

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

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**INTERNATIONAL CO-PROSECUTOR'S RESPONSE TO MEAS MUTH'S
REQUEST TO TERMINATE, SEAL AND ARCHIVE CASE FILE 003**

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I. INTRODUCTION

1. To terminate, seal and archive Case 003 without a trial on the charges contained in the Indictment¹ would be a denial of justice for *all* Parties, the victims living and dead, and the Cambodian population. Although the International Co-Prosecutor (“ICP”) agrees that it is appropriate for the Pre-Trial Chamber (“PTC”) to admit Meas Muth’s Request,² it is internally inconsistent and replete with errors of fact, law and logic, and should therefore be dismissed.
2. The ICP agrees it is “time for the PTC to act decisively” and that the PTC’s failure to do so “would be an abdication of [its] responsibilities”.³ However, contrary to Meas Muth’s Request to Terminate, the required decisive action is to send this case to trial without delay. This is the only result that is consistent with the ECCC legal framework and this Chamber’s unanimous finding that the Indictment is valid.⁴ Indeed, both mandate that Meas Muth’s responsibility for crimes abhorrent to the victims and global community be determined by a fair and impartial judicial process that serves the interests of justice for *all* parties.⁵

II. SUBMISSIONS

3. As a preliminary matter, the ICP notes that the internally inconsistent and contradictory nature of the Request not only warrants its dismissal, but also warrants summary dismissal.⁶ Contradictorily, Meas Muth argues for immediate and unconditional termination,⁷ while at the same time making clear, no less than three times, that he seeks the dismissal of Case 003 *only if* the PTC cannot now reach a supermajority to send the case to trial.⁸ Indeed, though

¹ D267 Closing Order, 28 Nov. 2018 (“Indictment”).

² D272 Meas Muth’s Request to Terminate, Seal, and Archive Case File 003, 17 June 2021 (“Request to Terminate”).

³ D272 Request to Terminate, para. 73.

⁴ D266/27 & D267/35 Considerations on Appeals Against Closing Orders, 7 Apr. 2021 (“Considerations”), Opinion of Judges Prak Kimsan, Ney Thol and Huot Vuthy, para. 115, adopted by all three National Judges via their signatures at EN 01666986, FR 01667144, KH 01667332; Opinion of Judges Olivier Beauvallet and Kang Jin Baik (“International Judges’ Opinion”), paras 119, 262, 284, 339-340, 342-343, adopted by both International Judges via their signatures at EN 01667089, FR 01667264, KH 01667480.

⁵ D271/1 International Co-Prosecutor’s Request for Conclusion of the Pre-Trial Stage of the Case 003 Proceedings, 21 June 2021. The ICP incorporates by reference this Request for Conclusion.

⁶ The Supreme Court Chamber (“SCC”) has held that a Chamber “cannot be expected to consider a party’s submissions in detail if they are obscure, contradictory, [or] vague”. See Case 002-F36 Appeal Judgement, 23 Nov. 2016, para. 101 citing Case 001-F28 Appeal Judgement, 3 Feb. 2012 (“*Duch AJ*”), para. 20. The PTC has taken the same approach. See e.g. Case 002-D300/2/2 Decision on Ieng Sary’s Appeal Against OCIJ Order on Requests D153, D172, D173, D174, D178 & D284, 5 May 2010, paras 19-20. See also D266/27 & D267/35 Considerations, International Judges’ Opinion, paras 190-191 (Submissions “cannot be allowed to turn into a guessing enterprise for the Pre-Trial Chamber”).

⁷ D272 Request to Terminate, pp. 1, 30.

⁸ D272 Request to Terminate, para. 47 (“*If the PTC is incapable of reaching a supermajority to send Mr. Meas Muth to trial, it must terminate Case 003, seal the Case File, and archive it. Either way, the PTC must*”).

he now apparently denies the reality of it, nowhere in *this* Request does Meas Muth deny the PTC's unanimous finding that the Indictment is valid. Rather, he recounts all five PTC Judges' findings to that effect.⁹ He claims to seek an answer only on "whether he will face trial",¹⁰ which comports with his repeated request, both in this motion,¹¹ and previously,¹² to have an opportunity to challenge the Indictment. Not only are Meas Muth's positions contradictory, but his acquiescence to a trial approved by a PTC supermajority entirely undermines his arguments regarding the immediate termination of Case 003 based on undue delay.¹³

There has been no undue delay in Case 003

4. Meas Muth's argument that the proceedings are a violation of his fair trial rights, in particular, his right to expeditious proceedings¹⁴ is without merit. Paradoxically, even Meas Muth recognises that achieving fair, adversarial, international justice takes significant time. As he acknowledged in 2017:

Even the most superficial student of the DK period, possessing a modicum of familiarity with mass atrocity trials, did not need to be clairvoyant to foresee that a single trial period alone would likely run up to three to four years. When factoring in the pre-trial and appeal stages, that same tyro would have known that a single case could take anywhere from four to 12 years from start to finish. [...] [I]t is baffling to think that those representing the UN in setting up the ECCC were not aware that the *minimum* lifespan of the tribunal would be 14 to 18 years [...] Given the modalities to which the UN and Cambodian Government agreed, substantive and procedural justice at the ECCC was always bound to be exceedingly time-consuming [...].¹⁵

conclusively act expeditiously." (original emphasis omitted; emphasis added)), Heading III.D. ("Unless the PTC reverses and decides by supermajority to send Case 003 to trial, it must terminate, seal and archive Case File 003" (emphasis added)), para. 73 ("If the PTC Judges are incapable of reaching a supermajority to send Case 003 to trial, they must adhere to their judicial oaths and faithfully follow the law by exercising their authority to terminate the proceedings, to seal the Case File and to archive it." (original emphasis omitted; emphasis added)). See also para. 60 ("If the PTC is unable to come to a consensus or supermajority and issue a final, binding decision concluding the pre-trial proceedings in Case 003, fulfilling its overriding duty to ensure Mr. Meas Muth's fair trial rights, it must terminate the proceedings in Case 003, seal the Case File, and archive it to avoid an abuse of process and a miscarriage of justice." (emphasis added)).

⁹ D272 Request to Terminate, paras 32, 34.

¹⁰ D272 Request to Terminate, para. 54.

¹¹ D272 Request to Terminate, paras 54, 71.

¹² See e.g. D267/27 Meas Muth's Supplement to his Appeal Against the International Co-Investigating Judge's Indictment, 5 May 2020, p. 1, paras 24, 50; D249/2 Meas Muth's Submission on the Budgetary Situation of the ECCC and its Impact on Case 003, 5 June 2017 ("Meas Muth's Budget Submission"), paras 28-29; D267/4 Meas Muth's Appeal Against the International Co-Investigating Judge's Indictment, 8 Apr. 2019, p. 1, paras 4, 42-43, 47; D267/31 Meas Muth's Reply to the International Co-Prosecutor's Response to Meas Muth's Supplement to His Appeal Against the International Co-Investigating Judge's Indictment, 15 June 2020, paras 4, 22; D256/11 Meas Muth's Response to the International Co-Prosecutor's Final Submission, 12 Apr. 2018, paras 19, 67.

¹³ D272 Request to Terminate, pp. 1, 30, paras 51-69.

¹⁴ D272 Request to Terminate, paras 47-59, 70.

¹⁵ D249/2 Meas Muth's Budget Submission, paras 2-3 (emphasis in original).

5. Paradoxes aside, Meas Muth's now-alleged violation of his right to expeditious proceedings is without merit for the reasons outlined below.
6. Meas Muth incorrectly adds almost four years to argue the proceedings have been unduly delayed. As he himself points out,¹⁶ the starting point for determining whether proceedings have been conducted within a reasonable time is from when he was "officially notified that he would be prosecuted", *i.e.* from when the competent authority informed him of an allegation that he has committed a criminal offence.¹⁷ For Meas Muth, this occurred on 24 February 2012, when Reserve Co-Investigating Judge ("CIJ") Laurent Kasper-Ansermet informed him that he was a suspect in an ongoing judicial investigation.¹⁸ Thus, the relevant time period is just over nine (9) years, not 13.¹⁹
7. Meas Muth fails to appreciate²⁰ that his right to expeditious proceedings does not depend on the amount of time passed *per se*,²¹ nor on *any* delay.²² Rather, the plain language of Rule

¹⁶ **D272** Request to Terminate, para. 49.

¹⁷ **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, Opinion of Judges Beauvallet and Baik (The "Undersigned Judges") Regarding the Merit of the Appeal, 26 Apr. 2016 ("International Judges' Motion to Strike Considerations"), para. 35, fn. 134 *citing Eckle v. Germany*, No. 8130/78, Judgment, 15 July 1982, para. 73; *Hozee v. The Netherlands*, No. 21961/93, Judgment, 22 May 1998, para. 43; *Coëme and others v. Belgium*, Nos 32492/96, 32547/96, 32548/96, 33209/96, 33210/96, Judgment, 22 June 2000 ("*Coëme v. Belgium* Judgment"), para. 133.

¹⁸ **D30** Notification of Suspect's Rights [Rule 21(1)(D)], 24 Feb. 2012. Meas Muth has previously asserted that he became aware that he was under judicial investigation in 2011, when the confidential Introductory Submission was leaked to the press (*see D249/2* Meas Muth's Budget Submission, para. 26). Since this notification was not officially made by the competent authority, it is insufficient to begin the time running for present purposes.

¹⁹ *Contra D272* Request to Terminate, paras 1, 47, 51-52, 54, 65, 70, Heading III.B. The European Court of Human Rights ("ECtHR") has placed great emphasis on the time that the person was officially made *aware* of the proceedings, contrasted with the mere existence of an investigation. *See e.g. Ustyantsev v. Ukraine*, No. 3299/05, Judgment, 12 Jan. 2012, para. 91; *Kechev v. Bulgaria*, No. 13364/05, Judgment, 26 July 2012, para. 47.

²⁰ *See e.g. D272* Request to Terminate, para. 47 ("13 years of pre-trial proceedings against Mr. Meas Muth does not, by any stretch of the imagination, comport with his right to expeditious proceedings"), section III.B. (entitled "The delay in 13-year long Case 003 pre-trial proceedings is unreasonable").

²¹ *E.g., ICTY: Šešelj*, IT-03-67-T, Decision on Oral Request of the Accused for Abuse of Process, 10 Feb. 2010 ("*Šešelj* Abuse of Process Decision"), para. 30 ("international and European jurisprudence clearly establish that there is no predetermined threshold with regard to the time period beyond which a trial may be considered unfair on account of undue delay."); **ICTR: Ntabakuze**, ICTR-98-41A-A, Judgement, 8 May 2012, para. 20 ("the length of an accused's detention does not in itself constitute undue delay, and the fact that Ntabakuze had been detained for 12 years at the time of filing his Notice of Appeal is insufficient, in itself, to show that the Trial Chamber erred in its conclusion that there was no undue delay in the proceedings."); *Bizimungu et al.*, ICTR-99-50-T, Judgement and Sentence, 30 Sep. 2011 ("*Bizimungu* TJ"), para. 74; *Kanyabashi*, ICTR-96-15-I, Decision on the Defence Extremely Urgent Motion Habeas Corpus and for Stoppage of Proceedings, 23 May 2000, para. 68 ("The reasonableness of the period cannot be translated into a fixed number of days, months or years"); *Nyiramasuhuko et al.*, ICTR-98-42-A, Judgment, 14 Dec. 2015 ("*Nyiramasuhuko* AJ"), para. 359; **ICC: Bemba**, ICC-01/05-01/08-3694, Decision on Mr Bemba's Claim for Compensation and Damages, 18 May 2020, para. 67 ("in the framework of the Court, [...] no time limits exist either with regard to the different phases of the proceedings or, more critically, in respect of the duration of custodial detention, whether in respect of each phase of the proceedings or overall").

²² *Contra D272* Request to Terminate, paras 51a-b, d.

21(4),²³ and article 14(3)(c) of the International Covenant on Civil and Political Rights (“ICCPR”), upon which the Rule is based,²⁴ makes it clear that the duration of the proceedings is to be “reasonable” or, in other words, “without *undue* delay”.²⁵ This accords with international criminal jurisprudence²⁶ and regional human rights instruments.²⁷ The assessment of what is undue must, as Meas Muth concedes,²⁸ be made “in light of the circumstances”, which includes three factors: (i) the complexity of the proceedings, (ii) the conduct of the accused, and (iii) the conduct of the authorities involved. A determination of complexity includes an assessment of the number of oral and written motions and decisions, counts, modes of liability, accused and witnesses, as well as the complexity of the facts and law, temporal and geographical scope, and quantity of evidence.²⁹

8. Meas Muth overlooks the need to balance prejudice against advancing justice when determining “undue delay”. He ignores three crucial considerations of particular relevance to Case 003. First, the PTC must consider whether the accused is or has been in custody.³⁰

²³ Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (Rev. 9), as revised on 16 Jan. 2015 (“Rules” or “IR(s)”), IR 21(4) (“Proceedings before the ECCC shall be brought to a conclusion *within a reasonable time*” (emphasis added)).

²⁴ 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, 6 June 2003 (“ECCC Agreement”), art. 12(2) (“The Extraordinary Chambers shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights [“ICCPR”], to which Cambodia is a party”); ICCPR, art. 14(3)(c) (“In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality [...] (c) To be tried *without undue delay*” (emphasis added)). See also Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, with amendments as promulgated on 27 Oct. 2004 (“ECCC Law”), art. 35 new, which erroneously says “to be tried without delay” in the English version but correctly says “À être jugée sans retard *excessif*” (emphasis added) in the French version.

²⁵ Emphasis added.

²⁶ See e.g. *Halilović*, IT-01-48-A, Decision on Defence Motion for Prompt Scheduling of Appeal Hearing, 27 Oct. 2006, para. 17 (recognising the right to an expeditious trial and that “the right to be tried without undue delay does not protect against *any* delay in the proceedings; it protects against *undue* delay.” (Original emphasis)); *Nyiramasuhuko* AJ, para. 364.

²⁷ See e.g. (European) Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 Nov. 1950, 213 UNTS 221 (as amended), art. 6(1) (“entitled to a fair and public hearing within a reasonable time”); African (Banjul) Charter on Human and Peoples’ Rights, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), art. 7(1)(d) (“right to be tried within a reasonable time”); American Convention on Human Rights, “Pact of San José, Costa Rica”, 22 Nov. 1969, Organization of American States, art. 8(1) (“right to a hearing [...] within a reasonable time”).

²⁸ **D272** Request to Terminate, para. 50 citing **D120/3/1/8** International Judges’ Motion to Strike Considerations, para. 37.

²⁹ See e.g. **ICTR**: *Nyiramasuhuko* AJ, paras 360, 362; *Bizimungu* TJ, paras 73, 75; *Renzaho*, ICTR-97-31-A, Judgement, 1 Apr. 2011 (“*Renzaho* AJ”), para. 238; *Nahimana et al.*, ICTR-99-52-A, Judgement, 28 Nov. 2007 (“*Nahimana* AJ”), para. 1074; *Rwamakuba*, ICTR-98-44C-PT, Decision on Defence Motion for Stay of Proceedings, 3 June 2005 (“*Rwamakuba* Stay Decision”), para. 29; **ICTY**: *Šešelj* Abuse of Process Decision, para. 30. **STL**: *Ayyash et al.*, STL-11-01/T/TC, Judgment, 18 Aug. 2020 (“*Ayyash et al.* TJ”), para. 966.

³⁰ *Abdoella v. The Netherlands*, No. 12728/87, Judgment, 25 Nov. 1992, para. 24 (“The Court concludes that where a person is kept in detention pending the determination of a criminal charge against him, the fact of his detention is a factor to be considered in assessing whether the requirement of a decision on the merits within

Second, the seriousness of the charges must also be examined.³¹ Third, the ECCC's mandate – to *bring to trial* those within its jurisdiction³² – cannot be ignored; the right to be tried without undue delay “entails balancing the rights of the accused with the ends of justice”,³³ including the need to ascertain the truth about the crimes with which the accused is charged.³⁴ The PTC thus has the duty “to balance the right to be tried without undue delay with the general necessity for the investigation and judicial processes to advance”.³⁵

9. Meas Muth incorrectly simplifies the complexity and seriousness of Case 003, contradicting his own prior arguments. From the above, it is clear that Meas Muth errs in his bald, unsubstantiated statement that “[c]omplexity neither explains nor excuses” the length of the Case 003 pre-trial proceedings,³⁶ which is contradicted by his prior admissions.³⁷ Moreover,

a reasonable time has been met.”); *Korshunov v. Russia*, No. 38971/06, Judgment, 25 Oct. 2007, para. 71 (“the fact that he was held in custody required particular diligence on the part of the authorities dealing with the case to administer justice expeditiously”); *Kryuk v. Russia*, No. 11769/04, Judgment, 13 Dec. 2011, para. 67; *Borisenko v. Ukraine*, No. 25725/02, Judgment, 12 Jan. 2012, para. 58; **UNHRC**: General Comment No. 32, Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial, CCPR/C/GC/32, 23 Aug. 2007, para. 35.

³¹ See e.g., *Šešelj Abuse of Process Decision*, paras 29-30; *Rwamakuba Stay Decision*, para. 19 (“gravity of the charges”).

³² ECCC Law, arts 1, 2 new; ECCC Agreement, art. 1.

³³ **D120/3/1/8** International Judges’ Motion to Strike Considerations, para. 36. See also *Mugenzi et al.*, ICTR-99-50-I, Decision on Justin Mugenzi’s Motion for Stay of Proceedings or in the Alternative Provisional Release (Rule 65) and in Addition Severance (Rule 82(B)), 8 Nov. 2002, para. 32; *Boddaert v. Belgium*, No. 12919/87, Judgment, 12 Oct. 1992, para. 39 (“Article 6 [...] commands that judicial proceedings be expeditious, but it also lays down the more general principle of the proper administration of justice.”) applied in *Coëme v. Belgium* Judgment, para. 140.

³⁴ **D120/3/1/8** International Judges’ Motion to Strike Considerations, para. 36; *Neumeister v. Austria*, No. 1936/63, Judgment, 27 June 1968, para. 21; *Šešelj Abuse of Process Decision*, para. 29; *X v. Federal Republic of Germany*, No. 6946/75, Decision, 6 July 1976, p. 116 (“the international community requires the competent authorities [...] to investigate and prosecute these [war] crimes despite the difficulties encountered by reason of the long time that has elapsed since the commission of the acts concerned. [...] [T]he length of such proceedings must be measured in the light of the above consideration[] which take[s] into account their exceptional character.”).

³⁵ Case 002-**D314/1/8** Decision on Nuon Chea’s and Ieng Sary’s Appeal against OCIJ Order on Requests to Summons Witnesses, 8 June 2010, para. 70; **D120/3/1/8** International Judges’ Motion to Strike Considerations, para. 36.

³⁶ **D272** Request to Terminate, para. 52.

³⁷ See e.g. **D120/3/1/1** Meas Muth’s Appeal Against International Co-Investigating Judge’s Re-Issued Decision on Meas Muth’s Motion to Strike the International Co-Prosecutor’s Supplementary Submission, 22 Sep. 2015, para. 49 (“Case 003 is somewhat complex, dealing as it does, with allegations of serious crimes that allegedly took place approximately forty years ago”); **D249/2** Meas Muth’s Budget Submission, para. 1 (crimes in Democratic Kampuchea were “complex in substance”); **D267/5/1** Meas Muth’s Supplemental Arguments Concerning his Request for Extension of Time and Enlargement of Page Limits for Response and Reply, 7 May 2019, para. 1 (adopting with approval the ICP’s characterisation of the Case 003 investigation as “complex”); **D266/13** & **D267/18** Meas Muth’s Request to Dispense with Personal Appearance at the Hearings on the Appeals against the Closing Orders, 18 Nov. 2019 (“Meas Muth’s Appeal Hearing Submission”), p. 1, para. 4 (describing the “complex legal and factual arguments” that would take place during the Case 003 PTC appeal hearings); **D128.1/1/1** Meas Muth’s Request for Extension of Pages to Appeal Co-Investigating Judge Harmon’s Notification of Charges Against Meas Muth and to File in English with the Khmer Translation to Follow, 28 May 2015, p. 1, para. 7; **D128/1/1** Meas Muth’s Request for Extension of Pages to Appeal Co-Investigating Judge Harmon’s Decision to Charge Meas Muth *in Absentia*, 28 May 2015, p. 1.

his comparison between Cases 002 and 003³⁸ is unwarranted and misleading. The question to be addressed is whether Case 003 is complex, not whether it is complex in comparison to other cases before the ECCC.³⁹ Yet nowhere in this filing does Meas Muth meaningfully engage with the facts and procedural history of Case 003.

10. Meas Muth wilfully understates the factual complexity of the case. His reference to the Indictment to describe Case 003 as a case “concern[ing] one Charged Person in relation to eight crime sites and events and his Revolutionary Army of Kampuchea (“RAK”) role”,⁴⁰ is a grossly misleading characterisation of this investigation. The Introductory⁴¹ and Supplementary⁴² Submissions seized the CIJs of an investigation into the *entire* RAK to determine the responsibility⁴³ of (initially⁴⁴) two Suspects in their capacity as high-ranking military officers⁴⁵ for crimes committed by the members of the DK Navy and Air Force *throughout* Cambodia, including its territorial waters and islands, during the ECCC’s *entire* temporal jurisdiction. As well as identifying many specific crime sites and events, the Introductory Submission seized the CIJs of an investigation into all RAK internal purges, and all RAK security centres and related purge sites.⁴⁶ The Supplementary Submission additionally requested an investigation into forced marriages.⁴⁷ It was only towards the end of the judicial investigation that inquiries were discontinued under Rule 66*bis* with regard

³⁸ D272 Request to Terminate, para. 52.

³⁹ As noted above, the assessment of complexity must be made in light of the circumstances of the particular case. *See further* D120/3/1/8 International Judges’ Motion to Strike Considerations, paras 39-40; Case 002-C20/5/18 [Redacted] Decision on Ieng Thirith’s Appeal Against Order of Extension of Provisional Detention, 11 May 2009, para. 57 and citations therein; *Davies v. The United Kingdom*, No. 42007/98, Judgment, 16 July 2002, para. 26.

⁴⁰ D272 Request to Terminate, para. 52 *citing* D267 Indictment.

⁴¹ D1 Co-Prosecutors’ Second Introductory Submission Regarding the Revolutionary Army of Kampuchea, 20 Nov. 2008 (“IS”).

⁴² D120 International Co-Prosecutor’s Supplementary Submission Regarding Crime Sites Related to Case 003, 31 Oct. 2014 (“SS”).

⁴³ Pursuant to a range of modes of liability, including joint criminal enterprise (“JCE”). *See* D1 IS, paras 96-98; D120 SS, para. 26. *See also* D267 Indictment, paras 562-577, EN 01596603-01596614, FR 01621343-01621352, KH 01600889-01600898.

⁴⁴ Until at least mid-2013, there were two suspects in Case 003, Meas Muth and Sou Met. On 22 Oct. 2013, the CIJs notified the Parties that Sou Met had died (D86 Notification of the Death of a Suspect in Case File 003, 22 Oct. 2013); the proceedings against him were terminated on 2 June 2015 (D86/3 Dismissal of Allegations Against Sou Met, 2 June 2015.).

⁴⁵ Both Meas Muth and Sou Met held *multiple* roles in the DK hierarchy. *See* D1 IS, paras 2, 68-74 (Sou Met), 3, 81-86 (Meas Muth); D120 SS, paras 12-14 (Meas Muth); D267 Indictment, paras 149-170, 459, 461.

⁴⁶ D1 IS, paras 43-58, 63-66; D120 SS, paras 6-14, 18-19. Facts relating to the operations, including purges, of the entire RAK were also vital for establishing the existence of a JCE. *See* D1 IS, paras 33-41, 65-66. *See further* D120/3 Re-Issued Decision on Meas Muth’s Motion to Strike the International Co-Prosecutor’s Supplementary Submission, 11 Sep. 2015, para. 32; D120/3/1/8 International Judges’ Motion to Strike Considerations, para. 42.

⁴⁷ D120 SS, paras 20-24.

to a number of crime sites and events.⁴⁸

11. Meas Muth also overlooks the legal complexity of Case 003. The wide-ranging factual allegations described above were mirrored by numerous legal characterisations extending from domestic crimes to grave breaches of the Geneva Conventions to crimes against humanity and genocide.⁴⁹ Moreover, as evidenced in procedural histories filed in Case 003,⁵⁰ the case has entailed disagreements permitted under the Internal Rules,⁵¹ novel legal issues,⁵² and required, *inter alia*, reviewing Cases 001 and 002 for relevant evidence, and addressing numerous motions, investigative requests, annulment applications, and appeals.⁵³ At the close of the investigation, Case File 003 contained around 7,000 documents, including more than 900 written records of interview.⁵⁴ Moreover, by the time the Indictment was issued, 646 victims had applied for admission as Civil Parties in Case 003.⁵⁵ The Introductory and Supplementary Submissions,⁵⁶ Final Submissions⁵⁷ and Meas Muth's

⁴⁸ See **D184** Request for Comments Regarding Alleged Facts Not to be Investigated Further, 16 Mar. 2016 ("Facts Not to be Investigated Request"); **D184/3** Notice of Provisional Discontinuance Regarding Individual Allegations, 24 Aug. 2016; **D184/4** Notification Pursuant to Internal Rule 66*bis* (2), 22 Nov. 2016; **D226** Decision to Reduce the Scope of Judicial Investigation Pursuant to Internal Rule 66*bis*, 10 Jan. 2017. The facts were: (i) all allegations relating to the S-22 security centre; (ii) all allegations relating to the Kampong Chhnang Airport Construction Site; (iii) all allegations relating to the Stung Tauch execution site; and (iv) all allegations relating to RAK involvement in the "purges" of the Central Zone, the New North Zone and the East Zone, excluding the alleged "purges" of members of the RAK units located in those areas. Other facts were dismissed pursuant to IR 67, including allegations relating to (i) crimes committed in Vietnam, (ii) Prison 810; (iii) crimes committed at other unidentified security centres operated by the RAK. See further, **D256/7** International Co-Prosecutor's Final Submission, 14 Nov. 2017 ("ICP's Final Submission"), paras 34-36.

⁴⁹ **D1** IS, para. 99; **D120** SS, para. 25; **D174** Written Record of Initial Appearance, 14 Dec. 2015 ("Written Record of Initial Appearance"), pp. 2-3 (adding genocide charges). See also **D267** Indictment, paras 470-561, EN 01596603-01596614, FR 01621343-01621352, KH 01600889-01600898.

⁵⁰ See e.g. **D256/7** ICP's Final Submission, paras 6-47; **D267** Indictment, paras 1-27; **D266** Order Dismissing the Case Against Meas Muth, 28 Nov. 2018 ("Dismissal Order"), paras 15-35; **D266/27** & **D267/35** Considerations, paras 1-36.

⁵¹ IRs 71-72.

⁵² See e.g. **D191/18** Notification on the Interpretation of 'Attack Against the Civilian Population' in the Context of Crimes Against Humanity With Regard to a State's or Regime's Own Armed Forces, 7 Feb. 2017; **D184** Facts Not to be Investigated Request. See also **D214** Meas Muth's Motion Against the Application of Forced Marriage as the Crime Against Humanity of an Other Inhumane Act, 18 Nov. 2016; **D145** Meas Muth's Motion Against the Application of Command Responsibility to Crimes That Are Not Connected to an International Armed Conflict, 23 July 2015; **D87/2/1.7** Meas Muth's Request for Clarification of Whether the OCIJ Considers Itself Bound by Pre-Trial Chamber Jurisprudence That Crimes Against Humanity Requires a Nexus With Armed Conflict, 17 Oct. 2013.

⁵³ See e.g. **D267.2** Annex II: Motions and Request Filed with the CIJs, 28 Nov. 2018 (listing 175 filings and requests made to OCIJ before issuance of the Closing Orders. Of these, 162 were filed after 24 Feb. 2012, 118 by Meas Muth. 42 also involved proceedings before the PTC.). In addition, OCIJ and PTC undertook other necessary judicial activities in the form of decisions, orders, motions, memoranda, requests, responses, and replies. Overall, a search in Zylab for documents in English reveals a conservative estimate of 245 filings from the OCIJ and 79 filings from the PTC since 24 Feb. 2012.

⁵⁴ **D256/7** ICP's Final Submission, para. 41.

⁵⁵ **D269** Order on Admissibility of Civil Party Applications, 28 Nov. 2018 ("ICIJ CPA Order"), para. 2.

⁵⁶ **Introductory Submission (D1): English:** 118 pages; **Khmer:** 133 pages; **French:** 138 pages; **Supplementary Submission (D120): English:** 17 pages; **Khmer:** 26 pages; **French:** n/a.

⁵⁷ **ICP's Final Submission (D256/7): English:** 944 pages (plus 14 annexes); **Khmer:** 1605 (plus 14 annexes)

Response to the ICP's Final Submission,⁵⁸ as well as both Closing Orders⁵⁹ and the Decisions on Civil Party admissibility⁶⁰ ran, almost without exception, to hundreds of pages each.⁶¹ At the pre-trial appeal stage, the parties' appeals,⁶² as well as the PTC's two sets of Considerations, were similarly voluminous.⁶³

12. Meas Muth fails to acknowledge his own contribution to delays. He wrongly claims not to have caused any.⁶⁴ Whilst ICIJ Bohlander charging him in person in Battambang in December 2015 may not have delayed proceedings *in itself*, this ignores that Meas Muth for a long time failed to appear before the ECCC. In 2014, when summonsed by ICIJ Harmon for an initial appearance,⁶⁵ he refused to appear,⁶⁶ requiring the ICIJ to take further procedural steps, including issuing multiple arrest warrants,⁶⁷ which Meas Muth challenged.⁶⁸ The ICIJ was forced to charge Meas Muth *in absentia*,⁶⁹ again a decision that he challenged despite it being occasioned by his own failure to appear.⁷⁰ While Meas Muth may contest decisions, once the issues have been determined by the PTC, a failure to comply with validly issued decisions⁷¹ contributes to the length of the proceedings.

13. Meas Muth fails to establish any genuine impact of the proceedings on his day-to-day life.

French: n/a; **NCP's Final Submission (D256/6): English:** 11 pages; **Khmer:** 16 pages; **French:** n/a.

⁵⁸ **Meas Muth's Response (D256/11): English:** 318 pages; **Khmer:** 496 pages; **French:** n/a.

⁵⁹ **Indictment (D267): English:** 265 pages; **Khmer:** 431 pages; **French:** 313 pages; **Dismissal Order (D266): English:** 215 pages; **Khmer:** 355 pages; **French:** 179 pages.

⁶⁰ **ICIJ CPA Order (D269): English:** 11 pages (plus 5 Annexes); **Khmer:** 20 pages (plus 5 Annexes); **French:** 12 (plus 5 Annexes); **NCIJ CPA Order (D268): English:** 3 pages; **Khmer:** 4 pages; **French:** n/a.

⁶¹ The numbers of pages are as they appear in Zylab, including all front sheets and tables of contents.

⁶² **ICP's Appeal (D266/2): English:** 104 pages; **Khmer:** 175 pages; **French:** 126 pages; **NCP's Appeal (D267/3): English:** 37 pages; **Khmer:** 53 pages; **French:** 84 pages; **Meas Muth's Appeal (D267/4): English:** 49 pages; **Khmer:** 78 pages; **French:** 61 pages; **Civil Party Appeal (D269/3): English:** 41 pages; **Khmer:** 57 pages; **French:** n/a.

⁶³ **Considerations (D266/27 & D267/35): English:** 152 pages; **Khmer:** 216 pages; **French:** 175 pages; **Considerations on Civil Party Appeals (D269/4): English:** 49 pages; **Khmer:** 70 pages; **French:** 56 pages.

⁶⁴ **D272** Request to Terminate, para. 53.

⁶⁵ **A66** Summons to Initial Appearance, 28 Nov. 2014; **A66/1** Written Record of Service of Summons, 5 Dec. 2014; **A67** Summons of Lawyer, 28 Nov. 2014; **D82/5** Notification on Suspect's Requests to Access the Case File, Take Part in the Judicial Investigation, and to Strike ICP's Submissions, 28 Nov. 2014.

⁶⁶ **A67/1** Notice Concerning Mr. Meas Muth's Decision not to Recognize Summons, 3 Dec. 2014; **A67/1.1** Notice of Non-Recognition of Summons, 2 Dec. 2014; **A77** Meas Muth's Application to Seize the Pre-Trial Chamber with a Request for Annulment of Summons to Initial Appearance, 15 Dec. 2014.

⁶⁷ **C1** Arrest Warrant, 10 Dec. 2014; **C2** Arrest Warrant, 4 June 2015.

⁶⁸ **D130** Meas Muth's Request to Rescind the Arrest Warrant Issued on 10 December 2014, 10 Mar. 2015; **C2/1** Meas Muth Urgent Request for a Stay of Execution of the Arrest Warrant Issued on 4 June 2015 by CIJ Judge Harmon Pending Decision on the Appeal Against CIJ Judge Harmon's Decision to Charge Meas Muth *in Absentia*, 8 June 2015.

⁶⁹ **D128** Decision to Charge Meas Muth *in Absentia*, 3 Mar. 2015.

⁷⁰ **D128/1/3** Meas Muth's Appeal Against Co-Investigating Judge Harmon's Decision to Charge Meas Muth *in Absentia*, 16 June 2015.

⁷¹ **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. 4.

He does not substantiate his assertion that he has lived with the weight and public stigma of being under investigation for 13 years,⁷² nor does he provide any basis to conclude his day-to-day life in Cambodia has been affected. Meas Muth has lived freely for the entirety of the investigation. He has never been in ECCC custody⁷³ nor subjected to meaningful restrictions of his personal freedom; he merely needs to remain “at the disposal of the ECCC” with almost no conditions attached.⁷⁴ His freedoms of movement and association have not been impacted. In 2016, he obtained a new passport, which he failed to declare or surrender,⁷⁵ despite the assurances he gave to the ECCC,⁷⁶ and has been travelling regularly to Thailand for medical treatment for several years.⁷⁷ In 2019, he attended the funeral of Nuon Chea alongside other former DK leaders.⁷⁸

14. Meas Muth improperly speculates on the future of ECCC proceedings against him. His speculation regarding the potential future length of trial and appeal proceedings or any favourable outcome of issues litigated in those proceedings cannot form the basis for asserting a violation of expeditious proceedings.⁷⁹ A right cannot be said to be violated *before* it has been violated. Judges are “only empowered to determine whether there has been any violation of the Accused’s rights as at the present date”.⁸⁰ In any event, the

⁷² **D272** Request to Terminate, para. 54.

⁷³ **D174** Written Record of Initial Appearance, p. 11; **D267** Indictment, paras 578-579.

⁷⁴ **D174** Written Record of Initial Appearance, p. 11 (By way of implementation, Meas Muth is required to notify the ICIJ of any change in address. He agreed to accept weekly control visits to his residence by police. He also undertook to inform the ICIJ – either personally or through his counsel - whenever he wishes to leave the country for medical treatment and when he returns). *See also* **D174/2** Order on Implementation of Voluntary Assurances Given by Meas Muth at the Initial Appearance of 14 December 2015, 3 Feb. 2016, paras 1 (requiring Meas Muth to (i) surrender to the police within 7 days any valid passport obtained; (ii) be available at his residence for weekly police visits; and (iii) notify the police of any change of address), 2 (informing Meas Muth that he may regain temporary possession of his passport to leave Cambodia for medical or other compelling reasons *provided* he provides proof of scheduled medical treatment abroad or other compelling reason and specifies the foreseen duration of the travel. These latter provisos applying *mutatis mutandis* should Meas Muth leave Cambodia without requiring a passport for travel. Meas Muth is required to notify the police upon his return, surrendering his passport again.), 3 (making corresponding orders to the judicial police).

⁷⁵ **D266/18.2 & D267/23.2** Transcript of PTC Hearing in Case 003, 29 Nov. 2019, 12.08.05-12.13.22 (Meas Muth’s International Defence Counsel, Michael Karnavas, confirming that (i) he had been made aware in the previous 24 hours that Meas Muth obtained a valid passport in 2016, which had not been surrendered to police; and (ii) both before and after Meas Muth was formally charged by the ICIJ, “it was not uncommon” for him to cross the border without a passport to seek medical treatment in Thailand, including open heart surgery.).

⁷⁶ *See supra*, fn. 74.

⁷⁷ *See supra*, fn. 75. *See also* **D266/13 & D267/18** Meas Muth’s Appeal Hearing Submission, para. 2.

⁷⁸ *See e.g.* Business Standard (AFP), *Mourners pay final respects to Khmer Rouge ‘Brother Number Two’*, 9 Aug. 2019 (“Former Khmer Rouge naval chief Meas Muth, who has also been accused of genocide and crimes against humanity in a stalled criminal case, also attended Friday’s hours-long ceremony, saying he had come to ‘bid a final farewell’ to his former superior.”); VOA Khmer, *Bellwether Khmer Rouge Case Heads to Court on November 27*, 26 Nov. 2019 (containing a photo of Meas Muth at the funeral of Nuon Chea on 9 Aug. 2019, and documenting his trips to Thailand for medical treatment).

⁷⁹ **D272** Request to Terminate, section III.C. (entitled “Trial and appeal proceedings in Case 003 will last at least four years with an inevitable outcome”), paras 56-59, 62, 67.

⁸⁰ *Bizimungu et al.*, ICTR-99-50-T, Decision on Prosper Mugiraneza’s Second Motion to Dismiss for

proceedings depend on judicial decisions and are as efficient as those decisions dictate. The outcome is dependent upon the law applied impartially and independently to the facts; such a process would in no way guarantee a result favourable to Meas Muth.⁸¹

15. Meas Muth misunderstands the established law on the ECCC's personal jurisdiction. To the extent his submissions are based on assertions concerning the Trial Chamber's ("TC") future findings on personal jurisdiction,⁸² they are also ill-founded in law. They overlook clear SCC jurisprudence,⁸³ recognised repeatedly by the TC,⁸⁴ that this matter is not jurisdictional in nature.⁸⁵ Rather, it is "*exclusively* a policy decision" within the sole discretion of the Co-Prosecutors and CIJs,⁸⁶ and the TC has "no need to embark upon any assessment" of it.⁸⁷ The only truly jurisdictional question the TC must confirm is that Meas Muth was a Khmer Rouge official,⁸⁸ something he has never denied. Absent a finding of "bad faith, or a showing of unsound professional judgement" on the part of the ICIJ to trigger the "extremely narrow" residual review power of the TC,⁸⁹ the matter is not justiciable.
16. Meas Muth overlooks comparable international cases on "undue delay". Although the reasonableness of the length of proceedings is to be assessed on a case-by-case basis,⁹⁰ a survey of other international criminal tribunals shows that judicial proceedings with lengths of a similar range to Case 003⁹¹ have not been found unduly delayed, despite the fact that the other accused were in custody. Given the similar mandate of these courts and the inherent

Deprivation of His Right to Trial Without Undue Delay, 29 May 2007, paras 25 ("an assessment of whether the Accused's right to trial without undue delay has been violated will be made only as at today's date. This means that the Chamber, at the date of signature of this Decision, is making a determination as to whether or not the Accused's right to trial without undue delay has been violated - *to date*. The Chamber will not enter into any speculation about whether - at date of judgement, or at date of appeal from final judgement, if any - the Accused's right to trial without undue delay will have been violated. This Trial Chamber is only empowered to determine whether there has been any violation of the Accused's rights as at the present date." (original emphasis)), 26 ("the [legal] authorities in question only require the judicial body to consider the totality of the proceedings *which have already transpired* at the time it is making its assessment. For example, if the proceedings are in pre-trial phase, the judicial body must determine whether there has been undue delay up until that point" (original emphasis)).

⁸¹ *Contra* **D272** Request to Terminate, paras 56-59.

⁸² **D272** Request to Terminate, paras 56-58.

⁸³ Case 001-**F28** *Duch* AJ, para. 79.

⁸⁴ Case 002-**E465** Case 002/02 Judgement, 16 Nov. 2018, fn. 37; Case 002-**E313** Case 002/01 Judgement, 7 Aug. 2014, fn. 31.

⁸⁵ Case 001-**F28** *Duch* AJ, paras 62-81.

⁸⁶ Case 001-**F28** *Duch* AJ, paras 63, 74-75, 77-79, 80-81 (quote at 80, emphasis added).

⁸⁷ Case 001-**F28** *Duch* AJ, para. 81.

⁸⁸ Case 001-**F28** *Duch* AJ, para. 61.

⁸⁹ Case 001-**F28** *Duch* AJ, para. 80.

⁹⁰ See e.g., **D120/3/1/8** International Judges' Motion to Strike Considerations, para. 37; **ICTR**: *Nyiramasuhuko* AJ, para. 346; *Renzaho* AJ, para. 238; *Nahimana* AJ, para. 1074.

⁹¹ For comparative purposes of this analysis, unless otherwise noted, the duration of judicial proceedings has been calculated from the date the suspect was transferred to the Tribunal to the date of the final appeal judgment.

complexity of the cases before them, “it is not unreasonable to expect that the judicial process will not always be as expeditious as before domestic courts.”⁹² For example, at the ICTR, there were no findings of undue delay for judicial proceedings of approximately eight to 11 years for suspects in custody who faced five or less counts in relation to genocide and crimes against humanity, in (i) a single-accused case that involved 28 days of evidence at trial,⁹³ and (ii) a co-accused case that was severed before trial, with 32⁹⁴ and 80⁹⁵ days of evidence at trial. At the ICC, no findings of undue delay were made in a single-accused case where the suspect was in custody for over 8.5 years in relation to two counts of war crimes and 204 days of trial hearings.⁹⁶ At the SCSL, there were also no findings of undue delay in a single-accused case that exceeded 10 years, of which the suspect spent 7.5 years in custody, for 11 counts of crimes against humanity and war crimes and 420 days of evidence at trial.⁹⁷ At the ICTY, a single-accused case with nine counts of crimes against humanity and war crimes was *over* 13 years in length for a suspect who was in custody until he was hospitalised.⁹⁸ The duration of those proceedings excluded an appellate phase⁹⁹ and

⁹² *Nahimana* AJ, para. 1076. *See also Ayyash et al.* TJ, para. 966.

⁹³ Judicial proceedings lasted approximately 8 years (19 July 2004 to 8 May 2012): *Kanyarukiga*, ICTR-2002-78-T, Judgement and Sentence, 1 Nov. 2010, para. 2 and Annex A, paras 691-693 (transferred 19 July 2004; 4 counts; trial: 34 witnesses heard over 28 days); *Kanyarukiga*, ICTR-02-78-A, Judgement, 8 May 2012, para. 285 (disposition).

⁹⁴ Judicial proceedings lasted over 9 years (19 Feb. 2003 to 8 May 2012): *Hategekimana*, ICTR-00-55B-T, Judgment and Sentence, 6 Dec. 2010, para. 7 and Annex A, paras 5, 8 (transferred 19 Feb. 2003; severed from co-Accused on 25 Sep. 2007; 4 counts; trial: 40 witnesses heard over 43 days); *Hategekimana*, ICTR-00-55B-A, Judgement, 8 May 2012, para. 307 (disposition).

⁹⁵ Judicial proceedings lasted approximately 10.5 years (30 Oct. 2000 to 1 Apr. 2011): *Muvunyi*, ICTR-2000-55A-T, Judgement and Sentence, 12 Sep. 2006, paras 5-6 and Annex I, para. 15 (transferred 30 Oct. 2000; severed from co-Accused on 11 Dec. 2003; 5 counts; initial trial: 48 witnesses heard over 80 days); *Muvunyi*, ICTR-2000-55A-A, Judgement, 1 Apr. 2011 (final judgment after re-trial), Disposition.

⁹⁶ Judicial proceedings lasted over 8.5 years (16 Mar. 2006 to 1 Dec. 2014): *Lubanga*, ICC-01/04-01/06-2901, Decision on Sentence pursuant to Article 76 of the Statute, 10 July 2012, para. 104 (transferred 16 Mar. 2006); *Lubanga*, ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, 14 Mar. 2012, paras 1, 11 (2 counts; trial: 67 witnesses and 204 days of hearings); *Lubanga*, ICC-01/04-01/06-3121-Red, Judgment on the Appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 Dec. 2014, para. 159.

⁹⁷ Because Taylor had notice of the indictment against him as of the time the SCSL Office of the Prosecutor made it public, the duration of judicial proceedings has been calculated from the date the indictment was unsealed and an arrest warrant was issued to the date of the appeal judgment. Using this calculation, the judicial proceedings against Taylor lasted more than 10 years (4 June 2003 to 26 Sep. 2013), with him in custody from 29 Mar. 2006. *Taylor*, SCSL-03-01-T-1283, Judgement, 18 May 2012, paras 9-10, 12 and Annex B, para. 19 (indictment unsealed and arrest warrant issued 4 June 2003; transferred 29 Mar. 2006; 11 counts; trial: 115 witnesses heard over 420 days); *Taylor*, SCSL-03-01-A-1389, Judgment, 26 Sep. 2013, Disposition.

⁹⁸ Here, the duration of the judicial proceedings has been calculated from the date the suspect surrendered to the Court to the expiration of the deadline to file an appeal of the trial judgment. *Šešelj*, IT-03-67-T, Judgement, 31 Mar. 2016 (“*Šešelj* TJ”), Vol. 1, para. 8 and Annex 2, paras 2, 76-86 (surrendered 24 Feb. 2003; 9 counts; hospitalised 6 Jan. 2012).

⁹⁹ After 99 witnesses were heard over 652 hours and 46 minutes (7 Nov. 2007 to 11 Feb. 2009, resuming on 12 Jan. 2010 to 7 July 2010), the suspect was acquitted of all charges at trial and no appeals were lodged. *See Šešelj* TJ, Vol. 1, Disposition, Annex 2, paras 4-6.

included – twice – findings of no undue delay.¹⁰⁰

The termination, sealing and archiving of Case 003 is unwarranted

17. Meas Muth incorrectly concludes that an alleged abuse of process¹⁰¹ warrants the termination of proceedings.¹⁰² It is clear that he invokes the “abuse of process” doctrine only because he is aware that the ECCC framework does not allow a termination (or permanent stay) of proceedings on any other applicable basis, given the explicit bases for termination that are set forth in article 7 of the Cambodian Code of Criminal Procedure: death of the accused, the expiry of statute of limitations, the grant of an amnesty, the abrogation of the law, and *res judicata*,¹⁰³ are not applicable here.¹⁰⁴ SCC and TC jurisprudence is clear that, absent a finding of abuse of process, proceedings may not be terminated, except on the merits, other than for these explicit reasons.¹⁰⁵
18. Meas Muth fails to genuinely appreciate or meet the “particularly high”¹⁰⁶ abuse of process standard. As he concedes,¹⁰⁷ the doctrine exists “in order to ensure that *the most serious* violations of conduct or procedures, being *entirely improper or illegal*, are not permitted to negate the fair trial rights” given to an accused before a court.¹⁰⁸ Terminating proceedings is “a drastic remedy” to be used in “exceptional circumstances”,¹⁰⁹ warranted only when it

¹⁰⁰ See *Šešelj*, IT-03-67-T, Decision on Motion by Accused to Discontinue Proceedings, 29 Sep. 2011, paras 2-3, 31; *Šešelj Abuse of Process Decision*, para. 30.

¹⁰¹ **D272** Request to Terminate, paras 60-61, 63, 67.

¹⁰² **D272** Request to Terminate, paras 47, 60, 67, 69, 73, pp. 1, 30.

¹⁰³ See also French Code of Criminal Procedure (“FCCP”), art. 6.

¹⁰⁴ See also Cambodian Code of Criminal Procedure (“CCCP”), art. 8, providing additional causes of extinction of criminal actions in certain instances – none of which apply here - where they are expressly provided for in separate laws.

¹⁰⁵ Case 002-**E138/1/10/1/5/7** Decision on Immediate Appeal Against the Trial Chamber’s Order to Unconditionally Release the Accused Ieng Thirith, 14 Dec. 2012 (“SCC Second Immediate Release Decision”), para. 38; Case 002-**E116** Decision on Nuon Chea Motions Regarding Fairness of Judicial Investigation (E51/3, E82, E88 and E92), 9 Sep. 2011, paras 16-17. Contrary to Meas Muth’s submission (**D272** Request to Terminate, para. 64), the only “stays” sanctioned under Cambodian law are impermanent or conditional stays (Case 002-**E138/1/10/1/5/7** SCC Second Immediate Release Decision, paras 36, 38) that will be lifted once the obstacle to proceedings has been removed (Case 002-**E138/1/10/1/5/7** SCC Second Immediate Release Decision, para. 38; Case 002-**E138/1/7** Decision on Immediate Appeal Against the Trial Chamber’s Order to Release the Accused Ieng Thirith, 13 Dec. 2011, para. 17).

¹⁰⁶ Case 002-**D264/2/6** Decision on Ieng Thirith’s Appeal Against the Co-Investigating Judges’ Order Rejecting the Request for Stay of Proceedings on the Basis of Abuse of Process (D264/1), 10 Aug. 2010 (“Decision on IT Abuse of Process Request”), para. 24 citing *Šešelj Abuse of Process Decision*, para. 22.

¹⁰⁷ **D272** Request to Terminate, para. 63.

¹⁰⁸ Case 002-**D264/2/6** Decision on IT Abuse of Process Request, para. 10 (emphasis added), citing *Barayagwiza*, ICTR-97-19-AR72, Decision, 3 Nov. 1999, para. 4.

¹⁰⁹ *Lubanga*, ICC-01/04-01/06-2690-Red2, Redacted Decision on the “Defence Application Seeking a Permanent Stay of the Proceedings”, 7 Mar. 2011 (“*Lubanga* 7 March 2011 Stay Decision”), para. 165, citing *Lubanga*, ICC-01/04-01/06-2582, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled “Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU”, 8 Oct. 2010, para. 55; *Karemera et al.*, ICTR-98-44-T, Decision on Édouard Karemera’s Motion

would be ‘odious’ or ‘repugnant’ to the administration of justice to allow the proceedings to continue, or where the rights of the accused have been breached to the extent that a fair trial has been rendered impossible.¹¹⁰ The ECCC and other international criminal tribunals have all made clear that *only* where the charged person has suffered a serious mistreatment, such as inhuman, cruel or degrading treatment, or torture, or where there was another *egregious* violation of his rights, could this test be met.¹¹¹

19. Meas Muth overlooks that terminating proceedings will “usually be disproportionate” to the alleged harm suffered.¹¹² This Chamber has previously held that, in fashioning an appropriate remedy, the correct balance must be maintained between the rights of the accused and the essential interests of the Cambodian and international communities in prosecuting persons charged with the most serious international crimes,¹¹³ thereby promoting national reconciliation by ensuring that victims of crimes have a meaningful voice.¹¹⁴ Indeed, Rule 21(1) requires that the ECCC Law and Internal Rules be interpreted

Relating to his Right to be Tried without Undue Delay, 23 June 2009 (“*Karemera* Undue Delay Decision”), para. 6.

¹¹⁰ See e.g. *Lubanga* 7 March 2011 Stay Decision, para. 203; *Ntaganda*, ICC-01/04-02/06-1883, Decision on Defence request for stay of proceedings with prejudice to the Prosecution, 28 Apr. 2017, para. 20; *Kenyatta*, ICC-01/09-02/11-868-Red, Public redacted version of Decision on Defence application for a permanent stay of the proceedings due to abuse of process, 5 Dec. 2013, para. 14. See also *Kallon & Kamara*, SCSL-2004-15-AR72(E) & SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 Mar. 2004, para. 79.

¹¹¹ Case 002-D264/2/6 Decision on IT Abuse of Process Request, para. 27; *Dragan Nikolić*, IT-94-2-PT, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, 9 Oct. 2002, para. 114; *Lubanga*, ICC-01/04-01/06-772, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006, 14 Dec. 2006, para. 31; *Dragan Nikolić*, IT-94-2-AR73, Decision on Interlocutory Appeal Concerning Legality of Arrest, 5 June 2003 (“*Nikolić* Legality Decision”), paras 2, 28-33; *Barayagwiza*, ICTR-97-19-AR72, Decision, 3 Nov. 1999, para. 75.

¹¹² *Nikolić* Legality Decision, para. 30, followed by Case 002-D264/2/6 Decision on IT Abuse of Process Request, fn. 52; *Kajelijeli*, ICTR-98-44A-A, Judgement, 23 May 2005 (“*Kajelijeli* AJ”), para. 206. See also *Karemera* Undue Delay Decision, paras 4, 6.

¹¹³ Case 002-D264/2/6 Decision on IT Abuse of Process Request, para. 28. This is particularly clear in abuse of process claims that have been raised at the ICTY, ICTR and ICC. See e.g. *Nikolić* Legality Decision, paras 24 (“in cases of crimes such as genocide, crimes against humanity and war crimes which are universally recognised and condemned as such [...], courts seem to find in the special character of these offences and, arguably, in their seriousness, a good reason for not setting aside jurisdiction”), 25-26, 30 (“The correct balance must therefore be maintained between the fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law.”); *Karadžić*, IT-95-5/18-AR73.4, Decision on Karadžić’s Appeal of Trial Chamber’s Decision on Alleged Holbrooke Agreement, 12 Oct. 2009, paras 49, 52-53 (recalling that “one of the fundamental aims of international criminal courts and tribunals is to end impunity and to ensure that serious violations of international humanitarian law are prosecuted and punished” and the facts that gave rise to the Appellant’s expectations of impunity, even if proved, would not trigger the abuse of process justifying a stay of the proceedings). See also *Kajelijeli* AJ, para. 206; *Karemera* Undue Delay Decision, paras 8, 11. Following this approach would give significant weight to the main purpose/interest of the ECCC, which is to bring to trial the senior leaders and those who were most responsible for the crimes committed during the DK regime against the Cambodian people (see ECCC Agreement, art. 1; ECCC Law, arts 1, 2 new).

¹¹⁴ Case 002-D411/3/6 Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility

so as to safeguard the interests of the accused *as well as* the victims.¹¹⁵ It further mandates that proceedings “be fair and adversarial and preserve a balance between the rights of the parties”.¹¹⁶ The need to balance the rights of *all* parties – including the victims and the prosecution who act on behalf of and in the interests of Cambodian society and all of humanity – has been recognised in French and Cambodian law¹¹⁷ and by this Chamber,¹¹⁸ the SCC,¹¹⁹ and the international tribunals.¹²⁰

20. As discussed above, Meas Muth has failed to establish any undue delay in Case 003 thus far, and his mere speculations about the *future* “prospect[s]”¹²¹ of the case cannot sustain an abuse of process claim. In any case, terminating Case 003 would be a grossly disproportionate remedy for the alleged breaches when he is facing charges for crimes of such gravity. In fact, it is arguably not suitable at all to address Meas Muth’s alleged harm, since a dismissal unrelated to the merits of Case 003 does nothing to protect Meas Muth’s reputation or allow him to challenge the Indictment. The most logical solution to his

of Civil Party Applications, 24 June 2011 (“PTC’s CPA Appeal Decision”), paras 64-65; ECCC Agreement, preamble.

¹¹⁵ IR 21(1). *See also* United Nations General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UNGA Res 40/34 of 29 Nov. 1985, Principle 4 (“Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm they have suffered.”).

¹¹⁶ IR 21(1)(a).

¹¹⁷ **France**: FCCP, article préliminaire; Conseil Constitutionnel, No. 95-360, 2 Feb. 1995, para. 5. *See also* Pradel, *Manuel de Procédure Pénale* (14th edition), 1 July 2008, p. 141; **Cambodia**: CCCP, art. 4.

¹¹⁸ Case 002-D411/3/6 PTC’s CPA Appeal Decision, para. 67 (“the Pre-Trial Chamber reads the Internal Rules in a manner that takes into account the nature, the extent, the modes of participation and founding elements of the alleged crimes *and the needs of the affected community* as expressed in ECCC’s foundation instruments” (emphasis added)); Case 002-D404/2/4 Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, 24 June 2011, para. 67.

¹¹⁹ *See e.g.* Case 002-F10/2 Decision on Civil Party Lead Co-Lawyers’ Requests Relating to the Appeals in Case 002/01, 26 Dec. 2014, para. 12. *See also* Case 002-E50/2/1/4 Decision on Immediate Appeals by Nuon Chea and Ieng Thirith on Urgent Applications for Immediate Release, 3 June 2011, para. 39 (noting that the “interpretative direction of Rule 21(1) does not [...] mean that Internal Rules are to be construed so as to automatically grant the Accused an advantage in every concrete situation arising on the interpretation of the Internal Rules”); Case 002-E50/3/1/4 Decision on Immediate Appeal by Khieu Samphan on Application for Release, 6 June 2011, para. 30.

¹²⁰ *See e.g.* *Aleksovski*, IT-95-14/1, Decision on Prosecutor’s Appeal on Admissibility of Evidence, 16 Feb. 1999, para. 25; *Zigiranyirazo*, ICTR-2001-73-T, Decision on the Prosecution Joint Motion for Re-Opening its Case and for Reconsideration of the 31 January 2006 Decision on the Hearing of Witness Michel Bagaragaza via Video-Link, 16 Nov. 2006, para. 18; *Karemera et al*, ICTR-98-44-PT, Decision on Severance of André Rwamakuba and Amendments of the Indictment, 7 Dec. 2004, para. 26; *Situation in the Democratic Republic of the Congo*, ICC-01/04-135tEN, Decision on the Prosecution’s Application for Leave to Appeal the Chamber’s Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 31 Mar. 2006, para. 38; *Situation in Uganda*, ICC-02/04-112, Decision on the Prosecution’s Application for Leave to Appeal the Decision on Victims’ Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, 19 Dec. 2007, para. 27.

¹²¹ **D272** Request to Terminate, para. 62. *See also* para. 67.

concerns about having an unchallengeable indictment hanging over him “in perpetuity”¹²² would be to progress the case to trial.

III. CONCLUSION


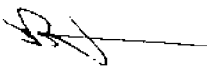
21. The ICP agrees with Meas Muth that the procedural stalemate that has followed the issuance of the PTC’s Considerations must not be allowed to continue. It is imperative that the pre-trial stage of Case 003 be concluded *through a judicial determination*. Clearly, however, the law requires that the PTC dismiss Meas Muth’s Request and forward this case for trial based on the legal framework of the ECCC and its unanimous finding that the Indictment is valid. It is equally clear that the interests of justice require the same outcome.

IV. RELIEF REQUESTED

22. For the reasons outlined above, the ICP respectfully requests the PTC to:

- a. dismiss the Request to Terminate;
- b. conclude the pre-trial stage of Case 003 by providing an agreed final determination confirming that Meas Muth is indicted and ordering him to be sent for trial; and
- c. take all necessary administrative actions to immediately forward the Considerations, Case 003 Indictment and remaining Case File to the Trial Chamber.

Respectfully submitted,

Date	Name	Place	Signature
8 July 2021	Brenda J. HOLLIS International Co-Prosecutor	Phnom Penh 	

¹²² D272 Request to Terminate, paras 18, 54, 71.