categorical restriction of the "most responsible" category to Duch had no impact on its subsequent determination that Meas Muth was not a "most

²⁸⁵ Meas Muth gives a one-sided view of the ICIJ's calculations by omitting all mention of the evidence the ICIJ found reliable enough to use as a basis for his findings (compare **D266/5** MM Response, para. 91(a-h) quotes, with **D267** Indictment, paras 249-57, 264-8, 329 (*see also* paras 283, 289, 301-2, 313, 323), 341, 367-70, 416-7, 421-4, 437-42, 444-50).

²⁸⁶ **D267** Indictment, para. 133 ["the estimations remain at minimum numbers [...] the actual victim numbers are very likely to be much higher than estimated"]. *See also* paras 132-45 regarding the conservative methodology that the ICIJ used to estimate victim numbers.

²⁸⁷ **D267** Indictment, paras 118-23, 130-1; Case 004/1-**D308/3/1/20** Im Chaem PTC Closing Order Considerations, para. 56 (unanimous holding); *see also* paras 48-55.

²⁸⁸ In line with the previous jurisprudence of the CIJs and TC (**D261** Case 004/1 Closing Order, para. 317; Case 001-**E188** *Duch* TJ, para. 22) and ICTY (*See e.g. Janković* Referral Decision, para. 19; *Lukić & Lukić* Referral Decision, paras 27, 29), the Dismissal Order acknowledges that the number of victims is a key factor in determining the gravity of the crimes (**D266** Dismissal Order, paras 365-6).

²⁸⁹ **D266** Dismissal Order, para. 428.

²⁹⁰ The ICP has replied to these as relevant elsewhere. *See supra*, paras 12-18.

²⁹¹ **D266/5** MM Response, para. 93.

²⁹² **D266/5** MM Response, paras 6d, 95.

²⁹³ **D266/5** MM Response, paras 93, 95-6.

²⁹⁴ **D266/2** ICP Appeal, paras 171-190.

²⁹⁵ **D266/5** MM Response, para. 95.

²⁹⁶ **D266/5** MM Response, para. 95 *citing* **D266** Dismissal Order, paras 396, 401.

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responsible” person.²⁹⁷ This is contrary to the plain language of the Dismissal Order. Whether this legal error dictated the personal jurisdiction outcome, or coloured the erroneous analysis challenged in Sub-ground E,²⁹⁸ the impact is plain²⁹⁹ and the error invalidates the decision.

Reply to Meas Muth’s Response on the Consequences of Conflicting Closing Orders

67. Meas Muth misapplies the *in dubio pro reo* principle and adopts an overly narrow interpretation of the governing law and jurisprudence in an attempt to undermine the clear mandate of the ECCC Agreement, ECCC Law, and Internal Rules, in particular Internal Rule 77(13)(b),³⁰⁰ that unless the ICIJ’s Indictment is overturned by a PTC supermajority, Case 003 must be sent for trial.³⁰¹
68. It was clearly the intent of the parties to the ECCC Agreement that where the CIJs disagree on a case going forward and the PTC fails to reach a supermajority resolving the difference, the prosecution of that case continues, *i.e.* the case file is transferred to the TC.³⁰² Meas Muth’s attempts to undermine David Scheffer’s evidence of the parties’ intentions to that effect are unpersuasive.³⁰³ As United States Ambassador-at-Large for War Crimes Issues, he was deeply involved in the negotiations throughout,³⁰⁴ and his reports have been relied on by the PTC, SCC and CIJs,³⁰⁵ as well as the Meas Muth defence team,³⁰⁶ including in this very Response.³⁰⁷ In any event, his recollections accord entirely with the written correspondence between Hans Corell and Sok An, the parties’ two main negotiators.³⁰⁸

²⁹⁷ **D266/5** MM Response, paras 6d, 93, 95-6.

²⁹⁸ See **D266/2** ICP Appeal, paras 112-3 (Sub-Ground E).

²⁹⁹ **D266** Dismissal Order, paras 427-8. Moreover, if not corrected, this error will persist to defeat an otherwise successful Appeal.

³⁰⁰ **D266/2** ICP Appeal, paras 192-3, 197-8; **D267/10** ICP Response to MM Appeal, paras 22-8, 38.

³⁰¹ **D266/2** ICP Appeal, paras 191-8; **D267/10** ICP Response to MM Appeal. At **D266/5** MM Response, paras 20, 98 Meas Muth repeats his Appeal argument that the Indictment must itself be upheld by a PTC supermajority, even if the Dismissal Order is set aside. As set out in **D267/10** ICP Response to MM Appeal, para. 20, Rules 77(13) and 79(1) both confirm that an indictment issued by the OCIJ seizes the Trial Chamber in the absence of approval by supermajority from the PTC. This is the only logical conclusion, since (i) if no party appeals the Indictment, as Meas Muth himself did not, the matter would never come before the PTC; and (ii) in the event the PTC fails to reach a supermajority, the default decision is that the Indictment will stand.

³⁰² **D267/10** ICP Response to MM Appeal, paras 23, 26, 29-32.

³⁰³ **D266/5** MM Response, para. 19.

³⁰⁴ **D267/10** ICP Response, para. 32; Case 001-C5/13 Brief of Professor David Scheffer international law expert as *Amicus Curiae* in support of the Co-Investigating Judges, pp. 2-3.

³⁰⁵ Case 004/1-D308/3/1/20 Im Chaem PTC Closing Order Considerations, fn. 151; Case 001-F28 Duch AJ, fn. 109; **D261** Case 004/1 Closing Order, fns 15-16; **D266** Dismissal Order, fn. 1161.

³⁰⁶ **D170** Meas Muth request to obtain and place on the case file the United Nations and Royal Government of Cambodia archive material concerning the negotiations to establish the ECCC, 10 Nov 2015, fn. 84.

³⁰⁷ **D266/5** MM Response, fns 41, 415.

³⁰⁸ **D267/4.1.5** Letter from UN Secretary General to Prime Minister H.E. Hun Sen, 19 Apr 2000, Annexed Note from Hans Corell to Secretary General, Subject: Urgent call from Cambodia – Options to settle differences between investigating judges/prosecutors, 19 Apr 2000, EN 01614369. See also **D181/2.36** Statement by Under-Secretary-General Hans Corell upon leaving Phnom Penh on 17 March 2003, 17 Mar 2003, EN 01326112.

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69. Moreover, Meas Muth's assertions³⁰⁹ that article 7(4) of the ECCC Agreement and the SCC jurisprudence³¹⁰ are inapplicable to the current situation where the PTC has been seised by appeals by the parties rather than through the formal dispute resolution procedure, overlook the fact that the substantive outcomes are the same. The manner in which the PTC has been seised of the same question – whether either CIJ erred in issuing his dismissal order or indictment - is irrelevant. Moreover, the PTC has confirmed the same result in the context of a disagreement between the CIJs concerning the content of their Closing Order that the CIJs, like in Case 003, chose *not* to refer to the PTC under the dispute resolution mechanism.³¹¹
70. The result that Case 003 progresses to trial is not, as Meas Muth repeatedly argues,³¹² defeated by the *in dubio pro reo* principle. Internal Rule 77(13)(b), mandating that the TC be seised by an indictment in the absence of a PTC supermajority overturning it, is *lex specialis* relating to indictments and prevails over the general terms of Rule 77(13)(a). *Lex specialis* is a widely recognised interpretation mechanism³¹³ used by different international and regional tribunals³¹⁴, including the ECCC.³¹⁵ *In dubio pro reo*, if applicable at all, is limited to doubts that remain *after* interpretation, and does not grant the charged person a concrete advantage in every situation.³¹⁶ In this case, no doubt remains: Internal Rule 77(13)(b) indicates an intent to implement the clear mandate of the ECCC Agreement and ECCC Law: where the CIJs disagree on a case progressing, absent a supermajority of the PTC, the case moves to trial.
71. Meas Muth ridicules what he terms a “judicially perverse maxim – *when in doubt, prosecute*”, as contrary to the *in dubio pro reo* principle.³¹⁷ Yet, *in dubio pro reo* applies to questions of fact and substantive law determining an accused's guilt at trial.³¹⁸ Far from being “perverse”, the ECCC mechanism respects the rights of all parties to the proceedings, including the defence and victims.³¹⁹ It follows French, Cambodian and ECCC law and jurisprudence stating that proceedings may only be terminated for a finite range of reasons unrelated to procedural

³⁰⁹ D266/5 MM Response, paras 18-19.

³¹⁰ Case 001-F28 Duch AJ, para. 65 citing ECCC Law, art. 23*new*; ECCC Agreement, art. 7(4); Rule 72(4)(d).

³¹¹ Case 002-D427/1/30 Decision on Ieng Sary's Appeal Against the Closing Order, 11 Apr 2011, paras 272-4. See D266/5 MM Response, paras 36-7.

³¹² D266/5 MM Response, paras 15, 17, 20; D267/4 MM Appeal, pp. 1-2, paras 2, 45, 49, 62-6.

³¹³ UNGA, Report of the International Law Commission, 58th session, 2006, para. 61; UNGA, Report of the International Law Commission, 56th session, 2004, para. 305.

³¹⁴ See, e.g. *Beagle Channel Arbitration (Argentina v. Chile)*, Report and Decision of the Court of Arbitration, 18 Feb 1977, paras 36, 38-9; *Brannigan and McBride v. UK*, para. 76; *Nikolova v. Bulgaria*, para. 69; Rudolf Gabriel, pp. 6398-99, paras 35-6 and p. 6404, para. 59.

³¹⁵ Case 001-F28 Duch AJ, paras 298, 348.

³¹⁶ D267/10 ICP Response to MM Appeal, paras 43-4.

³¹⁷ D266/5 MM Response, paras 2, 15, 20.

³¹⁸ D267/10 ICP Response to MM Appeal, paras 41-2.

³¹⁹ D267/10 ICP Response to MM Appeal, paras 43-8.

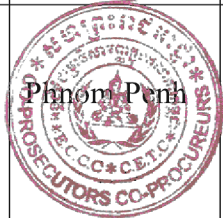

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uncertainty.³²⁰ Moreover, it accords with the *in dubio pro duriore* principle consistently applied in many civil law jurisdictions, which confirms that in case of doubt as to whether proceedings progress to trial, *in dubio pro reo* is inapplicable and it is presumed that the accused's guilt will be determined at trial.³²¹

IV. RELIEF SOUGHT

72. As stated in the ICP Appeal, the ICP respectfully requests that the Pre-Trial Chamber reverse the Dismissal Order's erroneous finding that Meas Muth is not subject to the ECCC's personal jurisdiction; find that Meas Muth was one of "those who were most responsible" for DK-era crimes; and send Meas Muth for trial on the basis of the Indictment issued by the ICIJ.

Respectfully submitted,

Date	Name	Place	Signature
9 August 2019	William SMITH International Deputy Co-Prosecutor for Brenda J. HOLLIS Reserve International Co-Prosecutor	Phnom Penh 	

³²⁰ D267/10 ICP Response to MM Appeal, para. 50.

³²¹ See, e.g. **Switzerland**: (Supreme Court of Switzerland, Judgment, 27 Mar 2012, 138 IV 86, para. 4.1.1 [(Unofficial translation) "The principle of *in dubio pro duriore* requires that in case of doubt, the procedure continues. [...] Indeed, in case of doubt, it is not up to the investigating or accusing authority to decide, but to the competent judge. At the indictment stage, the principle 'in dubio pro reo', relating to the evaluation of evidence by the judging authority, does not apply. On the contrary, the maxim 'in dubio pro duriore' imposes, in case of doubt, an indictment.]); Supreme Court of Switzerland, Judgment 14 May 2018, 6B_1456/2017, para. 4.1 & Supreme Court of Switzerland, Judgment 3 Jul 2018, 6B_193/2018, para. 2.1 [(Unofficial translation) "[In dubio pro duriore] results from the legality principle and implies that, in principle, a termination or non-investigation order cannot be issued by the Prosecution unless it is clear that the acts do not attract criminal responsibility or that the prosecutorial conditions are not met. The process must proceed if a conviction appears more likely than an acquittal, or if the probabilities of conviction and acquittal seem equivalent, particularly when the offence is serious.]); **Germany**: (German Criminal Procedure Code, s. 203 [(Unofficial translation) "The court shall decide to open main proceedings if in the light of the results of the preparatory proceedings there appear to be sufficient grounds to suspect that the indicted accused has committed a criminal offence.]); OLG Saarbrücken, NStZ-RR 2009, 88 [OLG Saarbrücken 17.07.2008 - 1 Ws 131/08], s. II.1.a) (p. 2) [(Unofficial Translation) "In assessing a criminal act preliminarily [...], sufficient grounds are given if the conviction of the suspect is expected with probability [...] The principle *in dubio pro reo* does not apply here, it may only play a role indirectly [...] The clarification of discrepancies between the statements of the suspect and the existing results of the evidence may therefore be left for the main trial"]; **Estonia** (Estonian Code of Criminal Procedure, art. 6; *Rõigas v. Estonia*, No. 49045/13, Judgment, 12 Sep 2017, paras 30, 51, 87, citing Estonian Supreme Court (*Riigikohus*) Judgment of 22 September 2010 (case no. 3-1-3-60-10) which "reiterated the principle of mandatory criminal proceedings provided for in Article 6 of the Code of Criminal Procedure. It noted that while the principle *in dubio pro reo* required that the accused was to be given the benefit of the doubt when a judgment was made, the principle *in dubio pro duriore* was applicable in respect of the initiation of criminal proceedings and at that stage any suspicion of crime was to be interpreted in favour of the initiation of proceedings").