

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

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**INTERNATIONAL CO-PROSECUTOR'S 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.<sup>1</sup> On the same day, the National Co-Investigating Judge (“NCIJ”) issued a closing order dismissing the case against Meas Muth (“Dismissal Order”) on the grounds that “the ECCC has no personal jurisdiction over Meas Muth.”<sup>2</sup>
2. The Dismissal Order is based on the finding that Meas Muth is not among the senior leaders or “those who were most responsible” for crimes and serious violations committed between 17 April 1975 and 6 January 1979. However, as detailed below, this Dismissal Order’s finding was premised on multiple factual and legal errors that invalidate the NCIJ’s conclusion on personal jurisdiction.
3. The International Co-Prosecutor (“ICP”) now appeals the Dismissal Order pursuant to Rules<sup>3</sup> 67(5) and 74(2). The ICP respectfully requests that the Pre-Trial Chamber (“PTC”) reverse the Dismissal Order and find that Meas Muth was among those most responsible for Khmer Rouge crimes and therefore falls within the personal jurisdiction of the ECCC. The ICP further requests that the PTC order that the case against Meas Muth proceed to trial on the basis of the Indictment issued by the ICIJ.<sup>4</sup>

## II. PROCEDURAL HISTORY

4. The relevant procedural history is set out in Annex I.

## III. APPLICABLE LAW

### A. ADMISSIBILITY OF THE APPEAL

<sup>1</sup> **D267** Closing Order, 28 Nov 2018 (“Indictment”).

<sup>2</sup> **D266** Order Dismissing the Case Against Meas Muth, 28 Nov 2018 (“Dismissal Order”), paras 429-30.

<sup>3</sup> Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 9), as revised on 16 January 2015 (“Internal Rules” or “Rules”).

<sup>4</sup> This request for relief follows from the novel situation of two conflicting closing orders, one an indictment and one a dismissal, in a single case, which inherently will have to be considered together. This request for relief is premised on the assumption that any appeals against the Indictment are not granted. In that situation, where there is a valid indictment, Rule 77(13)(b) requires that the PTC seize the Trial Chamber on the basis of the indictment.

5. Internal Rule 74(2) provides that the Co-Prosecutors “may appeal against all orders by the Co-Investigating Judges” and Rule 67(5) provides that a closing order is “subject to appeal as provided in Rule 74.”

#### B. STANDARD OF REVIEW FOR DECISIONS ON PERSONAL JURISDICTION

6. While the Co-Investigating Judges (“CIJs”) may exercise their own discretion in determining whether a Charged Person falls within the category of those “most responsible” for DK crimes, this discretion is not unlimited and “does not permit arbitrary action”.<sup>5</sup> The NCIJ’s decision in this regard is reviewable by the PTC.<sup>6</sup>
7. Further, 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.<sup>7</sup> As this PTC has recently unanimously held:

A discretionary decision may be reversed where it was: (1) based on an incorrect interpretation of the governing law (*i.e.* an error of law) invalidating the decision; (2) based on a patently incorrect conclusion of fact (*i.e.* an error of fact) occasioning a miscarriage of justice; and/or (3) so unfair or unreasonable as to constitute an abuse of the Co-Investigating Judges’ discretion and to force the conclusion that they failed to exercise their discretion judiciously. In other words, it must be established that there was an error or abuse which was fundamentally determinative of the Co-Investigating Judges’ exercise of discretion.<sup>8</sup>

<sup>5</sup> Case 004/1-**D308/3/1/20** Considerations on the International Co-Prosecutor’s Appeal of Closing Order (Reasons), 28 Jun 2018 (“Im Chaem PTC Closing Order Considerations”), para. 20 (unanimous holding); Case 001-**F28** Appeal Judgement, 3 Feb 2012 (“*Duch* AJ”), paras 62-74, 79.

<sup>6</sup> Case 004/1-**D308/3/1/20** Im Chaem PTC Closing Order Considerations, para. 20 (unanimous holding).

<sup>7</sup> *S. Milošević*, IT 02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel, 1 Nov 2004, para. 10 *cited in* Case 002-**D164/3/6** Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 12 Nov 2009 (“SMD Decision”), para. 25; *S. Milošević*, IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 Apr 2002, paras 5-6; *Šešelj*, IT-03-67-AR73.5, Decision on Vojislav Šešelj’s Interlocutory Appeal Against the Trial Chamber’s Decision on Form of Disclosure, 17 Apr 2007, para. 14; *Halilović*, IT-01-48-AR73.2, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, 19 Aug 2005, paras 5, 64; *Karemera et al.*, ICTR-98-44-AR73, Decision on Prosecutor’s Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment, 19 Dec 2003, para. 5; *Uwinkindi*, ICTR-01-75-AR72(C), Decision on Defence Appeal against the Decision Denying Motion Alleging Defects in the Indictment, 16 Nov 2011, para. 6; *Katanga & Ngudjolo Chui*, ICC-01/04-01/07-1718, Appeals Chamber, Judgment on the Appeal of the Prosecutor against the “Decision on Request 1200 of the Prosecutor for Prohibition and Restrictive Measures Against Mathieu Ngudjolo with Respect to Contacts Both Outside and Inside the Detention Centre”, 9 Dec 2009, paras 1, 41-43.

<sup>8</sup> Case 004/1-**D308/3/1/20** Im Chaem PTC Closing Order Considerations, para. 21 (unanimous holding).

8. The PTC has found it to be established international jurisprudence that, on appeal, “alleged errors of law are reviewed *de novo* to determine whether the legal decisions are correct and alleged errors of fact are reviewed under a standard of reasonableness to determine whether no reasonable trier of fact could have reached the finding of fact at issue.”<sup>9</sup>

### C. STANDARD FOR IDENTIFICATION OF THOSE “MOST RESPONSIBLE” FOR KHMER ROUGE CRIMES

9. Identification of those Khmer Rouge officials<sup>10</sup> “most responsible” for crimes falling within the ECCC’s jurisdiction requires an assessment of both the gravity of the crimes charged and the level of responsibility of the suspect.<sup>11</sup> This assessment must be made “based entirely on the merits of each individual case”,<sup>12</sup> and as both CIJs recently acknowledged, “there is no merit in any historical-political contention that the negotiations around the establishment of the ECCC led to a joint and binding understanding that only a certain finite number of (named) individuals were to be under the Court’s jurisdiction”.<sup>13</sup>
10. Factors relevant to assessing the gravity of the crimes committed, include (1) number of victims;<sup>14</sup> (2) geographic and temporal scope and the manner in which the crimes were allegedly committed; and (3) the number of separate incidents.<sup>15</sup>
11. As to the level of responsibility, relevant factors include: (1) level of participation in the crimes, including the level of participation in policy making and/or policy implementation; (2) the hierarchical rank or position of the accused, including (3) the

<sup>9</sup> Case 002-**D427/1/30** PTC, Decision on Ieng Sary’s Appeal Against the Closing Order, 11 Apr 2011 (“Ieng Sary Closing Order Appeal Decision”), para. 113.

<sup>10</sup> Case 001-**F28 Duch** AJ, paras 52, 61.

<sup>11</sup> Case 001-**F28 Duch** AJ, paras 71, 80; Case 001-**E188** Judgement, 26 Jul 2010 (“*Duch TJ*”), para. 22; **D261** Closing Order (Reasons) in Case 004/1, 10 Jul 2017 (“Case 004/1 Closing Order”), paras 37-41. *See also* Case 004/1-**D308/3/1/20** Im Chaem PTC Closing Order Considerations, para. 321; **D266** Dismissal Order, paras 3, 365-367 [acknowledging this to be the applicable standard]. *See also* *Lukić & Lukić* Referral Decision, paras 26-28.

<sup>12</sup> **D261** Case 004/1 Closing Order, para. 37. *See also* Case 004/1-**D308/3/1/20** Im Chaem PTC Closing Order Considerations, para. 321 (Judges Beauvallet and Baik).

<sup>13</sup> **D261** Case 004/1 Closing Order, paras 37-38.

<sup>14</sup> The gravity of crimes is determined in part by reference to the vulnerability of those victims. *See* Case 001-**F28 Duch** AJ, para. 375.

<sup>15</sup> **D261** Case 004/1 Closing Order, para. 317; Case 001-**E188 Duch** TJ, para. 22; **D266** Dismissal Order, para. 366 [acknowledging this to be the appropriate standard]. *See also* Case 004/1-**D308/3/1/20** Im Chaem PTC Closing Order Considerations, para. 327 (Judges Beauvallet and Baik); *Janković* Referral Decision, para. 19; *Todović* Referral Appeal Decision, paras 13, 16; Case 001-**F28 Duch** AJ, para. 375; *Tolimir* AJ, para. 633.

number of subordinates and hierarchical echelons above him or her and the permanence of the position.<sup>16</sup> Other relevant factors include effective authority<sup>17</sup> and ability to give orders;<sup>18</sup> the temporal scope of their control;<sup>19</sup> and whether those in more senior ranks have already been convicted.<sup>20</sup> The particular role of a person should not be exclusively assessed or predetermined on excessively formalistic grounds.<sup>21</sup>

12. The application of these two principles does not require a comparison and ranking of the responsibility of all possible perpetrators,<sup>22</sup> but instead should have regard to the other cases tried by the Court and the particular circumstances and context in which the crimes were committed.<sup>23</sup> Undue weight should not be placed on the local character of the crimes, since local leaders may wield significant influence and/or play a vital role in the implementation of nationwide policies warranting their inclusion within the category of those most responsible.<sup>24</sup>

#### D. REQUIREMENT TO INVESTIGATE AND ISSUE A DECISION ON ALL FACTS WITHIN THE SCOPE OF THE CASE

13. Pursuant to Internal Rule 55(2), the CIJs have the obligation to fully and fairly investigate *in rem all* the material facts alleged in an introductory and any supplementary submission(s).<sup>25</sup> The CIJs are not permitted to refuse to investigate,<sup>26</sup> and may complete

<sup>16</sup> Case 001-E188 *Duch* TJ, para. 22; D261 Case 004/1 Closing Order, paras 39-41. *See also* Case 004/1-D308/3/1/20 Im Chaem PTC Closing Order Considerations, paras 332, 335 (Judges Beauvallet and Baik); D266 Dismissal Order, paras 367, 369; D10.1.101 Closing Order, 15 Sep 2010 (“Case 002 Closing Order”), para. 1328; *Ademi* Referral Decision, para. 29; *Kovačević* Referral Decision, para. 20; *D. Milošević* Referral Decision, para. 23; *Lukić* Appeal Decision, para. 21.

<sup>17</sup> *Lukić & Lukić* Referral Decision, para. 28; *Ademi* Referral Decision, para. 29.

<sup>18</sup> *Ademi* Referral Decision, para. 29.

<sup>19</sup> *D. Milošević* Referral Decision, para. 23.

<sup>20</sup> *Kovačević* Referral Decision, para. 20.

<sup>21</sup> Case 001-E188 *Duch* TJ, para. 24. *See also* *Ntaganda*, ICC-01/04-169-US-Exp, Judgment on the Prosecutor’s Appeal Against the Decision of Pre-Trial Chamber I entitled “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58”, 13 Jul 2006, para. 76; Case 004/1-D308/3/1/20 Im Chaem PTC Closing Order Considerations, paras 321, 334 (Judges Beauvallet and Baik).

<sup>22</sup> Case 001-F28 *Duch* AJ, para. 62; Case 001-E188 *Duch* TJ, para. 24.

<sup>23</sup> *Ademi* Referral Decision, para. 28.

<sup>24</sup> *Lukić* Appeal Decision, para. 22. *See also* Case 004/1-D308/3/1/20 Im Chaem PTC Closing Order Considerations, paras 329, 335-336 (Judges Beauvallet and Baik).

<sup>25</sup> Internal Rules 53, 55(1), 55(2); Cambodian Code of Criminal Procedure (“Cambodian CCP”), art. 125; Case 001-D99/3/42 Decision on Appeal against Closing Order Indicting Kaing Guek Eav alias “Duch”, 5 Dec 2008 (“Decision on Duch Closing Order Appeal”), para. 35; Case 004-D365/3/1/5 [Redacted] Decision on International Co-Prosecutor’s Appeal of Decision on Request for Investigative Action Regarding Sexual Violence at Prison No. 8 and in Bakan District, 13 Feb 2018 (“PTC Sexual Violence Decision”), para. 39. *See also* Case 002-D198/1 Order Concerning the Co-Prosecutors’ Request for Clarification of Charges, 20 Nov 2009 (“OCIJ Clarification Order”), para. 6, fn. 1; Cass. Crim., 24 Mar 1977, No. 76-91.442 [“le juge d’instruction est tenu d’informer sur tous les faits dont il a été régulièrement saisi.” Unofficial translation: “the investigating judge is obliged to investigate all the facts of which he has been regularly seised.”].

<sup>26</sup> *See* Guéry & Chambon, *Droit et Pratique de l’Instruction préparatoire* (7<sup>th</sup> edition), 2010-2011, p. 158, s.



the investigation only when they have exercised their due diligence in collating all the material necessary to determine whether or not to issue an indictment, and to establish jurisdiction.<sup>27</sup> The CIJs have a further duty to make a decision in the closing order - whether a dismissal order or an indictment<sup>28</sup> - on each of the facts of which they have been validly seised.<sup>29</sup>

**E. REQUIREMENT FOR FACTUAL AND LEGAL FINDINGS REGARDING CRIMES COMMITTED AND THE CHARGED PERSON'S LIKELY CRIMINAL LIABILITY**

14. In compliance with the international standard that all decisions of judicial bodies must be reasoned,<sup>30</sup> “[t]he [CIJs]’ decision to *either dismiss acts or indict* the Charged Person

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51.02 (“Guéry”) *citing* Cass. Crim. 31 Mar 1987, no. 86-90.769 [“Attendu que, [...] le juge d’instruction n’est autorisé à rendre une ordonnance disant qu’il n’y a lieu à informer que si, pour des causes affectant l’action publique elle-même, les faits ne peuvent légalement comporter une poursuite ou si, à supposer les faits démontrés, ils ne peuvent admettre une qualification pénale.” Unofficial translation: “Whereas, under article 86, para. 3 of the Code of Criminal Procedure, the investigating judge is entitled to issue an order refusing to investigate only where, for the reasons that affect the prosecution itself, the facts cannot be prosecuted, or where the facts are established, they do not have any criminal characterisation.” Voir aussi: “Le juge d’instruction, saisi par réquisitoire supplétif du procureur de la République ne peut [...] refuser d’informer” Unofficial translation: “The investigating judge, when seised by the prosecutor’s supplementary submission cannot [...] refuse to investigate”].

<sup>27</sup> See Guéry, p. 853, s. 212.11 [“La procédure est complète lorsqu’elle réunit les éléments nécessaires pour décider s’il y a lieu de prononcer la mise en prévention de l’inculpé et pour déterminer la juridiction compétente. la loi n’a pas déterminé le délai; le juge d’instruction est seulement tenu de procéder avec diligence, comme tout juge.” Unofficial translation: “The procedure is complete where it meets all the elements necessary to decide whether to issue an indictment against the charged person and to determine the competent jurisdiction. The law does not bind the investigating judge to a time limit; he is only obliged to proceed with due diligence, as are all judges.”].

<sup>28</sup> A dismissal order and an indictment are both closing orders and carry the same procedural requirements. See Internal Rules 67(1) [“The [CIJs] shall conclude the investigation by issuing a Closing Order, either indicting a Charged Person and sending him or her to trial, or dismissing the case.”], 67(4) [“A Closing Order may both send the case to trial for certain acts of against certain persons and dismiss the case for others.”], Glossary [A Closing Order “refers to the final order made by the Co-Investigating Judges [...] at the end of the judicial investigation, whether Indictment or Dismissal Order.” And Dismissal Order “refers to a Closing Order by the Co-Investigating Judges or the Pre-Trial Chamber, dismissing the charges against a Charged Person.”]; Cambodian CCP, art. 247.

<sup>29</sup> Case 001-D99/3/42 Decision on Duch Closing Order Appeal, paras 29, 33, 37-38, 115; Case 002-D198/1 OCIJ Clarification Order, para. 10; Cass. Crim., 24 Mar 1977, No. 76-91.442 [“Le juge d’instruction avait l’obligation d’instruire, puis de statuer par une ordonnance de règlement sur l’ensemble des faits” [...] “Le juge est tenu de statuer par ordonnance du règlement sur tous les faits dont il a été régulièrement saisi” Unofficial translation: “The investigating judge has the obligation to investigate and then to render an order covering all the facts. [...] The judge is obliged to pronounce on all the facts of which he has been regularly seised”]; Cass. Crim. 4 Mar 2004, No. 03-85.983 [“le juge d’instruction n’a pas statué, comme il en a le devoir, dans son ordonnance de renvoi, sur tous les faits dont il est saisi” Unofficial translation: “The investigating judge did not rule in his closing order, as he was obliged, on all the facts of which he was seised”]. See also Case 004/1-D308/3/1/20 Im Chaem PTC Closing Order Considerations, paras 116, 129 (Judges Beauvallet and Baik).

<sup>30</sup> See Case 002-D55/1/8 Decision on Nuon Chea’s Appeal Against Order Refusing Request for Annulment, 26 Aug 2008, para. 21 (and jurisprudence therein) [“The Pre-Trial Chamber find that all decisions of judicial bodies are required to be reasoned as this is an international standard.”]; Case 001-D99/3/42 Decision on Duch Closing Order Appeal, para. 38; Case 002-E176/2/1/4 Decision on Nuon Chea’s Appeal Against the Trial Chamber’s Decision on Rule 35 Applications for Summary Action, 14 Sep 2012, para. 25 [“all judicial decisions – whether oral or written – must comply with a court’s obligation to provide adequate reasons”]

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shall be reasoned as specifically provided by Internal Rule 67(4).<sup>31</sup> As such, a closing order must “as a minimum [...] provide reasoning to support its findings regarding the substantive considerations relevant to its decision”.<sup>32</sup>

15. Since a determination as to whether a charged person is among those “most responsible” for crimes falling within the ECCC’s jurisdiction requires an assessment of both the gravity of the crimes charged and the level of responsibility of the suspect,<sup>33</sup> based on all the facts of which the CIJs were seised,<sup>34</sup> dismissing a case for want of personal jurisdiction must contain all the factual and legal findings necessary to make that decision.
16. The CIJs are therefore required to “make their final determinations with respect of the legal characterisation of the acts alleged by the Co-Prosecutors and determine whether they amount to crimes within the jurisdiction of the ECCC”.<sup>35</sup> Indeed, the PTC has unanimously held that these findings are required: in order to properly exercise its power to review decisions on personal jurisdiction, it “*must* be able to review the findings that led to it, including those regarding the existence of crimes or the likelihood of [a

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(cited by Meas Muth in **D256/11** Meas Muth’s Response to the International Co-Prosecutor’s Final Submission, para. 62, fn. 139); Case 002-E50 Decision on the Urgent Applications for Immediate Release of Nuon Chea, Khieu Samphan and Ieng Thirith, 16 Feb 2011 (“TC Immediate Release Decision”), paras 23-27 (and jurisprudence therein). *See further e.g. Milutinović*, IT-99-37-AR65.3, Appeals Chamber, Decision Refusing Milutinović Leave to Appeal, 3 Jul 2003, para. 22 [“A Chamber must, as part of the fair trial guarantee, render a reasoned opinion. This requirement obliges the Chamber, inter alia, to indicate its view about [...] all of those relevant factors which a reasonable Trial Chamber would have been expected to take into account before coming to a decision.”]; *Lubanga*, ICC-01/04-01/06-773, Appeals Chamber, Judgment on the appeal of Mr. Thomas Lubanga Dyilo Against the Decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81”, 14 Dec 2006 (“*Lubanga* Redaction Decision”), para. 20 [“Decisions of a Pre-Trial Chamber authorising the non-disclosure to the defence of the identity of a witness of the Prosecutor must be supported by sufficient reasoning.”]

<sup>31</sup> Case 001-D99/3/42 Decision on Duch Closing Order Appeal, paras 38 (emphasis added), 115; Internal Rule 67(4) [“The Closing Order shall state the reasons for the decision.”]; Case 004/1-D308/3/1/20 Im Chaem PTC Closing Order Considerations, para. 32 (unanimous decision); Cambodian CCP, art. 247 [“[The closing order] may be an indictment or a non-suit order [...] A closing order shall always be supported by a statement of reasons”].

<sup>32</sup> *Milutinović et al*, IT-05-87-AR65.1, Appeals Chamber, Decision on Interlocutory Appeal from Trial Chamber Decision Granting Nebojsa Pavkovic’s Provisional Release, 1 Nov 2005, para. 11; *Lubanga* Redaction Decision, para. 20.

<sup>33</sup> *See supra*, paras 9-12.

<sup>34</sup> *See supra*, para. 13.

<sup>35</sup> Case 002-D427/3/15 PTC, Decision on Appeals by Nuon Chea and Ieng Thirith Against the Closing Order, 15 Feb 2011 (“PTC Decision on Nuon Chea and Ieng Thirith Closing Order Appeal”), para. 79. *See also* Case 004/1-D308/3/1/20 Im Chaem PTC Closing Order Considerations, paras 321-340 (Judges Beauvallet and Baik). *See further Lubanga* Redaction Decision, para. 20 [“The decision must identify which facts it found to be relevant in coming to its conclusion”]. Every closing order issued so far at the ECCC except for this Dismissal Order and Case 004/2-D359 Order Dismissing the Case Against Ao An, 16 Aug 2018 (“Case 004/2 Dismissal Order”) has contained these findings.

suspect's] criminal responsibility.”<sup>36</sup> The Case 004/1 Closing Order, which found no personal jurisdiction over Im Chaem, contained findings on the crimes proven and Im Chaem's liability for those crimes. Indeed, these findings were central to the CIJs' analysis of the personal jurisdiction issue with respect to Im Chaem.<sup>37</sup>

17. Moreover, it must be clear how the CIJs assessed the evidence to reach their factual findings, including a demonstration of what evidence has been accepted as proof of all elements of the crimes charged.<sup>38</sup> It is presumed that the CIJs have properly evaluated all the evidence before them, as long as there is no indication that they completely disregarded any particular piece of relevant evidence.<sup>39</sup> Even where an analysis in itself might be reasoned, “an analysis limited to a select segment of the relevant evidentiary record is not necessarily sufficient to constitute a reasoned opinion.”<sup>40</sup>

#### F. STANDARD OF EVIDENCE FOR INDICTMENT

18. Under Internal Rule 67, there must be “sufficient evidence [...] of the charges” to issue an indictment against a Charged Person.<sup>41</sup> The CIJs and PTC have clarified that this requires a “probability” of guilt, which is incrementally more than a “mere possibility” but less than the “beyond a reasonable doubt” standard used at trial.<sup>42</sup> Moreover, “the evidentiary material on the Case File must be sufficiently serious and corroborative to provide a certain level of probative force.”<sup>43</sup>

#### IV. APPEAL SUBMISSIONS

19. The Dismissal Order errs in law and fact in finding that Meas Muth is not subject to the personal jurisdiction of the ECCC. This error is based on numerous factors, discussed below.

<sup>36</sup> Case 004/1-**D308/3/1/20** Im Chaem PTC Closing Order Considerations, para. 26 (unanimous holding) (emphasis added). See further Case 001-**D99/3/42** Decision on Duch Closing Order Appeal, para. 115.

<sup>37</sup> See **D261** Case 004/1 Closing Order, paras 281-325, fn. 735.

<sup>38</sup> See e.g. *Bemba* AJ, para. 52; *Kordić & Čerkez* AJ, para. 385; *Kunarac* AJ, para. 41.

<sup>39</sup> Case 002-**F36** Appeal Judgement, 23 Nov 2016 (“Case 002/01 AJ”) para. 304 (and citations therein).

<sup>40</sup> *Perišić* AJ, para. 95.

<sup>41</sup> The CIJs applied this standard in Case 001 (Case 001-**D99** Closing Order indicting Kaing Guek Eav *alias* Duch, 8 Aug 2008 (“*Duch* Closing Order”), para. 130) and Case 002 (**D10.1.101** Case 002 Closing Order, para. 1321).

<sup>42</sup> **D10.1.101** Case 002 Closing Order, para. 1323; Case 004/1-**D308/3/1/20** Im Chaem PTC Closing Order Considerations, paras 60-62.

<sup>43</sup> **D10.1.101** Case 002 Closing Order, para. 1323.

**A. LEGAL ERROR OF FAILURE TO MAKE FACTUAL AND LEGAL FINDINGS ON CRIMES COMMITTED AND MEAS MUTH’S CRIMINAL LIABILITY FOR THOSE CRIMES**

***1. Lack of findings regarding whether crimes within the jurisdiction of the ECCC were committed and whether Meas Muth is responsible for any such crimes***

20. As the Dismissal Order itself acknowledges, the assessment of who is “most responsible” for crimes within the jurisdiction of the ECCC requires an evaluation of both the gravity of the crimes charged and the level of responsibility of the suspect.<sup>44</sup> The judges of the PTC have unanimously held that to properly exercise their appellate review function on the issue of personal jurisdiction, they “must be able to review the findings that led to it, including those regarding the existence of crimes or the likelihood of [a suspect’s] criminal responsibility.”<sup>45</sup> This is true in respect of all facts of which the CIJs were regularly seised by an introductory or supplementary submission.<sup>46</sup> The Dismissal Order errs in failing to make many of the requisite factual findings and no legal findings at all regarding the crimes of which the CIJs were seised.
21. For example, instead of making factual findings about the operation of Wat Enta Nhien,<sup>47</sup> and the crimes that the Introductory Submission alleges took place there, the Dismissal Order simply discusses fragments of evidence from a handful of witnesses. Although globally, it appears to accept that Wat Enta Nhien was a Division 164 security centre, it does not state any conclusion on this point.<sup>48</sup> Particularly in view of the lack of any mention of Wat Enta Nhien in the Dismissal Order’s “Reasoning and Conclusion” section, it is impossible to determine what, if any, crimes the NCIJ considers occurred there, whether and to what degree he considers Meas Muth responsible for them, and what, if any, impact this has on his assessment of personal jurisdiction. If he considers that no crimes occurred there that can be imputed to Meas Muth, he must explain why.
22. This constitutes a failure to provide a reasoned opinion on all the facts of which the CIJs were regularly seised. All Case 003 parties are prejudiced as it is impossible to identify the basis upon which the Dismissal Order reaches the conclusions it does.<sup>49</sup> Moreover,

<sup>44</sup> **D266** Dismissal Order, paras 3, 365-7; Case 001-**E188** Duch TJ, para. 22. *See also* Case 004/1-**D308/3/1/20** Im Chaem PTC Closing Order Considerations, para. 321.

<sup>45</sup> Case 004/1-**D308/3/1/20** Im Chaem PTC Closing Order Considerations, para. 26 (emphasis added).

<sup>46</sup> Internal Rule 67(4); Case 001-**D99/3/42** Decision on Duch Closing Order Appeal, paras 33, 37-38; Cass. Crim., 24 Mar 1977, No. 76-91.442.

<sup>47</sup> **D266** Dismissal Order, paras 288-97.

<sup>48</sup> *See in particular*, **D266** Dismissal Order, paras 289, 292-3.

<sup>49</sup> Case 002-**D365/2/10** Decision on Co-Prosecutors’ Appeal Against the Co-Investigating Judges Order on Request to Place Additional Evidentiary Material on the Case File Which Assists in Proving the Charged

the public must also understand why the NCIJ does not consider that Meas Muth is one of those “most responsible” for crimes occurring during DK.<sup>50</sup>

23. As to legal characterisation, the Dismissal Order explicitly states that it will not “describe the types of crimes, legal qualifications or mode of liability.”<sup>51</sup> As noted above, findings regarding what crimes might have been committed and their gravity and the responsibility of any suspect or charged person are required by the PTC when reviewing the Dismissal Order’s personal jurisdiction decision. A failure to make legal findings on modes of liability renders impossible any attempt to assess which crimes Meas Muth is criminally “responsible” for, as well as the level of his participation.<sup>52</sup> The CIJs’ discretion is based upon a determination of who is “most responsible” *for crimes falling within the ECCC’s material jurisdiction*.<sup>53</sup> Only once facts have been legally characterised can this determination be made.<sup>54</sup> More specifically, the precise crime is important to the gravity assessment, since the nature and scale of the crimes, as well as their impact on victims, are all indicators of the gravity of given conduct.<sup>55</sup> To exclude legal characterisations fails to appreciate the full extent of Meas Muth’s criminal conduct.<sup>56</sup>
24. For example, the crime of extermination includes elements that murder does not: first,

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Persons’ Knowledge of the Crimes, 15 Jun 2010, paras 24-5 [A reasoned closing order places the appellant – which may be any party to the proceedings – “in a position to be able to determine whether to appeal and on what grounds. Equally, a respondent to any appeal has a right to know the reasons of a decision for so that a proper and pertinent response may be considered. [...] No appellate court can provide [a] reasoned decision when the rationale and logic of the decision appealed is not itself disclosed by a reasoned decision.”].

<sup>50</sup> Case 002-E50 TC Immediate Release Decision, para. 26; *Suominen v. Finland*, para. 37; *Khudoyorov v. Russia*, para. 174.

<sup>51</sup> **D266** Dismissal Order, para. 3.

<sup>52</sup> See Case 001-D99/3/42 Decision on Duch Closing Order Appeal, para. 115.

<sup>53</sup> See e.g. Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for Prosecution of Crimes Committed During the Period of Democratic Kampuchea with inclusion of amendments as promulgated on 27 Oct 2004 (NS/RKM/1004/006), 10 Aug 2001, (“ECCC Law”), art. 1 [“The purpose of this law is to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.”]

<sup>54</sup> Case 002-D427/3/15 PTC Decision on Nuon Chea and Ieng Thirith Closing Order Appeal, para. 79 [The CIJs must “make [...] final determinations with respect of the legal characterisation of the acts alleged [...] and determine whether they amount to crimes within the jurisdiction of the ECCC.”].

<sup>55</sup> Situation on the Registered Vessels of the Union of Comoros, the Hellenic Republic and the Kingdom of Cambodia, ICC-01/13-34, Pre-Trial Chamber I, Decision on the Request of the Union of the Comoros to Review the Prosecutor’s Decision not to Initiate an Investigation, 16 Jul 2015, para. 21; Case 001-F28 Duch AJ, para. 375. See further Case 004/1-D308/3/1/20 Im Chaem PTC Closing Order Considerations, para. 327 (Judges Beauvallet and Baik).

<sup>56</sup> Case 001-F28 Duch AJ, paras 295, 299. See also *Jelisić* AJ, Partial Dissenting Opinion of Judge Shahabuddeen, para. 42.

that a massive number of people were killed,<sup>57</sup> and second that the persons responsible had the specific intent to kill on a large scale.<sup>58</sup> Persecution, even when based on these same underlying acts, requires the specific intent to discriminate on political, racial or religious grounds.<sup>59</sup> Importantly, the characterisation of conduct as genocide recognises the unique gravity of this crime,<sup>60</sup> which is an attack on the whole of the human family as well as the victims themselves.<sup>61</sup> As the *Krstić* Trial Chamber explained:

The Convention [...] seeks to protect the right to life of human groups, as such. This characteristic makes genocide an exceptionally grave crime and distinguishes it from other serious crimes, in particular persecution, where the perpetrator selects his victims because of their membership in a specific community but does not necessarily seek to destroy the community as such [...] In this sense, even though the criminal acts themselves involved in a genocide may not vary from those in a crime against humanity or a crime against the laws and customs of war, the convicted person is, because of his specific intent, deemed to be more blameworthy.<sup>62</sup>

25. This principle also extends to the chapeau elements of crimes: a finding of crimes against humanity reflects the context and Meas Muth's knowledge of a "widespread or systematic attack against [a] civilian population"<sup>63</sup> whereas the crime of grave breaches of the Geneva Conventions acknowledges the violation of states' agreement to uphold international humanitarian law.

## **2. Lack of legal conclusions necessarily following from the Dismissal Order's own factual findings**

26. The Dismissal Order does not comprehensively review the evidence on the Case File (by ignoring evidence placed there after 29 April 2011, and conducting only a cursory review

<sup>57</sup> Case 002-F36 Case 002/01 AJ, para. 525; *Seromba* AJ, para. 189; *Ntakirutimana* AJ, para. 516.

<sup>58</sup> Case 002-F36 Case 002/01 AJ, paras 521-2, 525.

<sup>59</sup> Case 001-F28 *Duch* AJ, paras 316, 323; *Naletilić & Martinović* AJ, paras 589-90 (allowing cumulative convictions for persecution and torture); *Stakić* AJ, para. 364, 366-7 (allowing cumulative convictions for persecution, murder and other inhumane acts); *Nahimana* AJ, para. 1026.

<sup>60</sup> *Rukundo* TJ, para. 597 ["Genocide is, by definition, a crime of the most serious gravity which affects the very foundations of society and shocks the conscience of humanity."].

<sup>61</sup> Genocide Convention, preamble ["[G]enocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world [...] genocide has inflicted great losses on humanity [...] in order to liberate mankind from such an odious scourge, international co-operation is required"]; UN General Assembly Resolution 96(I), *The Crime of Genocide*, 11 Dec 1946, A/RES/96(I), pp. 188-9 ["Genocide is a denial of the right of existence of entire human groups [which] shocks the conscience of mankind [...] is contrary to moral law and to the spirit and aims of the United Nations. [...] The punishment of the crime of genocide is a matter of international concern"]; *Tolimir* TJ, paras 746, 1216.

<sup>62</sup> *Krstić* TJ, paras 553, 700. See further *Karadžić* TJ, para. 6046 [Karadžić's crimes "are among the most egregious of crimes in international criminal law and include extermination as a crime against humanity and genocide".]

<sup>63</sup> ECCC Law, art. 5; Case 001-F28 *Duch* AJ, para. 106; Case 002-F36 Case 002/01 AJ, para. 752.

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of much of the pre-April 2011 evidence) and does not reach the factual findings that would follow from a thorough evidentiary analysis. However, in some situations, it does contain a partial review of the evidence and limited factual findings, as detailed in this section. Even then, there are no legal conclusions on the commission of crimes and Meas Muth's responsibility that would necessarily follow from the Dismissal Order's own factual findings.

27. Importantly, the Dismissal Order makes a range of factual findings demonstrating that Meas Muth participated in a joint criminal enterprise ("JCE") to purge, detain and execute internal and external enemies, and to enslave the military and civilian population at worksites. Meas Muth is responsible for committing almost every crime within the scope of Case 003<sup>64</sup> pursuant to his significant (and in fact indispensable) contribution to this JCE.

Crimes committed by the DK Navy

28. The Dismissal Order makes the following factual findings regarding crimes committed by the DK navy: (i) the CPK had a central policy to purge, detain and execute its enemies;<sup>65</sup> (ii) such a policy was applicable to the RAK divisions, including Division 164 (the Navy), who were responsible throughout the country for external security against perceived enemies;<sup>66</sup> (iii) the General Staff issued orders to each division, including Division 164, to maintain an absolute stance to smash enemies, both on land and in the DK territorial waters; (iv) DK enemies included those associated with the Vietnamese;<sup>67</sup> (v) Meas Muth vowed "to defend the socialist Kampuchean motherland by sweeping cleanly away and without half-measures the uncover elements of the enemy, whether Yuon or other enemies";<sup>68</sup> (vi) Meas Muth commanded Division 164, including the DK Navy;<sup>69</sup> (vii) Meas Muth (and occasionally his subordinates) reported to Son Sen about the arrest and transfer of foreigners arrested at sea; and implemented Son Sen's orders, for example by smashing foreigners arrested at sea and on the islands;<sup>70</sup> (viii) some people arrested at sea, including Vietnamese and Thai, were sent from Kampong Som to

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<sup>64</sup> With the exception of forced marriage and rape.

<sup>65</sup> **D266** Dismissal Order, paras 82, 85, 94-5, 97, 100, 283.

<sup>66</sup> **D266** Dismissal Order, paras 148, 230, 255, 413.

<sup>67</sup> **D266** Dismissal Order, paras 85, 87-8, 234, 237, 241, 243.

<sup>68</sup> **D266** Dismissal Order, para. 256, *citing* **D1.3.34.60** Telegram 00 from Mut (Meas Muth) to M-870, 31 Dec 1977.

<sup>69</sup> **D266** Dismissal Order, paras 160, 187-8, 243, 256, 416.

<sup>70</sup> **D266** Dismissal Order, paras 167, 210-2, 215-6, 222, 251-2, 255, 257, 308, 313-4, 316, 321-2.

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S-21;<sup>71</sup> (ix) an overriding purpose of S-21 was to extract confessions and many S-21 confessions belonged to Vietnamese forces arrested along the DK land and sea borders;<sup>72</sup> (x) there were no judicial systems in the DK;<sup>73</sup> (xi) none of the S-21 detainees were released and all were executed;<sup>74</sup> and (xi) DK was engaged in, and Meas Muth was aware of, an armed conflict with Vietnam.<sup>75</sup>

*Crimes committed in pursuance of the RAK internal enemies and enslavement policies*

29. *Enemies Policy*: The Dismissal Order makes factual findings establishing a DK policy to purge internal enemies. It finds (i) the CPK had a policy to purge, detain and execute internal enemies;<sup>76</sup> (ii) the purge policy was applicable to the RAK divisions, including Division 164, who were also responsible for internal security against enemies, including in the army, Party and throughout the DK;<sup>77</sup> (iii) enemies included “no-good elements”, “former soldiers, former civil servants of the previous regime, CIA, KGB [agents] and *Yuon* enemies burrowing from within”, and 17 April people;<sup>78</sup> (iv) the General Staff gave orders and instructions to all military units to implement the purge policy by disseminating it, including through study sessions, by scrutinising biographies and identifying enemies, reporting on the enemy situation and facilitating arrests, transfers and executions;<sup>79</sup> and (v) the regime established numerous security centres to detain, temper, re-educate, re-fashion and torture people in order to identify traitorous networks, and/or to kill suspects and their families<sup>80</sup> As noted above, the Dismissal Order found that as there was no judicial system in DK, an overriding purpose of S-21 was to extract confessions, and all S-21 detainees were executed.<sup>81</sup>
30. As to Meas Muth’s involvement in the creation and implementation of the policy, the Dismissal Order finds that (i) Meas Muth participated in supporting DK policies through the suppression of enemies burrowing from within and dissemination of policies to

<sup>71</sup> **D266** Dismissal Order, paras 221, 307, 319, 326, 328. *See also* para. 312 regarding the capture of the Foxy Lady.

<sup>72</sup> **D266** Dismissal Order, paras 221, 269.

<sup>73</sup> **D266** Dismissal Order, para. 144.

<sup>74</sup> **D266** Dismissal Order, para. 269.

<sup>75</sup> **D266** Dismissal Order, paras 88, 121-2, 175, 194, 204, 211, 237, 243, 323-6, 328.

<sup>76</sup> **D266** Dismissal Order, paras 82, 85, 94-5, 97, 100, 235, 413.

<sup>77</sup> **D266** Dismissal Order, paras 148, 230, 232-3, 235, 245-9, 424.

<sup>78</sup> **D266** Dismissal Order, paras 85, 87, 89, 230, 247-9, 415.

<sup>79</sup> **D266** Dismissal Order, paras 97, 150, 212, 233, 247-50, 420.

<sup>80</sup> **D266** Dismissal Order, paras 97, 413.

<sup>81</sup> **D266** Dismissal Order, paras 144, 269-70.



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Division 164 soldiers;<sup>82</sup> (ii) as Division 164 Secretary, he often attended General Staff meetings on plans to purge RAK Divisions and sent telegrams in which he confirmed his loyalty to the Party and endorsed the enemies policy;<sup>83</sup> (iii) he attended a meeting at the Military Headquarters in Phnom Penh in early 1978 at which a decision was taken to purge the East Zone;<sup>84</sup> (iv) he received reports and reported regularly on the arrest of internal enemies in Kampong Som, and implemented orders from Son Sen on attacking and arresting more internal enemies, including “one platoon of depot units”, and those sent to S-21;<sup>85</sup> (v) he demobilised soldiers, sending them to production worksites, including for fishing or agricultural production, and there were “disappearances of unit chiefs when a purge occurred;”<sup>86</sup> (vi) Meas Muth monitored anyone implicated in an S-21 confession and sought Son Sen’s decision on arrest;<sup>87</sup> (vii) S-21 and divisions worked together to arrest people;<sup>88</sup> and (viii) from 1977, divisions and ministries were responsible for transporting prisoners from their units to S-21 (with the exception of high-ranking cadres).<sup>89</sup>

31. Enslavement Policy: The Dismissal Order makes factual findings establishing a policy, implemented by the RAK and Meas Muth, to create and operate cooperatives and forced labour worksites where military and civilians were enslaved: (i) the CPK had a policy to develop an economy based on mass agriculture with unreasonable production targets, through the operation of cooperatives and worksites in which people were “treated as slaves”: forced to labour (mainly in rice growing, irrigation and construction projects) for long hours, without sufficient food, sanitation or medical care, and without pay or freedom of movement;<sup>90</sup> (ii) the RAK was responsible, *inter alia*, for “helping build agriculture”, achieving the 4-year plan to produce three tons of rice per hectare and establishing worksites under military control;<sup>91</sup> (iii) worksites were used by the RAK, including Division 164, for “tempering” purged cadres;<sup>92</sup> and (iv) as Division 164

<sup>82</sup> D266 Dismissal Order, para. 422.

<sup>83</sup> D266 Dismissal Order, paras 156, 256, 422-3.

<sup>84</sup> D266 Dismissal Order, para. 238.

<sup>85</sup> D266 Dismissal Order, paras 167, 202, 211-2, 215-6, 218, 222, 251-2, 255-7, 285-6, 423.

<sup>86</sup> D266 Dismissal Order, para. 258.

<sup>87</sup> D266 Dismissal Order, para. 283.

<sup>88</sup> D266 Dismissal Order, para. 171. *See also* para. 170 [quoting with approval Duch stating, “Son Sen always asked for comments and assistance from the heads of the divisions” before arrests were made to send people to S-21].

<sup>89</sup> D266 Dismissal Order, paras 275-6.

<sup>90</sup> D266 Dismissal Order, paras 68-78, 80-2, 84-5, 100, 102.

<sup>91</sup> D266 Dismissal Order, paras 148, 150.

<sup>92</sup> D266 Dismissal Order, paras 241, 244, 258, 286.

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Secretary and Secretary of Kampong Som Autonomous Sector, Meas Muth received reports, and reported regularly to the General Staff and implemented its decisions regarding rice production and the operation of worksites, including at Stung Hav.<sup>93</sup>

32. In accordance with the internal enemies and enslavement policies, the Dismissal Order finds that (i) Meas Muth admitted that members of Division 164 were sent to S-21;<sup>94</sup> (ii) 42 to 67 Division 164 personnel were sent to S-21, where they were “interrogated for extracting confessions” and executed;<sup>95</sup> (iii) in total “over 5,000” RAK members were arrested and sent to S-21, including from Divisions 502 and 801;<sup>96</sup> and (iv) at Stung Hav, under the control of Battalion 450/165 of Division 164, a rock quarry was established to produce construction materials for a new pier and road. Those forced to carry out hard manual labour there were both Division 164 soldiers and civilians, including people who had bad tendencies, soldiers’ family members, former members of the Lon Nol regime, and women.<sup>97</sup>
33. At a minimum, these factual findings demonstrate that Meas Muth is individually criminally responsible, via his membership of a JCE, and by planning and ordering, for the crimes against humanity of extermination, murder, imprisonment, enslavement, torture, persecution (on political or racial grounds) and other inhumane acts (enforced disappearances and inhumane treatment) as well as grave breaches of the Geneva Conventions (wilful killing, torture, and unlawful confinement of a civilian).
34. To be clear, the ICP maintains his view that the evidence on the case file shows that Meas Muth is responsible for all the crimes described in the ICP’s Final Submission, including genocide of the Vietnamese, and not just those reflected in these limited factual findings. However, the Disclosure Order errs in law by failing to include findings on Meas Muth’s participation in and liability for these crimes.

**B. LEGAL ERROR OF FAILURE TO CONSIDER ANY EVIDENCE PLACED ON CASE FILE 003 AFTER 29 APRIL 2011**

35. The Dismissal Order makes clear that it relied solely upon “materials that were filed in the case file before 29 April 2011 when the two [CIJs] agreed to conclude the

<sup>93</sup> D266 Dismissal Order, paras 165-7, 215, 218, 257, 305.

<sup>94</sup> D266 Dismissal Order, para. 279.

<sup>95</sup> D266 Dismissal Order, paras 279-80, 424, 426 and also para. 287.

<sup>96</sup> D266 Dismissal Order, paras 343, 345-6, 426.

<sup>97</sup> D266 Dismissal Order, paras 299-305. The Dismissal Order further finds that Battalion 450/165 was under the control of Meas Muth and the Division 164 Committee (see para. 201).

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investigation.”<sup>98</sup> Even documents created earlier were not considered if they had not been placed on the Case file by that date.<sup>99</sup> However, the Dismissal Order’s reliance on the 2011 Notice of Conclusion is invalid for two reasons. First, the investigation was validly reopened by the Reserve ICIJ and continued by ICIJs Harmon and Bohlander, rendering the Notice of Conclusion legally void. Secondly, the Case 003 investigation was concluded on 29 April 2011 in violation of the CIJs’ obligation to genuinely, impartially and effectively investigate the crimes set out in the Introductory Submission.<sup>100</sup> The failure to rely on evidence placed on the case file after 29 April 2011 is an error of law that seriously impacted upon the Dismissal Order’s evaluation of evidence and resulted in erroneous factual findings which had a determinative impact on the issue of personal jurisdiction.

*A Rule 66(1) Notice of Conclusion does not prevent the case being reopened*

36. The Rule 66(1) Notice of Conclusion issued by the CIJs on 29 April 2011 was insufficient to terminate the investigation irrevocably. Under the Internal Rules, as well as Cambodian and French procedural law, the Notice is no more than a procedural notification that the investigating judge(s) consider(s) the investigation concluded, at which point the parties are given the opportunity to file requests for further investigative action.<sup>101</sup> It does not itself close the investigation. Only after those investigative steps requested by the parties have been either completed or any denial has been litigated and the appeal process exhausted, may the CIJs then forward the case file to the Co-Prosecutors<sup>102</sup> for their final submission.
37. As the PTC recently and unanimously recalled in this case, a judicial investigation is then

<sup>98</sup> **D266** Dismissal Order, para. 2. See further **D266** Dismissal Order, paras 18, 39, 41-2; **D13** Notice of Conclusion of Judicial Investigation, 29 Apr 2011 (“Notice of Conclusion”).

<sup>99</sup> **D266** Dismissal Order, paras 2, 359, 408. The ICP notes that one document placed on the case file by Judge Kasper-Ansermet was used in the Dismissal Order, fn. 942: **D22.1.14** International Telegram, *Capture of American Personnel*, 26 Apr 1978, attached to **D22** [ICP’s] First Case File 003 Investigative Request to admit additional documents and observations on the status of the investigation, 10 Jun 2011, rejected twice by Judges Blunk and You Bunleng and placed on the case file by ICIJ Kasper-Ansermet on 7 March 2012. The Dismissal Order also relies on evidence in five Case 001 and Case 002 transcripts that were placed on Case 003 after 29 April 2011: Case 001-**E1/19.1** T. 30 Apr 2009 (post-29 April 2011 Case 003 references: **D54/6.1.9** and **D98/3.1.86**); Case 001-**E1/20.1** T. 18 May 2009 (post-29 April 2011 Case 003 references: **D54/6.1.10** and **D98/1.2.1**); Case 001-**E1/27.1** T. 28 May 2009 (post-29 April 2011 Case 003 references: **D55/8.1.3** and **D98/1.2.7**); Case 001-**E1/29.1** T. 9 Jun 2009 (post-29 April 2011 Case 003 references: **D55/8.1.4** and **D98/3.2.90**); Case 002-**E1/129.1** T. 30 Oct 2012 (post-29 April 2011 Case 003 reference: **D98/3.2.177**).

<sup>100</sup> **D1** Co-Prosecutors’ Second Introductory Submission Regarding the Revolutionary Army of Kampuchea, 20 Nov 2008 (“Introductory Submission” or “IS”).

<sup>101</sup> Internal Rule 66(1); Cambodian CCP, art. 246; French Code of Criminal Procedure, art. 175.

<sup>102</sup> Internal Rule 66(4); Cambodian CCP, art. 246.

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concluded only by a *Closing Order* issued pursuant to Rule 67(1).<sup>103</sup> Before that time, the CIJs are seised with the case file<sup>104</sup> and are empowered to conduct further investigative action - at the request of the parties or *proprio motu* – and to reconsider all earlier decisions and orders, including any notice to conclude the judicial investigation.

38. As the Dismissal Order recognises,<sup>105</sup> following the resignation of ICIJ Blunk, the Reserve ICIJ assumed his duties on 1 November 2011, reassessed the state of the Case 003 investigation, declared the ICP's requests for investigative action<sup>106</sup> admissible and ordered the resumption of the judicial investigation on 2 December 2011.<sup>107</sup> Since he did so prior to the issuance of any Closing Order, and indeed before the NCIJ had even issued a forwarding order to the Co-Prosecutors under Rule 66(4),<sup>108</sup> the prior Rule 66(1) notice simply lapsed.<sup>109</sup> The failure of the PTC to reach a supermajority on the CIJs' refusal of the ICP's requests for investigative action<sup>110</sup> does not change the right of future ICIJs to

<sup>103</sup> **D257/1/8** Decision on Meas Muth's Application for the Annulment of Torture-Derived [WRIs], 24 Jul 2018 ("PTC Decision on Torture-Tainted Evidence"), para. 11 ["The [PTC] interprets Internal Rules 66(1), 67(1) and 76(2) in light of Internal Rule 21(1) and considers that the 'judicial investigation' is officially concluded by the issuance of the Closing Order, and not at the time the [CIJs] notify the parties of their intent to conclude it.']. See also Cambodian CCP, art. 247. Meas Muth also advocates this position: **D257/1/7** Meas Muth's Reply to [ICP's] Response to Application for Annulment of Alleged Torture-Derived [WRIs], 24 Oct 2017, para. 6.

<sup>104</sup> See 002/08-07-2009-ECCC-PTC (Doc. No. 2) Decision on Khieu Samphan's Interlocutory Application for an Immediate and Final Stay of Proceedings for Abuse of Process, 12 Jan 2011, para. 6; Case 004/2-**D360/3** Decision on Ao An's Urgent Request for Redaction and Interim Measures, 5 Sep 2018, para. 6.

<sup>105</sup> **D266** Dismissal Order, para. 28.

<sup>106</sup> 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.

<sup>107</sup> **D28** Order on Resuming the Judicial Investigation, 2 Dec 2011, p. 9: Disposition.

<sup>108</sup> **D52** Forwarding Order, 7 Feb 2013. The ICP notes that the NCIJ's position in this Forwarding Order regarding the content of the Case File is inconsistent with the Dismissal Order's reliance on only post-29 April 2011 evidence. In the Forwarding Order (p. 2), the NCIJ seeks to forward the Case File 003 to the Co-Prosecutors containing "only documents placed thereon before resignation of [ICIJ] Siegfried Blunk on 18 October 2011 and civil party applications submitted to the Victim Support Section before the deadline announced in the [CIJs'] statement of 7 June 2011."

<sup>109</sup> Cass. Crim., 9 Jan 1995, No. 94-84.975 ["alors que l'acte d'information auquel il avait été procédé le 5 juillet 1994 rendait caduc l'avis de fin d'information qui avait été donné le 15 juin 1994, et que, faute d'un nouvel avis, le requérant restait recevable à contester la régularité de la procédure" Unofficial translation: "whereas the investigative act which occurred on 5 July 1994 rendered void the notice of the conclusion of the investigation given on 15 June 1994, and absent a new notice [of conclusion], it was still permissible for the applicant to challenge the lawfulness of the proceedings"].

<sup>110</sup> **D20/4/4** Considerations of the [PTC] Regarding the [ICP's] Appeal Against the Decision on Time Extension Request and Investigative Requests Regarding Case 003, 2 Nov 2011; **D26/1/3** Considerations of the [PTC] Regarding the [ICP's] Appeal Against the Decision on Re-Filing of Three Investigative Requests, 15 Nov

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continue an investigation that had not yet been closed under Rule 67(1), or to re-consider the ICP's requests.<sup>111</sup>

39. The Dismissal Order further contests the right of the Reserve ICIJ to re-open the investigation in 2011 or perform any investigative act on the basis that he was never appointed as ICIJ by the Supreme Council of Magistracy.<sup>112</sup> However, this position misunderstands the ECCC Law. When ICIJ Blunk resigned in October 2011,<sup>113</sup> Laurent Kasper-Ansermet was already Reserve ICIJ. He had been validly appointed by Royal Decree dated 30 November 2010 with the approval of the Supreme Council of Magistracy and was sworn in on 21 February 2011.<sup>114</sup> In the "absence" of the ICIJ, article 26(2) of the ECCC Law provides that the functions of the ICIJ shall be undertaken by the Reserve ICIJ.<sup>115</sup> Article 27<sup>new</sup> also provides that "[i]n the event of the absence of the foreign [CIJ], he or she shall be replaced by the reserve foreign [CIJ]."<sup>116</sup> The two conditions for the implementation of these provisions had been met when ICIJ Blunk resigned; no other formalities were required. If a reserve ICIJ could not act in these circumstances, it would render meaningless the existence of the position.
40. In any event, the Dismissal Order does not dispute the appointments of ICIJs Mark Harmon and Michael Bohlander.<sup>117</sup> Indeed, Judges Bohlander and You Bunleng issued a joint Dismissal Order in Case 004/1.<sup>118</sup> The investigative acts carried out in Case 003 by these two ICIJs before any Closing Order was issued were in themselves sufficient to void the Notice of Conclusion issued by the CIJs on 29 April 2011.<sup>119</sup>
41. Meas Muth has always recognised the validity of the continuing investigation after 29 April 2011. He formally gained access to the case file on 3 March 2015 after being

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2011("PTC Investigative Request Refiling Considerations").

<sup>111</sup> *Contra* **D266** Dismissal Order, paras 40-41, 43.

<sup>112</sup> **D266** Dismissal Order, paras 28-29, 44.

<sup>113</sup> ICIJ Blunk resigned on 9 October 2011, with effect from 31 October 2011. *See* ECCC Press Release, *Press Release by the International Co-Investigating Judge*, 10 Oct 2011; ECCC Press Release, *Press Release by the International Reserve Co-Investigating Judge*, 6 Dec 2011.

<sup>114</sup> ECCC Press Release, *Dr. Siegfried Blunk Appointed as New International Co-Investigating Judge*, 1 Dec 2010; ECCC Press Release, *Press Release by the International Reserve Co-Investigating Judge*, 6 Dec 2011. ECCC Press Release, *Press Release by the International Reserve Co-Investigating Judge*, 9 Feb 2012. *See also* Opening Speech of H.E. Kong Srim, *President of the Plenary*, 21 Feb 2011.

<sup>115</sup> ECCC Law, art. 26 ["The reserve Investigating Judges shall replace the appointed Investigating judges in case of their absence."]

<sup>116</sup> ECCC Law, art. 27<sup>new</sup>(3).

<sup>117</sup> *See e.g.* **D266** Dismissal Order, para. 31.

<sup>118</sup> **D261** Case 004/1 Closing Order.

<sup>119</sup> *See supra*, fn. 109.

charged by ICIJ Harmon.<sup>120</sup> Since then, he has participated in the ICIJ's investigation, filing 20 requests for investigative action,<sup>121</sup> 13 applications to seize the PTC with requests to annul the investigation in part,<sup>122</sup> three requests to receive the work product of OCIJ investigators,<sup>123</sup> four requests to clarify or vary investigative techniques being used by investigators,<sup>124</sup> and numerous requests to correct or clarify material already on the Case File.<sup>125</sup> He also attended the notification of charges hearing before ICIJ Bohlander,<sup>126</sup> and while he contested both these and the earlier charges issued by ICIJ Harmon, he did so on other procedural and substantive grounds.<sup>127</sup> On none of these occasions, did Meas Muth argue that the investigation had terminated on 29 April 2011.

42. Moreover, the PTC has unanimously accepted the validity of the ongoing investigation.<sup>128</sup> The PTC unanimously declared the use of 10 WRIs produced after 29 April 2011 to be "permissible",<sup>129</sup> including one collected by the Reserve ICIJ personally

<sup>120</sup> **D128** Decision to Charge Meas Muth *in Absentia*, 3 Mar 2015; **D128.1** Annex: Notification of Charges Against Meas Muth, 3 Mar 2015.

<sup>121</sup> **Annex I**: Procedural History, para. 15, fn. 41.

<sup>122</sup> **Annex I**: Procedural History, para. 15, fn. 44.

<sup>123</sup> **Annex I**: Procedural History, para. 15, fn. 42.

<sup>124</sup> **Annex I**: Procedural History, para. 15, fn. 43.

<sup>125</sup> **Annex I**: Procedural History, para. 15, fn. 45.

<sup>126</sup> **D174** Written Record of Initial Appearance, 14 Dec 2015.

<sup>127</sup> **D128/1/3** Meas Muth's Appeal against Co-Investigating Judge Harmon's Decision to Charge Meas Muth *in absentia*, 16 Jun 2015; **D128.1/1/3** Meas Muth's Appeal Against Co-Investigating Judge Harmon's Notification of Charges against Meas Muth, 12 Jun 2015; **D174/1/1** Meas Muth's Appeal Against the International Co-Investigating Judge's Decision to Charge Meas Muth with Grave Breaches of the Geneva Conventions and National Crimes and to Apply JCE and Command Responsibility, 6 Jan 2016.

<sup>128</sup> *See e.g.* **D134/1/10** PTC, Decision on Meas Muth's Appeal Against Co-Investigating Judge Harmon's Decision on Meas Muth's Applications to Seize the Pre-Trial Chamber with Two Applications for Annulment of Investigative Action, 23 Dec 2015 ("PTC Decision on Two Annulment Applications"), para. 47 [Unanimously dismissing the request for annulment of the investigation into religious persecution, the PTC Judges noted "that the [ICIJ] recalled that the legal characterisation of the facts will be determined upon conclusion of the judicial investigation. Thereupon, it will rest with the parties to seek, if need be, a remedy in respect of the [CIJs'] Decision, including in respect of legal characterisation, should they be adopted."]. *See also* **D165/2/26** Decision Related to (1) Meas Muth's Appeal Against Decision on Nine Applications to Seize the Pre-Trial Chamber with Requests for Annulment and (2) the Two Annulment Requests Referred by the International Co-Investigating Judge, 13 Sep 2016 ("PTC Decision on Nine Annulment Applications"), paras 3 ["In the course of the investigation, the [CIJs] issued five forwarding orders to clarify the allegations laid before them" *citing* (i) **D1/2** Request for Clarification in Case 003, 8 Feb 2011 (Blunk); (ii) **D47** Forwarding Order, 24 Apr 2012 (Kasper-Ansermet); (iii) **D50** Forwarding Order, 4 May 2012 (Kasper-Ansermet); (iv) **D102** Forwarding Order, 9 Jun 2014 (Harmon); (v) **D105** Forwarding Order, 27 Jun 2014 (Harmon)], 54 [Holding that the ICIJ correctly declined to refer Meas Muth's annulment application relating to D54/81].

<sup>129</sup> **D257/1/8** PTC Decision on Torture-Tainted Evidence, paras 30-35 [confirming as permissible the use of **D54/74.1.11** Kor Bun Heng WRI (placed on the case file by Judge Harmon); **D55/6** Chin Kimthong WRI (Harmon); **D98/3.1.283** Suong Sikoeun WRI (Harmon); **D114/20** Mak Chhoeun WRI (Harmon); **D114/85** Chet Bunna WRI (Harmon); **D114/116** Svay Saman WRI (Bohlander); **D114/233** Sam Komnith WRI (Bohlander); **D114/171** Keo Saruon WRI (Bohlander); **D114/241** Chheng Cheang WRI (Bohlander); **D114/36.1.62** Thuch Sithan WRI (Bohlander); **D234/2.1.73** Pech Chim WRI (Bohlander).

shortly after he resumed the investigation.<sup>130</sup>

*The CIJs have an obligation to undertake a complete investigation*

43. In any event, when the CIJs issued their Notice of Conclusion on 29 April 2011, the Case 003 investigation was manifestly incomplete and failed to meet the requirements of a genuine, impartial and effective investigation into the facts set out in the ICP's Introductory Submission. Pursuant to articles 1, 2<sup>new</sup>, 3<sup>new</sup>, 4, 5 and 6 of the ECCC Law and Internal Rule 55(1),<sup>131</sup> the ECCC – and within it specifically the OCIJ<sup>132</sup> – is vested with an obligation to investigate the alleged commission of crimes falling under the material jurisdiction of the ECCC. International law and jurisprudence have confirmed this duty.<sup>133</sup> As the PTC recalled in Case 002, “The [RGC] was not only free to prosecute such crimes which occurred within its territorial jurisdiction [...] it was its obligation under international law to do so.”<sup>134</sup>
44. As the Dismissal Order recognises,<sup>135</sup> the scope of that investigation is defined by the Co-Prosecutors' introductory and supplementary submissions.<sup>136</sup> The CIJs must investigate *all facts* contained within the submissions, pertaining both to the issue of what crimes were committed and who was responsible. Without following the procedure set out in Rule 66bis, they cannot modify, redefine or reduce the scope of the

<sup>130</sup> **D257/1/8** PTC Decision on Torture-Tainted Evidence, paras 34-35 [confirming as permissible the use of **D37** Robert Hamill WRI, 20 Mar 2012].

<sup>131</sup> Internal Rule 55(1) states “A judicial investigation is compulsory for crimes within the jurisdiction of the ECCC.”

<sup>132</sup> ECCC Law, art. 23<sup>new</sup>; Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, Phnom Penh, 6 Jun 2003, 2329 UNTS 117 (“ECCC Agreement”), art. 5(1); Internal Rules 55-70.

<sup>133</sup> See Genocide Convention, acceded to by Cambodia on 14 October 1950, arts I and V; Torture Convention, acceded to by Cambodia on 15 October 1992, arts 4 and 5; GC III, acceded to by Cambodia on 8 December 1958, art. 129; GC IV, acceded to by Cambodia on 8 December 1958, art. 146. ICCPR: Cambodia, which acceded to the ICCPR on 26 May 1992, also had and continued to have an obligation to ensure that victims of crimes against humanity which, by definition, cause serious violations of human rights were and are afforded an effective remedy. In this respect, art. 2(3) of the ICCPR provides that “[e]ach State Party to the present Covenant undertakes (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity”. This obligation would generally require the State to prosecute and punish authors of violations. See *Bautista v. Colombia*, para. 8.6 [“the State party is under a duty to investigate thoroughly alleged violations of human rights [...] This duty applies *a fortiori* in cases in which the perpetrators of such violations have been identified.”]. See also *Kononov v. Latvia*, para. 213 [By May 1944, “[s]tates were at least permitted (if not required) to take steps to punish individuals for [war] crimes, including on the basis of command responsibility.”].

<sup>134</sup> Case 002-**D427/1/30** Ieng Sary Closing Order Appeal Decision, para. 213.

<sup>135</sup> **D266** Dismissal Order, para. 47.

<sup>136</sup> Internal Rules 53, 55(2), 55(3) and 55(4); Cambodian CCP, art. 125.

investigation.<sup>137</sup> The PTC has unequivocally stated that before the CIJs make *any* judicial determination with respect to the disposal of the case (either sending the case to trial or dismissing it), they “first have to conclude their investigation, which means that they have accomplished all the acts they deem necessary to ascertain the truth in relation to the facts set out in the Introductory [...] Submission[s].”<sup>138</sup>

45. To “ascertain the truth”, all investigations must be genuine,<sup>139</sup> impartial<sup>140</sup> and effective.<sup>141</sup> Whilst the Dismissal Order recognises the independence of the judiciary, it reaches the patently incorrect conclusion that this gives the CIJs the right “to conduct any investigation in any form”.<sup>142</sup> The judges do enjoy a considerable degree of latitude in deciding how to conduct those investigations,<sup>143</sup> but this does not allow them to derogate from their obligation to exercise due diligence in conducting a genuine and effective investigation.<sup>144</sup> The CIJs are not permitted to refuse to investigate.<sup>145</sup>
46. According to the Dismissal Order, “the judicial investigation [...] primarily focus[ed] on whether the Charged Person [...] falls within the personal jurisdiction of the [ECCC]”.<sup>146</sup> It continues that “conducting investigations was a waste of time” and that “[s]ince it [was] doubtful whether Meas Muth falls within the personal jurisdiction of the [ECCC] or not,

<sup>137</sup> Case 001-D99/3/42 Decision on Duch Closing Order Appeal, para. 35; Case 004-D365/3/1/5 PTC Sexual Violence Decision, para. 39; Case 002-D198/1 OCIJ Clarification Order, para. 6. *See also* Cass. Crim., 20 Mar 1972, No. 71-93.622 [“le juge d’instruction était saisi des faits dénoncés par le réquisitoire introductif”. Unofficial translation: “the investigating judge was seised with the facts disclosed in the introductory submission”].

<sup>138</sup> Case 002-D164/3/6 SMD Decision, para. 35. *See further* D26/1/3 PTC Investigative Request Refiling Considerations, para. 10.

<sup>139</sup> *See e.g. Urrutia v. Guatemala*, para. 119 [“the State should have conducted a genuine, impartial and effective investigation to clarify the facts relating to the abduction, detention and torture to which Maritza Urrutia was subjected and, in particular to identify and punish those responsible”]. *See also Urrutia v Guatemala*, para. 104c) [Arguments of Inter-American Commission of Human Rights: “the State must seek the truth effectively and, to this end, must demonstrate that it has conducted an immediate, exhaustive, genuine and impartial investigation. The State must also identify and punish the perpetrators of the corresponding crimes”]; ICC Statute, art. 17(1)(a).

<sup>140</sup> *See e.g. ECCC Law*, art. 10*new*, 25. *See also ECCC Agreement*, art. 3(3); Case 002-C20/5/18 Ieng Thirith Provisional Detention Decision, para. 63.

<sup>141</sup> *See e.g. Cantoral-Huamani and García-Santa Cruz v. Peru*, para. 131 [“the obligation to investigate is an obligation of means, rather than results. However, this does not signify that the investigation can be undertaken as ‘a mere formality predestined to be ineffective.’ Each act of the State that forms part of the investigative process, as well as the investigation as a whole, should have a specific purpose: the determination of the truth, and the investigation, pursuit, capture, prosecution and, if applicable, punishment of those responsible for the facts.”]; *Finucane v. UK*, paras 68-71.

<sup>142</sup> D266 Dismissal Order, para. 42. *See further* D266 Dismissal Order, para. 47.

<sup>143</sup> *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.

<sup>144</sup> *See* Guéry, p. 853, s. 212.11 (quoted *supra*, fn. 27).

<sup>145</sup> *See* Guéry, p. 158, s. 51.02 *citing* Cass. Crim., 31 Mar 1987, no. 86-90.769 (quoted *supra*, fn. 26).

<sup>146</sup> D266 Dismissal Order, para. 48.



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the two [CIJs] unanimously agreed not to charge Meas Muth.”<sup>147</sup> However, whatever preliminary view the CIJs may have formed on the issue of personal jurisdiction on 29 April 2011, a full investigation of the allegations in the Introductory Submission remained compulsory, and early discontinuance was a breach of the CIJs’ mandate.

47. The identification of those Khmer Rouge officials “most responsible” for crimes falling within the ECCC’s jurisdiction requires an assessment of both the gravity of the crimes and the level of responsibility of the suspect.<sup>148</sup> Without conducting a full investigation to determine what if any crimes were committed and who bears criminal responsibility, the CIJs cannot properly exercise their discretion on this fundamental issue of jurisdiction.<sup>149</sup>
48. Moreover, aborting the investigation before full application of the investigative scheme prescribed by the internal rules prejudices the Co-Prosecutors by depriving them of an opportunity to assess the evidence on the case file in order to decide whether to file supplementary submissions, and then to formulate a request to the CIJs, pursuant to Rule 66(5), either to indict the Charged Person or dismiss the case.<sup>150</sup> The rules specifically state that not only the CIJs, but also the Co-Prosecutors must determine whether the investigation is complete.<sup>151</sup>

*The Case 003 investigation was manifestly incomplete on 29 April 2011*

49. The Dismissal Order claims that, on 29 April 2011, when CIJs You Bunleng and

<sup>147</sup> **D266** Dismissal Order, paras 52-3.

<sup>148</sup> As well as any other individuals against whom there is clear and consistent evidence of criminal responsibility. **D266** Dismissal Order, paras 3, 365-7. *See further, supra*, paras 9-12.

<sup>149</sup> *See* Case 004/2-**D185/1** Decision on [Redacted] Motion for Annulment of Investigative Action Pursuant to Internal Rule 76, 22 Apr 2014 (“Decision on Motion Pursuant to IR 76”), para. 27. *See also* Cass. Crim., 26 Feb 1997, No. 95-86.088 [“la chambre d’accusation ne peut, sans méconnaître l’obligation d’informer imposée aux juridictions d’instruction par les articles 85 et 86 du Code de procédure pénale, déclarer territorialement incompétent un juge d’instruction saisi d’une plainte [...], faisant état de ce que l’une des personnes soupçonnées d’avoir participé aux infractions dénoncées réside dans son ressort, tant que ce magistrat n’a pas effectué les investigations de nature à lui permettre de vérifier sa compétence.” Unofficial translation: “The indictment division cannot, without disregarding the obligation to investigate imposed on the examining courts by articles 85 and 86 of the Code of Criminal Procedure, declare territorially incompetent an investigating judge who is seised of a complaint [...] and who states that one of the persons suspected of having participated in the offences resides in his jurisdiction, as long as the investigating judge has not carried out investigations of such a nature as to enable him to verify his competence.”].

<sup>150</sup> Case 004/2-**D185/1** Decision on Motion Pursuant to IR 76, para. 28.

<sup>151</sup> Internal Rule 66(5) [Setting out the obligation on the Co-Prosecutors to file a final submission only “[w]here the Co-Prosecutors consider, like the Co-Investigating Judges, that the investigation has been concluded”.] *See also* Cambodian CCP, art. 246 [“The Prosecutor will issue a written final submission [...] if he agrees with the investigating judge that the judicial investigation is terminated.”].

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Siegfried Blunk concluded the investigation,<sup>152</sup> it was “complete and finished”,<sup>153</sup> since the CIJs had “reviewed inculpatory and exculpatory evidence collected from key witnesses”<sup>154</sup> and transferred “more than 2,000 (two thousand) documents or 48,000 (forty-eight thousand) pages evidence from Case 002”.<sup>155</sup> However, a review of the evidence on the case file on 29 April 2011 reveals that the CIJs had not discharged their obligation to genuinely and effectively investigate all the facts set out in the Introductory Submission at that time.<sup>156</sup> For the same reasons, it is an inadequate basis upon which to issue a Dismissal Order determining that Meas Muth is not one of those “most responsible” for the crimes committed during the DK regime.

50. On 29 April 2011, the case file contained only 20 written records of interview (“WRIs”) from 17 witnesses.<sup>157</sup> Only eight of these witnesses discuss Division 164 crime sites or Meas Muth’s role in any detail at all.<sup>158</sup> Indeed, the CIJs themselves stated that “some witnesses identified by the investigators were not interviewed because resources were refocused on the reviewing of documents.”<sup>159</sup>
51. Prior to closing the investigation, the CIJs had also conducted extremely limited field investigations, resulting in just five site identification reports.<sup>160</sup> The Wat Enta Nhien and

<sup>152</sup> **D266** Dismissal Order, paras 2, 18.

<sup>153</sup> **D266** Dismissal Order, para. 39. *See further* **D266** Dismissal Order, para. 359.

<sup>154</sup> **D266** Dismissal Order, para. 48. *See further* **D266** Dismissal Order, para. 42.

<sup>155</sup> **D266** Dismissal Order, para. 359. *See further* **D266** Dismissal Order, para. 42.

<sup>156</sup> The ICP notes that on 29 April 2011, the investigation included crime sites more closely linked to Sou Met, some of which have since been excluded from the investigation under Rule 66*bis*. *See* **D184/4** Notification Pursuant to Internal Rule 66*bis*(2), 22 Nov 2016 [excluding from the investigation allegations concerning *inter alia* S-22 security centre and Kampong Chhnang Airport Construction Site]. For present purposes, the ICP concentrates on the investigation into the crimes and crimes sites for which the Introductory Submission alleges Meas Muth is responsible, together with his roles and responsibilities.

<sup>157</sup> 17 WRIs were conducted pursuant to a single rogatory letter issued by Judge Lemonde (**D2** ICIJ Rogatory Letter, 9 Jun 2010): **D2/2** Ou Leang WRI; **D2/3** Nop Hat WRI; **D2/4** Pauch Koy WRI; **D2/5** Hean Rum WRI; **D2/6** Nhoung Chrong WRI; **D2/7** Pen Sarin WRI; **D2/8** Say Born WRI; **D2/9** Say Born WRI; **D2/10** Say Born WRI; **D2/11** Um Keo WRI; **D2/12** Mao Phat WRI; **D2/13** Say Tay WRI; **D2/14** Meang Buolin WRI; **D2/15** Touch Soeuli WRI; **D2/16** Touch Soeuli WRI; **D2/17** In Saroeun WRI; **D2/18** Sreng Thi WRI. Three witnesses only in total were interrogated very briefly by Judge Blunk and/or You Bunleng in March-April 2011: **D6** Chhouk Rin WRI, 24 Mar 2011 [interrogated in two hours by Judge Blunk. Out of 22 questions, 11 concerned Case 003 specific facts (including Sou Met’s role) and 11 Case 004 criminal facts. **D6** was used only twice in **D266** Dismissal Order, at fns 151 and 943]; **D8** Sam Bung Leng WRI, 25 Mar 2011 [interrogated during 34 minutes by Judge Blunk. Four questions only were asked. The Dismissal Order considered the WRI as irrelevant to Case 003: **D266** Dismissal Order, fn. 5 (listing **D8** among some 130 irrelevant WRIs)]; **D12** Duch WRI, 27 Apr 2011 [Both CIJs interrogated Duch for 1 hour 40 minutes and asked 5 (sets of) questions only].

<sup>158</sup> **D2/4** Pauch Koy WRI; **D2/6** Nhoung Chrong WRI; **D2/7** Pen Sarin WRI; **D2/8** Say Born WRI; **D2/9** Say Born WRI; **D2/10** Say Born WRI; **D2/15** Touch Soeuli WRI; **D2/16** Touch Soeuli WRI; **D2/17** In Saroeun WRI [deemed irrelevant by **D266** Dismissal Order, fn. 5]; **D6** Chhouk Rin WRI; **D12** Duch WRI.

<sup>159</sup> **D2/1** Rogatory Letter Completion Report, 10 Feb 2011, EN 00649195.

<sup>160</sup> **D2/19** Division 801 security centre 809 in Ratanakiri Province; **D2/20** Division 801 Au Cheng Sector Security Centre in Rattanakiri Province; **D2/21** S-22 Security Centre; **D2/22** Wat Enta Nhien; **D2/23** Stung

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Stung Hav reports were qualified as “preliminary” and stressed that the investigation was incomplete and further investigative action needed to be undertaken, including interviewing witnesses.<sup>161</sup> The CIJs also actively refrained from placing relevant evidence on the case file. For example, although eight investigation reports were mentioned in the Rogatory Letter Report **D2/1** to have been “drafted in relation to in house document researches as designated in the annex to this Report”,<sup>162</sup> they were never listed in the attached recapitulative list,<sup>163</sup> and neither those investigation reports nor the majority of the relevant documents listed therein<sup>164</sup> were placed on the case file before 29 April 2011.<sup>165</sup> Most notably, while other US POW/MIA statements by subordinates of Meas Muth were placed on the case file by the CIJs on 5 April 2011,<sup>166</sup> the two statements from Meas Muth<sup>167</sup> were omitted. Similarly, the CIJs had not taken the

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Hav Rock Quarries and Related Sites.

- <sup>161</sup> **D2/22** Wat Enta Nhien Site ID Report, EN 00634139; **D2/23** Stung Hav Site ID Report, EN 00644148, 54.
- <sup>162</sup> **D2/1** Rogatory Letter Completion Report, 10 Feb 2011, EN 00649195-96.
- <sup>163</sup> **D2/1.1** Recapitulative List of Documents (attached to the Rogatory Letter Completion Report **D2/1**), 10 Feb 2011.
- <sup>164</sup> **D64.1.1** & **D64.1.13** Written Record of Investigation Action (“WRIA”), 15 Jun 2010; **D2/24** WRIA, 20 Jun 2010 [Describes the discovery of two important Meas Muth’s statements among the US POW/MIA Reports and recommends they be placed on the case file, which was not done]; **D64.1.14** WRIA, 27 Jul 2010 [Investigator reports having contacted R. Wetterhahn, author of the book “The Last Battle”, who stated that the witness Em Sun (Em Sun) was his source about the killing of two Americans at Wat Enta Nhien Security Centre in May/June 1975; Em Sun was never interrogated by ICIJ Blunk despite being a valuable witness as regards to Wat Enta Nhien security centre and Meas Muth’s position and role; see Em Sun’s four WRIs collected in November 2013: **D54/46**; **D54/47**, **D54/48**, **D54/49**]; **D64.1.16** WRIA, 3 Aug 2010; **D64.1.17** WRIA, 3 Sep 2010; **D64.1.20** WRIA, 16 Sep 2010; **D64.1.21** WRIA, 21 Sep 2010; **D64.1.49** WRIA, 16 Nov 2010.
- <sup>165</sup> The eight investigation reports between June and November 2010 were filed on 17 June 2013 (**D64.1.1** & **D64.1.13**; **D64.1.14**; **D64.1.16**; **D64.1.17**; **D64.1.20**; **D64.1.21**; **D64.1.49**) and 5 Jan 2017 (**D2/24**). 39 of the documents listed in those reports were placed on the case file a few weeks or months after 10 February 2011, but 45 other documents were not placed on the case file before the resignation of ICIJ Blunk (but were filed by ICIJs Kasper-Ansermet in 2012 and Harmon in 2013: 3 documents on 5 March 2012 (**D22.2.181** & **D22.2.182**, **D22.1.10**), 42 documents on 17 June 2013 (**D64.1.2**, **D64.1.3**, **D64.1.4**, **D64.1.5**, **D64.1.6**, **D64.1.7**, **D64.1.8**, **D64.1.9**, **D64.1.10**, **D64.1.11**, **D64.1.12**, **D64.1.15**, **D64.1.18**, **D64.1.19**, **D64.1.22**, **D64.1.23**, **D64.1.24**, **D64.1.25**, **D64.1.26**, **D64.1.27**, **D64.1.28**, **D64.1.29**, **D64.1.30**, **D64.1.31**, **D64.1.32**, **D64.1.33**, **D64.1.34**, **D64.1.35**, **D64.1.36**, **D64.1.37**, **D64.1.38**, **D64.1.39**, **D64.1.40**, **D64.1.41**, **D64.1.42**, **D64.1.43**, **D64.1.44**, **D64.1.45**, **D64.1.46**, **D64.1.47**, **D64.1.48**, **D64.1.50**). No reason was provided by the CIJs for this difference in treatment between those documents.
- <sup>166</sup> For example, **D4.1.745** Unknown male US POW/MIA Statement regarding Battalion 386, 8 Dec 1998; **D4.1.762** Kam Men US POW/MIA Statement, 2 Nov 2000; **D4.1.746** Som Sok US POW/MIA Statement, 19 Dec 2002; **D4.1.747** Ek Ny (Aek Ny) US POW/MIA Statement, 19 Dec 2002; **D4.1.749** Seng Sin and Khieu Nuok US POW/MIA Statement, 28 Jan 2003; **D4.1.760** DK cadre US POW/MIA Statement about the capture of a sailboat, 26 Apr 2006.
- <sup>167</sup> **D22.2.181** Meas Muth Statement (US POW/MIA), 5 Dec 2001; **D22.2.182** Meas Muth Statement (US POW/MIA), 30 May 2002. Paradoxically, the Dismissal Order uses a portion of the content of these two statements, yet attributes them to another source. See **D266** Dismissal Order, para. 311 which states: “Certain documents show that Meas Muth was hospitalised in Phnom Penh from May to July during the Mayaguez incident. He returned to Kampong Som in July or August 1975. He asserted that he had received the information from his wife and Chhan about the capture of the Mayaguez ship and the attack by the Americans after the incident and that he did not know the details”. This is directly taken from **D22.2.181** Meas Muth Statement (US POW/MIA), 5 Dec 2001, EN 00249694 [“3. Mayaguez Incident. A. From May to July or

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obvious investigative step of seeking Case 003-relevant statements from DC-Cam.<sup>168</sup>

52. The other material on the case file when the investigation was closed in 2011 was minimal. It included approximately 590 documents attached to the ICP's Introductory Submission;<sup>169</sup> a handful of Case 003 original documents placed on the case file before 29 April 2011;<sup>170</sup> and three lists of some military prisoners sent to S-21 compiled from Case 002 documents.<sup>171</sup> The Dismissal Order cites the transfer of "more than 2,000 (two thousand) documents [...] from Case 002" to justify the assertion that the investigation was "complete".<sup>172</sup> The actual number of documents transferred by the CIJs from Case 002 to Case 003 on 5 and 25 April 2011 is 1,287.<sup>173</sup> While some of this Case 002 evidence sheds light on events overlapping with the allegations in Case 003, it does not substitute for a thorough investigation, especially in relation to sites not within the scope of Case 002. The documents shed virtually no light on the responsibility of Meas Muth for the alleged crimes in this case.
53. Moreover, at least 135 of these Case 002 documents are duplicates of documents either attached to the Introductory Submission or listed elsewhere in the **D4.1** or **D10.1** tables.<sup>174</sup> Less than 50% of the 1,152 remaining documents have any direct relevance to the specific Case 003 crime sites, Meas Muth's roles and responsibilities, or effectively

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August 1975, Meas Muth was hospitalized in Phnom Penh with a serious intestinal disorder. The only information he received concerning the Mayaguez incident at the time of the incident was from his wife, who only mentioned the ship's capture and the U.S. attack during her brief visits to see him. She told him about the capture of the Mayaguez about two days after the incident and about the U.S. attack two or three days after it was over", EN 00249695 ["C. After his return to duty in July or August 1975, Meas Mut received a report from Chhan on the Mayaguez incident and the U.S. attack"]. See also **D22.2.182** Meas Muth Statement (US POW/PIA), 30 May 2002, EN 00249705 ["5. Hospitalization. On about 10 May 1975, Mut was hospitalized in the Russian Hospital in Phnom Penh"]. The cited document (fn. 946), **D4.1.759** Report entitled 'Organisation and History of the Khmer Communist 3<sup>rd</sup> Division, burial of remains on Tang Island', 16 Jun 2000, p.5, contains no such information.

<sup>168</sup> The successors of ICIJ Blunk, ICIJs Harmon and Bohlander, did so. See *infra*, para. 56, fn. 194.

<sup>169</sup> **D1** IS, attaching 590 documents which references start with "**D1.3**".

<sup>170</sup> Consisting of 24 documents and 48 annexes including photos and maps which are on the case file starting with reference "**D2**", and **D3.1.34**, **D3.1.36** (both media articles about the ongoing investigations, not evidence as such).

<sup>171</sup> **D9** Note on the Placement of Documents, 25 Apr 2011. The three lists attached do not constitute new S-21 material but are constituted of Case 003 S-21 material analysed and compiled by the CIJs: **D9.1** OCIJ List of Arrestees from Division 801; **D9.2** OCIJ S-21 Prisoners from Division 502: A Review; **D9.3** OCIJ S-21 Prisoners from Division 164: A Review.

<sup>172</sup> **D266** Dismissal Order, para. 359. See further **D266** Dismissal Order, para. 42.

<sup>173</sup> **D4** Note on the Placement of Documents from Case File 002 on Case File 003, 5 Apr 2011 (**D4.1**: 1156 documents including many doubles); **D10** Note on the Placement of Documents from Case File 002 on Case File 003, 25 Apr 2011 (**D10.1**: 131 documents including doubles).

<sup>174</sup> See **Annex II** – List of 135 Duplicates among the Case 002 Documents placed on Case File 003 by the CIJs on 5 and 25 April 2011.

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concern relevant DK Policies or General Staff / Central Division matters.<sup>175</sup> The Dismissal Order itself determines that a significant number (131) of the Case 002 WRIs placed on Case File 003 in April 2011 were not relevant.<sup>176</sup> Whilst the ICP believes at least one of these interviews is relevant (In Saroeun's statement giving detailed information regarding the executions of Thai nationals captured at sea),<sup>177</sup> a large number of these documents are indeed *entirely* irrelevant to Case 003 and their inclusion on the case file merely gave the statistical appearance of a thorough investigation. Just a few examples include documents which relate primarily to: (i) the Ministry of Social Affairs;<sup>178</sup> (ii) the Ministry of Foreign Affairs;<sup>179</sup> (iii) the treatment of the Cham;<sup>180</sup> (iv) security centres in Siem Reap,<sup>181</sup> and (v) Party Centre officials<sup>182</sup> – none of which have relevance to Case 003.

54. The investigation was patently inadequate in following up on documents transferred from Case File 002 as shown by the paucity of Case 003 interviews carried out in early 2011. The CIJs did not re-interview Case 002 witnesses (except for the short interviews with Duch and Chhouk Rin) on their prior statements and in light of the specific allegations made in Case File 003. Documents transferred from Case File 002, including S-21 material, should have been shown to witnesses for authentication and comment.<sup>183</sup>
55. By comparison, the CIJs have added around 2,467 documents and numerous civil party applications to the case file since 29 April 2011. These documents include (i) 77 Case

<sup>175</sup> Among the 1,152 documents, it is the ICP's view that at least 590 have no direct relevance for the current specific crime sites / crimes of Case 003 (in Kampong Som area/ Division 164: Wat Enta Nhien and Toek Sap security centres, Ream, Kang Keng and Bet Trang worksites, Durian plantation execution site, Stung Hav worksite, Crimes committed by the Navy at sea and Genocide of the Vietnamese, Forced Marriages; in Phnom Penh: S-21 security centre; in Kratie: purge of Division 117 / Sector 505 cadres).

<sup>176</sup> **D266** Dismissal Order, fn. 5. [Referring to 105 WRIs filed by the CIJs on 5 April 2011 (WRIs starting with a "D4.1" reference) and 25 WRIs on 25 April 2011 ("D10.1" reference).] The Dismissal Order also asserts the irrelevance of 8 other WRIs: **D1.3.32.43** Sau Khe WRI; **D2/2** Ou Leang WRI; **D2/3** Nop Hat WRI; **D2/5** Hean Rum WRI; **D2/12** Mao Phat WRI; **D2/13** Say Tay WRI; **D2/14** Meang Buolin WRI; **D2/17** In Saroeun WRI; **D8** Sam Bun Leng WRI.

<sup>177</sup> **D2/17** In Saroeun WRI.

<sup>178</sup> **D4.1.768** Say Vet WRI; **D4.1.770** Chum Nai WRI; **D4.1.771** E Phally WRI; **D4.1.772** Kri Buntheng WRI; **D4.1.777** Sin Iev WRI; **D4.1.779** Nhem Seam WRI; **D4.1.938** But Chuon WRI; **D4.1.1046** Him Dam WRI;

<sup>179</sup> **D4.1.834** Toch Vannarith WRI; **D4.1.1125** Sao Run WRI; **D4.1.1126** Loth Nitya alias Saloth Ban WRI; **D4.1.1130** Suong Sikoeun WRI.

<sup>180</sup> **D4.1.418** Sokh Proeung WRI; **D4.1.419** Sokh Proeung WRI; **D4.1.468** El Sam WRI; **D4.1.471** No Satas WRI; **D4.1.473** It Sen WRI; **D4.1.474** Ahmad Sofiyah WRI; **D4.1.475** Suf Romaly WRI; **D4.1.485** Sman At WRI; **D4.1.517** Kae Noh WRI; **D4.1.529** Seng Srun WRI; **D4.1.530** Samrit Muy WRI; **D4.1.531** Leng Sokhchea WRI; **D4.1.532** Din Pet WRI; **D4.1.533** Cheu Than WRI.

<sup>181</sup> **D4.1.457** Ou Phlan WRI; **D4.1.459** Nget Nguon WRI.

<sup>182</sup> **D4.1.566** Suong Sikeoun WRI; **D4.1.930** Sakim Lmut WRI.

<sup>183</sup> For example, questions should have been put to Duch regarding the arrests of Division 164 cadres listed in S-21 prisoner lists, and annotations on S-21 confessions referring to Meas Muth.

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001 trial transcripts;<sup>184</sup> (ii) 43 DK Media Reports, including 36 FBIS Reports; (iii) 19 DK Reports, including six reports from Meas Muth or Division 164 leadership about the monthly statistics and structure of Division 164<sup>185</sup> and a report from the Division 164 Bokor Radar unit;<sup>186</sup> (iv) hundreds of S-21 documents, including biographies,<sup>187</sup> and forced “confessions” from Division 164 cadres and soldiers,<sup>188</sup> from Division 117 and Sector 505 cadres in late 1978<sup>189</sup> or from Vietnamese and other nationals arrested at sea by Division 164;<sup>190</sup> and (v) 11 site identification reports for Case 003 crime sites.<sup>191</sup>

56. About 445 new WRIs were placed on the case file after 29 April 2011 (about 88 of the interviews were conducted prior to 29 April 2011 and about 357<sup>192</sup> after). These include

<sup>184</sup> Although available to the CIJs in 2010-11, most of them were transferred by ICIJ Mark Harmon pursuant to the ICIJ rogatory letters **D54**, **D55** and **D114** and ICIJ decision **D98/1**.

<sup>185</sup> **D22.2.1** Statistics of Office of Division 164, unknown date; **D22.2.2** Division 164 Daily List of Forces as of May 1976; **D22.2.4** Division 164 Daily List of Forces as of July 1976; **D22.2.5** Division 164 Daily List of Forces as of August 1976; **D22.2.6** Division 164 Daily List of Forces, by Meas Muth as of November 1976; **D22.1.12** Statistics Report from Division 164, Dec 1975.

<sup>186</sup> **D126.1.1** Report from the Bokor Radar Base to Brother 89 (Son Sen), 20 Jun 1977.

<sup>187</sup> See e.g. **D114/145.2.14** S-21 Biography of Pham Yaing Thann (Vietnamese national arrested on 12th November 1975 at sea, first sent to Toek Sap to work in durian tree plantations then transferred to S-21 on 7 May 1976); **D114/145.2.12** S-21 Biographies of Kvieng Thy Thoeung, Kvieng Hiv Lang and Choeng Thann Hoerng (Vietnamese fishermen arrested at sea in December 1975 and sent to S-21 in May 1976 after transiting by Toek Sap); **D251.1.1** S-21 Biography of Roath Leang, 1 Dec 1978 (Deputy Secretary of Division 117).

<sup>188</sup> See e.g., **D22.2.144** through **D22.2.147** S-21 Confession of Vong Loeng alias Chan Than (Commander of Battalion, Division 164), Jul 1976 – Apr 1977; **D114/145.1.10** S-21 Confession of Ouch Chann Thol (Division 164), Mar 1976; **D22.2.117** S-21 Confession of Sek Sen alias Sophal (Division 164 combatant), 25 May 1976; **D22.2.109** S-21 Confession Pov Chhean alias Bunny (Secretary of Battalion 165, Division 164), 29 Jun 1976; **D22.2.23** through **D22.2.47** S-21 Confession of Chey Han alias Chhan alias Norng Chhan (Division 164 Second Deputy Commander), Oct 1976- 13 Feb 1977; **D234/2.1.55** S-21 Confession of Hang Doeun alias Dim (First Deputy Commander of Division 164), 4 May-31 Jul 1977; **D126.1.60** S-21 Confession of Men Nget (Division 164 Committee Member), 16 Oct 1975; **D114/145.1.6** S-21 Confession of Kung Kien alias Oeng Vet (Secretary of Battalion 631), 24 May 1977; **D114/145.1.9** S-21 Confession of Mom Chim alias Yan (Member of Division 164), 7 Oct 1977; **D22.2.137** S-21 Confession of Taing Veng Seu alias Chhin (Division 164 translator), 2 Jun 1978.

<sup>189</sup> **D114/145.1.12** S-21 Confession of Svay Naunh (Chief of Division 117 Office), 29 Nov 1978; **D114/145.1.8** S-21 Confession of Khun Rum (Secretary of Division 117), 12 Dec 1978.

<sup>190</sup> **D126.1.40** S-21 Confession of Vinh Minh Chou (Vietnamese marine arrested at sea), 13 Mar 1978; **D114/145.2.192** S-21 Confession of Vinh Minh Chou, No. 162, 25 Mar 1978; **D114/145.2.17** S-21 Report based on the confessions of Vinh Minh, Chov Vang Le, Vin Phy Long, Nos 140, 141, 142, 4 Apr 1978; **D114/145.2.18** S-21 Confession of Ngeang (Vieng) Thanh Kvang, No. 155, 22 Mar 1978; **D54/4.1** & **D54/4.2** S-21 Confession of Ronald K. Dean, 21 Nov 1978-5 Jan 1979; **D54/4.2** Summary Report by Chann on S-21 Confessions of Ronald K. Dean, Michael S. Deeds and Christopher E. Delance, 4 Jan 1979.

<sup>191</sup> **D114/30** (Wat Enta Nhien SC); **D114/46** (Division 164 Kampong Som sites); **D114/54** (Toek Sap, Bet Trang, Wat Enta Nhien, Koh Rong Samloen and other Division 164 sites); **D114/56** (Toek Sap SC); **D114/60** (Stung Hav); **D114/80** (Durian I execution site and Bet Trang); **D114/99** (Durian II execution site, Toek Sap and Bet Trang); **D114/141** (Toek Sap); **D114/227** (Toek Sap); **D114/275** (Ou Kombot detention Centre (close to Toek Sap); **D114/292** (Bet Trang and Durian Plantation). As explained below, all crimes sites and criminal events currently falling within the scope of Case 003, except for forced marriage and rape, fell within the scope of the facts contained in the Introductory Submission. See **Legal Error of Failure to Consider and Issue a Decision on All Facts Within the Scope of Case 003**.

<sup>192</sup> Among those 357 WRIs collected after 29 April 2011, 328 are Case 003 original WRIs (with references starting either by **D114/** (205 WRIs), **D54/** (99 WRIs), **D32/** (12 WRIs) or **D55/** (4 WRIs), in addition to the

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WRIs for some of the most important Case 003 witnesses.<sup>193</sup> Another 320 witness statements, mostly from DC-Cam,<sup>194</sup> and at least nine statements by Meas Muth to the press or to the US POW/MIA interviewers, including five made prior to 29 April 2011, were only added to the case file after the reopening of the investigation.<sup>195</sup>

57. Further, contrary to the CIJs' practice in Case 002,<sup>196</sup> before the investigation was prematurely closed in 2011, victims were not given any information about the Case 003

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WRIs referenced as **D37, D39 through D43, D45 and D46**), one has been transferred from Case 002 (**D114/300.1.11** Uk Bunseng WRI) and 28 have been transferred from case 004 (**D98/3.1.152; D98/3.1.295; D98/3.1.31; D98/3.1.162; D98/3.1.278; D98/3.1.252; D98/3.1.265; D98/1.1.1; D98/1.1.10; D98/3.1.206; D98/1.1.9; D98/1.1.6; D98/1.1.8; D98/1.1.3; D98/1.1.5; D98/1.1.2; D98/3.1.207; D98/1.1.7; D98/1.1.11; D98/1.1.4; D234/2.1.73; D234/2.1.129; D234/2.1.137; D234/2.1.74; D234/2.1.130; D114/297.1.1; D114/297.1.8; D228/1.1.1**).

<sup>193</sup> Pak Sok (**D54/23; D54/24; D54/25; D54/26; D54/27**); Ek Ny (**D54/102; D54/103; D54/104; D54/105; D114/282; D114/283; D114/284**); Prum Sarat (**D54/87; D114/285**); Moeng Vet (**D54/59; D54/60; D54/61; D54/62; D54/63; D114/297.1.8**); Chet Bunna (**D114/65; D114/66; D114/85; D114/86**); Chum Chy (**D114/261; D114/262; D114/263; D114/264; D114/265; D114/281**); Em Sun (**D54/46; D54/47; D54/48; D54/49**); Meas Im (**D114/214; D114/215; D114/216**); Meas Voeun (**D54/50; D54/51; D54/52; D54/53; D54/54**); Moul Chhin (**D114/31; D114/39; D114/40**); Neak Yoeun (**D54/115; D54/116; D114/11; D114/12; D114/13**); Soem Ny (**D54/30; D54/31; D54/32; D54/37; D54/88**).

<sup>194</sup> Around 250 statements collected prior to 29 April 2011 have been placed on the case file 003 after that date by the successors of ICIJ Blunk while 70 or more statements are dated after 29 April 2011. Among the 50 different DC-Cam interviews cited in the ICP Final Submission (see Table **D256/11.3** filed by Meas Muth), 43 were placed on the case file after 29 April 2011: **D54/24.1 & D59/2/3.14a** Pak Sok; **D54/28.1** Liet Lan; **D54/30.1 & D59/2/2.16a** Soem Ni; **D54/33.1** Y Chhon; **D54/35.1** Prak Sokha; **D54/38.1** Lun Seng; **D54/42.1 & D59/1/4.27** Heng Viech; **D54/60.2** Moeng Vet; **D54/67.3** Nong Net; **D54/70.2** Mut Mao; **D54/78.1 & D59/1/1.12** Nob Hal; **D54/81.2 & D59/1/1.14** Hing Uch; **D54/92.1 & D59/2/3.17a** Yem Sam On; **D54/99.1 & D59/1/1.9a** Lay Bunhak; **D54/106.2** Sann Kan alias Buth; **D54/112.1 & D59/1/1.10a** Phlong Chhea; **D54/115.1** Neak Yoeun; **D59/1/1.7a** Mak Chhoeun; **D59/1/1.8a** Prum Sarat; **D59/1/1.11a** Heang Ret; **D59/1/1.27** Moy Sot; **D59/1/1.29** Nget Chanthau; **D59/1/1.46** Lat Bandet; **D59/1/1.52** Pheach Ruos; **D59/1/1.57** Khor Mot; **D59/1/4.21** Uk Sokh; **D59/1/4.25** Long Ly; **D59/2/2.14a** Leang Bie; **D59/2/2.118a** Touch Chhum; **D88.1.5 & D59/2/4.16a** Seng Soeun; **D98/3.1.127** Kim Va; **D98/3.1.176** Meas Voeun; **D114/17.1** Ma Chhoeun; **D114/36.149** Leng Samet; **D114/79.1** Kang Som; **D114/157.1.2** Sao Sau; **D114/157.1.3** Chen Phat; **D114/157.1.4** Hao Ao; **D114/215** Meas Im; **D123/2/2.18a** Touch Chhum; **D220/1.2.1** Ou Kim alias Ret; **D234/2.1.94** Prak Yut. Only one was transferred from Case 002 to Case 003 by the CIJs in April 2011: **D4.1.964** Ieng Sary.

<sup>195</sup> **D22.2.181** Meas Muth Statement (US POW/MIA), 5 Dec 2001; **D22.2.182** Meas Muth Statement (US POW/PIA), 30 May 2002; **D22.2.184** Meas Muth Statement, *Ex-KR Division Chief Warns of Instability if Prosecuted* (Cambodia Daily), 16 Feb 2009; **D22.2.185** Meas Muth Statement, *Indict No More: Former Rebel Commander* (Voice of America), 26 Mar 2009; **D22.2.186** Meas Muth Statement, *Ex-KR leader responds to activist's allegations* (Phnom Penh Post), 6 Apr 2011; **D54/1.1** Meas Muth Statement, *A Last Stand* (Southeast Asia Globe), 27 Jul 2011; **D114/307.5** Meas Muth Statement in Transcript of *Brother Number One* (Journeyman Pictures), 2013 (the documentary film is on the case file at **D233/2.2R**); **D114/307.6** Meas Muth Statement (Voice of America), 6 Oct 2011; **D54/16/1R** Audio Meas Muth Interview with David Kattenburg, Apr 2009.

<sup>196</sup> In Case 002, the CIJs issued a press release on 5 November 2009 disclosing the scope of the investigation and informing victims of their right to apply to become civil parties in the case, more than two months prior to the closing of the investigation (on 14 January 2010). See ECCC Press Release, *Statement from the Co-Investigating Judges Judicial Investigation of Case 002/19-09-2007-ECCC-OCIJ and Civil Party Applications*, 5 Nov 2009. They then twice extended the deadline for doing so (until 30 June 2010). Still, the PTC considered in Case 002 that the information provided to victims was insufficient and not provided in a timely manner, thus infringing upon the rights of the victims: Case 002-**D404/2/4** and **D411/3/6** Decisions on Appeals against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, 24 Jun 2011, paras 51-4.

investigation or their right to apply to become civil parties or complainants.<sup>197</sup> A notice of conclusion of the investigation under Rule 66(1) triggers a 15-day time period when victims may submit civil party applications.<sup>198</sup> Potential civil party applicants cannot exercise this right when information is not provided in a timely manner about which crime sites are the subject of investigation.<sup>199</sup> The complete exclusion of civil parties prior to the premature closing of the investigation in 2011 resulted in an incomplete investigation and constituted a denial of the rights of civil parties expressly provided for in the Rules.<sup>200</sup>

*The failure to assess all the evidence on the Case File had a determinative impact on personal jurisdiction*

58. By failing to consider any evidence on Case File 003 after 29 April 2011, the Dismissal Order severely undermined its ability to produce a reasoned decision to dismiss the case against Meas Muth for want of personal jurisdiction.<sup>201</sup> The error played a major role in the failure to reach accurate factual findings on both the gravity of the crimes and Meas Muth's level of responsibility.

59. In addition to providing almost the entirety of the available crime base and suspect-based

<sup>197</sup> The CIJs merely announced to the public, on 29 April 2011 itself, that they were issuing a Notice of Conclusion of the investigation, without giving any information about the scope of such investigation or any other information whatsoever. See ECCC Press Release, *Statement from the Co-Investigating Judges*, 29 Apr 2011 ["The [CIJs] today in a public decision concluded the investigations in Case 003 (the Case File containing more than 2.000 pieces of evidence, comprising more than 48.000 pages), and have notified the parties according to Rule 66.1"].

<sup>198</sup> Internal Rule 23*bis*(2).

<sup>199</sup> Case 002-D404/2/4 and D411/3/6 Decisions on Appeals against Orders of the [CIJs] on the Admissibility of Civil Party Applications, 24 Jun 2011, paras 51-54. See also Internal Rule 21(1)(c) requiring that the ECCC ensure that victims are kept informed and their rights are respected *throughout* the proceedings (emphasis added).

<sup>200</sup> See, *inter alia*, the rights granted to civil parties during the judicial investigation under Internal Rules 55(8) (to attend on-site visits conducted by the CIJs), 55(10) (to request investigative action), 58(5) (to participate in confrontations), 59(5) (to request the CIJs to interview him or her, interview witnesses, go to a site, order expertise and collect evidence), 74(4) (to appeal against certain orders issued by the CIJs) and 76(2) (to request annulment of any part of the proceedings). The exclusion of civil parties resulted in an incomplete investigation as evidence relevant to the truth of the allegations was not discovered: For example, Civil Party Applicant Ou Dav gave important evidence regarding the Division 164 command and communications structure (D114/24 Ou Dav WRI, A42, 48, 54, 61, 67-70, 91-2, 97, 140), including Meas Muth's decision-making autonomy (D114/24 Ou Dav WRI, A90-1, 96-97, 140-1) and his order to capture all foreign boats entering DK waters (D114/24 Ou Dav WRI, A56, 89-91, 96-7). Ou Dav stated that he obeyed orders to shoot at foreigners who resisted their capture, bring Thai boats and fishermen to Kampong Som, where they were handed over to Meas Muth's soldiers and later exchanged against petrol (D114/24 Ou Dav WRI, A56, 82-4, 86-91, 103-17131, 133, 145-53, 157). His evidence also explains Meas Muth's involvement in plans to purge Division 164 and target capitalists, new people and former Lon Nol soldiers (D114/25 Ou Dav WRI, A13-14). He further discussed the operation of Toek Sap and Wat Enta Nhien security centres and of Stung Hav worksite (D114/25 Ou Dav WRI, A19-20, 32-3).

<sup>201</sup> See *e.g.* *Perišić* AJ, para. 95 ["an analysis limited to a select segment of the relevant evidentiary record is not necessarily sufficient to constitute a reasoned opinion."].



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evidence for a number of crime sites and criminal events completely omitted by the Dismissal Order (a further legal error described below),<sup>202</sup> the evidence collected after 29 April 2011 that was not considered in the Dismissal Order played a determinative role in erroneous factual findings. Examples include errors in (i) identifying the number and types of victims for whom Meas Muth was responsible at Wat Enta Nhien security centre, Stung Hav worksites and for foreigners killed at sea, on the islands, in Kampong Som Sector and at S-21, including those captured by West Zone Division 1 forces;<sup>203</sup> (ii) assessing Meas Muth's participation in the implementation of the DK enemies and enslavement policies through visits to Kampong Som security centres and worksites, and identifying enemies;<sup>204</sup> (iii) the continuation of Meas Muth's role as Division 164 Secretary with full control over military and civilians in Kampong Som Sector until January 1979;<sup>205</sup> and (iv) Meas Muth's position as member of the General Staff from mid-1975 and Deputy Secretary of the General Staff from late 1978.<sup>206</sup>

60. Importantly for the assessment of personal jurisdiction,<sup>207</sup> the post-29 April 2011 evidence provided clear and consistent evidence that Meas Muth committed genocide against the Vietnamese. By the Introductory Submission, the CIJs were seised of facts relating to crimes committed by the DK Navy against the Vietnamese.<sup>208</sup> They were thereby obliged to investigate “[t]he circumstances in which the alleged crime was committed and that contribute to the determination of its legal characterisation.”<sup>209</sup>
61. The ICP notes that the Dismissal Order did completely ignore some of the key pre-29 April 2011 evidence on the DK policy towards the Vietnamese and their agents,<sup>210</sup> the

<sup>202</sup> As described in further detail below. See **Legal Error of Failure to Consider and Issue a Decision on All Facts Within the Scope of Case 003**.

<sup>203</sup> See **Factual Errors Regarding the Dismissal Order's Treatment of Victims**.

<sup>204</sup> See e.g. *infra*, paras 104, 121-134.

<sup>205</sup> See *infra*, paras 137-41.

<sup>206</sup> See *infra*, paras 142-7.

<sup>207</sup> As discussed above, establishing that a suspect has committed genocide is vital to an assessment of the gravity of the crimes committed.

<sup>208</sup> **D1 IS**, paras 59-61.

<sup>209</sup> Case 001-**D99/3/42** Decision on Duch Closing Order Appeal, para. 35.

<sup>210</sup> These documents were not cited in the Dismissal Order: **D4.1.862** *Revolutionary Flag*, Apr 1977, EN 00478496 [“As for the enemies that are [...] ‘Y[uon]’ agents, the cheap running dogs of the enemy [...] the forces that remain have been fundamentally scattered, like rats being hit and falling from their nests into the water and being chased and struck by the people and annihilated”], EN 00478496 [“We must [...] smash them even more so they cannot raise their heads”], EN 00478500, 02; **D4.1.617** FBIS, *Past Year's National Defence Efforts Reviewed*, 10 May 1978, EN 00294786-87 [discusses party instructions to destroy as many of the enemy as possible [...] “one of us had to kill 30 Vietnamese”], EN 00294790; **D1.3.25.33** FBIS, *Khieu Samphan Statement*, 31 Dec 1977, EN 00166070; **D4.1.896** *Revolutionary Youth*, Apr 1977, EN 00491127; **D4.1.989** Chea Sim Interview, 3 Dec 1991, EN 00419371-75; **D1.3.19.4** CPK Directive from Office 870, 1 Jan 1979, EN 00183666; **D4.1.866** *Revolutionary Flag*, Feb 1978, EN 00464065 [“eradicate the enemy”];

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radio broadcast in 1978 of S-21 confessions by Vietnamese soldiers or “spies” arrested at sea,<sup>211</sup> and the treatment of the Vietnamese by the Navy and at S-21.<sup>212</sup> Although the Dismissal Order relies on some other pre-April 2011 evidentiary documents for other limited purposes, it fails to analyse how they prove: (a) the existence of a genocidal DK policy towards the Vietnamese that can be inferred from the Party Centre hate propaganda,<sup>213</sup> and to which Meas Muth was exposed and adhered to;<sup>214</sup> and (b) the responsibility and special genocidal intent of Meas Muth in the capture, arrest and

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**D4.1.893** *Revolutionary Youth*, Oct 1978, EN 00539998; **D1.3.29.5** Pol Pot Statement, 5 Jan 1979, EN S 00017564-65; **D10.1.59** *Revolutionary Flag*, Aug 1977, EN 00399223, 36, 46.

<sup>211</sup> **D1.3.26.7** BBC/SWB, *Confession by Vietnamese Spy*, 4 Apr 1978, EN S 00010459; **D1.3.26.5** BBC/SWB, *Confession of a captured SRV Sailor*, 3 Feb 1978, EN S 00008894-96; **D1.3.25.40** FBIS, *Cambodia Reports Continued Vietnamese Bombing*, 28 Mar 1978; **D10.1.68** FBIS, *Captured SRV Officer Relates Attack Plans*, 5 Jun 1978, EN 00169799-800; *Confession of Spy Sergeant Captured 29 March Reported*, 29 Jun 1978, EN 00169865-66.

<sup>212</sup> **D4.1.754** Unknown Division 164 soldier US POW/ MIA Statement, 18 Jul 2005, EN 00387429; **D1.3.17.5** Nayan Chanda, *Brother Enemy*, EN 00192197-98 [Describes how Khmer troops evacuated at gunpoint five hundred Vietnamese inhabitants from Poulo Panjang Island (*Tho Chu / Koh Krachak Ses*) in 1975 and, how they were never heard of again]; **D4.1.5** Analytical Report by DC-Cam (*List of Foreigners Smashed at S-21*) [comprises the names of 113 Vietnamese, mostly described as “spies”, including at least 34 from Kampong Som, executed between 18 April 1978 and 18 November 1978 at S-21].

<sup>213</sup> The Dismissal Order does not refer at all to such Party Centre propaganda, even less to a national genocidal policy, contrary to the ICP Final Submission: **D256/7** ICP Final Submission, paras 739-61 and the sources placed on the case file before 29 April 2011 cited: **D4.1.869** *Revolutionary Flag*, Jul 1978, EN 00428289 [“eliminate our aggressive, expansionist, territory-swallowing and genocidal Yuon enemy”], EN 00428291, 303-04; **D1.3.24.5** *Revolutionary Flag*, May-Jun 1978, EN 00185329, 33,42; **D1.3.27.20** DK Military Meeting Minutes, 9 Oct 1976, EN 00940345 [Son Sen: “[the Vietnamese] are genuinely our enemies”]; **D4.1.374** FBIS, *Revolutionary Army Adopts Resolutions on SRV Dispute*, 4 Jan 1978, EN 00169539 [“exterminate the annexationist Vietnamese enemy [...] so that they will be completely wiped out from our Cambodian territory”]; **D4.1.868** *Revolutionary Flag*, Apr 1978, EN 00519830, 33-34, 42; **D1.3.17.1** Elizabeth Becker, *When the War Was Over*, EN 00237947-48 [“new directive, in the middle of 1977, to kill off a new category of enemy – people of Vietnamese ancestry”]; **D4.1.883** *Revolutionary Flag*, Apr 1976, EN 00517853; **D1.3.17.3** DK Ministry of Foreign Affairs Report, Black Paper, Sep 1978, EN 00082517; **D4.1.45** *Revolutionary Youth*, Jan-Feb 1978, EN 00278717; **D4.1.193** Nuon Chea Speech, 3 Sep 1978, EN 00065915; **D4.1.583** CPK Central Committee Directive, 20 Jun 1978.

<sup>214</sup> **D256/7** ICP Final Submission, paras 781-97 citing **D1.3.2.2** DK Telegram 10 from Son Sen to Meas Muth, 4 Nov 1976 [instructions about the absolute necessity to destroy the enemies entering DK waters]; **D1.3.8.3** DK Military Meeting Minutes, 3 Aug 1976, EN 00234012 [presenting Vietnam as an enemy]; **D1.3.27.20** DK Military Meeting Minutes, 9 Oct 1976, EN 00940350-51 [Son Sen: “Now they are genuinely our enemies”]; **D1.3.34.60** Telegram 00 from Meas Muth to Office 870, 31 Dec 1977, EN 00184995 [“We have received the guiding view and the declaration of the Party about the aggression of the Yuon”].

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systematic killing of the Vietnamese<sup>215</sup> or in their transfer to S-21.<sup>216</sup> The Dismissal Order mentions two reports of Meas Muth to Son Sen regarding the sinking and capture of Vietnamese boats as well as the arrest and killing by the Navy of 120 Vietnamese in just four days while at the same time, some Thai fishermen were exchanged for goods,<sup>217</sup> yet fails to acknowledge the patent difference of treatment reserved for the Vietnamese and Thai captured.<sup>218</sup>

62. However, the decision to consider only the documents on the case file before 29 April 2011 led the NCIJ to disregard the most detailed evidence related to the crimes against the Vietnamese. In particular, the Dismissal Order failed to consider a large number of compelling WRIs<sup>219</sup> and trial transcripts specifically focusing on the genocide of the

<sup>215</sup> **D266** Dismissal Order, paras 313-4, 315-22 [Although it describes the communication by Meas Muth of reports on the arrest and killing of Vietnamese to Son Sen, the Dismissal Order suggests that Meas Muth had no authority to order alone their arrest or execution, as Son Sen or Ta Mok's orders were required or alternatively, Sim, Ta Soeung or Ta Ran needed to be consulted. The Dismissal Order presents Meas Muth as a conveyor belt between the Centre and his subordinates.]. The special intent of Meas Muth to commit the genocide of the Vietnamese can be inferred from the following pre-29 April 2011 documents: **D1.3.34.60** Telegram 00 from Meas Muth to Office 870, 31 Dec 1977, EN 00184995 ["We who have the duty to defend the maritime spearhead would like to: 1. Be in total unity within the Party. 2. Vow determination [...] to defend the socialist Kampuchean motherland by sweeping cleanly away and without half-measures the uncover[ed] elements of the enemy, whether the Yuon or other enemies"]; **D1.3.30.25**, **D4.1.635** Confidential Telephone Communication from Meas Muth to Son Sen, 1 Apr 1978, EN 01098703; **D1.3.34.64** DK Confidential Telephone Communication from Meas Muth to Son Sen, 20 Mar 1978; **D1.3.27.20** DK Military Meeting Minutes, 9 Oct 1976, EN 00940350-51; **D2/16** Touch Soeuli alias Soeu Touch WRI, A32-33; **D2/6** Nhong Chrong WRI, A42-44; **D2/9** Say Born WRI, A58.

<sup>216</sup> See the pre-29 April 2011 sources cited in **D256/7** ICP Final Submission, paras 168, 544.

<sup>217</sup> **D266** Dismissal Order, paras 313-314, *citing* **D1.3.34.64** DK Telephone Message from Meas Muth to Son Sen, EN 00233649; **D1.3.30.25** DK Telephone Message from Mut, 1 Apr 1978, EN 00143507.

<sup>218</sup> **D266** Dismissal Order, paras 315-322. Regarding the difference of treatment between the Vietnamese and Thai captured at sea, *see also* **D1.3.30.25** Confidential Telephone Messages from Meas Muth, 1 Apr 1978, EN 00143507 [Discusses modalities to release some Thai in exchange of cartons of cigarettes and palm oil]; **D1.3.13.11** Sieng OCP Statement, EN 00217565 [Describes negotiations with Thai authorities for the release of fishermen].

<sup>219</sup> At least 68 Case 003 original WRIs collected after 29 April 2011 directly concern the treatment of the Vietnamese arrested at sea: **D32/6** Keu Vichet; **D32/10** Khieu Saran; **D54/7**, **D54/8** Dol Song; **D54/23**, **D54/24**, **D54/25**, **D54/26** Pak Sok; **D54/31** Soem Ny; **D54/33**, **D54/34** Ing Chhon alias Y Chhong; **D54/38**, **D54/43**, **D54/44**, **D54/45** Lon Seng; **D54/50**, **D54/51**, **D54/52**, **D54/53**, **D54/54** Meas Vooun; **D54/63** Moeng Vet; **D54/71**, **D54/72** Mut Mao; **D54/78**, **D54/79** Nop Hal; **D54/83** Hing Uch; **D54/87** Prum Sarat; **D54/93** Yem Sam On; **D54/98**, **D114/287** Heang Ret; **D54/100** Lay Bunhak; **D54/102**, **D54/105**, **D114/282**, **D114/283**, **D114/284** Ek Ny; **D54/114** Hem Sambath; **D114/11**, **D114/12** Neak Yoeun; **D114/16** Sok Vanna; **D114/17**, **D114/18**, **D114/19** Mak Chhoeung; **D114/24**, **D114/25** Ou Dav; **D114/40** Moul Chhin; **D114/52** Cheang Chuo; **D114/58** Sam Saom; **D114/65** Chet Bunna; **D114/84** Ek Sophal; **D114/103** Liet Lan; **D114/104** Iem Phong; **D114/122** Nob Phan; **D114/123** Chuon Thy; **D114/126** Ou Kim; **D114/130** Iem Phong; **D114/132** Mao Ran; **D114/42**, **D114/43** Suos Thy; **D114/186** Shat Chak; **D114/211** Norng Sophang; **D114/247** Hok Khoan; **D114/259** Keo Leou; **D114/261**, **D114/263**, **D114/264** Chum Chy; **D114/301** Chhun Phal; **D114/302** Kung Pai.

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Vietnamese,<sup>220</sup> the OCIJ S-21 prisoner list and other S-21 material,<sup>221</sup> and FBIS reports, including the 1978 reports containing Vietnamese summary confessions broadcast on Radio Phnom Penh.<sup>222</sup> This evidence establishes that Meas Muth and the DK regime considered that the Vietnamese, as the “Hereditary Enemy and Enemy Number One,”<sup>223</sup> had to be systematically destroyed as such, regardless of their status, sex and age: refugees, fishermen, “spies” and POWs, babies, children, adults, the elderly, male or female had all to be eliminated.<sup>224</sup> Meas Muth disseminated this genocidal policy within his Division 164 through study sessions and trainings.<sup>225</sup> As a result of the orders Meas Muth gave and decisions he made regarding the execution of all Vietnamese captured at sea, thousands,<sup>226</sup> mostly refugees,<sup>227</sup> were arrested and killed at sea, on the islands or in Kampong Som.<sup>228</sup> Meas Muth further contributed to the genocide by facilitating or ordering the transfer of at least 188 Vietnamese prisoners to S-21,<sup>229</sup> including 8

- <sup>220</sup> See e.g. **D98.3.1** Annex A- Documents to be put on Case File 003, Nos 42 (R. Hamill, **D98/3.1.42**), 53, 54, 55 (Him Huy, **D98/3.1.53, 54, 55**), 178 (Meas Voeun, **D98/3.1.178**); **D98/1.2.22** Duch, T. 2 Mar 2012, 14.17.05-14.25.09; **D114/297.1.20** Pak Sok, T. 16 Dec 2015, 10.03.10-13.58.15; **D114/297.1.21** Pak Sok, T. 5 Jan 2016, 10.54.50-10.58.50, 13.35.04-14.31.22; **D234/2.1.92** Prum Sarat, T. 26 Jan 2016, 10.55.25-10.58.17, 15.49.55-15.53.04; **D234/2.1.93** Prum Sarat, T. 27 Jan 2016, 09.51.04-10.49.35, 13.55.27-13.56.33; **D234/2.1.95** Meas Voeun, T. 2 Feb 2016, 14.10.55-14.35.36, 15.54.15-16.00.12; **D234/2.1.96** Meas Voeun, T. 3 Feb 2016, 09.15.00-09.29.08; **D54/6.1.12** Nayan Chanda, T. 25 May 2009, 09.34.11-09.36.16, 13.44.10-14.00.18; **D234/2.1.112** Prak Khan, T. 27 Apr 2016, 15.57.03-15.59.05.
- <sup>221</sup> **D114/230.1.1** OCIJ S-21 Prisoner List [which shows that 188 Vietnamese were arrested in Kampong Som by the Navy (or by Division 1 who then sent them to Division 164), transferred then executed at S-21; as well as 6 Vietnamese transferred by Meas Muth from Kratie in late 1978]; see **D256/7** ICP Final Submission paras 126, 173, 548, 551, 1091. See also some S-21 biographies of Vietnamese fishermen who were caught at sea by Division 164: **D114/145.2.1** (3 persons), **D114/145.2.12** (3 persons), **D114/145.2.13** (2 persons), **D114/145.2.10** (2 persons), **D114/145.2.14** (1 person); S-21 Confessions of Vietnamese (not all arrested at sea): **D126.1.3-5**, **D126.1.16-9**, **D126.1.21-54**, **D126.1.62**, **D126.1.67**, **D114/145.2.4-9**, **D114/145.2.18-19**, **D114/145.2.21-24**.
- <sup>222</sup> All FBIS Reports for 1978: **D64.1.35** to **D64.1.46** (12 reports), **D114/37.1.82**.
- <sup>223</sup> **D256/7** ICP Final Submission, paras 131, 137, 363, 387, 390, 407-8, 744, 751-3, 783 (see post-29 April 2011 references).
- <sup>224</sup> **D256/7** ICP Final Submission, paras 128-9, 131, 146, 387, 407, 739, 744, 747-50, 759, 769-70, 772, 784 1123 (see post-29 April 2011 references).
- <sup>225</sup> **D256/7** ICP Final Submission, paras 131, 138, 290, 744, 783, 1123 (see the post-29 April 2011 references).
- <sup>226</sup> **D256/7** ICP Final Submission, paras 173, 402, 793, 795 (see post-29 April 2011 references); **D267** Indictment, paras 132-45, 248-57.
- <sup>227</sup> **D256/7** ICP Final Submission, paras 133, 386, 399, 403 (see post-29 April 2011 references cited), including: **D54/24.1** Pak Sok DC-Cam Statement, EN 00978576 [“They were mostly the refugees escaping to the third country. Most of those people were escaping from a war and traveling through our area. When we arrested them, we shot them to dead”]; **D54/102** Ek Ny (Ni) WRI, A29; **D114/283** Ek Ny WRI, A4, 18; **D54/79** Nop Hal WRI, A8, 11, 18, 23; **D54/23** Pak Sok WRI, A37-38; **D54/25** Pak Sok WRI, A11, 20; **D114/127** Ou Kim WRI, A3; **D114/126** Ou Kim WRI, A36-41; **D114/57** Som Soam WRI, A20-23; **D98/3.1.178** Meas Voeun, T. 4 Oct 2012, 10.23.23-10.26.02; **D54/87** Prum Sarat WRI, A121-125, 132.
- <sup>228</sup> **D256/7** ICP Final Submission, paras 131-2, 139, 140-1, 313, 379-80, 385, 387, 392-3, 399, 401-6, 410-1, 413, 421-2, 425, 432, 500, 502, 770, 784-5, 792, 796-7 (see post-29 April 2011 references).
- <sup>229</sup> **D256/7** ICP Final Submission, paras 137, 141-2, 174, 387, 417-9, 425, 428, 500, 544-6, 548, 550-1, 583, 585, 588, 797 (see post-29 April 2011 references); **D114/230.1.1** OCIJ S-21 Prisoner List, Nos 592-4, 596-7, 602, 606-7, 612, 625, 651-3, 663, 676, 678, 8164-7, 8250-63, 8271-2, 8400-3, 8405-10, 8689, 8982-4, 8987-90, 8992-4, 9647, 9650-53, 9857-9, 9888, 9899-9900, 9917-9928, 10257-10262, 10264, 10265, 10267,

teenagers.<sup>230</sup>

**C. LEGAL ERROR OF FAILURE TO CONSIDER AND ISSUE A DECISION ON ALL FACTS  
WITHIN THE SCOPE OF CASE 003**

63. The CIJs have a duty to issue a decision on all the facts of which they have been seised.<sup>231</sup> The Dismissal Order is legally defective in that it fails to even consider many of the crime sites and criminal events of which the CIJs had been lawfully seised. The sites and events not even considered are (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). This defect severely compromises the Dismissal Order's personal jurisdiction determination, which requires a full assessment of both the gravity of the crimes and the level of Meas Muth's responsibility.<sup>232</sup> This legal error is a result of the Dismissal Order's failure to correctly interpret the scope of Case 003 as set out in the Introductory Submission, and to acknowledge procedural acts occurring in the investigation after 29 April 2011, including in particular, the ICP's Supplementary Submission filed on 31 October 2014.<sup>233</sup>

*Crime sites falling within the scope of the Introductory and Supplementary Submissions*

64. It is clear that the Dismissal Order considers only those crime sites and events *expressly* mentioned in the Introductory Submission to fall within the scope of Case 003 (such as Wat Enta Nhien security centre, Stung Hav quarry, S-21 and crimes committed by the DK Navy). However, this misunderstands the scope of the crimes of which the CIJs were seised. Before the filing of the Supplementary Submission, the scope of the Case 003 investigation was defined by the Introductory Submission,<sup>234</sup> including the content of

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11872-5, 11877, 12490-8, 12653-6, 13007-20, 13431-4, 13436-7, 13446, 13453, 13458, 13463, 13469, 13474, 13483, 13486, 13488, 13498-13499, 13501, 13529, 13532, 13535, 13541, 13543, 13642-3, 13895-6, 13912-31, 14728, 14758, 14785, 14795-9, 14816, 14820; **D54/87** Prum Sarat WRI, A135, 137, 144.

<sup>230</sup> **D114/230.1.1** OCIJ S-21 Prisoner List, No. 13434, 8405, 8255, 8258, 8408, 10262, 12496.

<sup>231</sup> Case 001-**D99/3/42** Decision on Duch Closing Order Appeal, paras 33, 37-8; Case 002-**D198/1** OCIJ Clarification Order, para. 10; Cass. Crim., 24 Mar 1977, No. 76-91.442. *See also* Case 004/1-**D308/3/1/20** Im Chaem PTC Closing Order Considerations, paras 116, 129 (Judges Beauvallet and Baik).

<sup>232</sup> **D266** Dismissal Order, paras 3, 365-7. *See further supra*, paras 9-12.

<sup>233</sup> **D120** [ICP] Supplementary Submission Regarding Crime Sites Related to Case 003, 31 Oct 2014 ("Supplementary Submission").

<sup>234</sup> Internal Rules 53, 55(2); Cambodian CCP, art. 125; Case 001-**D99/3/42** Decision on Duch Closing Order Appeal, paras 34-35; Case 004-**D365/3/1/5** PTC Sexual Violence Decision, para. 39; Case 002-**D198/1** OCIJ Clarification Order, para. 6.

hundreds of annexes.<sup>235</sup> By law, the CIJs were seised of all *facts* “set out” therein.<sup>236</sup> “Facts” are not synonymous with “crime sites,” which need not be expressly mentioned in the Co-Prosecutors’ submissions to be “set out” therein if the investigation of that site is required to fulfil the obligation to fully investigate particular facts. The PTC has found unanimously that the CIJs are seised of “[t]he circumstances surrounding the acts mentioned in the Introductory [...] Submission”,<sup>237</sup> which includes the locations where the facts alleged took place or which were connected to the facts.<sup>238</sup> Except for the allegations of forced marriage and rape contained for the first time in the Supplementary Submission, the CIJs were seised of all the other crime sites by the Introductory Submission.

65. The ICP seised the CIJs with facts concerning (i) Division 164 personnel who were “subjected to frequent and arbitrary arrests and forced labor”; (ii) purges within Division 164 (of, *inter alia*, soldiers and cadres from the East Zone under Deputy Secretary Dim), including arrests and executions; and (iii) arrests and execution of those who were

<sup>235</sup> Cass. Crim., 27 Jun 1991, No. 91-82.706 [“La saisine du magistrat instructeur, quant aux faits, est déterminée par les pièces annexées à ce réquisitoire”. Unofficial translation: “The matter laid before the Investigating Judges as regards the facts is defined by the annexures to the submission”]; Cass. Crim., 11 Jul 1972, No. 72-90.719. *See also* **D134/1/10** PTC Decision on Two Annulment Applications, para. 4 (Judges Beauvallet and Bwana); **D165/2/26** PTC Decision on Nine Annulment Applications, para. 150 (Judges Beauvallet and Baik); Internal Rule 53(2).

<sup>236</sup> Internal Rules 53, 55(2), 55(3) and 55(4); Cambodian CCP, art. 125.

<sup>237</sup> Case 001-**D99/3/42** Decision on Duch Closing Order Appeal, para. 35.

<sup>238</sup> Cass. Crim., 10 Mar 1977, No. 75-91.224 [“S’il est interdit aux juges de statuer sur des faits autres que ceux qui leur sont déférés, il leur appartient de retenir tous ceux qui, bien que non expressément visés dans le titre de la poursuite, ne constituent que des circonstances du fait principal, se rattachant à lui et propre à le caractériser.” Unofficial translation: “Whereas judges are barred from adjudicating facts other than those laid before them, it lies with them to draw on all of those facts, which although not expressly stated in the proceedings, constitute mere circumstances of the principal fact, to which they are connected and which they specifically characterise.”]; Cass. Crim., 24 Apr 2013, No. 12-80.750, inédit [“lorsqu’une activité délictueuse consiste en une situation d’agissements identiques étroitement liés les uns aux autres qui se développent dans le temps, ces agissements forment une opération unique de sorte que le juge d’instruction est autorisé à informer sur l’ensemble de ces agissements alors même que l’acte de poursuite ne viserait que certains d’entre eux; en l’espèce, le juge d’instruction est saisi de l’ensemble des fausses écritures comptables qui sont le corollaire des faits d’abus de confiance aggravés et leur sont rattachés de manière indivisible” Unofficial translation: “where a criminal activity consists of the same closely-related conduct developed over time, such conduct forms a single operation, and it is therefore permissible for the investigating judge to investigate such conduct in its entirety even if the introductory submission concerns only part of it; in this instance, the Investigating Judge is seised of all the falsified accounting records, which relate to the aggravated breach of trust and are indivisibly linked to it”. *See further* **D134/1/10** PTC Decision on Two Annulment Applications, paras 14, 19 (Judges Beauvallet and Bwana) [“the [CIJs]’ investigation is limited by the alleged criminal acts defined by the Co-Prosecutors. However, it rests with the Judge to elicit the circumstances of their commission, and the *locus in quo* in particular. [...] That a crime site is unmentioned in the Submissions [...] is not sufficient to determine whether the acts allegedly committed there, or perhaps even the acts committed in an unspecified location, fall within the sphere of said *sub judice* matter. In short, the *locus in quo* is a circumstance which identifies the location of the fact, but is not the fact *per se*.”]; **D165/2/26** PTC Decision on Nine Annulment Applications, para. 152 (Judges Beauvallet and Baik).

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identified as having former regime connections.<sup>239</sup> The ICP clarified that Wat Enta Nhien was only one of the possible destinations within Kampong Som Sector where purged Division 164 personnel were taken.<sup>240</sup> Moreover, the Introductory Submission seized the CIJs with investigations into the role played by the DK Navy in the captures at sea of Vietnamese and Thai fishermen or other foreign nationals and their subsequent fate (for example, forced labour, execution or transfers to S-21).<sup>241</sup>

66. There is therefore a clear direct nexus between the Division 164 purge and the *Toek Sap security centre*. The security centre and its adjoining execution site were used by Division 164 for detaining, “re-educating” and executing its own soldiers,<sup>242</sup> and thus fell squarely within the scope of the Introductory Submission as a location of the “major purge”<sup>243</sup> of Division 164.<sup>244</sup> The Introductory Submission annexed an OCP interview confirming that Toek Sap was a killing site.<sup>245</sup> In addition, foreigners captured at sea were taken to Toek Sap, where they were detained, forced to work, executed and/or transferred on to S-21.<sup>246</sup> Toek Sap is thus an integral part of the facts about crimes committed by the DK Navy. The *Durian I* plantation falls within these same facts as it was an execution site used by Division 164 for, *inter alia*, foreigners captured at sea.<sup>247</sup>
67. The detention, forced labour and execution of Thai and Vietnamese fishermen in *Ream*, its worksites and the execution sites<sup>248</sup> are also indivisibly linked to the crimes committed at sea by the DK Navy.<sup>249</sup> Moreover, the *Ream Area worksites* - including *Kang Keng*<sup>250</sup>

<sup>239</sup> D1 IS, paras 52-4.

<sup>240</sup> D1 IS, para. 53.

<sup>241</sup> D1 IS, paras 59-61.

<sup>242</sup> See *infra*, paras 73-5.

<sup>243</sup> D1 IS, para. 53.

<sup>244</sup> See also D165/2/26 PTC Decision on Nine Annulment Applications, paras 189-200 (Judges Beauvallet and Baik). See further D102/1 [ICP’s] Response to Forwarding Order Regarding Toek Sab Prison, 20 Jun 2014, para. 3; D165/2/15 [ICP’s] Response on the Merits of Meas Muth’s Application to Seize the Pre-Trial Chamber with a Request for Annulment of all Investigative Action Concerning Toek Sap, 8 Feb 2016.

<sup>245</sup> D1 IS, fn. 226 citing D1.3.13.8 Pen Sarin OCP Statement, EN 00217562.

<sup>246</sup> See *infra*, paras 73-5.

<sup>247</sup> D1 IS, paras 59-61. See further D134/1/10 PTC Decision on Two Annulment Applications, paras 24-34 (Judges Beauvallet and Bwana); D134/1/6 [ICP’s] Response to Meas Muth’s Appeal Against the [ICIJ’s] Decision on Meas Muth’s Applications to Seize the [PTC] with Two Requests for Annulment of Investigative Action (“ICP Appeal Response on Two Annulment Applications”), 13 Jul 2015, paras 23-7; D47 Forwarding Order, 24 Apr 2012, paras 2, 5-6; D47/1 [ICP’s] Response to Forwarding Order of 24 April 2012, para. 6; D54 Rogatory Letter, 7 Feb 2013, Annex I, EN 00885629.

<sup>248</sup> See *infra*, paras 76-8.

<sup>249</sup> D1 IS, paras 59-61. See further D165/2/26 PTC Decision on Nine Annulment Applications, paras 207-11, 214.

<sup>250</sup> See further D165/2/16 [ICP’s] Response on the Merits of Meas Muth’s Application to Seize the [PTC] with a Request for Annulment of all Investigative Action Concerning Kang Keng Forced Labour and Reeducation Sites, 8 Feb 2016; D165/2/26 PTC Decision on Nine Annulment Applications, paras 175-84 (Judges

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and Bet Trang<sup>251</sup> fell squarely within the scope of Case 003 allegations concerning the “frequent and arbitrary arrests and forced labor” of Division 164 personnel<sup>252</sup> as these were forced labour worksites under the authority of Division 164<sup>253</sup> and were used for the purposes of reeducating/refashioning individuals, including Division 164 “no-good elements.”<sup>254</sup> Some of the Division 164 military minutes supporting the assertion in the Introductory Submission that Meas Muth reported on the arrest of internal enemies refer to Kang Keng as the site of the arrest of soldiers by Division 164.<sup>255</sup> Since Durian I, Durian II (also known as Ou Trav Durian Plantation) and the Centre d’Instruction (“C.I.”), served as execution sites for the Ream forced labourers,<sup>256</sup> they were intrinsically connected to the operations of these sites.

68. Purges of other RAK Divisions: The ICP seized the CIJs with the purge of all RAK Centre Divisions, Independent Regiments, and General Staff members, including personnel sent to S-21 from Divisions 164, 502 and 310.<sup>257</sup> As alleged in the Introductory Submission, Meas Muth was responsible for the crimes committed against those RAK prisoners by virtue of his contributions to the JCE to purge enemies and traitors from the RAK divisions that reported to the General Staff.<sup>258</sup> The purges of Division 310 and 502 more generally are elucidated further in paragraphs 44-51, and 66 of the Introductory Submission.<sup>259</sup> The CIJs were also hereby seized<sup>260</sup> of the purge of Division 117 in late 1978, as this was a Centre Division which reported directly to the General Staff.<sup>261</sup>

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Beauvallet and Baik); **D47/1** [ICP’s] Response to Forwarding Order of 24 April 2012, para. 8.

<sup>251</sup> See further **D134/1/10** PTC Decision on Two Annulment Applications, paras 35-46 (Judges Beauvallet and Bwana); **D134/1/6** ICP Appeal Response on Two Annulment Applications, paras 23, 28-33; **D47** Forwarding Order, 24 Apr 2012, paras 2, 5, 7; **D47/1** [ICP’s] Response to Forwarding Order of 24 April 2012, paras 7-8; **D54** Rogatory Letter, 7 Feb 2013, Annex I, EN 00885629, referring to **D1** IS, paras 52, 86(a).

<sup>252</sup> **D1** IS, para. 52. See further **D165/2/26** PTC Decision on Nine Annulment Applications, paras 212-4.

<sup>253</sup> See *infra*, para. 76.

<sup>254</sup> See *infra*, paras 76-7.

<sup>255</sup> **D1** IS, para. 52, fn. 216 citing **D1.3.8.4** DK Military Meeting Minutes, 9 Sep 1976.

<sup>256</sup> See *infra*, paras 77-8.

<sup>257</sup> **D1** IS, paras 43, 65-6.

<sup>258</sup> **D1** IS, para. 43, incorporating by reference paras 33-41.

<sup>259</sup> See, in particular, **D1** IS, paras 45 [“Division 502 personnel were subjected to the constant fear of arrest or execution [...] those committing mistakes would be arrested [...] Those who were arrested never returned. Personnel who were accused of having traitorous links were sent away. Many were sent to S-21, where they were executed [...] the purge within the Division continued”], 49 [discussing the developments of “the purge of Division 310”], 66 [“the purge of the RAK was also conducted at other crime sites”].

<sup>260</sup> It is clear from the word “including” in **D1** IS, para. 43 that the divisions named were not intended to be the exhaustive list, and it fell to the CIJs to identify all “regular” RAK divisions. See further **D165/2/17** [ICP’s] Response on the Merits of Meas Muth’s Application to Seise the Pre-Trial Chamber with a Request for Annulment of All Investigative Action and Charges Concerning Purges in Kratie (Sector 505) in Late 1978, 8 Feb 2016. See also **D165/2/26** PTC Decision on Nine Annulment Applications, paras 156-65 (Judges Beauvallet and Baik).

<sup>261</sup> After its formation in Longveaek as a branch of West Zone Division 1, Division 117 was transferred to



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Indeed, the S-21 prisoner list annexed to the Introductory Submission lists a number of detainees from Division 117.<sup>262</sup> The list also records the names of cadres purged from Sector 505 in late 1978.<sup>263</sup> The purge of Sector 505 cadres was part of the same operation that purged Division 117 and the two are indivisibly bound.<sup>264</sup>

69. Any possible doubt as to whether these crime sites and events fell within the scope of the Introductory Submission were dispelled when the ICP clarified the scope of Case 003 in the Supplementary Submission.<sup>265</sup> The Supplementary Submission also seized the CIJs with facts relating to forced marriage and rape arising from forced consummations.<sup>266</sup>

*These crimes significantly enhance the gravity of the crimes for which Meas Muth is responsible*

70. The scale, scope and impact of the crimes for which Meas Muth can be held responsible are significantly greater than that considered in the Dismissal Order. One cannot evaluate his responsibility without considering the full extent of Meas Muth's roles in crimes against those captured at sea, RAK personnel, and civilians under his control in Kampong Som Sector. The depravity of Meas Muth's conduct and the gravity of his crimes can

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Kratie and placed under the control of the General Staff. See **D256/7** ICP Final Submission, para. 856.

<sup>262</sup> See, e.g., **D1** IS, fn. 141 *citing* **D1.3.33.1** Combined S-21 Prisoner List, EN 00171540 [Khun Sarom (Khun Rom), Div. 117 Secretary, entry 8 Dec 1978]; EN 00171675 [Rat Leang (Roath Leang), Div. 117 Deputy Secretary, entry 1 Dec 1978]; EN 00171737 [Svay Nonh (Svay Naunh), Chief of Division 117 office, entry 29 Nov 1978].

<sup>263</sup> **D1** IS, fn. 141 *citing* **D1.3.33.1** Combined S-21 Prisoner List, EN 00171461 (Chhim Khon, Deputy Secretary of Kratie Sector. From **D1.3.28.137** S-21 Prisoner List, 15 Dec 1978, EN 00758336 (No. 4), Chhim Khon entered S-21 on 2 Dec 1978); **D1.3.33.1** Combined S-21 Prisoner List, EN 00171595 (Meas Moeun, entered S-21 on 8 Dec 1978. From **D1.3.28.137** S-21 Prisoner List, 15 Dec 1978, EN 00758337 (No. 15), Meas Moeun was Secretary of Sector 505).

<sup>264</sup> Although holding notionally civilian positions at the time, the high-ranking Sector 505 cadres purged in late 1978, including Sector Secretary Meas Moeun, Kratie District Secretary Huon Yeng and Snuol District Secretary Chhum Chin *alias* Phoan were RAK military cadres, some from Division 117 itself, and each of these men was involved in the border fighting with Vietnam alongside the Division 117 military cadres. See **D256/7** ICP Final Submission, paras 855, 858. Moreover, the arrests of the senior Division 117 and Sector 505 cadres and civilians were contemporaneous, motivated by the same perception of treachery after military defeats against the Vietnamese. The arrestees were brought to S-21 together and the meeting called by Meas Muth as the purge was underway convened both military and civilian cadres. See **D256/7** ICP Final Submission, paras 859-863. See further **D165/2/17** [ICP's] Response on the Merits of Meas Muth's Application to Seize the Pre-Trial Chamber with a Request for Annulment of All Investigative Action and Charges Concerning Purges in Kratie (Sector 505) in Late 1978, 8 Feb 2016. See also **D165/2/26** PTC Decision on Nine Annulment Applications, paras 166-70 (Judges Beauvallet and Baik).

<sup>265</sup> Internal Rules 53, 55(3); **D120** Supplementary Submission, paras 6 (Durian I and Bet Trang), 7-9 (Kang Keng and Durian II), 10-11 (Toek Sap), 12-14 (Purge of Division 117 and Sector 505 cadres in Kratie in late 1978), 15-19 (Ream Area worksites, cooperative and related execution sites). The ICP notes that whilst Meas Muth sought to annul this Supplementary Submission, the PTC judges failed to reach a supermajority and the validity of the Supplementary Submission was thereby confirmed. See **D120/3/1/8** Considerations on Meas Muth's Appeal Against the International Co-Investigating Judge's Re-Issued Decision on Meas Muth's Motion to Strike the International Co-Prosecutor's Supplementary Submission, 26 Apr 2016.

<sup>266</sup> **D120** Supplementary Submission, paras 20-4.

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only be appreciated when one considers that he contributed to a great multitude of crimes, over a long period of time and at multiple locations.<sup>267</sup>

71. *Forced Marriage and Rape*: The Dismissal Order fails to consider forced marriages and rapes (forced consummation) that were part of the criminal conduct of Meas Muth. To implement the CPK policy to increase the population in the Kampong Som Sector, weddings were regularly arranged both for military personnel and civilians from late 1975 until the end of the regime.<sup>268</sup> Women – including many from Division 164’s Female Battalion 167,<sup>269</sup> and civilians<sup>270</sup> – were forced to marry Division 164 combatants.<sup>271</sup> Marriages took place in coercive circumstances where genuine individual consent was not possible.<sup>272</sup> Those chosen for these marriages often feared the consequences of refusal.<sup>273</sup> Some who refused to marry were threatened, and others punished.<sup>274</sup> Up to 71 couples were married in a single ceremony.<sup>275</sup> The weddings lacked the ceremonies traditional for Cambodians. Families were often absent and many were married with little or no prior notice.<sup>276</sup> It is probable that hundreds of people were forced into marriages in the Kampong Som areas under Meas Muth’s control.<sup>277</sup>
72. Those coerced to marry were then expected or ordered to have sexual intercourse.<sup>278</sup> Victims of forced marriage and rape suffered multiple forms of trauma.<sup>279</sup> This conduct should have been legally characterised as the crime against humanity of other inhumane acts (forced marriage and rape).<sup>280</sup>
73. *Toek Sap Security Centre*: The Dismissal Order fails to consider Meas Muth’s responsibility for crimes at Toek Sap security centre.<sup>281</sup> The evidence that suggests over

<sup>267</sup> Meas Muth’s participation in these crimes is discussed elsewhere in this Appeal. *See infra*, paras 28-32, 96, 98-107, 121-134.

<sup>268</sup> **D256/7** ICP Final Submission, paras 198-201, 205, 799, 800-20, 822-6 and fns 3329-31.

<sup>269</sup> **D256/7** ICP Final Submission, para. 827.

<sup>270</sup> **D256/7** ICP Final Submission, paras 821, 827.

<sup>271</sup> **D256/7** ICP Final Submission, paras 827-9.

<sup>272</sup> **D256/7** ICP Final Submission, paras 814-7, 204-5, 823, 827, 829-30, 835, 837

<sup>273</sup> **D256/7** ICP Final Submission, paras 827, 835-7.

<sup>274</sup> **D256/7** ICP Final Submission, paras 203, 836, 838 [*see also*, para. 817].

<sup>275</sup> **D256/7** ICP Final Submission, paras 205, 826.

<sup>276</sup> **D256/7** ICP Final Submission, paras 826, 832-3, 828 [*see also*, paras 800, 818].

<sup>277</sup> **D256/7** ICP Final Submission, paras 205, 1091.

<sup>278</sup> **D256/7** ICP Final Submission, paras 839-42 [*see also*, para. 818].

<sup>279</sup> **D256/7** ICP Final Submission, para. 843.

<sup>280</sup> **D256/7** ICP Final Submission, para. 1136.

<sup>281</sup> Toek Sap was a Division 164 security centre and execution site in Kampong Som Sector administered by Regiment 63 from at least mid-November 1975 until the end of the DK period. **D256/7** ICP Final Submission, paras 65, 158, 237, 481-8.

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1,000 inmates were arbitrarily imprisoned and/or immediately executed at the site,<sup>282</sup> including (i) demobilised Division 164 combatants;<sup>283</sup> (ii) former Lon Nol combatants who had surrendered in April 1975;<sup>284</sup> (iii) civilians from the Kampong Som Sector considered “enemies” of the revolution,<sup>285</sup> including 17 April people and Khmer Krom civilians;<sup>286</sup> and (iv) Vietnamese, Thai and other foreign nationals captured by the DK Navy.<sup>287</sup> Some of the victims were children.<sup>288</sup> The main prison held up to 100 detainees at any one time and an additional 60 prisoners were detained at the sawmill.<sup>289</sup>

74. Prisoners endured inhumane conditions. Most were shackled and cuffed.<sup>290</sup> Many were forced to work in gruelling conditions in chains or tied together with ropes pierced through their ears.<sup>291</sup> Detainees were malnourished, tortured, and suffered severe psychological and physical trauma.<sup>292</sup> There is overwhelming evidence that the vast majority of the prisoners were executed. Hundreds of prisoners were taken to Toek Sap and disappeared,<sup>293</sup> and at least a thousand bodies were found in the adjoining plantations, with some buried as fertiliser for the durian trees.<sup>294</sup>
75. These acts should have been legally characterised as the crimes against humanity of extermination, murder, imprisonment, torture, other inhumane acts (inhumane treatment and enforced disappearances), and persecution on political grounds; and grave breaches of the Geneva Conventions (unlawful confinement of a civilian, wilful killing and wilfully causing great suffering or injury to body or health).<sup>295</sup>
76. *Ream Area Worksites and Execution Sites*: The Dismissal Order makes no mention of facts about various Division 164<sup>296</sup> worksites and cooperatives in the Ream area where

<sup>282</sup> D256/7 ICP Final Submission, paras 159, 438-40, 492, 503-5, 519.

<sup>283</sup> D256/7 ICP Final Submission, paras 342, 346, 354, 364, 366, 494-6.

<sup>284</sup> D256/7 ICP Final Submission, para. 499.

<sup>285</sup> D256/7 ICP Final Submission, paras 497, 714.

<sup>286</sup> D256/7 ICP Final Submission, paras 498, 711-3.

<sup>287</sup> D256/7 ICP Final Submission, paras 146, 347, 364, 410, 412, 425, 427-30, 485, 491, 500-1, 523.

<sup>288</sup> D256/7 ICP Final Submission, paras 502, 522.

<sup>289</sup> D256/7 ICP Final Submission, para. 503.

<sup>290</sup> D256/7 ICP Final Submission, para. 506.

<sup>291</sup> D256/7 ICP Final Submission, paras 506, 509-11.

<sup>292</sup> D256/7 ICP Final Submission, paras 364, 507-8, 511-5.

<sup>293</sup> D256/7 ICP Final Submission, paras 516, 518-20.

<sup>294</sup> D256/7 ICP Final Submission, paras 505, 520-2.

<sup>295</sup> D256/7 ICP Final Submission, para. 1136.

<sup>296</sup> The Ream area worksites and execution sites were administered by Regiment 63 throughout the regime, with a battalion of Regiment 62 stationed near Ream beach, where one of their functions was to receive prisoners captured on the islands and at sea. D256/7 ICP Final Submission, paras 237-41, 337-8, 662-6, 668, 672-3, 718. For details of the sites, see D256/7 ICP Final Submission, paras 649-61, 676-7.

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thousands of soldiers and civilians were enslaved.<sup>297</sup> Workers from the army were primarily demobilised Division 164 cadres,<sup>298</sup> while the civilians, including children and the elderly,<sup>299</sup> were Thai fishermen captured at sea, soldiers' families, 17 April people, local villagers, Khmer Krom and East Zone people.<sup>300</sup> In September 1976, Meas Muth reported that 17,000 were engaged in rice production alone in Kampong Som Sector.<sup>301</sup>

77. Labourers were forced to work to fulfil unreasonable quotas and enjoyed no freedom of movement.<sup>302</sup> Work and living conditions were inhumane.<sup>303</sup> Some of the sick, or anyone considered lazy or unable to meet their quotas, or who had committed other 'mistakes' were beaten or forced to work harder.<sup>304</sup> Overworked, emaciated, often sick, with insufficient sleep, many dared not complain for fear of punishment.<sup>305</sup> Workers died from overwork, starvation, and illness.<sup>306</sup> Those who were accused of committing 'offences' were sent to Stung Hav, Toek Sap, the Durian I or Durian II Plantations, C.I., or S-21.<sup>307</sup> Large numbers of 17 April people,<sup>308</sup> those perceived as "Lon Nol agents",<sup>309</sup> demobilised Division 164 soldiers,<sup>310</sup> and Khmer Krom<sup>311</sup> disappeared never to be seen again. Following the DK regime, witnesses saw burial pits and mass graves with corpses, bones, skulls and clothes scattered at the execution sites.<sup>312</sup> These acts should have been legally characterised as the crimes against humanity of extermination, murder, enslavement, other inhumane acts (inhumane treatment and enforced disappearances),

<sup>297</sup> D256/7 ICP Final Submission, paras 187, 649.

<sup>298</sup> D256/7 ICP Final Submission, paras 342, 345, 353, 360, 366, 670, 674, 690-8 [e.g. former Battalion 386 under Chhan, those "affiliated" with the Lon Nol regime, soldiers captured and released by the Vietnamese, the "East Zone" network under Dim, or anyone accused of committing offences].

<sup>299</sup> D256/7 ICP Final Submission, paras 674, 682, 711, 730.

<sup>300</sup> D256/7 ICP Final Submission, paras 397, 671, 674, 688-9, 699-701.

<sup>301</sup> D256/7 ICP Final Submission, paras 656, 674-5. Whilst the ICP does not assume that every one of these was based in the Ream area, he notes that this was the primary rice production area in Kampong Som Sector, and that the number is indicative of the magnitude of the numbers enslaved in this area. [see also, paras 180, 341, 468].

<sup>302</sup> D256/7 ICP Final Submission, paras 676-80.

<sup>303</sup> D256/7 ICP Final Submission, paras 187, 679-85, 727-35 [long hours of work without breaks, insufficient food, and punished with even smaller rations if they could not work].

<sup>304</sup> D256/7 ICP Final Submission, paras 682, 684, 731-2.

<sup>305</sup> D256/7 ICP Final Submission, paras 684-5, 730.

<sup>306</sup> D256/7 ICP Final Submission, paras 727-8, 731.

<sup>307</sup> D256/7 ICP Final Submission, paras 354, 679, 682-5, 702-4, 714-6, 719-25, 733. For further details regarding Durian II and C.I. execution sites, see paras 660 (Durian II), 661 (C.I.).

<sup>308</sup> D256/7 ICP Final Submission, paras 705, 716, 722, 724.

<sup>309</sup> D256/7 ICP Final Submission, para. 706.

<sup>310</sup> D256/7 ICP Final Submission, para. 724

<sup>311</sup> D256/7 ICP Final Submission, paras 707-16.

<sup>312</sup> D256/7 ICP Final Submission, paras 717-8, 723, 726.

and persecution on political grounds.<sup>313</sup>

78. Durian I Plantation: The Dismissal Order fails to make any findings about the “Durian I” execution site<sup>314</sup> which was used as an execution site for persons taken from Ream area worksites, and for foreigners – including Thai and Vietnamese – captured by the DK Navy.<sup>315</sup> After the DK regime, witnesses saw burial pits and graves and bodies buried under the durian trees as fertiliser.<sup>316</sup> The numbers killed are likely in their hundreds.<sup>317</sup> These facts should have been legally characterised as genocide, the crimes against humanity of extermination, murder, other inhumane acts (enforced disappearances) and persecution on political grounds; and grave breaches of the Geneva Conventions (wilful killing).<sup>318</sup>
79. RAK Purges: Kratie (Division 117 and Sector 505): Meas Muth was assigned to conduct the purge in Kratie of high-ranking Division 117 and Sector 505 officials in Kratie in late November 1978 and lower-level military cadres and civilians accused of treachery.<sup>319</sup> During this purge, at least 32 people were transferred to Phnom Penh and subsequently executed in S-21.<sup>320</sup> Others were imprisoned either in Pochentong Market in Phnom Penh or in security centres in Kratie Province, or “disappeared forever”.<sup>321</sup> In addition, Meas Muth personally ordered the unlawful killing of the Sector military cadre, Mao Oeung.<sup>322</sup> A group of 11 Division 117 soldiers were arrested and killed at the end of the regime, accused of betrayal,<sup>323</sup> and several senior cadres and 10-20 soldiers in Regiment 17 of Division 117 were called to join study sessions and disappeared.<sup>324</sup>
80. Divisions 502 and 310:<sup>325</sup> The Dismissal Order fails to take into account in its personal

<sup>313</sup> D256/7 ICP Final Submission, para. 1136.

<sup>314</sup> D256/7 ICP Final Submission, paras 658-9, 718

<sup>315</sup> D256/7 ICP Final Submission, paras 659, 716.

<sup>316</sup> D256/7 ICP Final Submission, paras 717-8.

<sup>317</sup> D256/7 ICP Final Submission, paras 716-8. *See also* D267 Indictment, para. 267.

<sup>318</sup> D256/7 ICP Final Submission, para. 1136.

<sup>319</sup> D256/7 ICP Final Submission, paras 120-4, 860-8, 876.

<sup>320</sup> D256/7 ICP Final Submission, paras 550-1, 861, 868-9.

<sup>321</sup> D256/7 ICP Final Submission, paras 867, 870-2.

<sup>322</sup> D256/7 ICP Final Submission, paras 867, 874.

<sup>323</sup> D114/203 Menh Noeum WRI, A25-39.

<sup>324</sup> D114/203 Menh Noeum WRI, A38.

<sup>325</sup> The ICP notes that, other than those sent to S-21, he did not seek indictment in his Final Submission for other crimes committed pursuant to the purges of Divisions 502 and 310, since he was of the view that these should be excluded from the investigation pursuant to Internal Rule 66bis (D184/2 [ICP’s] Response to the [ICIJ’s] Request for Comments, 29 Apr 2016, para. 22). However, the ICIJ rejected this submission and retained these facts within the scope of Case 003 (D184/3 Notice of Provisional Discontinuance Regarding Individual Allegations, 24 Aug 2016, para. 21). For further details of the make-up of Divisions 502 and 310,

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jurisdiction decision Meas Muth's role in the purge of Divisions 502 and 310. The OCIJ S-21 prisoner list identifies 357 military from Division 502 and 1,117 from Division 310 sent to S-21.<sup>326</sup> In addition, 150 former East Zone soldiers from Division 502 were transferred to a village near Ta Khmao for re-education. All but 15 disappeared after being taken away accused of treachery.<sup>327</sup>

81. *Other Divisions*: In addition to Divisions 164, 117, 502 and 310, roughly 3,330 other members of RAK Centre Divisions and Independent Regiments and General Staff were sent to S-21 where they were detained, tortured and executed.<sup>328</sup>
82. Those acts taking place at locations other than S-21 should have been legally characterised as the crimes against humanity of extermination, murder, imprisonment, other inhumane acts (enforced disappearances), and persecution on political grounds. At S-21, these acts should have been legally characterised as the crimes against humanity of extermination, murder, imprisonment, torture, persecution on political grounds, and other inhumane acts (inhumane treatment and enforced disappearances).<sup>329</sup>

**D. LEGAL AND FACTUAL ERRORS IN THE DISMISSAL ORDER'S TREATMENT OF COERCION, DURESS, AND SUPERIOR ORDERS WHEN DETERMINING LEVEL OF RESPONSIBILITY FOR CRIMES COMMITTED**

***1. The Dismissal Order accorded excessive weight to superior orders and duress in the analysis of personal jurisdiction***

83. The Dismissal Order's finding that Meas Muth was not within the category of those most responsible for the crimes of the DK regime places emphasis on the fact that Meas Muth: (i) was subject to superior orders from Son Sen and the Standing Committee;<sup>330</sup> (ii) was merely tasked with implementing and disseminating the Party Centre policies;<sup>331</sup> and (iii)

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as well as the conduct of the purges, *see* D267 Indictment, paras 292-4, 300-2 (Division 502), 295-7, 304-34 (Division 310).

<sup>326</sup> D256/7 ICP Final Submission, paras 172, 552, *citing* D114/230.1.1 OCIJ S-21 Prisoner List [identifying Division 310 – 1,117 prisoners; Division 502 – 357 prisoners].

<sup>327</sup> D45 Thorng Channa WRI, EN 00802846-9.

<sup>328</sup> D256/7 ICP Final Submission, paras 172, 552, *citing* D114/230.1.1 OCIJ S-21 Prisoner List [identifying the following numbers of prisoners as "Arrested From" the other divisions, regiments and offices that comprised the RAK and whose leaders participated with Meas Muth in the Division Secretaries meetings: Division 170 – 403 prisoners; Division 290 – 441 prisoners; Division 450 – 509 prisoners; Division 703 – 676 prisoners; Division 801 – 35 prisoners; Division 920 – 395 prisoners; Regiment 152 – 291 prisoners; Regiment 377 – 53 prisoners; Regiment 488 – 77 prisoners; General Staff – 453 prisoners.] For details on detention, torture and execution at S-21, *see* D256/7 ICP Final Submission, paras 553-93.

<sup>329</sup> D256/7 ICP Final Submission, para. 1136.

<sup>330</sup> D266 Dismissal Order, paras 121, 166, 212, 216, 226, 252, 257, 316, 322, 415, 424.

<sup>331</sup> D266 Dismissal Order, paras 97-8, 167, 226, 232, 248, 277, 305, 322, 387, 416, 418, 420.

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was acting under duress within the coercive system created by the CPK.<sup>332</sup> The Dismissal Order finds that Meas Muth had no prominent role or authority during the DK regime as the 30 March 1976 Central Committee instructions would not have given him the right to smash inside and outside the Party ranks<sup>333</sup> and he would not have been a member of the Central Committee.<sup>334</sup> The Dismissal Order at times portrays Meas Muth as a lower level cadre,<sup>335</sup> without power to make any consequential decisions, even as to the arrest of persons under his control.<sup>336</sup>

84. The three ECCC persons convicted and sentenced to life imprisonment had also claimed in the past that they were only following orders and feared for their safety if they did not obey. Khieu Samphan claimed that he had no decision-making power,<sup>337</sup> disagreed with certain aspects of CPK policy but stated, “I would not have survived if I dared to reveal any disagreement or objection to anything.”<sup>338</sup> Duch said he was terrified and feared for his life.<sup>339</sup> Even Nuon Chea told his biographers that he feared being called an enemy after so many leading cadres were taken to prison and tortured.<sup>340</sup> Indeed, many of those whom the Dismissal Order identifies as theoretical candidates for prosecution at the ECCC - by reference to their membership of the Standing Committee and/or Central Committee<sup>341</sup> - were in fact purged.<sup>342</sup> If following orders from a superior authority excluded a person from being among those senior leaders or most responsible for DK

<sup>332</sup> **D266** Dismissal Order, paras 98, 100, 256, 284, 386, 412, 415, 420.

<sup>333</sup> **D266** Dismissal Order, paras 130, 169, 232, 246, 254, 271, 425.

<sup>334</sup> **D266** Dismissal Order, paras 111-2, 115, 117, 118-9, 121-2.

<sup>335</sup> **D266** Dismissal Order, paras 256 [“Meas Muth’s assertion confirms that lower levels had to obey orders”, where Meas Muth suggested he was himself a low-level cadre], 419 [“Meas Muth was under around 50 (fifty) cadres and held the same position as many other cadres”], 423 [“[documents] do not show Meas Muth’s initiative and order to arrest or execute [anyone] other than the reports”], 428 [“Meas Muth had several roles, but he did not exercise much power”], 387 [“Cadres at lower levels were tasked to disseminate policies and/or implement orders only”], 401 [“the prosecution of these senior leaders shall not extend to low-level cadres besides Duch”], 386. *See also* **D54/1.1** Meas Muth Statement, *A Last Stand* (Southeast Asia Globe), 27 Jul 2011, EN 00915788 [“I was a lower officer [...] I was not a Khmer Rouge leader”].

<sup>336</sup> **D266** Dismissal Order, paras 254, 283, 418, 428.

<sup>337</sup> **D4.1.192** Khieu Samphan Statement (SOAS/HRW), 17 Aug 2005, EN 00184680; **D1.3.33.15** Khieu Samphan WRI, EN 00156750; **D4.1.1074** Khieu Samphan WRI, EN 00156757.

<sup>338</sup> **D4.1.1074** Khieu Samphan WRI, EN 00156757. *See also* **D4.1.1075** Khieu Samphan WRI, EN 00156949.

<sup>339</sup> *See infra*, para. 110, fn. 454-5.

<sup>340</sup> **D234/2.1.14** G. Chon & T. Sambath, *Behind the Killing Fields*, EN 00757519 (p. 81, bottom).

<sup>341</sup> **D266** Dismissal Order, paras 395 [“[Senior leaders] refer merely to members of the Central Committee of the CPK and the Party Standing Committee. Even though there was no name list of those people, the working group was likely to refer specifically to top leaders [...] who were all members of the Standing Committee and/or the Central Committee of the CPK”], 365, 406.

<sup>342</sup> For example, Vorn Vet, Sao Phim, Koy Thuon and Ros Nhim were members of the Standing Committee and/or Central Committee (**D266** Dismissal Order, paras 108, 117, 126-7, 139, 273), yet they were all “smashed”, or in Sao Phim’s case committed suicide when his purge was inevitable, before the end of the DK Regime (**D266** Dismissal Order, paras 100, 108, 126).

crimes, no one would have been prosecuted: all could claim Pol Pot was above them and tolerated no dissent.

85. The SCC has held that the existence of superior orders does not preclude a finding that a suspect is among those “most responsible”:

embark[ing] upon a relative assessment of [...] criminal responsibility within the DK [...] would amount to indirectly permitting a defence of superior orders and would frustrate the express provisions of the ECCC Law, including Article 29.<sup>343</sup>

At least since the London Charter established the International Military Tribunal (“IMT”) at Nuremberg,<sup>344</sup> it has been clear that under customary international law, those acting pursuant to superior orders remain criminally responsible for any international crimes they commit.<sup>345</sup> Similarly, the ECCC Law<sup>346</sup> and the 1956 Penal Code<sup>347</sup> both establish that an illegal order from a superior does not relieve the suspect of individual criminal responsibility. Nor, where the order is manifestly unlawful, such as an order to commit

<sup>343</sup> Case 001-F28 *Duch* AJ, para. 62.

<sup>344</sup> Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis, London, 8 Aug 1945 (“London Charter”), 82 UNTS 279, art. 8 [“The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.”].

<sup>345</sup> See e.g. Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 Dec 1945 (“Control Council Law No. 10”), art. II(4)(b) [“The fact that any person acted pursuant to the order of his Government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation.”]; Charter of the International Military Tribunal for the Far East, 19 Jan 1946, art. 6; Statute of the International Criminal Tribunal for the former Yugoslavia, 25 May 1993 as updated Sep 2009, art. 7(4) [“The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires”]; Statute of the International Criminal Tribunal for Rwanda, 8 Nov 1994 as amended 26 Mar 2004, art. 6(4); Statute of the Special Court for Sierra Leone, annexed to the Agreement between the United Nations and the Government of Sierra Leone on the establishment of the Special Court for Sierra Leone, Freetown, 15 Jan 2002 (“SCSL Statute”), art. 6(4); Security Council Resolution 1757, Attachment, Statute of the Special Tribunal for Lebanon, UN Doc. S/RES/1757, 30 May 2007, art. 3(3); *United States v. List et al.*, Opinion and Judgment, 19 Feb 1948, Trials of War Criminals before the Nürnberg Military Tribunals Under Control Council Law No. 10 (“TWC”), Vol. XI, pp. 1236-7; *Šainović* AJ, para. 1661. See further *Taylor* TJ, para. 476 [“an intermediary lower in the chain of command who passes the order on to the perpetrator may also be held responsible for ordering the underlying offence as long as he has the requisite state of mind.”] upheld in *Taylor* AJ, 26 Sep 2013, para. 589; *Kupreškić* TJ, para. 862; *Milutinović* TJ, Vol 1 of 4, para. 87.

<sup>346</sup> ECCC Law, art. 29(4) [“The fact that a Suspect acted pursuant to an order of the Government of Democratic Kampuchea or of a superior shall not relieve the Suspect of individual criminal responsibility”]. See also Case 001-E188 *Duch* TJ, para. 552 [“acting pursuant to superior orders does not constitute a legitimate defence to charges of crimes against humanity and war crimes”]. See further Case 001-E188 *Duch* TJ, para. 527; Case 002-E313 Case 002/01 Judgement, 7 Aug 2014 (“Case 002/01 TJ”), para. 702 [“Responsibility may ensue where an accused issues, passes down or otherwise transmits an order, including through intermediaries.”].

<sup>347</sup> Cambodian Penal Code, 1956, art. 100 [“In the case of illegal orders given by a lawful authority the judge shall determine on a case by case basis the criminal responsibility of those executing the orders” (unofficial translation).]



genocide or crimes against humanity,<sup>348</sup> can the charged person claim any mitigation of sentence.<sup>349</sup> In the face of manifestly illegal orders, the duty is to disobey rather than to obey.<sup>350</sup> As such, where an accused acted on the basis of manifestly unlawful orders, this should not impact upon an assessment of his level of responsibility or personal jurisdiction.<sup>351</sup>

86. The Judges of the IMT agreed:

[Wilhelm Keitel's] defense relies on the fact that he is a soldier, and on the doctrine of "superior orders", prohibited by Article 8 of the Charter as a defense.

There is nothing in mitigation. Superior orders, even to a soldier, cannot be considered in mitigation where crimes as shocking and extensive have been committed consciously, ruthlessly, and without military excuse or justification.<sup>352</sup>

87. In Case 001, rejecting a plea of superior orders, the Trial Chamber found that "[Duch] also knew that orders of the Government of DK to commit these offences were

<sup>348</sup> See e.g. ICC Statute, art. 33(2).

<sup>349</sup> *United States v. Ohlendorf et al.*, Opinion and Judgment, 8-9 Apr 1948 ("*Einsatzgruppen Judgment*"), TWC, Vol. IV, pp. 470-1: ["The obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent. He does not respond, and is not expected to respond, like a piece of machinery. It is a fallacy of wide-spread consumption that a soldier is required to do everything his superior officer orders him to do. [...] The subordinate is bound only to obey the lawful orders of his superior and if he accepts a criminal order and executes it with a malice of his own, he may not plead superior orders in mitigation of his offense. If the nature of the ordered act is manifestly beyond the scope of the superior's authority, the subordinate may not plead ignorance to the criminality of the order]. See also *United States v. Milch*, Judgment, 16-17 Apr 1947, reported in Law Reports of Trials of War Criminals ("*LRTWC*"), Vol VII, pp. 40-2, 65 [The US Military Tribunal rejected a plea of superior orders in mitigation on the grounds that the orders related to the waging of a war of aggression involving the commission of persecution and terrorism, which the defendant *must have known* were illegal]. See further *Buck et al.*, British Military Court, Wuppertal (6-10 May 1946), reported in LRTWC, Vol V, pp. 42-3: ["The Judge Advocate stated that in principle, superior orders provided no defence to a criminal charge [...] The Judge Advocate expressed the view that an accused would be guilty if he committed a war crime in pursuance of an order, first if the order was *obviously unlawful*, secondly if the accused *knew that the order was unlawful*, or thirdly if he *ought to have known it to be unlawful had he considered the circumstances in which it was given.*"; *Golkel et al.*, British Military Court, Wuppertal, Germany, 15-21 May 1946 ("*Golkel Case*"), reported in LRTWC, Vol. V, p. 51 ["It was no defence to plead superior orders when these were *obviously unlawful*, as they were in the "*Llandoverly Castle*" Case. Nor did the defence hold good if an accused either *knew that the orders were unlawful or must be deemed from the surrounding circumstances to have known that they were unlawful.*"].

<sup>350</sup> *Erdemović* AJ Cassese Opinion, para. 15; *Erdemović* 1996 SJ, para. 18; *Mrkšić & Šljivančanin* AJ, fn. 331; ICRC (International Committee of the Red Cross), Customary IHL Database, Rule 154, available at [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule154](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule154).

<sup>351</sup> As mentioned by the NCIJ in **D266** Dismissal Order, para. 368, "the consideration of the personal jurisdiction does not differ from the consideration given when a sentence is imposed".

<sup>352</sup> *United States et al. v. Göring et al.*, Judgment, 1 Oct 1946 ("*IMT Judgment*"), Trial of the Major War Criminals before the International Military Tribunal, Vol. I, pp. 290-1. See also IMT Judgment, p. 325 ["[Alfred Jodl's] defense, in brief, is the doctrine of "superior orders", prohibited by Article 8 of the Charter as a defense. There is nothing in mitigation. Participation in such crimes as these has never been required of any soldier and he cannot now shield himself behind a mythical requirement of soldierly obedience at all costs as his excuse for commission of these crimes."].

unlawful.”<sup>353</sup> This also applies to Meas Muth’s situation: by fully implementing Son Sen and the Party Centre’s manifestly unlawful orders to force the population to work, forcibly marry couples and to arrest, imprison, torture, persecute or execute perceived enemies without a justifiable legal basis and without any due process of law, Meas Muth knew he was participating in crimes and that the orders received could never relieve him of individual criminal responsibility or provide mitigation of any kind.

88. The Dismissal Order goes on to argue that all superior orders from the DK upper echelons were accompanied by duress or coercion: that Meas Muth, like any other DK cadre, had to obey superior orders by fear of being personally arrested and executed.<sup>354</sup> This argument is unpersuasive for several reasons. First, the Dismissal Order cites only one statement from Meas Muth supporting an assertion that Meas Muth himself felt any duress or coercion to implement orders.<sup>355</sup> Moreover, the Dismissal Order tellingly omitted to refer to Meas Muth’s entire statement, which led him to revealingly compare himself and Duch to German Reichsmarschall Hermann Göring: “For me, there is no problem with the court. I will say everything: what I know and what I did. The low ranks had to respect the orders. It was like under Hitler. Hitler asked Goering to kill the Jews. If Goering did not do it, he would have been killed. Like [former S-21 chief] Mr Duch, he was ordered to kill people and if he did not kill them, he would have been killed”.<sup>356</sup> While Meas Muth may very well be correct that Nazi leaders who opposed the criminal policies of Hitler put their lives at risk, no court has ever recognised that as a reason to forego prosecuting those who carried out these criminal policies. Hermann Göring was sentenced to death at Nüremberg,<sup>357</sup> just as Duch was sentenced to life imprisonment at the ECCC.<sup>358</sup> Indeed, in their concluding remarks on defendant Göring, the IMT held, “His guilt is unique in its enormity. The record discloses no excuses for this man.”<sup>359</sup> Göring and Duch are perfect examples illustrating that it does not serve the interests of justice to shield key perpetrators who enthusiastically implement policies of atrocity

<sup>353</sup> Case 001-E188 *Duch* TJ, para. 552.

<sup>354</sup> **D266** Dismissal Order, paras 98, 100, 256, 284, 412, 415, 420.

<sup>355</sup> **D266** Dismissal Order, para. 256 [“Meas Muth’s assertion confirms that lower levels had to obey orders”], citing **D1.3.33.16** Meas Muth Statement, Interview by C. Chaumeau and B. Saroeun (Phnom Penh Post), EN 00089662.

<sup>356</sup> **D1.3.33.16** Meas Muth Statement, Interview by C. Chaumeau and B. Saroeun (Phnom Penh Post), EN 00089662 [see also the final version under the reference **D22.2.180**, EN 00161881 (quote unchanged)].

<sup>357</sup> IMT Judgment, p. 365.

<sup>358</sup> Case 001-F28 *Duch* AJ, para. 383, Disposition.

<sup>359</sup> IMT Judgment, p. 282.

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crimes merely on the basis that they claim they were following orders under duress.

89. In fact, it is clear that “[d]uress cannot [...] be invoked when the perceived threat results from the implementation of a policy of terror in which [an accused] himself has willingly and actively participated.”<sup>360</sup> To the extent that, having participated in the creation and maintenance of the DK coercion system, Meas Muth also found himself subject to it, this cannot in any way be taken to lessen his responsibility for the crimes he committed.
90. The Dismissal Order fails to appreciate that Meas Muth was not just a simple military cadre forced to implement the orders of the upper level against his will by the coercive environment of the DK regime. To the contrary, as underlined in the Dismissal Order, Meas Muth never missed an opportunity during the DK regime to show his absolute commitment and loyalty to the Party.<sup>361</sup> As Ta Mok’s son-in-law, trusted division commander, high-ranking General Staff cadre and Central Committee member, Meas Muth enjoyed relative security during the DK regime. Rather, as Division 164 commander, Secretary of the Kampong Som Autonomous Sector and, most importantly, as Central Committee member from at least January 1976 and later as General Staff Deputy Secretary, Meas Muth was one of those high-ranking DK cadres who willingly and actively helped create and maintain the terror machinery. As a top military commander who led troops in the field, Meas Muth exercised considerable autonomy in enforcing DK policies. He himself benefited from his own criminal acts as he continuously rose in the ranks of the Khmer Rouge regime and enjoyed material privileges.<sup>362</sup> In fact, the one person most feared by both civilians and soldiers in

<sup>360</sup> Case 001-E188 *Duch* TJ, para. 557. See further *Erdemović* AJ Cassese Opinion, paras 16, 17 [“According to the case-law on international humanitarian law, duress or necessity cannot excuse from criminal responsibility the person who intends to avail himself of such defence if he freely and knowingly chose to become a member of a unit, organisation or group institutionally intent upon actions contrary to international humanitarian law.”], 41, 50 (confirmed by Judge Stephen at para. 68 of his Separate and Dissenting Opinion); *Erdemović* 1996 SJ, para. 18; *Einsatzgruppen* Judgment, pp. 480-1; *United States v. Milch*, Judgment, 16-17 Apr 1947, TWC, Vol. II, p. 791.

<sup>361</sup> **D266** Dismissal Order, para. 256, fn. 813-4, citing **D1.3.34.60**, DK Telegram 00, from Meas Muth to Committee M-870, 31 Dec 1977, EN 00184995. See also **D1.3.27.20** DK Military Meeting Minutes, 9 Oct 1976, EN 00940350-51 [About the measures to be taken against traitors, Meas Muth states “I would like to be in total agreement and unity with the Party. Do whatever needs to be done”]. Even recently, Meas Muth continued to show his continuous loyalty to the past DK regime: **D1.3.7.8** Meas Muth Statement, *Let Bygones Be Bygones* (Cambodia Daily), 1-2 Mar 2008, EN 00165821 [[Meas Muth] “says he has no regrets save for the fact that the Khmer Rouge did not have enough time to realize the promise of their peasant utopia”].

<sup>362</sup> **D256/7** ICP Final Submission, paras 48-78 [Meas Muth joined the Khmer Rouge in 1970, was full-rights member of the CPK by at least 1973, became Sector 13 Committee member in charge of the military (1971-1973), Division 3 Commander in the Southwest Zone (in 1973/early 1974), Commander of the largest RAK Central division (Division 3/164 from 1975), Secretary of the Kampong Som Autonomous Sector (17 April 1975), member of the CPK Central Committee (by January 1976) and Deputy Secretary of the General Staff (in 1978)].

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Kampong Som (and later Sector 505) was Meas Muth, not far-off leaders in Phnom Penh.<sup>363</sup> If death came, it was usually at the hands of those acting directly under Meas Muth's orders, including the infamous Battalion 165/450.<sup>364</sup>

91. In suggesting that Meas Muth had no choice but to participate in the crimes of the DK regime by fear of being arrested and killed himself,<sup>365</sup> the Dismissal Order also ignores the fact that other high-ranking DK cadres, including from Central Divisions, stopped contributing to the criminal activity of the CPK and fled across the border or resisted the regime within Cambodia. The Dismissal Order does not consider the fact that Meas Muth had the advantage of being based 230 km away from the CPK's Phnom Penh headquarters K-1 and K-3 and close to the maritime borders with Vietnam and Thailand as well as to international waters<sup>366</sup> (unlike others such as Duch, who was found among those most responsible). Meas Muth could have easily fled the DK regime on one of the Navy ships if he had wanted to. To say that Meas Muth had no choice but to enslave and kill thousands of Cambodians and foreigners under his authority in order to save his own life ignores these other possible courses of action.

***2. Meas Muth committed crimes willingly and enthusiastically with no need for coercion or duress***

92. The Dismissal Order's treatment of superior orders, coercion, and duress is also based on the factual premise that, because those who disobeyed the DK regime were subject to punishment,<sup>367</sup> fear for his own safety must necessarily have been the primary reason that Meas Muth committed or participated in crimes. However, as the Trial Chamber set out in Case 001, "A subordinate who establishes the existence of superior orders may be subject to a less severe sentence *only* in cases where the order of the superior effectively reduces the degree of his guilt. If the order had no influence on the unlawful behaviour because the accused was already prepared to carry it out, no such mitigating

<sup>363</sup> D256/7 ICP Final Submission, paras 80 (fns 237-8), 85 (fns 257-9), 367 (fns 1290-1).

<sup>364</sup> D256/7 ICP Final Submission, paras 80, 153, 155, 213, 249, 252-5, 366, 432, 434, 445, 477.

<sup>365</sup> D266 Dismissal Order, paras 98, 100, 284, 412, 415, 420.

<sup>366</sup> The DK islands under Meas Muth's authority that were close to Vietnam and its main island Koh Tral (Phu Quoc) were Koh Seh and Koh Thmei. Meas Muth visited Koh Rong, Koh Kong (close to the Thai border), Koh Tang and Koh Poulo Wai (close to the Thai and international waters): D1.3.34.10 DK Telegram 44 from Division 164 Secretary Meas Muth to Son Sen, EN 00233647; D114/89 Seng Sin WRI, A171, 173, 177; D114/127 Ou Kim alias Ret WRI, A49-54. See also D1.3.30.2 DK Telegram from Meas Muth to Brother 89, 5 Jan 1976, EN 00231824; D54/92 Sam On Yem WRI, A49; D22.1.10 FBIS, *Chinese Delegation Visits Kompong Som Area*, 13 Dec 1977, EN 00168349; D114/19 Ma (Mak) Chhoeun WRI, A33-34.

<sup>367</sup> D266 Dismissal Order, paras 98, 100, 284, 388, 420, 386-7, 256, 279.

circumstances can be said to exist.”<sup>368</sup>

93. Indeed, post-WWII jurisprudence is replete with examples where attempts to evade responsibility or mitigate sentence by evoking superior orders and/or duress or coercion has been quashed by findings that the accused wholeheartedly participated in the crimes. In *Einsatzgruppen*, the US Military Tribunal held:

The test to be applied is whether the subordinate acted under coercion or whether he himself approved of the principle involved in the order. If the second proposition be true, the plea of superior orders fails. The doer may not plead innocence to a criminal act ordered by his superior if he is in accord with the principle and intent of the superior. When the will of the doer merges with the will of the superior in the execution of the illegal act, the doer may not plead duress under superior orders.<sup>369</sup>

94. Despite his denials,<sup>370</sup> the evidence in Case 003 clearly shows that Meas Muth fully adhered to the DK policies and was prepared to willingly commit crimes. The Dismissal Order made no finding and there is no evidence that Meas Muth ever sought to disobey superior orders.<sup>371</sup> Instead, he carried out his multiple duties to serve the DK with enthusiasm and loyalty. His membership of the Central Committee<sup>372</sup> and close relationships with CPK Standing Committee leaders, including with Son Sen,<sup>373</sup> ensured

<sup>368</sup> Case 001-E188 *Duch* TJ, para. 607 citing *Erdemović* 1996 SJ, para. 53.

<sup>369</sup> *Einsatzgruppen* Judgment, p. 480; *Attorney-General of the Government of Israel v. Eichmann*, Supreme Court of Israel, No. 336/61, 29 May 1962, para. 15 [Applying the test in *Einsatzgruppen*, the Court concluded that Eichmann could not plead duress since “[he] performed the order of extermination at all times *con amore*, that is to say, with genuine zeal and devotion to the task”. See also *United States v. Krupp et al.*, Opinion and Judgment, 31 Jul 1948, TWC, Vol. IX, p. 1439 [“Under the rule of necessity, the contemplated compulsion must actually operate upon the will of the accused to the extent he is thereby compelled to do what otherwise he would not have done ... [I]f, in the execution of the illegal act, the will of the accused be not thereby overpowered but instead coincides with the will of those from whom the alleged compulsion emanates, there is no necessity justifying the illegal conduct”]; *Bralo*, IT-95-17-A, Judgment on Sentencing Appeal, 2 Apr 2007, para. 24 [“The Appeals Chamber not only considers that the Appellant failed to resist these unlawful orders, but also stresses his enthusiasm and willingness to implement such orders, as evidenced in the Trial Chamber’s findings on the Appellant’s desire to humiliate his victims”]; *Mrđa* SJ, para. 66 [“The absence of any convincing evidence of any meaningful sign that Darko Mrđa wanted to dissociate himself from the massacre at the time of its commission prevents the Trial Chamber from accepting duress as a mitigating circumstance”].

<sup>370</sup> **D22.2.186** Meas Muth Statement, *Ex-KR leader responds to activist's allegations* (Phnom Penh Post), 6 Apr 2011, EN 00687297 [“Meas Muth said [...] he had ‘made no mistakes’. I was never involved with arrests or killings”]; **D22.2.185** Meas Muth Statement, *Indict No More: Former Rebel Commander*, 26 Mar 2009 [denying any wrongdoing as a DK commander]; **D22.2.181** Meas Muth Statement (US POW/MIA), 5 Dec 2001, EN 00249698 [Denying any knowledge of the capture of foreigners on yachts in 1975-1978”]; **D54/1.1** Meas Muth Statement, *A Last Stand* (Southeast Asia Globe), 27 Jul 2011, EN 00915788 [Meas Mut “flatly denied any suggestion he was involved in mass atrocities”].

<sup>371</sup> The Trial Chamber found the same about Duch: “[a]lthough the Accused described several situations in which he felt personally fearful, he did not cite disobedience to an order.” See Case 001-E188 *Duch* TJ, para. 555.

<sup>372</sup> See *infra*, paras 148-54. See also **D256/7** ICP Final Submission, paras 49-51.

<sup>373</sup> **D256/7** ICP Final Submission, paras 91, 95-100.

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his own power grew and allowed him to exercise a large degree of autonomy in how his subordinates treated the Cambodian military and civilian population under his control and towards the foreigners arrested at sea.<sup>374</sup>

95. For example, in internal staff meetings, Meas Muth expressed his unconditional support for Son Sen's plans to identify, purge and smash any perceived enemy hiding within the ranks of all the RAK central divisions,<sup>375</sup> including Division 164, and zealously implemented the purge plans.<sup>376</sup> He declared at a General Staff meeting that, "No-good elements or enemies are still camouflaged and infiltrated in the rank [...] On this I would like to be in total agreement and unity with the Party. Do whatever needs to be done in not allowing the situation to get out of hand and not to let them strengthen or expand themselves at all".<sup>377</sup> Meas Muth vowed his determination to conduct thorough internal purges, "sweeping cleanly away and without half measures the uncover elements of the enemy whether the Yuon or other enemies."<sup>378</sup>
96. Meas Muth kept his promise: the active search for bad elements and traitors as well as their networks of enemies within Division 164 led to the disarmament, arrest, enslavement and often imprisonment, torture and execution in Kampong Som of thousands of soldiers and cadres,<sup>379</sup> while only a fraction of them, particularly the high-ranking cadres, were arrested then transferred to S-21.<sup>380</sup> The fact that only 67 Division 164 cadres and soldiers were imprisoned, tortured and executed in S-21,<sup>381</sup> a relatively low number in comparison to other central divisions<sup>382</sup> and the high number of Division 164 troops,<sup>383</sup> indicate that Party leaders were satisfied with Meas Muth leading the

<sup>374</sup> **D256/7** ICP Final Submission, paras 81, 332. *See also*, **D1.3.34.11** DK Telegram 11 from Dim to Mut, 24 Sep 1976, EN 00233660.

<sup>375</sup> **D256/7** ICP Final Submission, para. 332.

<sup>376</sup> **D256/7** ICP Final Submission, paras 328-38, in particular paras 329, 334 (fn. 1155-6).

<sup>377</sup> **D256/7** ICP Final Submission, para. 329 (fn. 1133).

<sup>378</sup> **D256/7** ICP Final Submission, para. 334 (fn. 1156). As for the genocide of the Vietnamese, *see supra*, paras 60-2.

<sup>379</sup> **D256/7** ICP Final Submission, paras 335-337, 340-367 [Among those purged were: (a) 300-720 Division 3 soldiers captured by the Vietnamese in May-June 1975 who were purged upon their release; (b) perceived traitors and their networks, including hundreds from Battalion 386/Sector 37 allegedly from Chhan's network and 700-1,000 East Zone soldiers from Dim's network; (c) Division 164 soldiers allegedly affiliated with the Lon Nol regime or with Vietnam, U.S.S.R., Thailand, the U.S.; (d) those who committed serious and minor 'offences'; and (e) some defectors].

<sup>380</sup> **D256/7** ICP Final Submission, paras 346-7.

<sup>381</sup> **D256/7** ICP Final Submission, paras 347, 542-3.

<sup>382</sup> **D256/7** ICP Final Submission, para. 172 [detailing the number of central divisions soldiers imprisoned at S-21].

<sup>383</sup> **D256/7** ICP Final Submission, paras 64, 1082 [Division 3/164 had at least 8,600 soldiers and up to 12,000 at any time while the second largest, Division 310, comprised about 6,000 soldiers in early 1977 before its purge.]

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internal purge within his own division ranks at his own security centres and various Kampong Som worksites.<sup>384</sup> Within Division 164 and Kampong Som Autonomous Sector, only Meas Muth had the power to decide to smash enemies and did not delegate that power to any subordinate.<sup>385</sup> Meas Muth consolidated his firm power by purging his deputy commanders Chhan and Dim as well as hundreds of their subordinates originally from Sector 37 and the East Zone.<sup>386</sup> Meas Muth exercised power mercilessly, physically beating subordinates who he viewed as having committed mistakes.<sup>387</sup>

97. The fact that Meas Muth earned frequent promotions during the DK period demonstrates that top CPK leaders recognised his contributions to the criminal regime, particularly in carrying out the bloody internal purges.<sup>388</sup> Even after the fall of the DK regime, Meas Muth lived with other leaders in Khmer Rouge-controlled areas until 1999 and defended the DK's legacy.<sup>389</sup> Thirty years after the end of the DK regime, Meas Muth admitted that people were killed during the DK regime but stated that "he has no regrets, save for the fact that the Khmer Rouge did not have enough time to realize the promise of their peasant utopia."<sup>390</sup> In 2013, he further suggested that had the DK remained in power, Cambodia would now be "20 times more developed" and that it was infiltrators, who tried to overthrow Pol Pot and undermine his "good policies", that carried out the killings.<sup>391</sup>

### ***3. Son Sen delegated to Meas Muth his power to arrest and smash foreigners captured at sea***

98. The Dismissal Order repeatedly cites the 30 March 1976 Central Committee instructions which granted the "Zone Standing Committee," the "Central Committee," the "General Staff" and the "Standing Committee" "the right to smash inside and outside the ranks" to

<sup>384</sup> **D256/7** ICP Final Submission, paras 102-19, 328-67 [purges within Division 164], 150-7, 450-5 [Wat Enta Nhien security centre], 150-2, 158-63, 490, 494-7 [Toek Sap security centre], 186-92, 674-98 [Ream Area worksites], 193-7, 613-48 [Stung Hav worksite].

<sup>385</sup> **D256/7** ICP Final Submission, paras 332 (fn. 1143-4) [Witness Heang Ret explained that Meas Muth decided to kill ordinary soldiers while the General Staff's authorisation was required to kill highly ranked cadres], 81 (fns 244-7). See further **D114/24** Ou Dav WRI, A140.

<sup>386</sup> **D256/7** ICP Final Submission, paras 348-54 (Chhan), 355-60 (Dim).

<sup>387</sup> **D256/7** ICP Final Submission, para. 367 [Witnesses describing him as "vicious", "mean", "bad" or "savage"].

<sup>388</sup> **D256/7** ICP Final Submission, paras 48-78, 845.

<sup>389</sup> **D1.3.7.8** Meas Muth Statement, *Let Bygones Be Bygones* (Cambodia Daily), 1-2 Mar 2008, EN 00165821; **D54/1.1** Meas Muth Statement, *A Last Stand* (Southeast Asia Globe), 27 Jul 2011, EN 00915789.

<sup>390</sup> **D1.3.7.8** Meas Muth Statement, *Let Bygones Be Bygones* (Cambodia Daily), 1-2 Mar 2008, EN 00165821.

<sup>391</sup> **D114/307.5** Meas Muth Statement, Transcript of "Brother Number One" (Journeyman.tv), 2013, EN 01389356 [Meas Muth estimates that less than a million people died during the DK regime].

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argue that Meas Muth had no authority to order killings.<sup>392</sup> The Dismissal Order states that Meas Muth would not only have to report to Son Sen or the Party Centre about any security incident but was required to wait for their explicit instructions before acting.<sup>393</sup> He is depicted as largely powerless serving only to relay orders between Son Sen and lower subordinates.<sup>394</sup> Such an intermediary could not be considered as a person “most responsible”. However, there are a number of clear factual errors in these findings.

99. The Dismissal Order states that “Meas Muth reported to Son Sen regarding attacks on fishing boats and capture of Vietnamese boats *and sought advice on measures to be taken.*” The evidence cited in support of this conclusion is a telephone report sent by Meas Muth to Son Sen on 20 March 1978.<sup>395</sup> However, nowhere in this conversation did Meas Muth seek any advice on what to do; rather he informed Son Sen of past events and of decisions he had already made.<sup>396</sup>
100. In fact, just as Meas Muth enjoyed the freedom to decide on the fate of his purged low-ranking Division 164 soldiers, and later the Division 117/Sector 505 cadres in Kratie,<sup>397</sup> he also enjoyed a large degree of autonomy in deciding how the Vietnamese, Thai and other foreigners captured at sea were to be treated. As member of the General Staff Committee since at least July-August 1975 and Son Sen’s deputy secretary in 1978,<sup>398</sup> Meas Muth could make such decisions to arrest and smash those captured at sea pursuant to the 30 March 1976 instructions.<sup>399</sup> Moreover, due to the frequent captures of foreign boats,<sup>400</sup> and Son Sen’s busy agenda (as the war with Vietnam developed in 1977-1978) and the need for immediate decisions in certain situations,<sup>401</sup> it would not have been

<sup>392</sup> **D266** Dismissal Order, paras 130, 169, 232, 246, 254, 271, 425.

<sup>393</sup> **D266** Dismissal Order, paras 121, 166, 212, 216, 226, 252, 257, 316, 322.

<sup>394</sup> **D266** Dismissal Order, paras 425, 97-88, 167, 226, 232, 248, 254, 277, 305, 322, 387, 416, 418-20.

<sup>395</sup> **D266** Dismissal Order, para. 216 (emphasis added).

<sup>396</sup> **D1.3.34.64 (D54/25.1)** DK Telephone Communication from Meas Muth to Son Sen, 20 Mar 1978, EN 00233649.

<sup>397</sup> *See supra*, paras 65-6, 79, 95-6; *see infra* paras 123, 127-8, 132-3, 146.

<sup>398</sup> **D256/7** ICP Final Submission, para. 53. Duch confirmed to Judge Blunk and You Bunleng that Meas Muth and Sou Met, as chiefs of the Navy and the Air Force, were effectively members of the General Staff standing committee since the start and *not* assistants: **D12** Duch WRI, EN 00680797.

<sup>399</sup> The 30 March 1976 instructions of the Central Committee gave the power to smash inside and outside the ranks to the “General Staff”. Duch’s personal interpretation is that this would mean ‘Son Sen’ only: **D266** Dismissal Order, paras 170, 271 *citing* **D12** Duch WRI, EN 00680799; **D98/1.2.1 & D54/6.1.10**, Duch T., 18 May 2009, 12.10.35-12.16.13; **D10.1.64** Duch Final Written Submission, EN 00412110.

<sup>400</sup> **D256/7** ICP Final Submission, paras 421-4. Meas Muth however asserted in an interview that boat captures would only take place once every three months: **D54/16/1R** Meas Muth Interview with David Kattenburg, Apr 2009, 35:30-39.

<sup>401</sup> **D256/7** ICP Final Submission, paras 375 (fn. 1314-8), 376 (fn. 1321-3).



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possible to consult Son Sen for each incident and wait for orders before taking action.

101. Even though in a few instances Meas Muth did report to Son Sen to seek advice,<sup>402</sup> the evidence – even that collected before 29 April 2011 – demonstrates that as regards the foreigners captured at sea, Son Sen generally delegated his authority, and the decision to shoot, drown, arrest, interrogate and/or execute prisoners fell to Meas Muth.<sup>403</sup> The Dismissal Order acknowledges this, stating: “*The General Staff was to issue orders and instructions to each division, including Division 164, such as an absolute stance to smash enemies, both on land and the DK territorial waters.*”<sup>404</sup> Son Sen’s delegation of power applied to various situations:

- a. All Vietnamese captured at sea (including children) had to be systematically killed during the entire DK regime, but the modalities of their deaths were decided by Meas Muth. Except for those Son Sen or the Party Centre required to transfer to S-21,<sup>405</sup> Meas Muth instructed his troops to either shoot all Vietnamese on their boats, tie and throw them into the sea, or to execute them on islands or in Kampong Som, including some at his own headquarters.<sup>406</sup> This is evidenced by reports and telegrams sent by Meas Muth to Son Sen but also by witness testimonies placed on the case file after 29 April 2011, including those of Pak Sok, Ek Ny, Moul Chhin and Mut Mao.<sup>407</sup> For example, witness Ek Ny remembers that originally the instruction was that all Vietnamese captured by Division 164 forces were to be sent to Meas Muth in Kampong Som to be executed. However, later Meas Muth ordered that all Vietnamese captured at sea should be killed and their bodies used to fertilize

<sup>402</sup> See e.g., **D1.3.14.1** DK Telegram from Meas Muth to Son Sen, 11 Jun 1976, EN 01191727 [Meas Muth seeks Angkar’s advise for a decision on an security issue involving his deputy Dim and Battalion 165 cadre Sam-At alias Sun]; **D1.3.34.10** DK Telegram 44 from Division 164 Secretary Meas Muth to Son Sen, EN 00233647 [requesting more advice about the seizure of 75mm canons].

<sup>403</sup> **D1.3.2.2** DK Telegram 10 from Son Sen to Meas Muth, 4 Nov 1976, EN 00233970 [“For our standpoint, [we] must absolutely destroy them at any time when they [illegally] entered our maritime as well as land territories”]; **D1.3.27.20** DK Military Meeting Minutes, 9 Oct 1976, EN 00940345 [Son Sen explaining that the Vietnamese are now genuinely the enemies]; **D1.3.34.60** DK Telegram 00 from Meas Muth to M-870, 31 Dec 1977, EN 00184995 [Meas Muth explains that he would ‘sweep’ “cleanly away” the uncover[ed] elements of the enemy, “whether the Yuon or other enemies”, which indicates he had the power to smash them]. About the power to arrest and interrogate, see: **D1.3.12.20** DK Report from Meas Muth to So Sen, 12 Aug 1977, EN 00233972; **D4.1.1020** DK Report from Meas Muth to So Sen, 20 Feb 1976, EN 00525783.

<sup>404</sup> **D266** Dismissal Order, para. 212 (emphasis added).

<sup>405</sup> **D256/7** ICP Final Submission, paras 386-7, 417, 544.

<sup>406</sup> **D256/7** ICP Final Submission, paras 376, 380, 387, 413, 421-4.

<sup>407</sup> **D256/7** ICP Final Submission, paras 132-4, 138-41, 376, 380, 385-7, 392-3, 399-407, 410-1.

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the coconut trees on Koh Tang Island.<sup>408</sup>

- b. Pursuant to Meas Muth's direct orders, the Thai captured would be either abandoned at sea, executed on boats, islands or in Kampong Som<sup>409</sup> and sometimes transferred to S-21.<sup>410</sup> A number of them were released for diplomatic reasons or in exchange of goods, sometimes after a period of forced labour;<sup>411</sup> and
- c. The other foreigners (Westerners and other Asian nationals) arrested by Meas Muth's troops would normally be transferred to Wat Enta Nhien or S-21 after a period of detention on Bamboo Island or in Kampong Som security centres.<sup>412</sup>

102. The wording of many of Meas Muth's reports and telegrams makes it clear that he alone decided to attack, arrest or execute those captured at sea without any specific instructions from Son Sen, and that only after the killing did he report the incident. For example, on 1 April 1978, Meas Muth reported that 120 Vietnamese had been arrested and executed in late March 1978 and five boats seized.<sup>413</sup> Finally, witnesses testified after 29 April 2011 that instructions were given immediately by Meas Muth on the radio and, in case of emergency, directly to the ships responsible for the capture, which demonstrates that further consultations with the upper level were not required.<sup>414</sup> During study sessions, Meas Muth also issued instructions to the Navy, that in cases of emergency they should attack the foreign vessels immediately and capture or sink them without awaiting further orders.<sup>415</sup>

<sup>408</sup> **D114/282** Ek Ny WRI, A63; **D54/102** Ek Ny WRI, A41, 43-44, *cited in* **D256/7** ICP Final Submission, para. 132.

<sup>409</sup> **D256/7** ICP Final Submission, paras 144-7, 379(a-c), 389, 392, 394-5, 400-2, 406, 410-2, 414-7, 419, 421-4; *see also* **D1.3.34.10** DK Telegram 44 from Meas Muth to Son Sen (Brother 89), 13 Aug 1976, EN 00233647; **D118/207.2** DK Report from Dim to Son Sen and Meas Muth, 15 Sep 1977.

<sup>410</sup> **D256/7** ICP Final Submission, paras 147, 379(c), 544-6.

<sup>411</sup> **D256/7** ICP Final Submission, paras 145, 379(d), 396-7, 407, 410.

<sup>412</sup> **D256/7** ICP Final Submission, paras 148-9, 173, 390-1, 398, 408, 420, 549.

<sup>413</sup> **D54/73.1 (D4.1.635 & D1.3.30.25)** Confidential Telephone Report from Meas Muth, 1 Apr 78, EN 01098703. *See also, e.g.:* **D1.3.34.64** DK Telephone Report from Meas Muth to Son Sen, 20 Mar 1978, EN 00233649 [Meas Muth reports having fired and sunk a Vietnamese boat; caught one Thai boat with 21 people; captured two boats with 76 Vietnamese people on board]; **D1.3.34.10** DK Telegram 44 from Meas Muth to Son Sen, 13 Aug 1976, EN 00233647; **D1.3.12.18** DK Telegram 09 from Meas Muth to Son Sen, 29 May 1977; **D1.3.12.20** Report from Meas Muth to Son Sen, 12 Aug 1977, EN 00233972; **D1.3.12.7** DK Report, Aug 1976, EN 00233963.

<sup>414</sup> **D256/7** ICP Final Submission, para. 376 (fn. 1323), 381 (fn. 1340), 382 (fn. 1343)

<sup>415</sup> **D256/7** ICP Final Submission, para. 376 (fn. 1324).

**4. Meas Muth established and participated in mechanisms for identifying perceived enemies, ordered their arrests and transferred some to S-21**

103. The Dismissal Order relies on Meas Muth's statements to find that it is not established that he arrested or transferred anyone to S-21.<sup>416</sup> Rather, the Order finds that arrests by Meas Muth's division and arrests of soldiers from his division were made pursuant to Pol Pot, Nuon Chea or Son Sen's instructions or because Duch's subordinates arrested them.<sup>417</sup> The Dismissal Order reiterates that Meas Muth did not have the power to arrest, transfer or execute anyone<sup>418</sup> but had to watch and report suspects to Son Sen who would then take decisions.<sup>419</sup> This finding is contradicted even by one of the documents it cites - a telegram from his deputy Dim reporting that arrests of enemies were made following a decision by Meas Muth.<sup>420</sup> Finally, even though the Dismissal Order finds that "Meas Muth participated in supporting DK policies through the suppression of enemies burrowing from within",<sup>421</sup> it concludes that "it was less likely that Meas Muth had the power over either the facilitation of the arrest and transfer [of Division 164 soldiers] to S-21 Security Centre or the suppression on territorial waters." It states that only 42 to 67 Division 164 soldiers "and *some others* [who] were arrested from the sea" were sent to S-21 security centre.<sup>422</sup> Those elements, it finds, would not give the ECCC personal jurisdiction over Meas Muth.
104. This analysis is premised on several errors. The Dismissal Order grossly underestimates the S-21 victims for whom Meas Muth is responsible,<sup>423</sup> and fails to appreciate the degree to which Meas Muth was responsible for these victims' fate. Moreover, Meas Muth in fact played a key role in deciding which prisoners would be sent to S-21 or punished in Kampong Som, by either: (i) identifying and arresting, in Kampong Som and Kratie, internal enemies and their networks through a system of screening biographies, self-criticism sessions, interrogation of prisoners and analysis of people's suspicious activities, before transferring some to S-21;<sup>424</sup> (ii) authorising and giving assistance for the arrest and/or transfer of internal enemies identified by Duch through the interrogation

<sup>416</sup> D266 Dismissal Order, paras 279-80, 289.

<sup>417</sup> D266 Dismissal Order, paras 279-80, 283, 286, 424. See D256/7 ICP Final Submission, para. 540 (fn. 2039).

<sup>418</sup> D266 Dismissal Order, paras 279-80, 283, 286, 423, 425.

<sup>419</sup> D266 Dismissal Order, paras 283, 286, 319.

<sup>420</sup> D266 Dismissal Order, para. 285, citing D1.3.34.11 DK telegram 11 from Dim to Meas Muth, 24 Sep 1976.

<sup>421</sup> D266 Dismissal Order, para. 422.

<sup>422</sup> D266 Dismissal Order, paras 425-6 (emphasis added).

<sup>423</sup> See *infra*, paras 169-70 [see also, paras 156, 158, 160-4, 166].

<sup>424</sup> D256/7 ICP Final Submission, paras 68, 84, 103-6, 115-6, 118-23, 151, 156-7, 159-61, 172-3, 337-340, 346-50, 356-8, 539, 543, 550-1.

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under torture at S-21;<sup>425</sup> (iii) identifying more traitors from the content of S-21 confessions and deciding to arrest the implicated persons and/or to send them to Phnom Penh/S-21.<sup>426</sup> Meas Muth's participation in the JCE was therefore not just significant; it was indispensable to its successful execution.

105. Son Sen requested Meas Muth to review S-21 confessions and identify whether the soldiers named within them were traitors. Two confessions from S-21 prisoners contained annotations from Son Sen that show that he made specific requests to Meas Muth for further investigations in 1977.<sup>427</sup> Duch confirmed that RAK central divisions received S-21 confessions for two reasons: 'to inform the unit head of enemy activities within that unit, and [...] to allow him to contemplate the arrest of implicated persons'.<sup>428</sup> He added that "[b]efore someone was arrested, it was compulsory to consult the head of his unit",<sup>429</sup> and "before making any decisions, Son Sen always asked for comments and assistance from the heads of the divisions".<sup>430</sup>
106. Meas Muth met regularly with S-21 representatives at General Staff meetings (or study sessions) during which division secretaries reported on prisoners that had been sent to S-21.<sup>431</sup> Meas Muth personally admitted in a VOA interview that he knew that some of his subordinates were taken to S-21 after taking part in training sessions in Phnom Penh.<sup>432</sup> The evidence collected after 29 April 2011 clearly shows that in several large Division 164 meetings over which he presided, Meas Muth announced the arrests of "traitors" and discussed or read excerpts of their S-21 confessions, in particular those of his deputies.<sup>433</sup> Moreover, before being transferred to S-21, arrestees were temporarily detained in the Kampong Som area with the approval of Meas Muth.<sup>434</sup>

107. The Dismissal Order states that the transport of the arrestees from Kampong Som to S-

<sup>425</sup> D256/7 ICP Final Submission, paras 113, 119, 163-4, 168, 172, 346, 357, 539, 542-3, 550.

<sup>426</sup> D256/7 ICP Final Submission, paras 106, 108-10, 117, 168-70, 346-7, 350, 356, 358-9, 539-40.

<sup>427</sup> D256/7 ICP Final Submission, paras 117, 539 (fn. 2032), 540.

<sup>428</sup> D256/7 ICP Final Submission, para. 539 (fn. 2030).

<sup>429</sup> D4.1.400 Duch WRI, EN 00242880.

<sup>430</sup> D12 Duch WRI, EN 00680799. The Dismissal Order underlines that Duch stated that "Regarding Sou Met and Meas Muth, there were no documents proving such requests for comments." (D266 Dismissal Order, para. 284). This is contradicted by the annotations of Son Sen on two confessions. Bearing in mind that only a small number of S-21 confessions annotated by Son Sen were retrieved, the general principle described by Duch remains valid.

<sup>431</sup> D256/7 ICP Final Submission, paras 536, 540 (fn. 2036-7).

<sup>432</sup> D256/7 ICP Final Submission, para. 347 (fn. 1199) [Deputies Chey Han *alias* Chhan from Sector 37 and Hoeng Doeun *alias* Dim from the East Zone, as well as a few others].

<sup>433</sup> D256/7 ICP Final Submission, paras 107-10, 543 (fn. 2064).

<sup>434</sup> D256/7 ICP Final Submission, paras 347, 358, 485 (fn. 1819), 500, 546, 797. *See also supra*, paras 66, 101(c), 55 (fn. 187); *see infra* paras 123, 127, 167.

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21 was done in 1977-1978 by S-21 personnel, including Witness Him Huy.<sup>435</sup> However, Him Huy clarified in a 2015 interview ignored by the Dismissal Order that he had never picked any prisoner up in Kampong Som.<sup>436</sup> Moreover, Duch stated that before 1977, S-21 personnel would normally arrange the transport of the prisoners from the divisions to S-21, but that sometimes divisions would send prisoners there themselves. From 1977 onwards, as acknowledged in the Dismissal Order,<sup>437</sup> Duch explained it was the divisions' responsibility to bring the arrestees to Phnom Penh,<sup>438</sup> with the sole exception made for the high-ranking cadres who were invited to meetings in Phnom Penh by the Party Centre before being taken to S-21. This equally applied to Division 164 and Kampong Som Autonomous Sector: before 1977, Meas Muth would occasionally transport prisoners to S-21; after 1977, he would do it systematically except for the high-ranking officials invited to Phnom Penh by the Party Centre.<sup>439</sup>

##### **5. Arbitrarily different treatment of superior orders, coercion, and duress in Case 001 and Case 003**

108. The NCIJ's own findings in the Case 001 Closing Order provide a stark rebuttal of the assertion that acting pursuant to superior orders removes an individual from the category of the "most responsible". In Case 001, the CIJs found that Duch received specific orders from his superiors in a host of areas, including: (i) the extraction and content of specific confessions;<sup>440</sup> (ii) the rations that were to be provided to prisoners;<sup>441</sup> (iii) medical experimentation carried out on prisoners;<sup>442</sup> (iv) the use of torture on specific prisoners;<sup>443</sup> (v) the specific administrative procedures to be followed when executing prisoners;<sup>444</sup> and (vi) the manner of killing and disposal of the remains of certain

<sup>435</sup> **D266** Dismissal Order, paras 279-280 [citing Him Huy], 319. *See also*, as for the Westerners, **D54/16/1R** Audio recording of an interview with Meas Muth by David Kattenburg, Apr 2009, 49:18-50:33.

<sup>436</sup> **D114/92** Him Huy WRI, A21-8 [explains they were told they would go to Kampong Som but ended up picking arrestees in Srae Ambel salt fields in the Southwest Zone], A30-1, 37 [mentions seeing that 20-30 Thai civilians brought to S-21 in 1976 or 1977 did not arrive at S-21 in S-21 vehicles].

<sup>437</sup> **D266** Dismissal Order, para 275 (fn. 858).

<sup>438</sup> **D4.1.1118** Duch WRI, EN 00195606 ["from 1977, [...] other units took care of transportation (for instance, Divisions 170, 290 and 310)"]; **D4.1.1109** Duch WRI, EN 00177588 [explaining that as for the Vietnamese, at first, S-21 personnel sometimes transported the prisoners, holding a special laissez-passer, but that this system was subsequently abandoned. S-21 stopped the transport and was only in charge of their reception]; **D1.3.33.9** Duch WRI, EN 00178061 ["For the Vietnamese [POWs], S-21 was never in charge of their transportation. The POWs were sent directly to us by the unit."]; **D4.1.404** Duch WRI, EN 00242932.

<sup>439</sup> **D256/7** ICP Final Submission, para. 417.

<sup>440</sup> Case 001-**D99** Duch Closing Order, para. 44.

<sup>441</sup> Case 001-**D99** Duch Closing Order, para. 68.

<sup>442</sup> Case 001-**D99** Duch Closing Order, para. 70.

<sup>443</sup> Case 001-**D99** Duch Closing Order, paras 85, 99.

<sup>444</sup> Case 001-**D99** Duch Closing Order, para. 107.

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important prisoners.<sup>445</sup> They further found that Duch had limited influence over who was arrested.<sup>446</sup> He could not refuse to receive a prisoner who was sent to him, nor was he free to conclude after investigation that anyone was innocent.<sup>447</sup> He could not release prisoners,<sup>448</sup> and he had no discretion not to execute any prisoner sent to him; the greatest leeway his superiors granted him was the authority to keep some skilled prisoners alive for a certain period of time to work.<sup>449</sup> The CIJs explicitly found that “[t]he primary role of S-21 was to implement ‘[t]he Party’s political line regarding the enemy’”.<sup>450</sup>

109. A fair review of the Case 001 Closing Order and the evidence on Case File 003 shows that Meas Muth had *more* discretion in how he carried out his instructions than Duch. This is partly due to the significantly higher position Meas Muth occupied in the CPK hierarchy and in the RAK. While Meas Muth was tasked with implementing the CPK’s internal and external enemies policy, there is little evidence of his receiving orders to arrest and execute specific individuals. Unlike Duch, who simply received the prisoners sent to him and had limited or no authority to release those he had been ordered to interrogate and murder, Meas Muth had the power to make decisions over the fates of specific individuals under his power—particularly purged or undisciplined low-ranking soldiers and civilians.<sup>451</sup> There is little to no evidence that Meas Muth, unlike Duch, was “subjected to constant surveillance”<sup>452</sup> by Son Sen or the Standing Committee members.
110. The Dismissal Order found that as a relatively low-level DK cadre, Meas Muth had to comply with all orders and feared for his life if he did not, suggesting that this is a reason to find he was not “most responsible.”<sup>453</sup> But in Case 001, the CIJs acknowledged Duch’s evidence that the CPK purge left him “paralysed by fear for his life”, “terrified to the point he slept day and night”,<sup>454</sup> and in fear for the lives of his family members.<sup>455</sup> Any fear felt by Duch would have been reinforced by experience, since he would have been aware that many senior members of the CPK far above him in the Party hierarchy were

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<sup>445</sup> Case 001-D99 *Duch* Closing Order, para. 122.

<sup>446</sup> Case 001-D99 *Duch* Closing Order, paras 33, 51-2.

<sup>447</sup> Case 001-D99 *Duch* Closing Order, paras 44, 53.

<sup>448</sup> Case 001-D99 *Duch* Closing Order, para. 31.

<sup>449</sup> Case 001-D99 *Duch* Closing Order, paras 31, 111.

<sup>450</sup> Case 001-D99 *Duch* Closing Order, para. 31 (emphasis added).

<sup>451</sup> **D266** Dismissal Order, paras 79-87.

<sup>452</sup> Case 001-D99 *Duch* Closing Order, para. 170.

<sup>453</sup> **D266** Dismissal Order, paras 98, 100, 256, 284, 412, 415, 420.

<sup>454</sup> Case 001-D99 *Duch* Closing Order, para. 169.

<sup>455</sup> Case 001-D99 *Duch* Closing Order, para. 170.

imprisoned, subject to inhumane treatment, tortured, and killed at S-21.

111. Given that superior orders, coercion, and duress did not remove Duch from the category of the “most responsible,” they cannot do so with respect to Meas Muth. To hold that Meas Muth is outside the jurisdiction of the ECCC because he was following superior orders and had reason to fear the consequences of any dissent while Duch, Nuon Chea, Khieu Samphan, Ieng Sary and Ieng Tirth were not would be to embrace an arbitrarily different application of the law to similarly situated persons.

**E. LEGAL AND FACTUAL ERRORS IN THE DISMISSAL ORDER’S TREATMENT OF DIRECT PARTICIPATION IN AND PROXIMITY TO CRIMES WHEN DETERMINING LEVEL OF RESPONSIBILITY FOR CRIMES COMMITTED**

***1. The Dismissal Order accorded excessive weight to direct participation in and proximity to crimes in the analysis of personal jurisdiction***

112. The Dismissal Order asserts that, since the drafters of the ECCC Agreement introduced the category of “most responsible” for the former S-21 chief, Duch, “those who were most responsible played a key role in committing crimes, proximate to the commission, under their autonomy and de facto authority”<sup>456</sup>, and that those in lower ranks can be found “most responsible” based only upon “their personal participation in brutal acts.”<sup>457</sup> It continues that “[t]he scope of one person’s direct acts and the effective authority of those acts are the areas for proper consideration.”<sup>458</sup>
113. When assessing Meas Muth’s participation and authority at individual crime sites, the Dismissal Order repeatedly emphasises that Meas Muth was not physically present,<sup>459</sup> and concludes that he was not among those most responsible for the DK crimes because he 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

<sup>456</sup> **D266** Dismissal Order, paras 396-7 [“Overall, it can be said that the phrase ‘those who were most responsible’ was specifically included in reference to former S-21 Chief Kaing Guek-Eav *alias* Duch [...] The inclusion of Duch means that those who were most responsible played a key role in committing crimes, proximate to the commission, under their autonomy and de facto authority”]. *See further* **D266** Dismissal Order, para 373 [“Duch was within the category of those most responsible because of his “*direct* *perpetration*, authority, and power of decision-making and management”], 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.”].

<sup>457</sup> **D266** Dismissal Order, para. 368.

<sup>458</sup> **D266** Dismissal Order, para. 368.

<sup>459</sup> **D266** Dismissal Order, paras 297, 305, 311.

Duch's case.<sup>460</sup>

114. These arguments are logically, legally and factually flawed. First, as set out in further detail below, the “most responsible” category found in the ECCC Agreement and ECCC Law is, both by its text and by the intention of the RGC and 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. Indeed, the Dismissal Order itself correctly finds that those most responsible must be discerned by reference to the gravity of the crimes and level of responsibility of the charged persons, taking into account a non-exhaustive variety of factors,<sup>461</sup> none of which require either physical proximity to the crimes or direct perpetration.<sup>462</sup>
115. This is patently correct. The conduct that contributes to the commission of international crimes can be, and for those most responsible often is, geographically and temporarily removed from the physical act of commission itself. It has been established in jurisprudence since the post-WWII trials that to find responsibility through any of the modes of liability found in article 29 of the ECCC Law, other than direct perpetration, physical presence at the crime site is not required.<sup>463</sup> This has been recognised for commission through a JCE.<sup>464</sup> Indeed, participation in the common purpose need not

<sup>460</sup> D266 Dismissal Order, para. 428 (emphasis added).

<sup>461</sup> D266 Dismissal Order, paras 365-7; *supra*, paras 9-12.

<sup>462</sup> One of the factors to be considered in an analysis of the charged person's level of responsibility is his or her level of participation in the crimes. Whilst “participation” is not a term of art, it is patently not limited to *direct* participation, and has frequently been used to refer to all the modes of responsibility in art. 29 of the ECCC Law. See e.g. *Kayishema & Ruzindana* AJ, para. 185; *Musema* TJ, para. 114; *Kamuhanda* TJ, para. 588; *Delalić* AJ, para. 351.

<sup>463</sup> See e.g. *Tadić* TJ, paras 679 [“That participation in the commission of the crime does not require an actual physical presence or physical assistance appears to have been well accepted at the Nürnberg war crimes trials”] and 691 [“actual physical presence when the crime is committed is not necessary”] citing *Golkel* Case, p. 53 [“it is quite clear that those words [‘concerned in the killing’] do not mean that a man actually had to be present at the site of the shooting”] and *Trial of Max Wielen and 17 Others*, British Military Court, Hamburg, Germany, 1 Jul-3 Sep 1947, reported in LRTWC, Vol. XI, pp. 43-4, 46 [“By finding the accused Schimmel and Gmeiner guilty, the court indicated that being ‘concerned in the killing’ does not necessarily require the presence of the accused on the scene of the crime, since both Schimmel and Gmeiner gave instructions to their subordinates but were not present at the shooting” (citing from p. 46)]; *Gustav Becker, Wilhelm Weber and 18 Others*, Permanent Military Tribunal at Lyon, 17 Jul 1947, LRTWC, Vol. VII, pp. 67, 70. [The accused, except for one, had arrested several French civilians in occupied France who were, as a consequence, deported to a concentration camp in Germany where three of them died from ill-treatment. They were found guilty of having caused the death of the French civilians in Germany by contributing to and facilitating the deportation of the civilians.]; *Kayishema & Ruzindana* TJ, para. 200 [“It is not presupposed that the accused must be present at the scene of the crime, nor that his contribution be a direct one”].

<sup>464</sup> See e.g. *Krnjelac* AJ, para. 81 [“The Appeals Chamber considers that the presence of the participant in the joint criminal enterprise at the time the crime is committed by the principal offender is not required”]; *Kvočka* AJ, para. 112; *Simba* AJ, para. 296; *Karemera & Ndirumapatse* AJ, para. 153 [“It is immaterial whether Ndirumapatse was out of the country while some of the criminal acts were perpetrated. A participant in a joint



even involve the commission of a crime,<sup>465</sup> and participants can incur liability for crimes committed by direct perpetrators who were not JCE members.<sup>466</sup> Similarly, by their very nature, neither direct perpetration nor physical presence is required for criminal responsibility through planning, instigating and ordering,<sup>467</sup> nor for aiding and abetting,<sup>468</sup> or superior responsibility.<sup>469</sup>

116. If conduct by any mode of responsibility other than direct participation precluded a finding that a suspect reached the level of “most responsible”, it would prevent the prosecution of almost anyone but the lowest-ranking tools of a criminal regime like the DK. Given the collective nature of international crimes, the level of responsibility generally increases as the proximity and physical perpetration decreases. The general who planned a mass killing is considered more responsible than the foot soldier who carried out the plan.<sup>470</sup> Giving excessive weight to direct perpetration and physical proximity in determining who is most responsible for organised mass atrocities therefore fails to capture the nature and mechanisms behind the most serious international crimes.
117. Indeed, the Dismissal Order has created an illogical dichotomy between “senior leaders” and “those most responsible”. This contradicts the SCC’s holding (relied on by the Dismissal Order<sup>471</sup>) that the two categories of persons subject to the ECCC’s personal jurisdiction “are not dichotomous” and that senior leaders must also be most responsible

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criminal enterprise is not required to be physically present when and where the crime is being committed”]; *Bagilishema* TJ, para. 33.

<sup>465</sup> Case 002-E313 Case 002/01 TJ, para. 693; Case 001-E188 *Duch* TJ, para. 508; *Tadić* AJ, paras 227, 229; *Šainović* AJ, para. 985; *Prlić* AJ, paras 1410, 1880; *Sesay* AJ, para. 611.

<sup>466</sup> Case 002-F36 Case 002/01 AJ, para. 1040; Case 002-E313 Case 002/01 TJ, para. 225; *Prlić* AJ, para. 1998; *Brđanin* AJ, paras 410-414, 418, 430; *Dorđević* AJ, para. 165; *Sesay* AJ, paras 398-400.

<sup>467</sup> *Bošković & Tarčulovski* AJ, para. 132 [“The Appeals Chamber recalls that the accused’s presence at the crime scene is not a requisite element of planning, instigating and ordering”]. See also *Instigating: Nahimana* AJ, para. 660; *Nyiramasuhuko* AJ, para. 3327; *Ordering: D. Milošević* AJ, para. 290.

<sup>468</sup> The one exception being the case of the approving spectator. See e.g. *Lukić & Lukić* AJ, para. 425 [“The Appeals Chamber notes that the physical presence of an aider and abettor at or near the scene of the crime may be a relevant factor in cases of aiding and abetting by tacit approval. Further, the actus reus of aiding and abetting may be fulfilled remotely”]; *Ntagerura* AJ, para. 372; *Akayesu* TJ, para. 484; *Rutaganda* TJ, para. 43; *Brima* TJ, para. 775.

<sup>469</sup> *Karemera & Ngirumpatse* AJ, para. 259 [“Bearing in mind that presence is not required for superior responsibility pursuant to Article 6(3) of the Statute”].

<sup>470</sup> See e.g. *Tadić* AJ, para. 191 [“Most of the time these crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design. Although only some members of the group may physically perpetrate the criminal act [...] the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less – or indeed no different – from that of those actually carrying out the acts in question”].

<sup>471</sup> **D266** Dismissal Order, para. 364.

for crimes committed during DK.<sup>472</sup> Further, it ignores the recognised principle that in evaluating the level of responsibility “the hierarchical rank or position of the accused” must be considered.<sup>473</sup> Finally, it contradicts the Dismissal Order’s finding that “[t]o determine who is among those ‘most responsible’ is [...] to focus on [...] the level of their participation in the policy-making and/or implementation.”<sup>474</sup>

118. Moreover, this position also differs from the NCIJ’s previous findings on personal jurisdiction in Case 002.<sup>475</sup> In Case 002, the CIJs, including the NCIJ, found that the four charged persons, Nuon Chea, Khieu Samphan, Ieng Sary and Ieng Thirith, were not only senior leaders but also fell within the category of those most responsible “due to their personal participation in the implementation of the CPK’s common purpose through criminal means”.<sup>476</sup> They did not find that any of them had directly participated in any crimes, nor that their responsibility was solely founded on their attendance at any crime sites investigated.<sup>477</sup>
119. Finally, the Dismissal Order entirely overlooks the contrary jurisprudence of other international criminal tribunals. Although it expressly relies on the Rule 11*bis* criteria laid out by the ICTY,<sup>478</sup> it then ignores that in none of the decisions by the ICTY Referral Bench where the individual was confirmed to be most responsible was any substantive weight given to proximity to the crimes or direct participation.<sup>479</sup> Moreover, the ICTY

<sup>472</sup> Case 001-F28 *Duch* AJ, para. 57 [“the term ‘senior leaders of the Democratic Kampuchea and those who were most responsible’ refers to two categories of Khmer Rouge officials that are not dichotomous. One category is senior leaders [...] who are among the most responsible”].

<sup>473</sup> **D266** Dismissal Order, paras 367, 369.

<sup>474</sup> **D266** Dismissal Order, para. 369.

<sup>475</sup> **D266** Dismissal Order, paras 361-74.

<sup>476</sup> **D10.1.101** Case 002 Closing Order, paras 1327-8.

<sup>477</sup> **D10.1.101** Case 002 Closing Order, paras 1521-63. *See further* **D10.1.101** Case 002 Closing Order, paras 862-993 (Nuon Chea), 994-1125 (Ieng Sary), 1126-1200 (Khieu Samphan), 1201-95 (Ieng Thirith).

<sup>478</sup> **D266** Dismissal Order, paras 366-7.

<sup>479</sup> *D. Milošević* Referral Decision, paras 21-23. [The Referral Bench decided that Milošević was among those “most senior” because he held the permanent position of commander of the SRK, a corps with 18,000 soldiers, over a prolonged period of time, only one echelon of military commander was above him and he played a clear leadership role, for example taking part in negotiations]; *Lukić* Appeal Decision, paras 21-23. The Appeals Chamber reversed the *Lukić & Lukić* Referral Decision to refer the case to the authorities of Bosnia finding that the Referral Bench placed excessive emphasis on the limited geographical scope of the accused’s acts and failed to appreciate his level of participation as a “leader and orchestrator of these crimes”; *Delić* Referral Decision, paras 20-25 [The Referral Bench found that the accused was among those “most responsible” because of his senior military position and his role in planning, directing and monitoring military operations. The Referral Bench noted the accused was not charged with physical perpetration and then explicitly stated that it is “not persuaded by the Prosecution that the ‘remoteness’ of the Accused from the underlying offences is such that it diminishes his alleged level of responsibility to a degree which would make the case suitable for referral”].

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sentenced Zdravko Tolimir to life imprisonment for genocide<sup>480</sup> for his participation in a JCE to murder the men and boys of Srebrenica, despite having been under the direct command of Ratko Mladić and never present in Srebrenica during the genocide.<sup>481</sup>

120. The *Taylor* case at the Special Court for Sierra Leone (“SCSL”) is perhaps the most compelling example of the error in the Dismissal Order’s approach. Article 1(1) of the SCSL Statute limits the personal jurisdiction of the Court to those “who bear the *greatest responsibility*” for crimes committed during the Sierra Leone civil war.<sup>482</sup> In a decision upheld on appeal, the SCSL Trial Chamber convicted former Liberian Head of State, who had never set foot in Sierra Leone,<sup>483</sup> for aiding and abetting crimes there and sentenced him to 50 years’ imprisonment.<sup>484</sup>

## 2. *Meas Muth played a direct and active role in the commission of crimes*

121. In any event, the Dismissal Order’s finding that Meas Muth’s participation in the crimes was unimportant, inactive and distant<sup>485</sup> is manifestly unreasonable. As established above, Meas Muth participated in 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.<sup>486</sup> He had the full power to arrest and smash a) foreigners captured at sea, b) soldiers within the Division 164 ranks, and c) perceived enemies in Kampong Som Autonomous Sector, and established and participated in mechanisms for identifying perceived enemies, ordered their arrests and transferred some to S-21.<sup>487</sup> Moreover, as set out below, the only reasonable conclusion from a comprehensive review of all the evidence on the case file is that, in vigorously implementing the CPK’s enemies, enslavement and forced marriage policies, Meas Muth established, visited and played a direct and active role in the operation of the Kampong

<sup>480</sup> *Tolimir* AJ, para. 648 [The Appeals Chamber found that considering Tolimir’s convictions for genocide committed through the killings of the men from Srebrenica and through the infliction of serious bodily or mental harm to the Bosnian Muslim population of Srebrenica alone, Tolimir’s level of responsibility warranted the life sentence imposed by the Trial Chamber].

<sup>481</sup> *Tolimir* TJ, paras 914-6, 1096, 1099, 1101, 1103-4, 1109-10, 1129, 1242.

<sup>482</sup> SCSL Statute, art. 1(1) (emphasis added).

<sup>483</sup> *Taylor* SJ, para. 98 [“While Mr. Taylor never set foot in Sierra Leone, his heavy footprint is there, and the Trial Chamber considers the extraterritoriality of his criminal acts to be an aggravating factor”]

<sup>484</sup> *Taylor* TJ, para. 6994; *Taylor* SJ, Disposition, p. 40.

<sup>485</sup> **D266** Dismissal Order, para. 428.

<sup>486</sup> *See supra*, paras 28-32, 96, 98-107. The only people he could not smash in Kampong Som were those who were requested by the Party Centre to be transferred to S-21 (in particular, Thai and Vietnamese arrested at sea who entered S-21 in May 1976; a number of Vietnamese arrested at sea whose S-21 confessions were used for propaganda purposes in 1978; high-ranking cadres from Division 164 or the Kampong Som Autonomous Sector; a few ordinary citizens and soldiers).

<sup>487</sup> *See supra*, paras 96, 98-107.

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Som Sector security centres and worksites, arranged forced marriages, and directly participated in the Kratie purge.

122. *Wat Enta Nhien Security Centre*: The Dismissal Order finds that “no documents indicate Meas Muth’s presence during arrests or regular inspections at Wat Enta Nhien,” but that “Battalion 450 was a unit controlling Wat Enta Nhien” from late April or early May 1975.<sup>488</sup> These statements overlook Meas Muth’s intimate connection with this security centre. First, Meas Muth established the security centre at Wat Enta Nhien, which was situated in very close proximity to the Division 164 Headquarters, where he resided.<sup>489</sup> His troops seized the pagoda shortly after 18 April 1975 when Division 3 entered Kampong Som, expelling the monks. Meas Muth then ordered Independent Battalion 450/165 to manage the site.<sup>490</sup>
123. Beyond finding that Battalion 450 was “responsible for general security for Division 164”, and that “Ta Norn was in charge of Security Unit 450,”<sup>491</sup> the Dismissal Order entirely overlooks the significance in this context of Battalion 450/165’s intimate connection to Meas Muth: it was an elite special forces unit under his direct control,<sup>492</sup> which provided Meas Muth’s personal messengers and bodyguards,<sup>493</sup> ensured security at both the division headquarters,<sup>494</sup> and was tasked with carrying out investigations, arrests and executions on his behalf across the entire Division.<sup>495</sup> Its first commander, Sa(r) Moeun reported directly to Meas Muth<sup>496</sup> and his successor, Norn, was posted at the entrance of Meas Muth’s own house and division headquarters.<sup>497</sup> Wat Enta Nhien played a vital role in Meas Muth’s internal purges,<sup>498</sup> either as the final destination for many demobilised troops, or as a holding location before their transfer to S-21.<sup>499</sup> On occasions, it also held those Meas Muth had ordered arrested at sea.<sup>500</sup>
124. Meas Muth was regularly seen at Wat Enta Nhien, often combining his visits with

<sup>488</sup> D266 Dismissal Order, paras 291, 297.

<sup>489</sup> D256/7 ICP Final Submission, paras 441, 443, 445 [see also paras 211, 216].

<sup>490</sup> D256/7 ICP Final Submission, paras 442-3.

<sup>491</sup> D266 Dismissal Order, paras 291, 297.

<sup>492</sup> D256/7 ICP Final Submission, paras 153, 155, 252-5, 366, 432. See D266 Dismissal Order, paras 201-3.

<sup>493</sup> D256/7 ICP Final Submission, paras 253-4, 366, 432. See also D266 Dismissal Order, para. 203.

<sup>494</sup> D256/7 ICP Final Submission, paras 253, 432.

<sup>495</sup> D256/7 ICP Final Submission, paras 253, 432, 434, 476-7, 141 [killing of an old Vietnamese lady and two adolescents within the Division 164 headquarters which was guarded by Battalion 165/450].

<sup>496</sup> D256/7 ICP Final Submission, paras 155, 252, 255, 433.

<sup>497</sup> D256/7 ICP Final Submission, paras 255, 433-4.

<sup>498</sup> See *supra*, paras 28-32, 96, 98-107.

<sup>499</sup> D256/7 ICP Final Submission, paras 345-7, 351, 364, 366, 425, 427, 450-4.

<sup>500</sup> D256/7 ICP Final Submission, paras 390, 457-60.

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meetings at other sites, such as Stung Hav, Ream or Kang Keng.<sup>501</sup> There, Meas Muth interrogated prisoners, recorded their confessions and “sent them away”.<sup>502</sup> He was informed about executions at Wat Enta Nhien and announced them to his subordinates. During the purge of former Battalion 386, its political commissar in Division 164, Rem, was killed by members of Battalion 450/165 in front of Wat Enta Nhien while trying to resist arrest. Meas Muth taught Rem’s story when he read confessions of purged cadres to Division 164 troops at a meeting.<sup>503</sup>

125. *Stung Hav Worksites and Prison*: The Dismissal Order similarly finds that “no specific testimony or evidence indicates his inspections” at Stung Hav.<sup>504</sup> However, that completely disregards a large body of evidence to the contrary, including Pen Sarin’s pre-29 April 2011 statement that Meas Muth “came to visit [Stung Hau] on a number of occasions”.<sup>505</sup> In citing the meeting minutes of 9 September 1976,<sup>506</sup> the Dismissal Order overlooks that the same minutes show that Meas Muth was personally involved in separating the “good” from the “bad” people in Stung Hav.<sup>507</sup> The Dismissal Order further fails to consider evidence demonstrating that Meas Muth (i) issued orders about the Stung Hav facility to his brother, Meas Im, a member of the Stung Hav Committee with logistics responsibilities for the entire Division 164;<sup>508</sup> (ii) held meetings there where he announced the names of “traitors” and lectured cadres on the CPK enemy policy;<sup>509</sup> and (iii) personally received regular updates on the daily life at Stung Hav<sup>510</sup> including the poor food conditions there.<sup>511</sup>

126. Moreover, the Dismissal Order again overlooks the significance of Division 164’s

<sup>501</sup> D256/7 ICP Final Submission, paras 156, 444-5.

<sup>502</sup> D256/7 ICP Final Submission, paras 156, 444-6.

<sup>503</sup> D256/7 ICP Final Submission, para. 477 *citing* D54/101 Ek Ny WRI, A11 [“Ta Mut at that time even used that story along with the confessions of some of the arrested [cadres] to teach us in the meeting. He read the confessions and the story to us and announced that those confessed persons had been in the traitor string”]. *See also* D54/102 Ek Ny WRI, A5 [“almost all the soldiers knew about Rem’s story”].

<sup>504</sup> D266 Dismissal Order, para. 305.

<sup>505</sup> D1.3.13.8 Pen Sarin OCP Statement, EN 00217560 [“Meas Mut came to visit [Stung Hau] on a number of occasions and when he stayed at Stung Hau overnight, he stayed in the same location as the Chinese technicians”]; D256/7 ICP Final Submission, paras 110, 197, 352, 445, 605-7.

<sup>506</sup> D266 Dismissal Order, para. 305, *citing* D1.3.8.4 DK Military Meeting Minutes (Comrades 164), 9 Sep 1976.

<sup>507</sup> D1.3.8.4 DK Military Meeting Minutes (Comrades 164), 9 Sep 1976, EN 00657355 [“Recently, the Division commander separated the bad people and sent them to stay at the different places so that they were not mixed with the good people”]. *See also* D256/7 ICP Final Submission, para. 623.

<sup>508</sup> D256/7 ICP Final Submission, para. 608.

<sup>509</sup> D256/7 ICP Final Submission, paras 110, 352, 606.

<sup>510</sup> D256/7 ICP Final Submission, paras 607-8.

<sup>511</sup> D256/7 ICP Final Submission, para. 645.

establishment of the site soon after Meas Muth's troops arrived 1975<sup>512</sup> and its management by Battalion 450/165.<sup>513</sup> Though the Dismissal Order alludes to the fact that most of the workers were Division 164 soldiers, it entirely misses the indispensable role the site played in Meas Muth's internal purges. Low-ranking cadres or combatants whom he demobilised were enslaved at Stung Hav for tempering or refashioning; others were imprisoned there.<sup>514</sup> Meas Muth also sent prisoners from Stung Hav to S-21.<sup>515</sup>

127. *Toek Sap Security Centre*: Although the Dismissal Order fails to deal with Toek Sap security centre,<sup>516</sup> if it had it would have found consistent evidence that Meas Muth's troops occupied the Toek Sap site almost immediately after entering Kampong Som in April 1975,<sup>517</sup> establishing the Division 164 logistics hub and Meas Muth's other main security centre.<sup>518</sup> Like Wat Enta Nhien, Toek Sap played a vital role in Meas Muth's internal purges,<sup>519</sup> either as the final destination for many of Division 164's demobilised troops, or as a holding location before their transfer to S-21.<sup>520</sup> It was also a prominent holding and execution location for those Meas Muth had ordered arrested at sea.<sup>521</sup>
128. Meas Muth visited Toek Sap on a regular basis.<sup>522</sup> Moreover, the Toek Sap site was controlled by Regiment 63,<sup>523</sup> which like Battalion 450/165, had intimate connections to Meas Muth personally. Sin Chorn, Regiment 63 commander from late 1976 onwards, directly reported to Meas Muth<sup>524</sup> and his successor, Nhan, was one of Meas Muth's most trusted cadres, acting as a conduit to Meas Muth personally. During the purge, the two led study sessions together to root out "traitors", and Meas Muth appointed Nhan to the Division 164 committee. Nhan took up residence at Meas Muth's compound in Kampong Som and by late 1978, Meas Muth assigned him to Kratie to serve as Division 117 Secretary after he had purged the previous Division leadership.<sup>525</sup>

<sup>512</sup> **D266** Dismissal Order, para. 302. *See further* **D256/7** ICP Final Submission, para. 596.

<sup>513</sup> **D266** Dismissal Order, paras 300, 305. *See supra*, para. 123.

<sup>514</sup> **D266** Dismissal Order, para. 302. *See further* **D256/7** ICP Final Submission, paras 353, 360, 364, 366, 425, 603, 613, 621-30.

<sup>515</sup> **D256/7** ICP Final Submission, para. 642.

<sup>516</sup> *See Legal Error of Failure to Consider and Issue a Decision on All Facts Within the Scope of Case 003.*

<sup>517</sup> **D256/7** ICP Final Submission, para. 485.

<sup>518</sup> **D256/7** ICP Final Submission, paras 482, 485.

<sup>519</sup> *See supra*, paras 28-32, 96, 98-107.

<sup>520</sup> **D256/7** ICP Final Submission, paras 342, 346-7, 354, 364, 366, 427, 429, 494-496.

<sup>521</sup> **D256/7** ICP Final Submission, paras 410, 412, 428, 500-1.

<sup>522</sup> **D256/7** ICP Final Submission, paras 162, 487.

<sup>523</sup> **D256/7** ICP Final Submission, para. 488. *See* **D266** Dismissal Order, para. 195.

<sup>524</sup> **D256/7** ICP Final Submission, para. 489.

<sup>525</sup> **D256/7** ICP Final Submission, para. 490.

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129. *Ream area worksites and execution sites*: Again, the Dismissal Order fails to deal with the Ream area worksites and execution sites, despite being validly seized of it by the Introductory Submission.<sup>526</sup> However, the evidence on the case file, including evidence filed before 29 April 2011, demonstrates that Meas Muth was intimately involved in operations. For example, a telegram to Meas Muth from his deputy, Dim, shows that Meas Muth issued orders for the implementation of the CPK enemy policy there.<sup>527</sup> The same telegram demonstrates that Meas Muth was kept informed of even a single death amongst the workers, and small details regarding the progress of rice cultivation.<sup>528</sup> Meeting minutes also show that Meas Muth reported on “thievery” at Kang Keng,<sup>529</sup> and the placement of artillery in Ream and Kang Keng.<sup>530</sup>
130. Moreover, the case file contains consistent evidence that Meas Muth (i) directly ordered the execution and burial of Thai and Vietnamese nationals at Durian I;<sup>531</sup> (ii) visited regularly, meeting with village chiefs and summoning cooperative chiefs to discuss production plans with them,<sup>532</sup> and (iii) held a large meeting at Kang Keng airfield where he identified “traitors” and “bad soldier elements” and read their confessions.<sup>533</sup> As at Stung Hav, Meas Muth placed demobilised Division 164 soldiers at the Ream worksites (including at Kang Keng and Bet Trang) and in the rice fields.<sup>534</sup> Meas Muth’s trusted confidant, Regiment 63 Commander Kim Nhan frequently met cooperative chairpersons and served as a conduit to Meas Muth.<sup>535</sup>
131. *Forced marriage and rape*: The Dismissal Order fails to deal with forced marriage and

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<sup>526</sup> See **Legal Error of Failure to Consider and Issue a Decision on All Facts Within the Scope of Case 003.**

<sup>527</sup> **D4.1.699** Telegram 11 from Dim to Brother Mut (Meas Muth), 24 Sep 1976, EN 00143240 (emphasis added) [“In Riem and Babos Py sub-districts, we have taken measures as you, brother, have decided. Five enemies managed to run into the forests. But now we have arrested all of them”]. See also **D256/7** ICP Final Submission, para. 188.

<sup>528</sup> **D4.1.699** Telegram 11 from Dim to Brother Mut, 24 Sep 1976, EN 00143240 [“For our situation, one of [the] combatants in Unit 62 doing farming in the vicinity of Chamkar Daung drowned and died without any valid reason. [...] The rice in all places is in progress. But in Kang Keng there are 12 hectares with deep water. However our brothers [combatants] are helping save the rice [from the flood].”].

<sup>529</sup> **D1.3.27.18** DK Military Meeting Minutes, *Minutes of Meeting of Secretaries and Logistics [Chiefs]*, 19 Sep 1976, EN 00195341 [“At Kang Keng there had been thievery, mostly appearing in military elements.”]

<sup>530</sup> **D1.3.8.3** DK Military Meeting Minutes, *Minutes of meeting of the military work in Kampong Som*, 3 Aug 1976, EN 00234012 [“I. Report on military situation: Comrade Mut: 1. Defense force preparation: a. Weapons placed on Kampong Som mainland: In the city of Kampong Som, there are four 105mm, one 40mm, six 37mm and two 12,7mm canons. At Ream and Kang Keng, there are six canons--105mm, 37mm, and 12,8mm”].

<sup>531</sup> **D256/7** ICP Final Submission, paras 146, 414.

<sup>532</sup> **D256/7** ICP Final Submission, paras 191-2, 445, 664-6.

<sup>533</sup> **D256/7** ICP Final Submission, paras 664-5, 352, 693.

<sup>534</sup> **D256/7** ICP Final Submission, paras 342, 345, 352, 360, 366.

<sup>535</sup> **D256/7** ICP Final Submission, paras 666, 672.

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rape in Kampong Som.<sup>536</sup> In Kampong Som, Meas Muth implemented the CPK policy to force individuals to wed partners chosen by the regime and then to consummate that marriage in order to increase the DK population.<sup>537</sup> He disseminated the policy throughout his area of control and instructed his cadres to organise mass marriages for Division 164 soldiers and civilians.<sup>538</sup> As a result, the majority of the couples did not know each other but felt compelled to marry and consummate the marriage.<sup>539</sup> In a 1978 study session held at Ochheuteal beach, Meas Muth presented “an annual marriage plan on the number of couples to be wed”. In that meeting, Meas Muth and Kim Nhan “reviewed all the requests that had been made and determined the number of couples to be wed”. Meas Muth then instructed cadres to “review all the marriage requests and marry them off” and explained publicly that this was necessary to achieve the party’s goal to increase the population to 20 million people.<sup>540</sup> As the Division Commander, Meas Muth had the power to not only authorise marriages but also to determine whether a person that had refused to wed would be punished.<sup>541</sup> Weddings took place at his residence M-164 and other prominent Division 164 locations, including training facilities or logistics office,<sup>542</sup> and were presided over by top Meas Muth’s Division 164 subordinate leaders.<sup>543</sup> Meas Muth himself presided over ceremonies at the Division level.<sup>544</sup>

132. *Division 117/Sector 505 purge*: Again, the Dismissal Order fails to deal with the Kratie purges.<sup>545</sup> Meas Muth was directly and actively involved in every step of the purge of Division 117 and Sector 505 cadres at the end of 1978. He travelled to Kratie and personally arranged the transfer of at least ten cadres, including his own nephew Khun Rum (Division 117 Secretary) and cousin, Meas Moeun (Sector 505 Secretary), to Phnom Penh where they were immediately imprisoned in S-21.<sup>546</sup> He was physically present at the airport when at least two of the cadres boarded their plane.<sup>547</sup>

<sup>536</sup> See **Legal Error of Failure to Consider and Issue a Decision on All Facts Within the Scope of Case 003.**

<sup>537</sup> **D256/7** ICP Final Submission, paras 799, 821.

<sup>538</sup> **D256/7** ICP Final Submission, paras 822, 825, 827.

<sup>539</sup> **D256/7** ICP Final Submission, paras 827-8, 835-42.

<sup>540</sup> **D256/7** ICP Final Submission, para. 822.

<sup>541</sup> **D256/7** ICP Final Submission, para. 203.

<sup>542</sup> **D256/7** ICP Final Submission, para. 834.

<sup>543</sup> **D256/7** ICP Final Submission, paras 823, 825 [Division 164 leaders Dim, Tim Seng, Kim Nhan and Han].

<sup>544</sup> **D256/7** ICP Final Submission, para. 825.

<sup>545</sup> See **Legal Error of Failure to Consider and Issue a Decision on All Facts Within the Scope of Case 003.**

<sup>546</sup> **D256/7** ICP Final Submission, paras 122, 845, 860-2.

<sup>547</sup> **D256/7** ICP Final Submission, paras 122, 860.



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133. Once the purged cadres had been removed, Meas Muth held a meeting with the remaining Division 117 and Sector 505 cadres, where he announced that he had discharged the cadres because they were “traitors”.<sup>548</sup> He then replaced them, appointing his own Division 164 regiment commanders as secretaries of Division 117 and Sector 505.<sup>549</sup> Meas Muth remained in Kratie, and in control of Division 117 and Sector 505, where he continued to purge the lower ranks, including issuing direct orders to execute a Sector 505 military cadre,<sup>550</sup> and overseeing the transfer of military, civilians and captured Vietnamese to S-21.<sup>551</sup>
134. In its deliberations on personal jurisdiction, the Dismissal Order summarises Duch’s role in the crimes as follows: “Duch managed confessions, annotated them, and requested his superiors for arresting suspects who were implicated in the confessions. Duch facilitated arrests, prepared and taught interrogation techniques, and monitored the interrogation and the execution of prisoners and so on and so forth”.<sup>552</sup> As detailed here,<sup>553</sup> Meas Muth’s participation was as least as direct and proximate as each of these acts, and in reality, he enjoyed significantly more autonomy in his implementation of CPK policy than Duch. There is no rational basis when applying all the jurisprudence that exists on the ECCC’s personal jurisdiction to consider Meas Muth any less responsible for crimes than Duch.

**F. ERRONEOUS FACTUAL FINDINGS WITH A DETERMINATIVE IMPACT ON THE ISSUE OF PERSONAL JURISDICTION**

135. The Dismissal Order contains several unreasonable factual findings on specific points that played a key role in the assessment of personal jurisdiction. In most cases, these factual errors resulted from the Dismissal Order’s failure to review any more than the fraction of evidence available on 29 April 2011,<sup>554</sup> while other relevant evidence

<sup>548</sup> **D256/7** ICP Final Submission, paras 122, 863.

<sup>549</sup> **D256/7** ICP Final Submission, paras 123, 845-6, 863-5 [Kim Nhan and Sok Pheap were nominated by Muth].

<sup>550</sup> **D256/7** ICP Final Submission, paras 123, 846, 866-8.

<sup>551</sup> **D256/7** ICP Final Submission, paras 868-9.

<sup>552</sup> **D266** Dismissal Order, para. 371 (citations omitted), fn 1122-25 *citing* Case 001-**E188** Duch TJ, paras 154, 174, 177, 395. *See further* Case 001-**D99** Duch Closing Order, paras 45, 82 (managed and annotated confessions), paras 57-58 (requested superiors for arresting suspects implicated in confessions), paras 52-3, 56-9 (facilitated arrests of prisoners and S-21 personnel), para. 61 (ordered arrests of S-21 personnel), paras 79, 83, 90, 97 (organised, instructed interrogators, monitored interrogations), para. 82 (interrogated himself), 107-11, 113, 118, 119, 121 (monitored executions), paras 90-9 (tortured or ordered torture).

<sup>553</sup> *See supra*, paras 28-32, 96, 98-107, 121-133.

<sup>554</sup> As noted above, this was an error of law. *See Legal Error of Failure to Consider Any Evidence Placed on Case File 003 after 29 April 2011.*

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available before that date was also not considered.

136. On appeal, there is a rebuttable presumption that the judge has properly evaluated all the evidence.<sup>555</sup> While the factfinder has discretion to find some pieces of evidence more persuasive than others,<sup>556</sup> it must be clear how each factual finding was made.<sup>557</sup> There is no discretion to simply ignore a large body of relevant evidence contradicting his findings with no explanation why the selected evidence was preferred.<sup>558</sup> An analysis limited to a select segment of the relevant evidentiary record is not sufficient to constitute a reasoned opinion.<sup>559</sup>

**1. Meas Muth was Secretary of Division 164 (formerly Division 3) and Secretary of Kampong Som Autonomous Sector from 17 April 1975 until 6 January 1979**

137. The Dismissal Order finds that “Meas Muth became Secretary of Division 164 of the [DK] Navy in Kampong Som [...] *at least between January 1976 and April 1978* and Chairman of the Committee Kampong Som City”.<sup>560</sup> When analysing the ECCC’s personal jurisdiction over Meas Muth, the Dismissal Order finds that in his role as Division 164 Secretary, Meas Muth was “in charge of political affairs [...], focusing mainly on dissemination of Party policies”<sup>561</sup> and that one of his two deputy secretaries was responsible for military affairs.<sup>562</sup>
138. The Dismissal Order finding that Meas Muth may not have assumed command of Division 164 until January 1976 is first contradicted by findings in the very same section of the Dismissal Order that (a) Division 164 originated from Division 3 which was established in the Southwest Zone in 1973 or early 1974 and; (b) that “Meas Muth was appointed Chairman [...]. Regiments and battalions [of Division 3] were commanded by

<sup>555</sup> Case 002-F36 Case 002/01 AJ, para. 304 (and citations therein).

<sup>556</sup> *Muvunyi I* AJ, para. 144.

<sup>557</sup> *Bemba* AJ, para. 52; *Kordić & Čerkez* AJ, para. 385; *Kunarac* AJ, para. 41.

<sup>558</sup> Internal Rule 67(4) [“The Closing Order shall state the reasons for the decision.”]; Case 002-F36 Case 002/01 AJ, para. 304; *Muvunyi I* AJ, paras 144, 147; *Gotovina & Markač* AJ, para. 61.

<sup>559</sup> *Perišić* AJ, paras 92, 95.

<sup>560</sup> **D266** Dismissal Order, para. 188 (emphasis added) [No period is mentioned for his role as chairman of the Kampong Som City]. *See also* para. 181.

<sup>561</sup> **D266** Dismissal Order, para. 416. *See also* para. 182 [“Meas Muth [...] was appointed as Chairman of Division 3 (in charge of political affairs)”]. Although the Dismissal Order does not admit it, this finding is directly based on two Meas Muth statements that were *not* placed on the case file prior to 29 April 2011: **D22.2.181** Meas Muth US POW/MIA Statement, 5 Dec 2001, EN 00249694-5, 99 [Meas Muth claims that Chhan was Division Commander in 1975, Saroeun was deputy commander and that himself was just a member in charge of the political affairs]; **D22.2.182** Meas Muth Statement (US POW/PIA), 30 May 2002, EN 00249704-05 [“The 3<sup>rd</sup> Division then absorbed troops from Sector 37 and Chhan became the Division Commander and BG Mut became the Division political officer”]

<sup>562</sup> **D266** Dismissal Order, paras 182, 416.

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Meas Muth”.<sup>563</sup> The Dismissal Order then finds that “after the liberation on 17 April 1975, [Division 3] was ordered to move Kampong Som. There it was renamed Centre Division 164 [...] on 22 July 1975, and later became the DK Navy on 9 October 1975 under Meas Muth’s command.”<sup>564</sup>

139. The finding that Meas Muth may not have been Division 164 secretary until January 1976 is also contradicted by a tremendous volume of evidence on the case file, almost none of which the Dismissal Order engages with. The evidence relied on by the Dismissal Order to identify the January 1976-April 1978 parameters includes the first surviving telegram from Meas Muth, and his last documented telephone message.<sup>565</sup> These communications are not dispositive of the length of Meas Muth’s command of Division 164. Indeed, the evidence relied on by the Dismissal Order to make the above findings<sup>566</sup> explicitly acknowledges Meas Muth as the Secretary of Division 3/164 since at least 1974,<sup>567</sup> and this is corroborated by a wealth of other evidence collected after 29 April 2011.<sup>568</sup> The evidence also demonstrates that Meas Muth was appointed Secretary of Kampong Som Autonomous Sector and Secretary of Kampong City when he arrived there in April 1975.<sup>569</sup>
140. The evidence is similarly unequivocal that Meas Muth remained in control of Division 164 and Kampong Som Sector until January 1979, as this is confirmed by Division 164 cadres based in Kampong Som.<sup>570</sup> Many explain that after Meas Muth was assigned to work at the RAK headquarters in Phnom Penh and undertook assignments near the Vietnamese border, he continued to give orders through Division 164 Deputy

<sup>563</sup> **D266** Dismissal Order, paras 182-3.

<sup>564</sup> **D266** Dismissal Order, para. 187 (citations omitted, emphasis added).

<sup>565</sup> **D266** Dismissal Order, para. 188, *citing* **D1.3.30.2** Report from Meas Muth to Brother 89, 5 Jan 1976; **D1.3.12.1** DK Report from Teanh, 4 Jan 1976, EN 00233962 [listing Meas Muth as the commander of Division 164]; **D1.3.30.25** Confidential Telephone Messages from Mut, 1 Apr 1978.

<sup>566</sup> *See supra*, para. 137.

<sup>567</sup> **D2/8** Say Born WRI, A21, 23, 27, 32, 37, 43, 59; **D2/9** Say Born WRI, A30; **D2/6** Nhoung Chrong WRI, A10, 13; **D4.1.911** Iep Duch WRI, p. 3; **D1.3.30.29** M. Matsushita & S. Heder, *Interviews with Kampuchean Refugees*, EN 00170723 [No. 18]; **D4.1.759** Khem Ngun US POW/MIA Statement, EN 00387265-6; **D4.1.759** Mao Rann US POW/MIA Statement, EN 00387267; **D4.1.746** Som Sok US POW/MIA Statement, EN 00387462; **D4.1.750** Unknown US POW/MIA Statement, EN 00387278-9.

<sup>568</sup> **D256/7** ICP Final Submission, para. 61. *See e.g.* **D114/186** Sath Chak WRI, A16; **D114/89** Seng Sin WRI, A15, 66; **D114/82** Keo San WRI, A5; **D54/98** Heang Ret WRI, A38; **D114/181** Sem Kol WRI, A6-8; **D54/43** Lon Seng WRI, A5; **D54/51** Meas Voeun WRI, A1.

<sup>569</sup> **D256/7** ICP Final Submission, paras 72 (fn. 217-20), 75-76 (fn. 226-9, 232) [*see the evidence quoted*].

<sup>570</sup> **D256/7** ICP Final Submission, paras 61 (fn. 186), 78 (fn. 236), 866 (fn. 3515) [*see the evidence cited*]; *See also* **D54/79** Nop Hal WRI, A26; **D54/87** Prum Sarat WRI, A45, 171-172; **D1.3.30.29** M. Matsushita & S. Heder, *Interviews with Kampuchean Refugees at Thai-Cambodia Border*, EN 00170723; **D59/1/1.8a** Prum Sarat DC-Cam Statement, EN 00974227; **D54/48** Em Sun WRI, A19.

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Commander, Tim Seng.<sup>571</sup> Meas Muth himself confirmed that he did not relinquish command of Division 164 when he moved to Kratie.<sup>572</sup> Meas Muth's continuing control over Division 164 is also demonstrated by the fact that he redeployed and commanded large numbers of Division 164 troops at the Vietnamese border (including Kratie) in 1978,<sup>573</sup> and appointed two Division 164 Regiment commanders to the highest-ranking positions in Division 117 and Sector 505 after purging the former leadership there.<sup>574</sup>

141. As Division 164 and Kampong Som Autonomous Sector Secretary, Meas Muth controlled both military and civilian affairs in the Kampong Som Sector.<sup>575</sup> He was in charge of the protection and security of the Kampong Som Port during the entire regime (formally placed under the Ministry of Commerce).<sup>576</sup> Meas Muth fully controlled the port from February 1978 until January 1979.<sup>577</sup>

**2. Meas Muth was a member of the General Staff Committee from mid-1975 and Deputy Secretary of the General Staff from late 1978**

142. The Dismissal Order erred in affirming that there are considerable doubts Meas Muth was ever member of the General Staff Committee and that, in the event he did become a member or even its deputy chief, it would not have been earlier than 50 days before the DK regime collapsed.<sup>578</sup> From the evidence referred to in the Dismissal Order<sup>579</sup> and the most relevant evidence placed on the case file after 29 April 2011,<sup>580</sup> there is no doubt

<sup>571</sup> **D256/7** ICP Final Submission, para. 78 (fn. 236) [see the evidence cited]. With regard to Tim Seng's responsibilities, see **D256/7** ICP Final Submission, paras 224, 226, 244.

<sup>572</sup> **D54/16/1R** Meas Muth Audio Interview by D. Kattenburg, Apr 2009, 34:37-35:28 [In February 1978, "I still had my [Division 164] position but I was assigned for another mission in Kratie"].

<sup>573</sup> **D256/7** ICP Final Submission, paras 122 (fn. 356), 123 (fn. 363-5), 124 (fn. 370), 864 (fn. 3502), and the sources quoted.

<sup>574</sup> Meas Muth appointed Kim Nhan (Regiment 63 Commander and Division 164 committee member) as Division 117 Secretary and Sok Pheap (Regiment 61 Commander) as Sector 505 Secretary. See **D256/7** ICP Final Submission, para. 864.

<sup>575</sup> **D256/7** ICP Final Submission, paras 76-77, 220.

<sup>576</sup> **D256/7** ICP Final Submission, para. 221 (fn. 662-5), 253.

<sup>577</sup> Meas Muth nominated Division 164 cadres as Kampong Som Port chief and deputy chief to replace Thuch Rin alias Krin: **D256/7** ICP Final Submission, para 75 (fn. 230), 221 (fn. 666-7), 224 (a), (c).

<sup>578</sup> **D266** Dismissal Order, paras 163, 418.

<sup>579</sup> See in particular **D1.3.27.1** CPK Standing Committee Minutes, 9 Oct 1975; **D12** Duch WRI.

<sup>580</sup> See e.g., **D54/110** Lon Seng WRI, A8-10 [explains that as a division commander Meas Muth was a member in the committee of the army general staff since April 1975 and was consulted and associated to make general staff work plans]; **D54/54** Meas Voeun WRI, A4-5 [describes Meas Muth was a member of the General Staff Committee and had the authority over West Zone Division 1 on maritime operations]; **D32/10** Khieu Saran WRI, A15 ["all division commanders were members of the General Staff committee"]; **D114/158** Duch WRI, A24 ["The Centre army was arranged after 1975. I am talking about the General Staff Committee. The secretary of the General Staff Committee was Son Sen. After him, it was Men San alias Ya, [...] Seath Chhe alias Tum [...] The members of the General Staff Committee were Brother Muth, in charge of the Navy, at seas; Comrade Meth, in charge of air force; and other General Staff Committee members who were just assistants to the General Staff"]; **D12** Duch WRI, EN 00680797 [confirming Meas Muth and Sou Met were

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that Meas Muth was effectively a member of the General Staff Committee since the creation of the RAK Central Divisions in July-August 1975<sup>581</sup> and then Son Sen's deputy from at least late 1978.<sup>582</sup>

143. As a Central Division commander and chief of the Navy, Meas Muth was automatically a member of the General Staff.<sup>583</sup> As member, Meas Muth regularly attended the General Staff committee meetings in Phnom Penh,<sup>584</sup> including most of those held in plenary session.<sup>585</sup> Regarding Meas Muth's membership on the General Staff Committee, the Dismissal Order is inconsistent. Paragraph 163 discusses whether Meas Muth was a *member* of the General Staff and cites Duch as only underlying source mentioning the possibility of such membership; however, in the reasoning and conclusion section of the Dismissal Order, paragraph 418 states, on the basis of the same paragraph 163, that "a *few witnesses* claimed that [Meas Muth] was *Deputy Chief* of the General Staff".<sup>586</sup> First, logically Meas Muth could not have been promoted Deputy Chief without first being a member of the General Staff. Further, in the sole interview cited (it is therefore a *single* witness and not a *few witnesses* as mentioned in paragraph 418), Duch discusses the position of Meas Muth as *member* of the General Staff, but not as *deputy chief*.<sup>587</sup>

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members of the General Staff standing committee since the start, and not assistants].

<sup>581</sup> **D256/7** ICP Final Submission, paras 53-5 and the sources cited.

<sup>582</sup> **D256/7** ICP Final Submission, paras 52-3, 56-8 and the sources cited (in particular fn. 160-1, 168, 172-7). *See also* **D114/297.1.23** Moeng Vet, T. 27 Jul 2016, 13.48.58-13.50.21 ["At the general staff during the DK period, Son Sen was the commander in chief, and Meas Muth, the deputy commander in chief and Sou Met was deputy commander in chief of air force"].

<sup>583</sup> **D54/110** Lon Seng WRI, A8-10; **D32/10** Khieu Saran WRI, A15; **D54/54** Meas Vooun WRI, A4-5; **D114/158** Duch WRI, A24; **D12** Duch WRI, EN 00680797; **D54/37** Soem Ny WRI A30-31.

<sup>584</sup> **D1.3.8.2 (D4.1.632)** DK Military Meeting Minutes, 1 Jun 1976, EN 00233958; **D234/2.1.18** DK Military Meeting Minutes, 27 Jun 1976, EN 00543724; **D1.3.8.3** DK Military Meeting Minutes, 3 Aug 1976, EN 00234012; **D1.3.8.4** DK Military Meeting Minutes of Comrades 164, 9 Sep 1976 [Meas Muth was likely present although the names of the participants are not mentioned]; **D1.3.27.18** DK Military Meeting Minutes, 19 Sep 1976, EN 00195340-41; **D1.3.27.20** DK Military Meeting Minutes, 9 Oct 1976, EN 00183990, 00940350-1; **D1.3.27.22** DK Military Meeting Minutes, 21 Nov 1976, EN 00656384 [plenary session]; **D1.3.27.26** DK Military Meeting Minutes, 1 Mar 1977, EN 00933835. Two other meetings minutes do not mention the entire list of participants: **D1.3.8.7** DK Military Meeting Minutes, 18 Oct 1976; **D1.3.27.8** DK Military Meeting Minutes, 16 May 1976. *See also* **D266** Dismissal Order, para. 156 (fn 446) ["Meas Muth often attended General Staff meetings on plans to purge RAK divisions"]; **D256/7** ICP Final Submission, paras 54-55 and the evidence cited.

<sup>585</sup> Meas Muth, who was busy and stationed far away from Phnom Penh, did not attend the meetings organised for those stationed in or around Phnom Penh: *see e.g.* **D1.3.27.12** DK Military Meeting Minutes, 18 Aug 1976 [three participants + Son Sen]; **D1.3.27.16** DK Military Meeting Minutes, 16 Sep 1976 [4 participants]; **D1.3.27.13** DK Military Meeting Minutes, 30 Aug 1976 [6 participants].

<sup>586</sup> **D266** Dismissal Order, paras 163 ["Regarding Meas Muth's membership of the General Staff, we find that there are considerable doubts [...] Duch testified that perhaps hardly had Ya and Tum been smashed before Sou Met and Meas Muth became *members*"], 418 ["If it were true as a *few witnesses* claimed that he was *Deputy Chief* of the General Staff [...] (paragraph 163)"] (emphasis added).

<sup>587</sup> **D12** Duch WRI, EN 00680797.

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Undoubtedly, where the Dismissal Order refers to *a few witnesses* discussing the status of Meas Muth as General Staff *Deputy Chief*, these are witnesses who testified after 29 April 2011 and who explicitly mentioned that position.<sup>588</sup>

144. Regarding the period of Meas Muth's membership, the Dismissal Order states that even if Meas Muth had been a member or deputy chief of the General Staff, it would not have been for more than 50 days/one month.<sup>589</sup> Duch however never mentioned any date in the WRI cited, not even dates for the transfer of Maen San *alias* Ya or the execution of Siet Chhe *alias* Tum, after which the Dismissal Order claims Sou Met and Meas Muth could have become members/deputy chiefs at the 2 November 1978 Party Congress. On the contrary, Duch clearly stated that both Meas Muth and Sou Met were members of the General Staff Committee for the entire duration of the regime;<sup>590</sup>
145. Contradicting itself, the Dismissal Order first recognises with Duch that "The General Staff [...] members included Meas Muth responsible for the navy, Sou Met responsible for the air force".<sup>591</sup> However, the Dismissal Order then states that Meas Muth "*may* have been appointed as a *political assistant* to the General Staff at the 1975 Party Congress"<sup>592</sup> This is speculative and inconsistent. In the source cited, the 9 October 1975 Standing Committee meeting minutes, Pol Pot did propose to have a "Committee of Staff Assistants" for military policy and logistics but did not mention any name.<sup>593</sup> Adding to the confusion, the Dismissal Order also asserts that "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",<sup>594</sup> which establishes that Meas Muth was much higher in the RAK hierarchy than any assistant could ever be. The

<sup>588</sup> **D256/7** ICP Final Submission, paras 52-3, 56-8 and the sources cited (*see e.g.*, fns 160-1, 168, 172-7). This demonstrates once more that the Dismissal Order did not ignore the evidence placed on the case file after 29 April 2011 but used it without citing it.

<sup>589</sup> **D266** Dismissal Order, paras 163, 418.

<sup>590</sup> **D12** Duch WRI, EN 00680797-8 (emphasis added) ["After these people, there were other members including Meas Mut, responsible for navy, Sou Met, responsible for air force [...] Meas Mut and Sou Met were the member of the General Staff responsible for navy and air force [...] General Staff membership lasted for one full regime"], FR 00794727 [The French version does not use the term 'after these people' but states that apart from Son Sen, Ya and Tum, "the other members were Meas Muth and Sou Met" (unofficial translation). *See also*, about the time Meas Muth's membership started (1975): **D114/158** Duch WRI, A24; **D54/110** Lon Seng WRI, A10.

<sup>591</sup> **D266** Dismissal Order, para. 160, citing **D12** Duch, EN 00680797.

<sup>592</sup> **D266** Dismissal Order, para. 162, citing **D1.3.27.1** CPK Standing Committee Minutes, 9 Oct 1975, which erroneously refers to page 5 (EN 00183397).

<sup>593</sup> **D1.3.27.1** CPK Standing Committee Minutes, 9 Oct 1975, EN 00183402 (p.10) [Comrade Secretary: "the General Staff Committee [...] It must be a collective process because the new work demands collective leadership [...] Must have Committee of Staff Assistants for military policy and logistics"].

<sup>594</sup> **D266** Dismissal Order, para. 157 (fn. 451) (emphasis added).

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Dismissal Order finally states that, according to Duch, “division secretaries were assistants to the General Staff.”<sup>595</sup> However this misstates Duch’s response, as he referred to some assistants (In Lorn *alias* Nat, Sun Ty *alias* Teanh and Pech Chhan *alias* Saom) who were also secretaries of division and to other assistants like Chan Chak Krey and Chey Han *alias* Chhan (a Division 164 subordinate of Meas Muth). However, Duch twice clarified in the same answer that Meas Mut[h] and Sou Met were effectively members of the General Staff standing committee, not assistants.<sup>596</sup>

146. Based on multiple witness written and oral testimonies collected essentially after 29 April 2011, there is no doubt that Meas Muth was promoted to be deputy of Son Sen within the General Staff Committee in 1978,<sup>597</sup> while he retained his position of Division 164 commander till the end of the regime.<sup>598</sup> The only uncertainty concerns the exact date or month Meas Muth was effectively promoted. While Meas Muth claims it was in February 1978 that he was sent to Kratie,<sup>599</sup> most of the witnesses state it was in September-October 1978 or “late 1978” that he left Kampong Som to join the General Staff headquarters, began commanding Division 117 forces during intense border fighting with Vietnam,<sup>600</sup> before personally conducting the purges of both Sector 505 (Kratie) and Division 117 in November-December 1978 and continuing to control them until the end of the regime.<sup>601</sup>

<sup>595</sup> **D266** Dismissal Order, para 157, citing **D12** Duch WRI, EN 00680797.

<sup>596</sup> **D12** Duch WRI, EN 00680797-98.

<sup>597</sup> **D256/7** ICP Final Submission, paras 52-3, 56-8 and the sources cited (in particular fns 160-1, 168, 172-7), including **D114/297.1.24** Moeng Vet, T. 28 Jul 2016, 09.41.46-09.46.58; **D114/297.1.23** Moeng Vet, T. 27 Jul 2016, 13.48.58-13.50.21; **D54/62** Moeng Vet WRI, A22-3, 25, 27; **D54/60.2** Moeng Vet DC-Cam Statement, EN 00992989; **D54/63** Moeng Vet WRI, A31; **D54/100** Lay Boonhak WRI, A96; **D54/99.1** Lay Bunhak DC-Cam Statement, EN 01115988; **D114/297.1.27** Seng Soeun, T. 29 Aug 2016, 13.55.39-14.00.52; **D114/169** Seng Soeun WRI, A5, 25; **D114/186** Sath Chak WRI, A126-7, 129-30; **D114/65** Chet Bunna WRI, A9-10, 12; **D59/1/1.8a** Prum Sarat DC-Cam Statement, EN 00974225-26; **D59/1/1.11a** Heang (Hieng) Ret DC-Cam Statement, EN 00974098, 119-21.

<sup>598</sup> **D256/7** ICP Final Submission, paras 56 (*see* the sources cited in fn. 169), 866.

<sup>599</sup> Meas Muth confirmed he maintained control over Division 164 after he left Kampong Som but stated it occurred in February 1978: **D54/16/1R** Audio Recording of Interview with Meas Muth by David Kattenburg, Apr 2009, 34:37-35:28 [“In February 1978 I had left Kampong Som already [...] I was assigned to work in Kratie province [...] I still had my position [in Division 164] but I was assigned for another mission in Kratie”]. *See also*, **D59/1/1.11a** Heang Ret DC-Cam Statement, EN 00974119 [in 1977].

<sup>600</sup> **D256/7** ICP Final Submission, paras 52-3, 56, 121-2, 859 (fn. 3466); *see e.g.*, **D59/1/1.8a** Prum Sarat DC-Cam Statement, EN 00974225-27 [Around September 1978, Meas Muth went to Phnom Penh and was the deputy commander-in-chief of the general staff]; **D54/63** Moeng Vet WRI, A11-2 [“Meas Muth worked on the General Staff, so he had authority to order three branches of the military forces [...] A12: [In October 1978] we requested help from Meas Mut [...] that afternoon he sent the aircraft [to Kratie] to help us”]; **D54/23** Pak Sok WRI, A8-9 [“Meas Muth was sent to Kratie because at that time the arrests of cadres surged [...] A9: He went there in late 1978”].

<sup>601</sup> **D256/7** ICP Final Submission, paras 58, 87, 89, 120-3, 845-9, 860-3, 867 and the evidence cited.

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147. In fact, Meas Muth's influence in the RAK reached its peak in late 1978 when he was entrusted with the control over three branches of the RAK and was assigned to conduct purges within other centre divisions and autonomous sectors. At that moment, pursuant to the 30 March 1976 Central Committee directives,<sup>602</sup> he could make decisions to "smash" inside and outside the ranks of the *entire* RAK and no longer only Division 164 troops, Kampong Som civilians and foreigners at sea. The evidence establishes that Meas Muth effectively exercised this power to smash and used it in late 1978, with the help of Division 164 cadres under his command, to arrest and transfer to S-21 the Centre Division 117 military leadership, along with top-level Sector 505 civilian cadres and six Vietnamese nationals.<sup>603</sup> The Dismissal Order's speculation about the number of days or months Meas Muth was deputy chief of staff in late 1978 is therefore irrelevant.<sup>604</sup>

### ***3. Meas Muth was a member of the CPK Central Committee from January 1976***

148. The Dismissal Order erred in finding that Meas Muth's membership in the CPK Central Committee was not established and that Meas Muth was only an 'assistant' to the Central Committee who had no right to vote or participate in discussions or to 'smash' perceived enemies.<sup>605</sup> Meas Muth's membership on the Central Committee is well established by the most reliable source on this issue, Khieu Samphan, the DK Head of State and a fellow Central Committee member since January 1976 (candidate member in 1971-1976). Khieu Samphan would have no motive to exaggerate the position of Meas Muth.<sup>606</sup> Khieu Samphan was much better positioned to know the membership of the Central Committee than Duch, who was not a member but only based his opinion that Meas Muth was just a Central Committee assistant, a status not even envisaged by the CPK Statute,<sup>607</sup> on

<sup>602</sup> The 30 March 1976 Central Committee directives are discussed *supra* and *infra*, paras 100, 152 [*see also* paras 83, 98].

<sup>603</sup> **D256/7** ICP Final Submission, paras 58, 87, 89, 120-3, 550, 845-9, 860-3, 867 and the evidence cited. See also, about his authority to act in Son Sen's stead in Memot District, East Zone, and suppress "DK rebels": **D256/7** ICP Final Submission, para. 124 (fn. 370).

<sup>604</sup> **D266** Dismissal Order, paras 163, 418.

<sup>605</sup> **D266** Dismissal Order, paras 108-15, 117-22.

<sup>606</sup> **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."], EN 00156750 ["The third and last general meeting was held in 1976 in Phnom Penh in the Borei Keila sports centre."]. *See also*, about the holding of the 4<sup>th</sup> Party Congress in January 1976 when the new Central Committee members were appointed pursuant to arts 21(3) & 24 of the CPK Statute (**D1.3.22.1**): **D4.1.871** *Revolutionary Flag*, Sept 1978, EN 00488633 ["Party Congress in January 1976"]; **D4.1.1006** *Statute of the Communist Youth League of Kampuchea*, EN 00574545 ["January 1976"]; **D1.3.17.6** S. Heder and B. Titemore, *Seven Candidates for Prosecution*, EN 00393581 ["CPK Congress in January 1976"]; **D1.3.17.1** E. Becker, *When the War Was Over*, EN 00237887 [Party Congress was in January 1976].

<sup>607</sup> **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



secondary sources and S-21 confessions obtained under torture.<sup>608</sup> Khieu Samphan unambiguously affirmed that Meas Muth was a member of the CPK Central Committee.<sup>609</sup> When Khieu Samphan was asked to provide the names of the Central Committee members, he first named Meas Muth, before naming four other senior cadres.<sup>610</sup>

149. The Dismissal Order failed to provide reasons justifying the preference given to Duch's statements over Khieu Samphan's regarding Meas Muth's role in the Central Committee. Notably, the Dismissal Order seems to judge fully credible Khieu Samphan's statements as regards to the other members of the Central Committee he cited, namely Doeun, Koy Thuon, Ke Pauk and Pang. The *sole* source used by the NCIJ to establish that Koy Thuon, Ke Pauk and Doeun were effectively members of the Central Committee is the exact

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committee].

<sup>608</sup> **D266** Dismissal Order, paras 110-2, 117-8, 120-1. **D1.3.33.13** Duch WRI, EN 00154911 ["Amongst the Members of the Assisting Committee of the Central Committee, there were, in particular: Chhim Sam-aok [alias Pang], Sam Bit [...], Meas Mut [...], Sou Samet [...] Soeung [...] and Veau Em alias Sarun"]; **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 ["Nat [...] was discontented with four people who had been admitted to the assisting committee, but him [...] It was Nat who told me this story. And my supervisor Son Sen also told this story to me [...] Koy Thuon also told me about this"]; **D1.3.33.7** Duch Military Court Statement, EN 00184830; **D4.1.948** Duch WRI, EN 00329131; **D4.1.947** Duch WRI to Military Court, EN 00326764. *Contra*: **D10.1.64** Duch Final Written Submission, EN 00412107, fn. 33 ["the names of the Central Committee *members* I have ever heard of were Khieu Samphan, Pauk, Pal, Sarun, Sam Bith, Meas Muth, Sou Sameth and Soeung"] (emphasis added); **D4.1.405** Duch WRI, EN 00244242 ["[Nat] was jealous when Meas Mut and Sam Bit were nominated to the Central Committee in 1975"]. It is also possible that what Nat told Duch in late 1975 (about Meas Muth being nominated assistant to the Central Committee was no longer true when the fourth CPK General Congress was held in January 1976 (not in late 1975) and designated the members of the Central Committee, including Khieu Samphan: *see* **D4.1.947** Duch WRI to Military Court, EN 00326762-63; **D12** Duch WRI, EN 00680796.

<sup>609</sup> **D256/7** ICP Final Submission, paras 49-50. **D1.3.33.15** Khieu Samphan WRI, EN 00156751. 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). 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; **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).

<sup>610</sup> **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 names 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. And I was also a member of this central committee"]; **D4.1.1074** Khieu Samphan WRI, EN 00156753 ["Pang was close to Pol Pot [...] He was a member of the central committee"]. *See also* **D4.1.4** T. Carney, *The Organization of Power*, EN 00105152-53 [cites Ta Muth as member of the Central Committee together with his subordinates of the Kampong Som committee: Thuch Rin alias Krin, member, and Lohn -Sok Sim alias Chap Lonh-, candidate member].

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same interview of Khieu Samphan discussing Meas Muth's membership,<sup>611</sup> while another of his statements constitutes one of two sources proving Pang's membership.<sup>612</sup> Therefore, there is no objective reason for the Dismissal Order to solely rely on Khieu Samphan's declarations for establishing the membership of other Central Committee members but not to accord the same weight to Khieu Samphan's naming Meas Muth as a fellow member of the Central Committee. Given his important role within the RAK as Chief of the Navy and member of the General Staff Committee and his responsibilities as secretary of an autonomous sector, it is logical that Meas Muth was member of the Central Committee from at least January 1976. The Dismissal Order precisely acknowledges that the Central Committee was composed of more than 30 full-rights and candidate members, including *secretaries of sectors*.<sup>613</sup>

150. To minimise the role of Meas Muth within the Central Committee, the Dismissal Order also relies on Meas Muth's own statement in a press article where he denies this membership and claims he was an ordinary member of the Party.<sup>614</sup> But this self-serving denial is not corroborated by other evidence and deserves little weight. In the same interview, Meas Muth acknowledged that he would meet with Son Sen "in order to carry out the work of the Central Committee".<sup>615</sup> The Dismissal Order notes that no contemporaneous documents formally name Meas Muth as Central Committee member.<sup>616</sup> However, there is no complete list of Central Committee members that survived the DK regime.
151. Meas Muth's Central Committee membership has a determinative impact on the issue of personal jurisdiction as the Dismissal Order itself acknowledged that membership in the Central Committee would be sufficient to establish that Meas Muth was a DK "senior leader". Indeed, the Dismissal Order states that the term "senior leaders" in the ECCC Agreement was meant "to select only a very limited number of leaders who could fall

<sup>611</sup> **D266** Dismissal Order, para. 108 [fns 284 (Ke Pauk and Koy Thuon), 286 (Doeun)], relying solely on **D1.3.33.15** Khieu Samphan WRI, EN 00156751.

<sup>612</sup> **D266** Dismissal Order, para. 108 [fn. 287 (Pang)], stating that Pang was either member (Khieu Samphan) or assistant to the Central Committee (Duch), referring to **D4.1.1074** Khieu Samphan WRI, EN 00156753 and to **D1.3.33.13** Duch WRI, EN 00154910.

<sup>613</sup> **D266** Dismissal Order, para. 109.

<sup>614</sup> **D266** Dismissal Order, para. 115 (fn. 309), citing **D1.3.7.8** Meas Muth Statement, *Let Bygones Be Bygones* (Cambodia Daily), 1 Mar 2008.

<sup>615</sup> **D1.3.7.8** Meas Muth Statement, *Let Bygones Be Bygones* (Cambodia Daily), 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"].

<sup>616</sup> **D266** Dismissal Order, para. 115.

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under the jurisdiction of the ECCC. These refer merely to members of the Central Committee of the CPK and the Party Standing Committee”.<sup>617</sup>

152. As one of thirty members of the Central Committee, Meas Muth took part in the adoption of the 30 March 1976 decision delegating the right to ‘smash’ people inside and outside the ranks.<sup>618</sup> As member of the Central and General Staff Committees, Meas Muth was high enough in the CPK and RAK hierarchy to have the power and authority to arrest and execute internal and external enemies and be considered as one of those “most responsible” for the crimes of the DK regime.
153. The Dismissal Order lists Ieng Thirith among the DK “senior leaders” because she was member of “the Central Committee of the CPK”.<sup>619</sup> However, the Case 002 Closing Order, signed by both CIJs in September 2010, found that “Ieng Thirith was neither a member of the Standing Committee nor of the Central Committee”, citing both Khieu Samphan and Duch’s statements.<sup>620</sup> Although Ieng Thirith was significantly lower in the CPK hierarchy than Meas Muth, the Case 002 Closing Order still found that Ieng Thirith was a DK senior leader “due to [her] *de facto* and *de jure* hierarchical authority”.<sup>621</sup> The Closing Order further found that Ieng Thirith also fell in the category of those “most responsible”.<sup>622</sup>
154. The Dismissal Order states that Meas Muth was “below around 50 cadres”, including the nine Standing Committee members and candidate members, more than 30 full-rights and candidate members of the CPK Central Committee, six members of the Military Committee and the secretary, deputy and members of the General Staff Committee.<sup>623</sup> As demonstrated above, this assertion is false as Meas Muth was both a member of the Central Committee (the second highest body within the CPK structure which implemented the CPK line and instructed all zone and sector committees)<sup>624</sup> and of the General Staff Committee.

<sup>617</sup> D266 Dismissal Order, para. 395.

<sup>618</sup> D1.3.19.1 CPK Central Committee Directives, 30 Mar 1976.

<sup>619</sup> D266 Dismissal Order, para. 395, *in fine* [Van Rith, acting Minister of Commerce, is also listed and was not a Central Committee member, at least not before late 1978].

<sup>620</sup> D10.1.101 Case 002 Closing Order, para. 1207 [Mentions that Sao Sarun is the sole witness stating that Ieng Thirith was a Central Committee member but that the CIJs followed the statements of Khieu Samphan and Duch who said the opposite].

<sup>621</sup> D10.1.101 Case 002 Closing Order, para. 1327.

<sup>622</sup> D10.1.101 Case 002 Closing Order, para. 1328.

<sup>623</sup> D266 Dismissal Order, para. 419.

<sup>624</sup> D1.3.22.1 CPK Statute, Jan 1976, art. 23; D1.3.33.15 Khieu Samphan WRI, EN 00156750.

### G. FACTUAL ERRORS IN THE DISMISSAL ORDER'S TREATMENT OF VICTIMS

155. The Dismissal Order correctly holds that the number of victims is one factor necessary to determine the gravity of the crimes for the purposes of a personal jurisdiction assessment.<sup>625</sup> However, in its reasons for finding that Meas Muth falls outside the ECCC's personal jurisdiction, the Dismissal Order refers only to its extremely limited factual findings on victim numbers for deaths of foreigners captured at sea and purged Division 164 soldiers at S-21.<sup>626</sup> On this basis, the Dismissal Order concludes that "the number of victims who suffered as a result of Meas Muth's direct acts differs greatly from those who suffered as a result of Duch's direct acts".<sup>627</sup> Elsewhere in the Dismissal Order, it makes some restricted findings regarding workers at Stung Hav rock quarry as well as foreigners captured at sea and on the islands, and conducts a limited survey of evidence in respect of possible victims at Wat Enta Nhien.<sup>628</sup>
156. The Dismissal Order's treatment of victims constitutes factual errors for at least four reasons: (i) in its final analysis, it discounts victims of crimes not occurring at S-21; (ii) it fails to consider at all the victims at several criminal events and crime sites within the scope of Case 003; (iii) the S-21 figures it provides vastly underestimate the number of deaths at S-21 for which Meas Muth is at least partly responsible; and (iv) where it makes findings or surveys evidence regarding victims at other crime sites, it fails to take into account all evidence on the case file resulting in erroneous factual findings. Together, these errors lead the Dismissal Order to grossly underestimate the gravity of the crimes for which Meas Muth is responsible.
157. The Dismissal Order erred in considering only the fate of persons transferred from Kampong Som to S-21. Son Sen and the Party Centre granted Meas Muth the authority and autonomy to carry out the purge of Division 164 cadres and to control and punish the civilians in Kampong Som.<sup>629</sup> Son Sen had similarly delegated to Meas Muth the authority to arrest and smash foreigners captured at sea and on the islands claimed by DK.<sup>630</sup> As such, only a very small proportion of the Division 164 cadres (67), Kampong Som civilians and foreigners captured at sea were ever transferred to Phnom Penh and

<sup>625</sup> **D266** Dismissal Order, paras 365-6, *referring to* Case 001-E188 *Duch* TJ, para. 22.

<sup>626</sup> **D266** Dismissal Order, para. 426 [the term used for 'foreigners' arrested at sea is 'some others'].

<sup>627</sup> **D266** Dismissal Order, para. 428.

<sup>628</sup> **D266** Dismissal Order, paras 290-6 (Wat Enta Nhien), 299-305 (Stung Hav), 307-22 (Crimes committed by the DK Navy).

<sup>629</sup> *See supra*, paras 96, 103-7.

<sup>630</sup> *See supra*, paras 98-102.

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executed at S-21. The vast majority of victims were enslaved, arrested, imprisoned, tortured and/or executed in Kampong Som security centres, worksites and execution sites, or killed at sea or on nearby islands.

158. As detailed above,<sup>631</sup> the Dismissal Order also erred in failing to consider several crime sites and criminal events within the scope of Case 003 and to consider the extent of Meas Muth's responsibility for these crimes.<sup>632</sup> Had it done so, the Dismissal Order would have found that Meas Muth is responsible for the *forced marriage and rape* of many victims (both military and civilians and likely numbering in the hundreds) in the Kampong Som Sector.<sup>633</sup> At *Toek Sap security centre*, likely over a thousand people, including infants and children, were imprisoned in inhumane conditions. Some were tortured and at least a thousand were executed. Victim groups included purged Division 164 combatants,<sup>634</sup> former Lon Nol soldiers and officials, civilians, and Vietnamese, Thai and other foreign nationals captured at sea.<sup>635</sup> At the *Ream worksites and execution sites*, several thousand workers,<sup>636</sup> including children and the elderly, were enslaved in inhumane conditions. At least several hundred disappeared from the worksites, likely killed at local execution sites, including Toek Sap, the durian plantations and C.I. execution site. Victims included demobilised Division 164 soldiers and their families, Thai and Vietnamese captured at sea, and local civilians, including 17 April people and Khmer Krom.<sup>637</sup> During the *purges of Divisions 117, 502 and 310*, in addition to those sent to S-21,<sup>638</sup> over 150 soldiers were killed locally.<sup>639</sup>
159. *Crimes committed by the DK Navy*: In addition to "some others" it concludes were sent to S-21,<sup>640</sup> the Dismissal Order determines the "Number of Victims" of crimes committed

<sup>631</sup> See **Legal Error of Failure to Consider and Issue a Decision on All Facts Within the Scope of Case 003**.

<sup>632</sup> These were: (i) forced marriage (and rape in the context of forced marriage); (ii) Toek Sap security centre; (iii) Ream worksites (including Bet Trang, Kang Keng, and the Durian plantations); (iv) the purges of Division 117 (including Sector 505 cadres), Divisions 502 and 310.

<sup>633</sup> See *supra*, paras 71-2.

<sup>634</sup> Identifying whether victims fall into categories of persons targeted by the Khmer Rouge is relevant for legal characterisation of the crimes, as persecution (on political, religious or racial grounds), genocide and grave breaches of the Geneva Conventions.

<sup>635</sup> See *supra*, paras 73-5.

<sup>636</sup> See *supra*, paras 76-8. Meas Muth himself reported that his rice production workforce in Kampong Som numbered 17,000: **D1.3.27.18** DK Military Meeting Minutes, 19 Sep 1976, EN 00195341. As noted above, whilst the ICP does not assume that every one of these was based in the Ream area, he notes that this was the primary rice production area in Kampong Som Sector, and that the number is indicative of the magnitude of the numbers enslaved in this area. See further **D267** Indictment, paras 180, 341, 468.

<sup>637</sup> See *supra*, paras 76-8.

<sup>638</sup> See *infra*, para. 170.

<sup>639</sup> See *supra*, paras 79-80.

<sup>640</sup> **D266** Dismissal Order, para. 426.

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by the DK Navy, by reference to just two reports from Meas Muth to Son Sen. These document the sinking and capture of Vietnamese boats, the arrest and killing of 120 Vietnamese and the capture of one Thai boat.<sup>641</sup> Elsewhere in the section, the Dismissal Order reviews evidence of the capture of (i) two further Thai boats and the killing of people on board;<sup>642</sup> (ii) the “Foxy Lady” yacht carrying three Westerners in August 1978<sup>643</sup> (yet does not record the death at sea of one of the foreigners aboard and the other two captured then killed at S-21 which appears in the same document);<sup>644</sup> and (iii) another unidentified American in April 1978 near Koh Kong<sup>645</sup> It also refers to a report on the capture of one Thai fishing boat,<sup>646</sup> and a single S-21 list documenting 12 Vietnamese sent from Kampong Som to S-21, ten of whom it states “may have been sent from Division 1.”<sup>647</sup>

160. However, the Dismissal Order’s assessment severely underestimates the number of foreigners captured by the DK Navy who were imprisoned, tortured and killed at sea and on the islands, in Kampong Som sector and at S-21.
161. Much of the evidence the Dismissal Order fails to consider was on the case file before 29 April 2011. For example, it ignores numerous sources from S-21 demonstrating that at least 85 Vietnamese civilians and military, including teenagers, were transferred from Kampong Som, often tortured, and then executed at S-21.<sup>648</sup> The same document (the

<sup>641</sup> **D266** Dismissal Order, paras 313-4, *citing* **D1.3.34.64** Telephone Message from Meas Muth to Son Sen, 20 Mar 1978, EN 00233649; **D1.3.30.25** Telephone Message from Meas Muth, 1 Apr 1978, EN 00143507.

<sup>642</sup> **D266** Dismissal Order, para. 308, *citing* **D1.3.34.28** Telegram from Sim to Meas Muth, 15 Sep 1977.

<sup>643</sup> **D266** Dismissal Order, para. 312, *citing* **D11/2** Robert Hamill CPA.

<sup>644</sup> **D11/2** Robert Hamill CPA, EN 00681116 [detailing that Stuart Glass was shot and died near Koh Taing, Kerry G. Hamill, the skipper and other co-owner, and John Dewhirst, were arrested and ended up in S-21]. *See also* **D11/2.3** S-21 Confession of John D. Dewhirst, 13 Oct 1978, EN 00681102; **D1.3.33.3** Duch WRI, EN 00147526-27; **D1.3.33.4** Duch WRI, EN 00198221; **D4.1.378** Kung Phai WRI, EN 00163633-34.

<sup>645</sup> **D266** Dismissal Order, para. 309, *citing* **D22.1.14** *US Intelligence Capture of American Personnel*, 26 Apr 1978 (The Dismissal Order used D22.1.14 although this is a document that was placed on the case file after 29 April 2011).

<sup>646</sup> **D266** Dismissal Order, para. 321, *citing* **D1.3.34.10** Telegram from Meas Muth to Son Sen, 13 Aug 1976.

<sup>647</sup> **D266** Dismissal Order, para. 307, *citing* **D1.3.28.5** S-21 Prisoner List, FR 00864736-7, KH 00040774-5, [No EN] [Lists 10 ‘Yuon’ spies coming from Kampong Som and two ‘Yuon’ transferred from Division 164 on 1 May 1978]. The list does not indicate that 10 Vietnamese would have come from Division 1 in the West Zone. Even if that were the case, it would only prove the higher authority of Meas Muth and Division 164 over Division 1 as far as the arrests at sea were concerned as the arrestees had to be handed over by Division 1 leaders to Division 164 in Kampong Som, as repeatedly affirmed by witness Meas Voeun (*see e.g.* **D98/3.1.178** Meas Voeun, T. 4 Oct 2012, 10.20.29-10.26.02).

<sup>648</sup> This does not take many infants / young children into account as they were ordinarily not recorded by Suos Thy at S-21. **D4.1.950** OCP Revised S-21 Prisoner List, 19 May 2009 [85 Vietnamese “spies”, fishermen or military arrested in Kampong Som, Nos 317, 570, 572, 1409-11, 1500, 1503, 1736-38, 1781, 1788, 2558, 3138, 3212, 3243, 3907, 4039, 4560, 4584, 4587, 4589, 4731, 4807, 4939, 5056, 5859, 6166, 6169, 6174, 6176, 6187, 6189, 6193-4, 6200, 6205, 6210, 6212-3, 6228, 6236, 6238, 6246, 6248, 6251, 6255, 6257, 6261-5, 6267, 6270, 6281, 6285, 6287, 6315, 7385, 7388, 7393, 7396, 7580, 7643, 8504, 10326-7, 10621,

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OCP S-21 list) also documents at least 45 Thai nationals transferred from Kampong Som to S-21 in 1976.<sup>649</sup> The evidence shows that almost all 51 Vietnamese and Thai prisoners transferred from Kampong Som to S-21 on 7 May 1976 were killed in a mass execution on 24 May 1976.<sup>650</sup> In addition, an analytical report from DC-Cam documents at least 34 Vietnamese from Kampong Som executed at S-21 between 18 April 1978 and 18 November 1978.<sup>651</sup> A Stony Beach report establishes that the Division 164 leadership decided as early as April / May 1975 to execute 10 captured civilian Vietnamese, including women and children.<sup>652</sup> Finally, the Dismissal Order remarkably deems irrelevant,<sup>653</sup> without providing any explanation, In Saroeun's evidence of Thai captives killed at the Durian I plantation.<sup>654</sup>

162. The Dismissal Order also ignores the evidence of Westerners captured at sea and sent to S-21.<sup>655</sup> S-21 sources on the case file before 29 April 2011 show that three men<sup>656</sup> were detained and likely tortured there.
163. However, it is mainly as a result of refusing to consider the evidence available after 29 April 2011 that the Dismissal Order so grossly underestimates the extent of the DK

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10721, 10964, 10975, 10978, 10990, 10993, 11008, 11012, 11725, 11727, 11741, 11746, 11908-9, 12069]; **D1.3.1.13** S-21 Confession of Vinh Minh Chou (Vietnamese marine POW), 3 Apr 1978; **D10.1.6** S-21 Confession of Nguyen Thi Bach Ve (Huê), 27 Apr 1978; **D4.1.987** S-21 Confessions of Vietnamese Prisoners in *Evidences on the Vietnamese Aggression against Democratic Kampuchea*, 26 Jan 1978, EN 00420557-64, EN 00420577-82; *See also*, among the documents used in the Dismissal Order (but not necessarily used in relation to the treatment of the Vietnamese): **D1.3.32.9** Chhun Phal WRI, EN 00163814 [describes the detention of Vietnamese fishermen at S-21 in 1978]; **D1.3.32.21** Kork Sras WRI, EN 00705430 [mentions the Vietnamese prisoners were killed outside the S-21 compound]; **D4.1.1109** Duch WRI, EN 00177587 [“[The Vietnamese detainees] were hundreds, and that all of them were executed”]; **D4.1.244** Him Huy WRI, EN 00161591 [explains the Vietnamese soldiers were kept for two weeks and were killed immediately after interrogation]; **D4.1.245** Prak Khan WRI, EN 00161556 [“For them, they were interrogated one or two days and then they disappeared, that was the end of it”].

<sup>649</sup> **D4.1.950** OCP Revised S-21 Prisoner List, 19 May 2009 [Nos 2, 3, 5, 260, 294, 346 (347), 348 (606), 539, 911, 1231, 1780 (1781), 3013, 3399, 3400, 3547, 4039 (4090), 4428, 4459, 4505, 4507, 4633, 4942, 4969, 5311 (5306), 5858 (5859), 5861, 5879, 7149, 7507, 7969, 8213, 8415 (8416), 8503 (8586), 8511, 8568 (8567), 8888, 9770, 9786, 9837, 9969, 10550, 10655, 11720 (11721), 11722, 12273 (12271)].

<sup>650</sup> **D1.3.3.2** S-21 Execution List, EN 00874373-75 [Nos 1-31 are all Thai fisherman sent to S-21 on 7 May 1976 and executed 24 May 1976], EN 00874556-60 [Nos 234-284 are 17 Vietnamese and 34 Thai sent from Kampong Som on 7 May 1976 and executed on 24 May 1976].

<sup>651</sup> **D4.1.5** Analytical Report by DC-Cam, *List of Foreigners Smashed at S-21* [names 113 Vietnamese, mostly “spies”, including at least 34 from Kampong Som, executed at S-21 between 18 Apr 1978-18 Nov 1978].

<sup>652</sup> **D4.1.754** Unknown Division 164 soldier US POW/ MIA Statement, EN 00387429.

<sup>653</sup> **D266** Dismissal Order, fn. 5.

<sup>654</sup> **D2/17** In Saroeun WRI, A7, 10, 11, 43.

<sup>655</sup> *See generally*, **D1.3.33.3** Duch WRI, EN 00147526-27; **D1.3.33.4** Duch WRI, EN 00198221; **D4.1.742** Nhem En WRI, EN 00401827.

<sup>656</sup> **D1.3.28.140** S-21 Prisoner List, 26 Nov 1978, EN 01236389 [identifying No. 1 as Christopher E. Delance and No. 2 as Michael S. Deeds; S-21 entry 26 Nov 1978]; **D11/4.2.4** S-21 Confession of Michael S. Deeds; **D11/4.2.1** Timothy S. Deeds CPA, EN 00741656; **D4.1.245** Prak Khan WRI, EN 00161555-56 [witnessed Duch personally interrogate and kick a prisoner named David Scott].

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Navy's campaign. Taken as a whole, the evidence on the case file demonstrates that thousands<sup>657</sup> (Thai, Vietnamese, other Asians and Westerners, including women, children and the elderly<sup>658</sup>) were killed immediately at sea,<sup>659</sup> or on the islands (mainly the Koh Rong islands, Koh Tang, and Koh Poulo Wai),<sup>660</sup> in Kampong Som Sector (Ream, Ochheuteal Beach, Division Headquarters, Durian I or Toek Sap (where some were first imprisoned and forced to work), and Wat Enta Nhien)<sup>661</sup> or were taken to S-21 where they were kept in inhumane conditions, often tortured and then executed.<sup>662</sup> As detailed in the ICP's Final Submission, surviving records demonstrate that Meas Muth sent 188 Vietnamese,<sup>663</sup> 58 Thai,<sup>664</sup> and eight Westerners<sup>665</sup> to S-21.

164. Former Khmer Rouge cadres Pak Sok and Ek Ny each confirmed that "thousands" had been killed by DK Navy forces.<sup>666</sup> In one year posted on Koh Rong Samloem in 1976, Moul Chhin saw 10 to 15 Thai fishermen killed every two or three days.<sup>667</sup> Particularly harrowing were Pak Sok's eye-witness accounts of a soldier killing a crying baby by throwing it into the sea,<sup>668</sup> and infants being smacked against trees on Koh Tang.<sup>669</sup>
165. *Stung Hav worksites*: The Dismissal Order finds that there were 100 workers at "Stung Hav rock quarry", who were Division 164 combatants and civilians, including those with "bad tendencies", soldiers' family members, former Lon Nol soldiers and women.<sup>670</sup> These findings vastly underestimate how many military and civilians Division 164 enslaved and imprisoned in appalling conditions, and sometimes killed in Stung Hav. First, by considering only the evidence of 100 workers at the "rock quarry," the Dismissal Order ignores all those labouring at the other Stung Hav sites. As the Dismissal Order

<sup>657</sup> In the Case 003 Indictment, the ICIJ calculated a conservative minimum estimated number of 1,200 Thai and 3,276 Vietnamese victims (D267 Indictment, paras 253, 255-7, 464) but himself stated that "the reality was very likely much grimmer" and that "[t]he casualty numbers, especially regarding the Vietnamese, only depended on how many Thai and Vietnamese who entered the waters were captured".

<sup>658</sup> See e.g. D256/7 ICP Final Submission, paras 141, 143, 146, 148-9, 403, 413, 418, 428.

<sup>659</sup> D256/7 ICP Final Submission, paras 379a), 380, 385, 387, 389, 399-400,

<sup>660</sup> D256/7 ICP Final Submission, paras 308, 370, 379b), 380, 385, 387, 392, 395, 401-406.

<sup>661</sup> D256/7 ICP Final Submission, paras 379c), 380, 384, 387, 390, 392-3, 395, 398, 410-16, 457-60, 500-1, 716-8.

<sup>662</sup> D256/7 ICP Final Submission, paras 387, 390-1, 417-20, 544-6, 548-9. Regarding conditions of confinement, torture and execution at S-21, see D256/7 ICP Final Submission, paras 553-93.

<sup>663</sup> D256/7 ICP Final Submission, paras 126, 142 (fn. 412) 173, 551, Annex D.5 (D256/7.10). Where the figure quoted is 194, this includes six sent from Kratie.

<sup>664</sup> D256/7 ICP Final Submission, paras 147, 173, 419, 551, Annex D.6 (D256/7.11).

<sup>665</sup> D256/7 ICP Final Submission, paras 148-9, 173, 549, 551, Annex D.7 (D256/7.12).

<sup>666</sup> D54/25 Pak Sok WRI, A11-3; D114/282 Ek Ny WRI, A58, 60-2; D114/283 Ek Ny WRI, A3, 7, 9.

<sup>667</sup> D114/31 Moul Chhin WRI, A60-5.

<sup>668</sup> D54/25 Pak Sok WRI, A22; D114/297.1.21 Pak Sok, T. 5 Jan 2016, 14.36.38-14.38.16.

<sup>669</sup> D54/25 Pak Sok WRI, A20; D114/297.1.20 Pak Sok, T. 16 Dec 2015, 11.03.07-11.06.59.

<sup>670</sup> D266 Dismissal Order, para. 302.



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recognises in part,<sup>671</sup> the Stung Hav worksites included several different quarries, the construction of a new military port, including a road connecting the new port to the oil refinery, and several other subsidiary projects, including a new railway and dam.<sup>672</sup> There was also a Division 164 prison there.<sup>673</sup>

166. Had the Dismissal Order reviewed all the relevant evidence on the case file, the only conclusion it could reasonably have reached was that hundreds and possibly thousands of people were enslaved in inhumane conditions at Stung Hav.<sup>674</sup> The workforce consisted mainly of demobilised soldiers (and some active) from Division 164,<sup>675</sup> and civilians, including 17 April people.<sup>676</sup> In fact, the Dismissal Order ignores evidence on the case file before 29 April 2011 demonstrating that 40-50 17 April women were working on the road construction site at Stung Hav.<sup>677</sup> Hundreds more were imprisoned at the jail, some of whom were tortured,<sup>678</sup> and a few were sent on to S-21.<sup>679</sup> Although it is not possible to provide an exact estimate of deaths and disappearances, the evidence demonstrates that they were common.<sup>680</sup>
167. *Wat Enta Nhien Security Centre*: As discussed previously, the Dismissal Order's analysis of crimes at Wat Enta Nhien does not constitute a reasoned decision.<sup>681</sup> It does however cite limited evidence regarding the existence of prisoners at Wat Enta Nhien, including evidence of its use as a security centre or provisional detention facility,<sup>682</sup> sightings of

<sup>671</sup> **D266** Dismissal Order, paras 299 [“The Stung Hav rock quarry and related sites were located in Stung Hav Commune [...] The site [...] consisted of at least 3 (three) round shaped quarries [...] and a camp site of Division 164 soldiers. The rock quarries were close to the marine water pier construct[ion], which was part of the DK harbour project”], 300 [Battalion 450 was in charge of building Stung Hav pier from 1976 to 1978”], 301 [referring to “construction materials for a pier in Stung Hav and to build a road connecting the port of Stung Hav with the Kampong Som oil refinery”], 302 [“women were made to build the road”], 304 [“Stung Hav road project”].

<sup>672</sup> **D256/7** ICP Final Submission, paras 594-99, 601-2.

<sup>673</sup> **D256/7** ICP Final Submission, paras 595, 636.

<sup>674</sup> **D256/7** ICP Final Submission, paras 613-4. For further details on the conditions at Stung Hav, see **D256/7** ICP Final Submission, paras 615-9, 622, 624-31.

<sup>675</sup> **D256/7** ICP Final Submission, paras 342, 352-3, 364, 366, 611, 613, 621-30.

<sup>676</sup> **D256/7** ICP Final Submission, para. 631.

<sup>677</sup> See e.g. **D2/7** Pen Sarin WRI, A11 [“There was not a regular number of workers working [on the road project]. There were about 30 unskilled workers. As for the technicians, there were two technicians operating each machine. Q: In the previous interview you said that there were 40 to 50 women working at this road construction site? A12: Yes, this women force was not working there regularly. They just came to help once in a while”]. See further **D1.3.13.8** Pen Sarin OCP Statement, EN 00217560 [“The females, about 40-50 were April 17 women”].

<sup>678</sup> **D256/7** ICP Final Submission, paras 636-41.

<sup>679</sup> **D256/7** ICP Final Submission, para. 642.

<sup>680</sup> **D256/7** ICP Final Submission, paras 633-5, 643, 647.

<sup>681</sup> See *supra*, paras 21-2.

<sup>682</sup> **D266** Dismissal Order, para. 292 citing **D1.3.13.1** Poch Koy OCP Statement, p. 2; **D1.3.13.8** Pen Sarin OCP Statement, p. 4; **D1.3.13.13** Touch Soeuli OCP Statement, pp. 7-8.

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detainees in 1977,<sup>683</sup> “10 (ten) shackles and blood; and chains [...] attached to the wall for hanging prisoners”,<sup>684</sup> and “50 to 60 sets of shackles [...] [with] room for about 10 people in each row”.<sup>685</sup> It also refers to 200 bodies exhumed from very close to the Wat in the early 1980s.<sup>686</sup> Yet it fails to make any factual findings about the Wat’s use as a security centre (and thus the number or categories of prisoners held there),<sup>687</sup> or whether any killings took place there during the DK period.<sup>688</sup> In this process, the Dismissal Order also ignores assessments of the number of prisoners at Wat Enta Nhien placed on the Case file before 29 April 2011.<sup>689</sup>

168. Had the Dismissal Order reviewed all the available evidence, the only reasonable finding would have been that the security centre had capacity to hold more than 200 prisoners at any one time,<sup>690</sup> and that the numbers detained in utterly inhumane conditions<sup>691</sup> at Wat Enta Nhien far exceeded the estimated 500-1000 bodies found at the site immediately after the fall of the DK regime.<sup>692</sup> Prisoners at Wat Enta Nhien included women and children<sup>693</sup> and comprised primarily demobilised Division 164 soldiers,<sup>694</sup> but also civilians,<sup>695</sup> and foreigners captured at sea.<sup>696</sup>
169. *S-21*: The Dismissal Order severely underestimates the numbers of S-21 victims for whom Meas Muth is responsible. Whilst it comes close to acknowledging the 67

<sup>683</sup> **D266** Dismissal Order, paras 290, 294 *citing* **D2/15** Touch Soeuli WRI, p. 7.

<sup>684</sup> **D266** Dismissal Order, para. 294 *citing* **D1.3.13.1** Pauch Koy (Boch Koy) OCP Statement, p. 2. *See also* **D266** Dismissal Order, para. 290.

<sup>685</sup> **D266** Dismissal Order, para. 295 *citing* **D1.3.13.1** Pauch Koy (Boch Koy) OCP Statement, p. 2.

<sup>686</sup> **D266** Dismissal Order, para. 296 *citing* **D1.3.13.1** Pauch Koy (Boch Koy) OCP Statement, p. 2; **D2/4** Pauch Koy WRI, pp. 7-8.

<sup>687</sup> **D266** Dismissal Order, paras 289, 292-3.

<sup>688</sup> **D266** Dismissal Order, para. 296.

<sup>689</sup> **D2/4** Pauch Koy WRI, A22-4 [“When I arrived, I saw the building was walled around of its outer parts. Inside the building they had built 5 detention cells, and I saw shackles in each cell [...] A23: I saw a set of ten shackles [...] Q: As we can understand it, you said that there was a set of ten shackles in each cell, is it right? A24: I saw in each cell there were two set of shackles, and there were 10 shackles in each set”]. *See also* **D2/22** Wat Enta Nhien Security Center Site ID Report, EN 00634142 [“The evidence suggest[s] that Wat Enta Nhien had a significant capacity by available space to hold at any given time a possible number above 100 detainees inside cells or rooms in the three remaining buildings” (The ICP notes that, at this stage, the OCIJ had not received the evidence of Nuon Yoem who witnessed the 100 corpses in the Wat Enta Nhien dining hall)].

<sup>690</sup> **D256/7** ICP Final Submission, para. 462.

<sup>691</sup> For further details on the detention conditions at Wat Enta Nhien, *see* **D256/7** ICP Final Submission, paras 448, 461-2, 465-75.

<sup>692</sup> **D256/7** ICP Final Submission, paras 464, 476-80.

<sup>693</sup> **D256/7** ICP Final Submission, paras 461, 478.

<sup>694</sup> **D256/7** ICP Final Submission, paras 450-5 [*See also* paras 345-7, 351, 364, 366].

<sup>695</sup> **D256/7** ICP Final Submission, para. 456.

<sup>696</sup> **D256/7** ICP Final Submission, paras 390, 457-60.

prisoners from Division 164 sent to S-21,<sup>697</sup> it fails to include the 21 former Lon Nol soldiers or officials and their relatives,<sup>698</sup> 73 civilians (and 251 Kampong Som Port workers)<sup>699</sup> and two individuals from West Zone Divisions 1 and 2, who, under Meas Muth's control as Secretary of Division 164 and Kampong Som Autonomous Sector, were transferred from Kampong Som to be executed in S-21. The Dismissal Order finally disregarded the evidence that 38 people from Kratie province were also arrested and sent by Meas Muth to S-21 in December 1978, including 6 Vietnamese,<sup>700</sup> 10 cadres from Division 117 and Sector 505 and 22 civilians.<sup>701</sup>

170. Moreover, despite making the requisite factual findings to establish Meas Muth's participation in a JCE to arrest, detain and execute perceived enemies within the RAK ranks,<sup>702</sup> the Dismissal Order failed to consider the crimes committed at S-21 against most of the roughly 4,800 other members of RAK Centre Divisions and Independent Regiments and General Staff personnel, including 357 from Division 502, 1,117 from Division 310, and 35 from Division 801.<sup>703</sup>

#### H. LEGAL ERROR OF HOLDING THAT DUCH IS THE ONLY MOST RESPONSIBLE PERSON

171. The Dismissal Order could be read to proffer an alternative basis for finding that Meas Muth falls outside the ECCC's personal jurisdiction: that—*ex ante* and as a matter of law—the category of “those who were most responsible” could only ever apply to Duch. In its survey of the negotiating history of the ECCC, the Dismissal Order emphasises that “the phrase ‘those who were most responsible’ was specifically included in reference to [...] Kaing Guek-Eav *alias* Duch [...] mean[ing] that had former S-21 Chief not been found alive, the phrase would not exist in the ECCC law.”<sup>704</sup> It claims that “[b]oth sides [i.e. the negotiating parties] seemed to take a similar view with respect to personal jurisdiction of the ECCC, i.e. senior leaders and Duch who was a cadre and a most

<sup>697</sup> **D266** Dismissal Order, para. 426 [“it is noted that Division 164 had around 42 (forty-two) to 67 (sixty-seven soldiers)”. See **D256/7** ICP Final Submission, paras 119, 173, 551, Annex D.1 (**D256/7.6**).

<sup>698</sup> **D256/7** ICP Final Submission, paras 173, 547, 551, Annex D.8 (**D256/7.13**).

<sup>699</sup> **D256/7** ICP Final Submission, paras 173, 547, 549, 551, Annex D.9 (**D256/7.14**), Annex D.10 (**D256/7.15**). The Dismissal Order does not mention those civilians.

<sup>700</sup> **D256/7** ICP Final Submission, paras 550, 869.

<sup>701</sup> **D256/7** ICP Final Submission, paras 122, 173, 861 (6 Division 117 and 4 Sector 505 cadres), 868 (22 civilians), Annex D.2 (**D256/7.7**), Annex D.4 (**D256/7.9**).

<sup>702</sup> See *supra*, paras 28-30. See further **D256/7** ICP Final Submission, paras 88-124, 552, 1111-23.

<sup>703</sup> **D256/7** ICP Final Submission, paras 172, 552. The ICP notes that, although the Dismissal Order confirms that personnel from Division 801 were sent to S-21, he did not “find legal and factual relationships between Division 801 and Meas Muth (**D266** Dismissal Order, paras 341-351).

<sup>704</sup> **D266** Dismissal Order, para. 396 (emphasis omitted).

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responsible person”<sup>705</sup> and goes on to conclude that “the prosecution of these senior leaders *shall not extend to low-level cadres besides Duch* whose name had already been considered by the legislature.”<sup>706</sup>

172. The Dismissal Order’s assertions that Duch is the only person solely within the category of those “most responsible”<sup>707</sup> for the crimes of the DK regime and that “prosecution shall not extend to low-level cadres besides Duch”, cites no evidence that this was the intent of the parties to the Agreement or the Cambodian Parliament when it adopted the ECCC Law. Any such assertions are incorrect for at least three reasons: (i) they are inconsistent with the plain language of the ECCC Agreement and ECCC Law; (ii) they are inconsistent with both the Royal Government of Cambodia’s (“RGC”) and the United Nations’ (“UN”) expressed understanding of personal jurisdiction when the ECCC was established; and (iii) they contradict the NCIJ’s own statements that there is no merit to the argument that personal jurisdiction was intended to be limited to a specific number of named individuals. Each of these factors will be addressed in turn.

***1. The holding that Duch is the only most responsible person contradicts the plain language of the ECCC Agreement and ECCC Law***

173. The ECCC’s personal jurisdiction was established under the agreement between the RGC and the UN (“ECCC Agreement”) which was implemented in Cambodia through the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia (“ECCC Law”).<sup>708</sup> Both provide that jurisdiction is limited to senior leaders of Democratic Kampuchea (“DK”) and *those who were most responsible* for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognised by Cambodia.<sup>709</sup>
174. The Dismissal Order’s holding that only Duch was intended to fall within the category of “*those who were most responsible*”<sup>710</sup> therefore contradicts the plain language of the ECCC Agreement, which is written in the plural and clearly refers to a category of people

<sup>705</sup> D266 Dismissal Order, para. 396.

<sup>706</sup> D266 Dismissal Order, para. 401.

<sup>707</sup> The Dismissal Order accepts the SCC jurisprudence that senior leaders must also be “most responsible”. See D266 Dismissal Order, para. 364.

<sup>708</sup> D266 Dismissal Order, paras 13-14; ECCC Agreement; ECCC Law.

<sup>709</sup> ECCC Agreement, art. 1 (emphasis added); ECCC Law, arts 1, 2*new* (emphasis added).

<sup>710</sup> This plural language occurs in all three (English, French and Khmer) versions of the ECCC Agreement and the ECCC Law. The French version refers to “les principaux responsables” and the Khmer version specifies “ជនទាំងឡាយដែលទទួលខុសត្រូវខ្ពស់បំផុត”.

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rather than an individual.<sup>711</sup> The same language appears in the ECCC Law.<sup>712</sup> The ECCC Agreement text is presumed to be an authentic expression of the intention of its two parties, the RGC and the UN.<sup>713</sup> If they had reached an understanding that Duch was the only candidate for those who could be a “most responsible” person for the purposes of prosecution at the ECCC, they could have expressly provided for this in their Agreement, which the RGC would then have implemented in the ECCC Law. The text of the ECCC Agreement makes clear that they did not.

***2. The holding that Duch is the only most responsible person is inconsistent with both the RGC’s and the UN’s expressed understanding of personal jurisdiction when the ECCC was established***

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175. The Dismissal Order asserts that the views of the RGC prior to the commencement of the ECCC Agreement should be preferred over those of the UN. It refers to “the intention of the national side as the law drafter”,<sup>714</sup> who had identified Duch as the only lower-level cadre who could be subject to the ECCC’s jurisdiction,<sup>715</sup> and concludes that an important factor in interpreting the ECCC’s personal jurisdiction provision is “the position of the parties, in particular the national side before the establishment of the ECCC where it focused on national reconciliation and searching for justice”.<sup>716</sup>

176. This argument is flawed for two reasons. First, as a matter of law, and in accordance with

<sup>711</sup> ECCC Agreement, preamble [“whereas the Cambodian authorities have requested assistance from the United Nations in bringing to trial [...] those who were most responsible”], arts 1, 2(1), 5(3), 6(3). The Dismissal Order recognises this provision multiple times at **D266** Dismissal Order, paras 13, 361, 362, 363, 364, 373, 396, 397, 405.

<sup>712</sup> ECCC Law, arts 1, 2*new*. See also **D266** Dismissal Order, paras 362-363.

<sup>713</sup> Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, (“Vienna Convention”), 1155 UNTS 331, art. 31(1) [“A treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose.”]. The parties expressly agreed that the Vienna Convention applies to the ECCC Agreement. See ECCC Agreement, art. 2(2). See also *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, Judgment, 3 Feb 1994, ICJ Reports 1994, p. 6, para. 41 [“Interpretation must be based above all upon the text of the treaty.”]; *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Preliminary Objections, Judgment, 15 Dec 2004, ICJ Reports 2004, p. 279, para. 100; *Interpretation of Peace Treaties (second phase)*, Advisory Opinion, 18 Jul 1950, ICJ Reports 1950, p. 229 [“It is the duty of the Court to interpret the Treaties, not to revise them.”]; ILC Draft Articles on the Law of Treaties with Commentaries, Yearbook of the International Law Commission, 1966, Vol. II, p. 220, para. 11 [“Commentary to article 27 [...] [Article 27 (now article 31)] as already indicated is based on the view that the text must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties. The Institute of International Law adopted this – the textual- approach to treaty interpretation.”].

<sup>714</sup> **D266** Dismissal Order, para. 400.

<sup>715</sup> **D266** Dismissal Order, para. 401.

<sup>716</sup> **D266** Dismissal Order, para. 407.

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the principle of sovereign equality,<sup>717</sup> parties to a treaty negotiation are equal participants, and as noted above, the text of their concluded treaty is presumed to be the record of their intention.<sup>718</sup> But more importantly, the history of the negotiations and the debates on the adoption of the ECCC Law are unambiguous. The RGC never intended that the entire category of “those most responsible” would be limited to Duch or any single individual. Rather, the intent was for the judges of the ECCC to make independent determinations based on the evidence as to who and how many individuals fit into this category. The UN took the same position.

177. The representations made to the National Assembly by Deputy Prime Minister Sok An, the RGC’s chief negotiator in the talks with the UN, are the best evidence of the intent of the Cambodian government at the time the ECCC Agreement was made. Sok An has consistently stated that “those who were most responsible” was a limited but open category.

178. Speaking on 29 December 2000, over 18 months after the arrest of Duch<sup>719</sup> and shortly before the adoption of the 2001 ECCC Law,<sup>720</sup> Sok An said, without referring to Duch:

The circle of competence is based on three major legal aspects: The first is what we call the aspect of the competence of individuals (“La compétence personnelle”) and is to define a target that is an objective of a trial by Extra-Ordinary Chambers. So it clearly states that only senior leaders and *those who most* were responsible for [the crimes] will be tried.<sup>721</sup>

179. During the October 2004 Cambodian National Assembly Debate on amending the ECCC Law to comply with the terms of the ECCC Agreement, several lawmakers asked for

<sup>717</sup> See e.g. Charter of the United Nations, San Francisco, 26 Jun 1945, art. 2(1) [“The Organization is based on the principle of the sovereign equality of all its Members.”]; UN General Assembly Resolution 2625, *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, A/RES/25/2625, 24 Oct 1970, p. 124 [“All states enjoy sovereign equality. They have equal rights and duties and are equal members of the international community”].

<sup>718</sup> See *supra*, para. 174. Vienna Convention, art. 32 [“Recourse may be had to *supplementary* means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable.” (emphasis added)]

<sup>719</sup> **D266** Dismissal Order, para. 402 [“Duch [...] was arrested in May 1999”]. See also Case 001-E188 *Duch TJ*, para. 623.

<sup>720</sup> Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for Prosecuting Crimes Committed During the Period of the Democratic Kampuchea, adopted 2 Jan 2001, promulgated 10 Aug 2001 (NS/RKM/0801/12), reprinted in *Searching for the Truth*, DC-Cam, Issue 13, pp. 65-77.

<sup>721</sup> Translation by DC-Cam of Minutes on the Session of the National Assembly of the Kingdom of Cambodia, 29 Dec 2000, *Searching for the Truth*, DC-Cam, Issue 14, Feb 2001, p. 44.

clarification as to what the drafters meant by “those most responsible”:

H.E. Ly Thuch: “[O]ur people and civil society want to ask H.E. to make it clear that who are the senior leaders and those most responsible? Do they include also chairmen of units of organization?”<sup>722</sup>

H.E. Keo Remy: “Who are the senior leaders? [...] Will the zone chiefs be prosecuted? Or [is] this law only [being] made to try 4 or 5 leaders. Who else will be prosecuted? It is unfair if we try only 3 or 4 people.”<sup>723</sup>

H.E. Eng Chhay Eang: “I am also not clear about *those most responsible*. For how much will those people have to be responsible? [...] I want the representative of the government to clarify for how much greatest responsibility those people must hold. [...] I would like to remind people not to be vague. If we emphasize only on the highest class, we meant Pol Pot, who died already.”<sup>724</sup>

180. Contrary to the assertion made in the Dismissal Order,<sup>725</sup> Sok An responded unambiguously that the jurisdiction was not restricted to senior leaders, and that there was no set number of people who might fall within the jurisdiction of the ECCC, and no list of names of potential targets of investigation. He also made it clear that the category of those who were “most responsible” referred to multiple potential targets. In his own words:

If we ask the question ‘who shall be indicted?,’ neither the United Nations nor the Task Force of the Royal Government of Cambodia are able to give a response. Because this is the task of the courts: the Extraordinary Chambers. If we list the names of people for the prosecution instead of the courts, we violate the power of the courts. Therefore, we cannot identify A, B, C, or D as the ones to be indicted. As a solution, we have identified two targets: *senior leaders* and *those most responsible*. Considering *senior leaders*, we refer to no more than 10 people, but we don’t clearly state that they are the members of the Standing Committee. This is the task of the Co-Prosecutors to decide who are the senior leaders. [...] However, there is still the second target. They are not the leaders, but they committed atrocious crimes. That’s why we use the term *those most responsible*. There is no specific amount of people in the second group to be indicted.<sup>726</sup>

181. Indeed, Prime Minister Hun Sen recognised that the determination of which individuals

<sup>722</sup> Transcript translated by DC-Cam of the First Session of the Third Term of Cambodian National Assembly, 4-5 Oct 2004 (“2004 National Assembly Transcript”), p. 9.

<sup>723</sup> 2004 National Assembly Transcript, p. 14.

<sup>724</sup> 2004 National Assembly Transcript, p. 27.

<sup>725</sup> **D266** Dismissal Order, para. 398 *citing* 2004 National Assembly Transcript (Khmer version) to support the proposition that “[t]he issue of narrow jurisdiction was raised by the representative of the [RGC] during a National Assembly session to debate and pass the draft [ECCC Law], that the number of targeted persons must be limited and restricted to only senior leaders.”

<sup>726</sup> 2004 National Assembly Transcript, pp. 1, 20-31 (emphasis added).

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fell within the personal jurisdiction of the ECCC was a matter for the independent determination of the judges of the court. In March 1999, he told the UN Secretary-General:

The Royal Government of Cambodia does not have any power to impose anything on the competent tribunal. [...] The issue of whether to try Ta Mok alone or any other Khmer Rouge leaders depends entirely on the competence of the tribunal. The Royal Government of Cambodia will not exert any influence on or interfere, in any form, in the normal proceedings of the judiciary, which will enjoy complete independence from the executive and legislative powers.<sup>727</sup>

182. One month later, in an April 1999 meeting with U.S. Senator John Kerry, who was involved in the negotiations, Prime Minister Hun Sen affirmed to Senator Kerry that:

The indictment and prosecution of other Khmer Rouge leaders are the sole competence of the court. The Royal Government is not entitled to give orders to the judicial branch to do this or that.<sup>728</sup>

*The United Nations*

183. The UN, the second party to the negotiations, shared the same understanding. Early in the process in 1999, the Group of Experts assigned by the Secretary-General to explore options that would best bring about justice in Cambodia stated:

Others not in the chart of senior leaders may have played a significant role in the atrocities. This seems especially true with respect to certain leaders at the zonal level. [...]

[T]he Group recommends that any tribunal focus upon those persons most responsible for the most serious violations of human rights during the reign of Democratic Kampuchea. This would include senior leaders with responsibility over the abuses as well as those at lower levels who are directly implicated in the most serious atrocities. We do not wish to offer a numerical limit on the number of such persons who could be targets of investigation. It is, nonetheless,

<sup>727</sup> Letter dated 24 March 1999 from the Prime Minister of Cambodia to the Secretary-General, UN Doc. A/53/875, S/1999/324, 24 Mar 1999, paras 2-3. Note that in para. 4, Hun Sen requested that the letter be circulated as a General Assembly document.

<sup>728</sup> Statement made on 18 April 1999 by the Cabinet of Samdech Hun Sen, Prime Minister of the Royal Government of Cambodia, UN Doc. A/53/916, 19 Apr 1999. Additionally, “[u]pon receiving these assurances from Samdech Prime Minister Hun Sen, Senator John Kerry welcomed the positive position of the Cambodian Prime Minister.” See also Kyodo News International, *Hun Sen regrets stating number of K. Rouge leaders to be tried*, 7 Jan 2000 [in an interview with Japanese media: “Cambodian Prime Minister Hun Sen expressed regret Friday at having stated ‘four to five’ Khmer Rouge leaders will be put on trial [...]. ‘I should not comment on or say anything that is within the bounds of the judiciary,’ he said. [...] Hun Sen said anyone who specifies the number of leaders to be tried ‘is wrong, and that includes U.N. legal experts who mentioned 20 or 30 people.’ The prime minister said that by giving an exact number of the Khmer Rouge leaders to be tried, ‘We abuse the court of law.’”].



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the sense of the Group from its consultations and research that the number of persons to be tried might well be in the range of some 20 to 30.<sup>729</sup>

184. These recommendations formed the basis for the UN's negotiating position at the time. David Scheffer recalled in an article published in 2011 that details his own involvement in the negotiations that "we were only interested in the surviving senior leaders who demonstrated significant responsibility *as well as other top functionaries, like Duch*, who had such instrumental roles in the atrocities."<sup>730</sup> He was clear that "the prosecutor must retain the discretion of whom to indict"<sup>731</sup> and that those most responsible constituted a "group" of persons.<sup>732</sup> Clearly, the UN understanding was that the category would not be limited only to Duch.
185. By March 2000, the Cambodian government had proposed the wording "those responsible", which broadened the category beyond what the UN had intended, and UN Secretary-General Kofi Annan and UN Legal Counsel Hans Corell both expressed concern to the RGC that the group was now too large. During the final negotiations on this point, neither the RGC nor the UN sought to make an express limitation of the category to Duch.<sup>733</sup> Instead, on 2 January 2001, the Cambodian National Assembly adopted the ECCC Law with the wording "those who were most responsible".<sup>734</sup> Notably, Scheffer recalled:

having been part of the negotiations for years, I know of no concession by U.N. negotiators to interpret the personal jurisdiction language so as to limit the suspect pool to only five specific individuals.<sup>735</sup>

186. Indeed, it would be reasonable to assume that Cambodian lawmakers and UN negotiators recognised the basic human rights norm, reflected in the Universal Declaration of Human

<sup>729</sup> Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135, UN Doc. No. A/53/850, S/1999/231, 16 Mar 1999 ("UN Group of Experts Report"), paras 109-110 (emphasis added).

<sup>730</sup> **D170.1.7** Scheffer D.J., *The Negotiating History of the ECCC's Personal Jurisdiction*, Cambodia Tribunal Monitor, 22 May 2011 ("Scheffer article"), EN 01168933 (emphasis removed and added) [*see also* EN 01168930-1].

<sup>731</sup> **D170.1.7** Scheffer article, EN 01168931.

<sup>732</sup> **D170.1.7** Scheffer article, EN 01168931 ["Both groups—the group of senior leaders and the group of those most responsible for the crimes—were to fall within the tribunal's personal jurisdiction. I do not recall a single suggestion otherwise."], EN 01168932, 4 [referring to the "two-group formula"].

<sup>733</sup> **D170.1.7** Scheffer article, EN 01168933-6.

<sup>734</sup> **D170.1.7** Scheffer article, EN 01168936.

<sup>735</sup> **D170.1.7** Scheffer article, EN 01168938 [This is a reference to Duch, who had already been convicted in 2010, and to the four indicted persons detained at the ECCC at that time: Nuon Chea, Ieng Sary, Khieu Samphan and Ieng Thirith.]

Rights,<sup>736</sup> the International Covenant on Civil and Political Rights,<sup>737</sup> and regional human rights instruments,<sup>738</sup> and enshrined in Article 31 of the Constitution of the Kingdom of Cambodia.<sup>739</sup> that all persons are equal before the law. Agreeing that “those who were most responsible” could, as a matter of law, refer only to Duch, regardless of what evidence showed about the relative responsibility of other persons, would not have treated Duch and other persons equally and would have violated these principles and protections.

187. In sum, the ECCC negotiating history shows that the intent of both the RGC and the UN at the time of the ECCC Agreement was that “those who were most responsible” was an open category whose membership would only be determined by the Co-Prosecutors and Judges of the ECCC based on the totality of the evidence and acting impartially and independently.<sup>740</sup> It is clear that neither party intended the interpretation adopted by the Dismissal Order.
188. Having concluded the ECCC Agreement, both sides are bound by its terms,<sup>741</sup> and neither side can now unilaterally change the scope of personal jurisdiction.<sup>742</sup> Indeed, the ECCC Agreement provides that “[i]n case amendments to the Law on the Establishment of the

<sup>736</sup> UDHR, art. 7.

<sup>737</sup> ICCPR, art. 14(1).

<sup>738</sup> See e.g. American Declaration of the Rights and Duties of Man, adopted by the Ninth International Conference of American States, Bogota, 1948, art. II; African (Banjul) Charter on Human and Peoples’ Rights, adopted 27 Jun 1981, entered into force 21 Oct 1986, art. 3(1); Protocol 12 to the [European] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 Nov 2000, preamble [“Having regard to the fundamental principle according to which all persons are equal before the law and are entitled to the equal protection of the law”].

<sup>739</sup> Cambodian Constitution, art. 31 [“Every Khmer [citizen] shall be equal before the law”].

<sup>740</sup> ECCC Agreement, art. 3(3) [“The judges shall be persons of high moral character, impartiality and integrity [...] They shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source.”]; ECCC Law, art. 10<sup>new</sup> [“Judges shall be independent in the performance of their functions, and shall not accept or seek any instructions from any government or any other source.”]; Cambodian Constitution, arts 51 [“[t]he legislative, executive, and judicial powers shall be separate.”], 128 [“[t]he judiciary shall guarantee and uphold impartiality and protect the rights and freedoms of the citizens”], 129 [“[o]nly judges shall have the right to adjudicate”], 130 [“[j]udicial power shall not be granted to the legislative or executive branches.”]; Charter of the Association of Southeast Asian Nations (ASEAN), 20 Nov 2007, preamble, art. 1(7) [“The Purposes of the ASEAN are: [...] To [...] enhance [...] the rule of law”]; UN Group of Experts Report, para. 97 [“fair and impartial justice requires independent decisions on whom to indict and to convict free of political pressure”]. See further Beijing Statement of Principles of the Independence of the Judiciary in the Lawasia Region, The Law Association for Asia and the Pacific, 28 Aug 1997, arts 3(a), 4-5; New Delhi Code of Minimum Standards of Judicial Independence, International Bar Association, 22 Oct 1982, art. 16; Basic Principles on the Independence of the Judiciary, endorsed by General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, paras 1-2, 4.

<sup>741</sup> Vienna Convention, art. 26 [“Pacta sunt servanda: Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”]. See further ECCC Agreement, art. 2(2).

<sup>742</sup> Vienna Convention, art. 39 [“A treaty may be amended by agreement between the parties.”]. The *pacta sunt servanda* principle implies the need to act unanimously.

Extraordinary Chambers are deemed necessary, such amendments shall always be preceded by consultations between the parties.”<sup>743</sup> This provision makes it clear that any change in policy regarding matters addressed by the ECCC Agreement (which includes personal jurisdiction) must be approved by *both* parties following a discussion in which *both* parties participate. To date, neither the RGC nor the UN have sought to amend the provision regarding the personal jurisdiction of the ECCC. Accordingly, the scope of personal jurisdiction set out in the ECCC Agreement and ECCC Law defines the personal jurisdiction of the ECCC and constitutes the law that the PTC must apply in this appeal.

***3. The holding that Duch is the only most responsible person contradicts the NCIJ’s own holdings in the Dismissal Order, as well as the Case 004/1 Closing Order and Case 004/2 Dismissal Order***

189. The Dismissal Order’s assertion that Duch is the only most responsible person also contradicts the NCIJ’s own holding in the Case 004/2 Dismissal Order, which acknowledges that in Case 001, the Supreme Court Chamber (“SCC”) implicitly held that “there is no merit in any historical-political contention that the negotiations around the establishment of the ECCC led to a joint and binding understanding that only a certain finite number of (named) individuals were to be under the court’s jurisdiction: The selection of persons to be investigated and indicted was and is purely a matter for the discretion of the OCP and OCIJ, and based entirely on the merits of each individual case.”<sup>744</sup> This same language appeared in the Case 004/1 Closing Order, signed by both the NCIJ and ICIJ.<sup>745</sup>
190. Moreover, in the Dismissal Order itself, the NCIJ correctly highlights on a number of occasions that the question of who could be among “those most responsible” was not predetermined by the ECCC Agreement. Rather:

classifying the criteria as “senior leaders” and “those most responsible” is the form of the discretionary power of prosecutions of the Co-Prosecutors and independent investigations of the Co-Investigating Judges.<sup>746</sup>

These holdings are obviously correct. It is clear that neither the Royal Government nor the United Nations believed that the Agreement or the Law meant that “only a certain

<sup>743</sup> ECCC Agreement, art. 2(3).

<sup>744</sup> Case 004/2-**D359** Case 004/2 Dismissal Order, para. 461.

<sup>745</sup> **D261** Closing Order (Reasons) in Case 004/1, para. 37.

<sup>746</sup> **D266** Dismissal Order, para. 364 [*See also*, paras 368, 405].

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finite number of (named) individuals were to be under the court's jurisdiction". The PTC has previously shared this view of the category's "flexibility".<sup>747</sup>

## V. SUBMISSIONS REGARDING CONFLICTING CLOSING ORDERS

191. For the reasons articulated in this appeal, the ICP submits that the Dismissal Order's finding on personal jurisdiction should be reversed. If this appeal is granted, it is clear that the case file should then be sent to the Trial Chamber for trial on the basis of the Indictment against Meas Muth. However, the ICP is mindful that the Indictment will also be subject to appeal by Meas Muth and the NCP. The ICP notes that there are two possible scenarios where even after the PTC rules on all appeals in this case, two conflicting Closing Orders will remain in effect. The first scenario could occur should the PTC be unable to reach the supermajority required by the Agreement, Law and Internal Rules for a decision. The second scenario would arise should the PTC reach decisions to deny all appeals, finding that both the ICIJ in his Indictment and the NCIJ in his Dismissal Order acted within their discretion. As explained below, should either situation arise, the relevant provisions of the Internal Rules and SCC jurisprudence mandate that the case proceed to trial on the basis of the Indictment. This result is consistent with the policy evidenced by the ECCC Agreement, ECCC Law, and other ECCC jurisprudence.

192. Internal Rule 77(13) provides:

A decision of the [Pre-Trial] Chamber requires the affirmative vote of at least 4 (four) judges. This decision is not subject to appeal. If the required majority is not attained, then the default decision of the Chamber shall be as follows:

- a) As regards an appeal against or an application for annulment of an order or investigative action other than an indictment, that such order or investigative action shall stand.
- b) As regards appeals against indictments issued by the Co-Investigating Judges, that the Trial Chamber be seised on the basis of the Closing Order of the Co-Investigating Judges.

193. Rule 1(2) further provides that "a reference in these IRs to the Co-Investigating Judges includes both of them acting jointly and each of them acting individually". Rule 77(13)(b)

<sup>747</sup> **D308/1/3/20** Im Chaem PTC Closing Order Considerations, para. 20 (unanimous holding) ["In this regard, the terms "senior leaders" and "those who were most responsible" represent the limits of the ECCC's personal jurisdiction. [...] the flexibility of these terms inherently require some margin of appreciation on the part of the [CIJs]" (internal citations omitted).

therefore applies to an indictment issued by a single CIJ, as in the case at hand.

194. Rule 77(13)(b) makes it explicitly clear that if the Indictment is not reversed by a supermajority decision on appeal, the case against Meas Muth must be sent to trial. Although the word “order” in Rule 77(13)(a) is likely taken to include dismissal orders,<sup>748</sup> Rule 77(13)(b) is *lex specialis* relating to indictments and thereby prevails over the general terms of Rule 77(13)(a). “Dismissal Order” and “Closing Order”, like “Indictment”, are defined terms in the Internal Rules.<sup>749</sup> Had the drafters of the Internal Rules wished to specifically address the effect of the failure of the PTC to overturn a dismissal order, they clearly could have done so. Therefore even where an unsuccessfully appealed dismissal order “stands” as a record of one CIJ’s exercise of his independent discretion and decision not to participate in the indictment, Rule 77(13)(b) indicates a policy choice that, in case of conflicting closing orders, the Trial Chamber must be seised of the indictment and the case must be tried.
195. SCC jurisprudence confirms this interpretation. In the Case 001 Appeal Judgment, the SCC held:

If, for example, the Pre-Trial Chamber decides that neither Co-Investigating Judge erred in proposing to issue an Indictment or Dismissal Order for the reason that a charged person is or is not most responsible, and if the Pre-Trial Chamber is unable to achieve a supermajority on the consequence of such a scenario, ‘the investigation shall proceed.’<sup>750</sup>

196. Although the SCC used the phrase “the investigation shall proceed” because it was quoting directly from the ECCC Law, the only reasonable interpretation of this statement is that the Indictment would proceed to trial—there is no other sense in which anything

<sup>748</sup> The ICP notes that the French version of Internal Rules 77(13) and 77(13)(a) read “Lorsque la majorité requise n’est pas atteinte, la Chambre préliminaire est présumée avoir rendu une décision s’interprétant comme suit: a) Concernant un appel contre une ordonnance ou une requête en annulation d’un acte d’instruction, *autre que l’ordonnance de clôture*, l’ordonnance ou l’acte d’instruction demeure”, thereby excluding a dismissal order from the ambit of Internal Rule 77(13)(a). The Khmer version, like the English, refers to “an order or investigative action *other than an indictment*”, leaving dismissals orders with the scope of that rule. In Case 004/1, where the PTC was unable to reach a supermajority decision on the ICP’s Appeal of **D261** Case 004/1 Closing Order (a dismissal order), the PTC unanimously “declared that the Closing Order (Reasons) dismissing the charges against Im Chaem shall stand”, in accordance with Internal Rule 77(13)(a). See Case 004/1-**D308/3/1/20** Im Chaem PTC Closing Order Considerations, p. 27 (unanimous holding).

<sup>749</sup> Internal Rules, Glossary, pp. 83-84.

<sup>750</sup> Case 001-F28 *Duch* AJ, para. 65 citing ECCC Law, art. 23*new*; ECCC Agreement, art. 7(4); Internal Rule 72(4)(d). Whilst this finding arises out of a discussion of the scenario where the one or both of the CIJs has referred the question of a conflicting indictment and dismissal order to the PTC under Internal Rule 72, the substantive outcome is equally applicable to the current situation where the PTC has been seised of appeals by the parties, since the manner in which the PTC has been seised of the same question – whether either judge erred in issuing his Dismissal Order or Indictment – is irrelevant.

could “proceed” at the stage that the SCC is discussing (*i.e.* when a conflicting indictment and dismissal order are being issued). Given that the Internal Rules define the “Trial Stage” as “refer[ring] to the date from which the Trial Chamber is seised of a case,”<sup>751</sup> the SCC appears to consider the “investigation” as continuing until the moment that the PTC discharges its duty to seise the Trial Chamber with an indictment as required by Rule 77(13)(b).

197. This result is also consistent with the spirit and structure of the ECCC Agreement, ECCC Law, and the Internal Rules. All firmly embrace the principle that CIJs and Co-Prosecutors can act independently to advance proceedings and a policy preference for proceedings to continue in the case of unresolved disagreements.<sup>752</sup> The PTC has repeatedly upheld this principle.<sup>753</sup>
198. In the current situation of a parallel indictment and dismissal order from the CIJs, Article 7(4) of the ECCC Agreement provides clear guidance as to what must be done should the PTC be unable to resolve a disagreement between the CIJs or the Co-Prosecutors. It provides that “the investigation or prosecution shall proceed.”<sup>754</sup> Whether one considers the transfer of the indictment and case file to the Trial Chamber to be part of the investigation, as the SCC did, or part of the prosecution, it is clear that if the PTC fails to overturn an indictment by supermajority, the Trial Chamber must be seised and the case brought to trial.

## VI. CONCLUSION

199. As set out in the ICP’s Final Submission, Meas Muth was a Central Committee member, Division 164 Commander, Secretary of the Kampong Som Autonomous Sector, and

<sup>751</sup> Internal Rules, Glossary, p. 85.

<sup>752</sup> See ECCC Agreement, arts 5(4), 6(4), 7(4); ECCC Law, arts 20 *new*, 23 *new*; Internal Rules 71, 72, 77(13).

<sup>753</sup> See *e.g.* **D1/1.3** Considerations of the PTC Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71, 18 Aug 2009, paras 16, 26, 45; Case 002-**D427/1/30** Ieng Sary Closing Order Appeal Decision, paras 274-276; **D120/3/1/4.1.12** Decision on Im Chaem’s Urgent Request to Stay the Execution of Her Summons to an Initial Appearance, 15 Aug 2014, para. 14; **D117/1/1/2** Decision on Meas Muth’s Appeal Against the International Co-Investigating Judge’s Order on Suspect’s Request Concerning Summons Signed by One Co-Investigating Judge, 3 Dec 2014, para. 16; **D128/1/7.1.4** Decision on [Redacted] Appeal Against the International Co-Investigating Judge’s Clarification on the Validity of a Summons Issued by One Co-Investigating Judge, 4 Dec 2014, para. 7; **D128/1/7.1.5** Decision on [Redacted] Appeal Against the Decision Rejecting His Request for Information Concerning the Co-Investigating Judges’ Disagreement of 5 April 2013, 22 Jan 2015, para. 11.

<sup>754</sup> ECCC Agreement, art. 7(4). This also reflects the understanding of one of the main UN negotiators of the ECCC Agreement, David Scheffer, who stated that under the supermajority rule, “The only way the prosecution or investigation is halted is if the Pre-Trial Chamber decides by supermajority vote that it should end.” See David Scheffer, “The Extraordinary Chambers in the Courts of Cambodia”, *International Criminal Law*, Third Edition, Vol. III, 2008, p. 246.

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member, then deputy chief, of the RAK General Staff.<sup>755</sup> In those high-ranking positions, he willingly ordered the arrest, imprisonment, enslavement and/or execution of many thousands of victims in the areas under his control.<sup>756</sup> Meas Muth organised and directed the genocidal campaign against the Vietnamese captured at sea by Division 164 and West Zone Division 1,<sup>757</sup> and ordered the imprisonment, execution or transfer to S-21 of over a thousand Thai and other foreigners also captured in the DK waters.<sup>758</sup> He established and managed security centres and several worksites in Kampong Som Sector, where perceived internal and external enemies were imprisoned in grossly inhumane conditions, enslaved, tortured and/or executed.<sup>759</sup> He also forced those under his control to marry spouses chosen by the CPK and to consummate their marriages, both without their genuine consent.<sup>760</sup> As deputy Chief of Staff, he conducted the purge of the leadership of Division 117 and Autonomous Sector 505 and their subordinates in late 1978, and sent local civilians and captured Vietnamese to S-21.<sup>761</sup> Meas Muth then took control of a second autonomous sector.

200. Because the Dismissal Order ignored all evidence placed on Case File 003 after 29 April 2011 and disregarded the ICP's Supplementary Submission, a huge portion of the crimes committed by Meas Muth were not taken into consideration at all. The remaining crimes that the Dismissal Order did discuss were not adequately analysed and the crimes themselves were not legally characterised. The Dismissal Order consequently failed to adequately take into account the gravity of these crimes and Meas Muth's level of responsibility in considering whether he fell within the ECCC's personal jurisdiction.
201. The Dismissal Order's minimisation of Meas Muth's criminal responsibility is also premised on its flawed legal analysis of the effect of superior orders on a determination of whether an individual falls within the category of those "most responsible" for DK crimes which is inconsistent with well-established ECCC jurisprudence from Case 001. The personal jurisdiction analysis is also premised on legal and factual errors regarding

<sup>755</sup> **D256/7** ICP Final Submission, paras 48-87.

<sup>756</sup> *See e.g.*, **D256/7** ICP Final Submission, paras 88-197, 221, 400, 402, 422, 613, 656, 674-5, 691, 1078-9, 1089-92.

<sup>757</sup> **D256/7** ICP Final Submission, paras 125-42, 316-7, 363, 400, 402, 422, 736-7, 781-98, 849, 1123, 1136, 1070-4.

<sup>758</sup> **D256/7** ICP Final Submission, paras 143-9, 173-5, 245, 302-5, 376-80, 385-95, 401-20, 425-30, 457-8, 485, 491-3, 500-2, 516-9, 544-9, 582-9, 559, 659, 716 -9, 792-8, 1077, 1091-2, 1123, 1136.

<sup>759</sup> **D256/7** ICP Final Submission, paras 116, 125, 150-63, 171-2, 177-97, 328-48, 351-3, 366, 542-3, 385, 356-60, 550-2, 690-4, 845-8, 860-9, 874-6, 1066, 1093, 1123.

<sup>760</sup> **D256/7** ICP Final Submission, paras 205-6, 799, 821-44, 1091, 1125.

<sup>761</sup> **D256/7** ICP Final Submission, paras 845-77.

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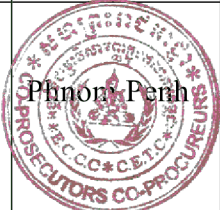

Meas Muth's critical participation in DK crimes. There is no evidence that Meas Muth ever challenged CPK policies. On the contrary, he enthusiastically embraced and implemented them and remained loyal to the CPK for two decades after the end of the DK regime.<sup>762</sup>

202. Given that the Dismissal Order's personal jurisdiction analysis was premised on these legal and factual errors, the ICP requests the Pre-Trial Chamber to re-evaluate the issue and find that Meas Muth does fall within the personal jurisdiction of the ECCC. Given the Closing Order issued by the ICIJ has indicted Meas Muth on several serious crimes, consistent with the Internal Rules, the ICP requests that the PTC forward the case file to the Trial Chamber.

## VII. RELIEF SOUGHT

203. For the foregoing reasons, the ICP respectfully requests that the Pre-Trial Chamber reverse the Dismissal Order's erroneous finding that Meas Muth is not subject to the personal jurisdiction of the ECCC; 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
8 April 2019	Nicholas KOUMJIAN International Co-Prosecutor		

<sup>762</sup> **D1.3.7.8** Meas Muth Statement, *Let Bygones Be Bygones* (Cambodia Daily), 1-2 Mar 2008, EN 00165821; **D54/1.1** Meas Muth Statement, *A Last Stand* (Southeast Asia Globe), 27 Jul 2011, EN 00915789; **D114/307.5** Meas Muth Statement, Transcript of "Brother Number One" (Journeyman.tv), 2013, EN 01389356.