

**BEFORE THE OFFICE OF THE CO-INVESTIGATING JUDGES**  
**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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**IM CHAEM'S OBSERVATIONS ON WHETHER SHE SHOULD BE CONSIDERED A  
"SENIOR LEADER" OR AMONG "THOSE WHO WERE MOST RESPONSIBLE"**

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## I. INTRODUCTION

1. On 24 July 2015, the Co-Investigating Judges invited the parties in Case 004 to submit any observations they may have regarding whether, in the exercise of their discretion, the Co-Investigating Judges should consider Ms. IM Chaem a “senior leader” or among “those who were most responsible”<sup>1</sup> for crimes falling in the scope of the Agreement.<sup>2</sup> Ms. IM Chaem, through her Co-Lawyers (the “Defence”), respectfully submits these observations pursuant to the Co-Investigating Judges’ request. Given that the determination as to whether Ms. IM Chaem falls in either of the two categories will significantly impact the outcome of the proceedings in her case, the Defence requests the opportunity to present oral arguments on this matter.
2. When exercising their discretion, the Co-Investigating Judges must keep the framework of the Agreement in mind, which is to investigate only two categories of individuals for crimes committed during the Democratic Kampuchea regime.<sup>3</sup> As such, the Court’s function is limited to bringing “senior leaders of the Khmer Rouge who are among the most responsible” and “non-senior leaders of the Khmer Rouge who are also among the most responsible” to justice.<sup>4</sup> A *prima facie* assessment of the documents gathered in an investigation that has lasted for more than six years<sup>5</sup> shows that, on the balance of probabilities, Ms. IM Chaem falls in neither category. As an alleged District Secretary, she was a low-level cadre and undoubtedly falls outside the “senior leaders” category. Ms. IM Chaem also falls outside the “person most responsible” category, because there is little or no evidence of the crimes with

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<sup>1</sup> Request for Submissions on Whether IM Chaem should be Considered a “Senior Leader” or among “Those who were Most Responsible”, 24 July 2015, D251 (“Co-Investigating Judges’ Request for Submissions”), para. 8.

<sup>2</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, 6 June 2003 (“Agreement”), Preamble, Art. 1.

<sup>3</sup> Agreement, Art. 5(3). *See also*, *Case of MEAS Muth*, 003/07-09-2009-ECCC/OCIJ, Decision on Personal Jurisdiction and Investigative Policy regarding Suspect [Redacted], 2 May 2012, D49, para. 13.

<sup>4</sup> *Case of KAING Guek Eav alias Duch*, 001/18-07-2007-ECCC/SC, Appeal Judgement, 3 February 2012, F28 (“*Duch* Appeal Judgement”), para. 57. *See also*, Agreement, Preamble, Art. 1.

<sup>5</sup> *See*, Co-Prosecutors’ Third Introductory Submission, 20 November 2008 (validly filed on 7 September 2009), D1 (“Third Introductory Submission”).

which Ms. IM Chaem is charged having been committed—let alone of their gravity—and even less evidence of her having been implicated in them.

3. On the basis of the observations set out in the pages below, the Defence respectfully requests that, in the exercise of their discretion, the Co-Investigating Judges a) decide that Ms. IM Chaem is neither a “senior leader” nor among “those who were most responsible” for crimes under the Court’s subject-matter jurisdiction; and b) dismiss the allegations against Ms. IM Chaem.
4. The Defence files these observations in English first, with the Khmer translation to follow at the first opportunity, as authorized by the Co-Investigating Judges.<sup>6</sup>

## II. PRELIMINARY CONSIDERATIONS

### A. Procedure in determining whether a charged person is a “senior leader” or among “those who were most responsible”

5. The Co-Investigating Judges have a duty to ensure that any charged person falls within the scope of whom they may investigate, as defined in the Agreement. Article 5(3) of the Agreement provides that “the scope of the investigations is limited to senior leaders of Democratic Kampuchea and those who were most responsible” for crimes under the Court’s subject-matter jurisdiction.<sup>7</sup> The scope defined in this provision is consonant with the purpose of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) as a whole, which is to bring to trial only “senior leaders of Democratic Kampuchea” and “those who were most responsible” for the aforementioned crimes.<sup>8</sup>
6. The Co-Investigating Judges may not continue investigating Ms. IM Chaem if they believe that she is neither a “senior leader” nor among “those who were most responsible” upon a *prima facie* assessment of the evidence.<sup>9</sup> They must exercise their investigatorial discretion

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<sup>6</sup> Decision on Requests for Extension [sic] of Time and Leave to File in One Language, 3 September 2015, D251/3.

<sup>7</sup> Agreement, Art. 5(3).

<sup>8</sup> Agreement, Preamble, Art. 1.

<sup>9</sup> See, *Case of MEAS Muth*, 003/07-09-2009-ECCC/OCIJ, Decision on Personal Jurisdiction and Investigative Policy regarding Suspect [Redacted], 2 May 2012, D49, para. 13.

“in good faith, based on sound professional judgment”,<sup>10</sup> within the limits defined in Article 5(3) of the Agreement. The proper exercise of this discretion requires that the investigation and allegations against Ms. IM Chaem be dismissed if she does not fall into either category of persons intended for prosecution by the parties to the Agreement.

7. If Ms. IM Chaem is in neither category, the proceedings must be terminated at the earliest possible opportunity. Any postponement would violate Ms. IM Chaem’s right to proceedings without undue delay.<sup>11</sup> The Defence therefore respectfully disagree with Judge Mark B. Harmon’s finding that this matter should be considered at the end of the investigation.<sup>12</sup> Ms. IM Chaem’s right to speedy proceedings means that the determination as to whether she is a “senior leader” or among “those who were most responsible” must be made on a continuing basis, in light of all the evidence gathered at any point during the investigation. In this case, any undue delay would have an even more egregious effect on Ms. IM Chaem’s rights given that the investigation has already lasted over six years.
8. In light of all the evidence gathered thus far, it has been exhaustively established that Ms. IM Chaem is neither a “senior leader” nor among “those who were most responsible” for the reasons set out in the pages below.<sup>13</sup> Given that the investigation is “nearing completion”,<sup>14</sup> it is unlikely that any new evidence will be discovered that could overturn this conclusion. For the sake of efficiency, the Defence has focused its analysis on evidence regarding the crimes with which Ms. IM Chaem was charged *in absentia* on 3 March 2015.<sup>15</sup> The Defence reserves the right, however, to submit further arguments on this issue in the event that Ms. IM Chaem is charged with other crimes.

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<sup>10</sup> *Duch* Appeal Judgement, para. 80.

<sup>11</sup> International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171 (“ICCPR”), Art. 14(3)(c). *See*, Agreement, Art. 12(2) and 13(1) which provide that Article 14 of the ICCPR applies at the ECCC.

<sup>12</sup> Co-Investigating Judges’ Request for Submissions, para. 5, *citing* Decision on Ta An’s Motion for Annulment of Investigative Action pursuant to Internal Rule 76, 22 April 2014, paras. 27-28.

<sup>13</sup> *See below*, paras. 12-57.

<sup>14</sup> Co-Investigating Judges’ Request for Submissions, para. 6.

<sup>15</sup> *See*, Notification of Charges against IM Chaem, 3 March 2015, D239.1. The Defence notes that the legality of the decision to charge Ms. IM Chaem *in absentia* is currently being adjudicated before the Pre-Trial Chamber. *See*, IM Chaem’s Appeal against the International Co-Investigating Judge’s Decision to Charge Her *In Absentia*, 2 April 2015, D239/1/2.

**B. Standard of proof and evidence required in determining whether a charged person is a “senior leader” or among “those who were most responsible”**

9. In their Request for Submissions, the Co-Investigating Judges indicated that they “would be assisted by any submissions that the parties may have”<sup>16</sup> as to whether Ms. IM Chaem should be considered a “senior leader” or a “person most responsible”. Given the language of the Request for Submissions—which does not appear to contemplate the prospect of Ms. IM Chaem not falling in either category—the Defence considers that this constitutes the first step in the indictment process.
10. As such, the Co-Investigating Judges must apply the highest standard of proof available to them in making their determination as to whether Ms. IM Chaem is a “senior leader” or among “those who were most responsible”, as is used to send a charged person to trial. At a minimum, the evidence must be clear and consistent, as is required for charging.<sup>17</sup> The appropriate standard, however, is the one defined in Case 002 regarding the threshold for indictment, *i.e.* that the evidence must be “sufficiently serious and corroborative to reach a certain level of probative force.”<sup>18</sup> Both standards emphasize the need for consistency or corroboration, which means that uncorroborated evidence will not be sufficiently probative to establish whether Ms. IM Chaem falls into either of the two categories. The question is therefore whether, on the balance of probabilities, Ms. IM Chaem is a “senior leader” or among “those who were most responsible” for crimes under the framework of the Agreement.
11. In assessing the evidence below, the Defence makes no admission regarding the truth that the evidence purports or its ultimate reliability. These issues are more appropriately reserved for the stage of the proceedings—should they eventuate—when the merits of the case against Ms. IM Chaem as a whole are considered.

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<sup>16</sup> Co-Investigating Judges’ Request for Submissions, para. 7.

<sup>17</sup> *See*, Internal Rules (Rev. 9), Extraordinary Chambers in the Courts of Cambodia, 12 June 2007 (as revised on 16 January 2015), Rule 55(4).

<sup>18</sup> *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ, Closing Order, 15 September 2010, D427 (“Case 002 Closing Order”), para. 1323.

### III. OBSERVATIONS

#### A. Ms. IM Chaem is not a “senior leader”

12. The term “senior leaders” encompasses only the very top leaders of the Khmer Rouge regime, which does not include Ms. IM Chaem. As a bilateral treaty, the Agreement must be interpreted according to the Vienna Convention on the Law of Treaties (“VCLT”).<sup>19</sup> The ordinary meaning of “senior leaders”<sup>20</sup> is sufficiently ambiguous to warrant recourse, under Article 32 of the VCLT, to the Agreement’s negotiating history, so that a more precise meaning can be discerned. The negotiation history reveals that the parties to the Agreement intended that “senior leaders” include members of the Standing Committee and its subordinate Central Committee, as well as those who held ministerial positions under the Democratic Kampuchea.<sup>21</sup> This was illustrated in Case 002, when the Co-Investigating Judges indicted NUON Chea, IENG Sary, KHIEU Samphan, and IENG Thirith, all fitting this description.<sup>22</sup>

13. As the Co-Investigating Judges explained in Case 002, Democratic Kampuchea was organized in a pyramidal fashion:

Democratic Kampuchea was sub-divided into a series of hierarchical administrative entities, all reporting up a vertical chain-of-command, culminating at the Centre. Immediately below the Centre were a number of large “zones”.

<sup>19</sup> See, Agreement, Art. 2(2).

<sup>20</sup> Agreement, Art. 1.

<sup>21</sup> See, S. Heder, ‘A Review of the Negotiations Leading to the Establishment of the Personal Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia’, Cambodia Tribunal Monitor, 1 August 2011, available at: <http://www.cambodiatribunal.org/sites/default/files/A%20Review%20of%20the%20Negotiations%20Leading%20to%20the%20Establishment%20of%20the%20Personal%20Jurisdiction%20of%20the%20ECCC.pdf>, last accessed 11 September 2015 (“Heder’s Negotiations History Review”), p. 41.

<sup>22</sup> See, Case 002 Closing Order, paras. 869-72 (referring to NUON Chea as a full-rights member of both the Central and the Standing committees), 1001-04 (referring to IENG Sary as a full-rights member of both the Central and the Standing committees), 1131-33 (referring to KHIEU Samphan as a full-rights member of the Central Committee and a potential member of the Standing Committee), 1213-14 (referring to IENG Thirith as being the Minister of Social Affairs under the Democratic Kampuchea regime). See also, Case 002 Closing Order, para. 1327 (concluding that the investigation shows that all four charged persons were senior leaders of Democratic Kampuchea due to their *de jure* and *de facto* hierarchical authority).

They were subdivided into “sectors” with each of these containing a number of “districts” within which were a series of “subdistricts” and “cooperatives”.<sup>23</sup>

14. As an alleged District Secretary, Ms. IM Chaem was neither a member of the Central and / or Standing committees, nor did she hold a ministerial position. She was a low-level cadre in the Democratic Kampuchea hierarchy—three echelons under the Centre—and therefore clearly falls outside of this “senior leaders” category. The Co-Investigating Judges would not be exercising their discretion reasonably if Ms. IM Chaem were being investigated on the basis that she is a senior leader.

**B. Ms. IM Chaem is not among “those who were most responsible”**

**(i) Definition of “those who were most responsible”**

15. The Agreement does not expand upon the definition of “those who were most responsible”, leaving its ordinary meaning too ambiguous to guide investigatorial discretion. Following the same interpretative principles discussed at paragraph 12 above, recourse should be made to the negotiation history of the Agreement to determine what the parties meant by the terminology.

16. The parties to the Agreement had initially envisaged that only Khmer Rouge leaders, limited to a small number of people, would be tried.<sup>24</sup> The intended mandate of the ECCC was then expanded so as to include Duch as a target for prosecution. A Group of Experts appointed to evaluate the existing evidence of Khmer Rouge human rights violations<sup>25</sup> recommended that the focus of prosecutions should go beyond senior leaders and potentially include “certain leaders at the zonal level, as well as officials of torture and interrogation centres such as Tuol Sleng”<sup>26</sup>—a clear reference to Duch. Duch thus became a “constant reference point”<sup>27</sup> to

<sup>23</sup> Case 002 Closing Order, para. 64.

<sup>24</sup> See, Heder’s Negotiations History Review, p. 41.

<sup>25</sup> ‘Resolution adopted by the General Assembly on the Situation of human rights in Cambodia’, UN Doc. A/RES/52/135, 12 December 1997, para. 16.

<sup>26</sup> ‘Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135’, UN Doc. A/53/850-S/1999/231, 18 February 1999 (“Group of Experts Report”), para. 109.

<sup>27</sup> D. Scheffer, ‘The Negotiating History of the ECCC’s Personal Jurisdiction’, Cambodia Tribunal Monitor, 22 May 2011, available at: [http://www.cambodiatribunal.org/sites/default/files/ctm\\_blog\\_5-22-2011.pdf](http://www.cambodiatribunal.org/sites/default/files/ctm_blog_5-22-2011.pdf), last accessed 11 September 2015 (“Scheffer’s Personal Jurisdiction Negotiating History”), p. 4.

determine targets for prosecution under the “person most responsible” category. Although Duch had no leading position in the Communist Party of Kampuchea, he was regarded as “highly responsible for the mass killing” and there would have been “questions asked” if he were not indicted.<sup>28</sup> In this regard, the drafters of the Agreement intended to shape the ECCC mandate to those “individuals like Duch who might not be among the senior Khmer Rouge leaders but were responsible for large scale commission of atrocity crimes”.<sup>29</sup> They were indeed interested only in “top functionaries, like Duch, who had such instrumental roles in the atrocities”.<sup>30</sup>

17. To further shape the ECCC’s mandate in line with this underlying intent, the Group of Experts narrowed the scope of the crimes and recommended that the ECCC focus upon “those persons most responsible for the most serious violations of human rights during the reign of Democratic Kampuchea.”<sup>31</sup> This was meant to include “senior leaders” and “those at lower levels who are directly implicated in the most serious atrocities.”<sup>32</sup> Duch was again used as a reference point to describe who falls within this last category.<sup>33</sup>

18. To sum up, the terminology “person most responsible” was, though never clearly defined, intended to include only those most responsible for the worst Khmer Rouge atrocities. This definition encompasses two cumulative criteria, *i.e.* the gravity of the alleged crimes and the level of responsibility of the perpetrator with regards to the said crimes.<sup>34</sup> In light of the above, this meant:

- Individuals responsible for *large scale commission of atrocity crimes*;<sup>35</sup>
- *Top functionaries*, like Duch, who had *instrumental roles in the atrocities*;<sup>36</sup>

<sup>28</sup> Heder’s Negotiations History Review, p. 27.

<sup>29</sup> Scheffer’s Personal Jurisdiction Negotiating History, p. 4.

<sup>30</sup> Scheffer’s Personal Jurisdiction Negotiating History, p. 5.

<sup>31</sup> Group of Experts Report, paras. 110, 154.

<sup>32</sup> Group of Experts Report, para. 110, emphasis added.

<sup>33</sup> Heder’s Negotiations History Review, p. 27.

<sup>34</sup> See, *Case of KAIING Guek Eav alias Duch*, 001/18-07-2007-ECCC/TC, Judgement, 26 July 2010, E188 (“*Duch Trial Judgement*”), para. 22; *Case of MEAS Muth*, 003/07-09-2009-ECCC/OCIJ, Decision on Personal Jurisdiction and Investigative Policy regarding Suspect [Redacted], 2 May 2012, D49, para. 15.

<sup>35</sup> Scheffer’s Personal Jurisdiction Negotiating History, p. 4.



- Those at *lower levels* only when they are *directly implicated in the most serious atrocities*.<sup>37</sup>

19. As will be demonstrated below, Ms. IM Chaem does not fall under any of these descriptions. She was a low-level District Secretary—one of more than a hundred across the country during the Khmer Rouge regime.<sup>38</sup> There is little or no evidence of crimes Ms. IM Chaem was charged with at Spean Sreng worksite and Phnom Trayoung Security Centre. There is even less evidence of her being implicated in them. When evidence of the gravity of the crimes and Ms. IM Chaem’s alleged level of responsibility in them is assessed and compared against Duch who was deemed “most responsible”, it becomes even clearer that she does not fall among “those who were most responsible” for crimes falling in the scope of the Agreement.

**(ii) *Spean Sreng worksite***

20. In the Third Introductory Submission, the International Co-Prosecutor alleged that:

In 1978, 1300 individuals were deployed to forced labour sites at the Spean Spreng and Prey Roneam dam construction sites in Preah Net Preah District (Sector 5 of the Northwest Zone). The building of the 8 kilometer Spean Spreng dam was done entirely by hand and completed in three months. Forced labourers working at the construction site were ill, malnourished and not properly clothed. Threats of death were routinely issued for minor mistakes, and workers were subject to arrest and execution.<sup>39</sup>

21. On 3 March 2015, Judge Mark B. Harmon, then International Co-Investigating Judge, charged Ms. IM Chaem, in her capacity of Secretary of Preah Net Preah District, with crimes against humanity and violations of the 1956 Cambodian Penal Code at Spean Sreng worksite between April 1977 and 6 January 1979. Ms. IM Chaem was charged with these crimes

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<sup>36</sup> Scheffer’s Personal Jurisdiction Negotiating History, p. 5.

<sup>37</sup> Group of Experts Report, para. 110.

<sup>38</sup> See, ‘DK Province, Zone, Region and District’ in DC-Cam *Searching for the Truth* (Issue 1, January 2000), p. 13. (“Kampuchea consists of ...112 districts”).

<sup>39</sup> Third Introductory Submission, para. 79 (references omitted).

through commission, planning, instigating, ordering, and aiding and abetting, and through superior responsibility.<sup>40</sup>

22. The Defence notes that the International Co-Investigating Judge did not provide any clarification as to the extent of “Spean Sreng worksite”. “Spean Spreng and Prey Roneam dam”, as described by the International Co-Prosecutor,<sup>41</sup> corresponds to what investigators name “Spean Sreng canal” and “Prey Roneam reservoir” in the course of their investigation. OCIJ investigators first determined that Spean Sreng canal starts from Spean Sreng River, in Phnum Srok District, and ends at Prey Roneam reservoir on National Road 6, in Preah Net Preah District.<sup>42</sup> They evaluated the canal to be about eight to ten kilometers long and 15 meters wide.<sup>43</sup> Witnesses also describe Spean Sreng canal as such.<sup>44</sup> So does Ms. IM Chaem.<sup>45</sup> According to KOR Len, the South part of Spean Sreng canal, starting from National Road 6 and linked to Prey Roneam reservoir, was called “O Lieb canal”.<sup>46</sup>
23. It is reasonable to consider that the International Co-Prosecutor seized the Co-Investigating Judges with the investigation on the crime site as described above under the designations “Spean Spreng and Prey Roneam dam” or “Spean Sreng canal” or “O Lieb canal”. It is therefore also reasonable to conclude that the reference to “Spean Sreng worksite” in the Notification of Charges<sup>47</sup> corresponds to events that took place at “Spean Sreng and Prey Roneam dam” connected by “Spean Sreng canal” and “O Lieb canal”.

<sup>40</sup> See, Notification of Charges against IM Chaem, 3 March 2015, D239.1.

<sup>41</sup> Third Introductory Submission, para. 79.

<sup>42</sup> Site Identification Report, 11 April 2012, D106/19, p. 2. See also, Map of Spean Sreng and Prey Roneam Dam Sites, Sector 5, Northwest Zone, 27 April 2012, D106/19.4.

<sup>43</sup> Site Identification Report, 11 April 2012, D106/19, p. 2.

<sup>44</sup> See, e.g., Written Record of Interview of TAK Buy, 3 April 2012, D106/9, p. 5; Written Record of Interview of CHUM Chim, 20 January 2015, D219/149, p. 5; Written Record of Interview of KOR Len, 11 March 2014, D119/98, p. 9.

<sup>45</sup> See, Transcript of interview of Im Chaem, 4 March 2007, D1.3.28.4, pp. 5-6 (describing Spean Sreng and Prey Roneam dams to be connected by a ten-kilometer long and 30-meter wide canal); Interview of IM Chaem by Smiling Toad Productions, 26 April 2007, D1.3.12.1, pp. 17, 20 (describing the “Yeay Chaem Dam” or “Yeay Chaem Channel” to be an eight-kilometer long and 30-meter wide canal linking Spean Sreng to Roneam).

<sup>46</sup> Written Record of Investigative Action, 8 May 2014, D119/129, p. 2.

<sup>47</sup> See, Notification of Charges against IM Chaem, 3 March 2015, D239.1.

Gravity of the crimes

24. The gravity of the crimes Ms. IM Chaem was charged with at Spean Sreng worksite may be determined based on factors such as the number of victims, the geographic and temporal scope and manner in which the crimes were allegedly committed, as well as the number of separate incidents.<sup>48</sup> An analysis of the evidence in relation to Spean Sreng worksite demonstrates that the alleged crimes do not pass the gravity threshold required to fall within the “most responsible person” category.
25. The International Co-Prosecutor submitted that workers at Spean Sreng worksite “were ill, malnourished, and not properly clothed”<sup>49</sup> and received “[t]hreats of death ... for minor mistakes,”<sup>50</sup> as well as “were subject to arrest and execution.”<sup>51</sup> Such allegations were solely based on two interviews by Ms. IM Chaem with DC-Cam and Smiling Toad Productions and a DC-Cam interview with TAK Buy, none of which was given under oath.
26. The interviews relied upon by the International Co-Prosecutor do not even relate to Spean Sreng worksite. TAK Buy’s statement according to which workers were subjected to death threats for minor mistakes relates to events at Trapeang Thma dam.<sup>52</sup> Ms. IM Chaem’s declarations to DC-Cam regarding individuals being subject to arrests and executions as well as being ill, malnourished, and not properly clothed, constitute her own description of Preah Net Preah District upon her arrival.<sup>53</sup> None of the authorities cited by the International Co-

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<sup>48</sup> *Duch* Trial Judgement, para. 22.

<sup>49</sup> Third Introductory Submission, para. 79, *citing* Transcript of interview of Im Chaem, 4 March 2007, D1.3.28.4, pp. 6, 9.

<sup>50</sup> Third Introductory Submission, para. 79, *citing* DC-Cam Interview of TAK Buy, 5 March 2007, D1.3.11.52, p. 16.

<sup>51</sup> Third Introductory Submission, para. 79, *citing* Transcript of interview of Im Chaem, 4 March 2007, D1.3.28.4, p. 7.

<sup>52</sup> DC-Cam Interview of TAK Buy, 5 March 2007, D1.3.11.52, pp. 5-7, 15-16.

<sup>53</sup> *See, e.g.*, Transcript of interview of Im Chaem, 4 March 2007, D1.3.28.4, p. 6 (“Upon my arrival at that place, I found it horrible to see youths at the construction site. They were ill and thin ... At the time I got there, some people became poisonous of the leave the[y] cooked for food. That was the hardship of people of Preah Net Preah [D]istrict before I arrived there.”), p. 18 (“Before I arrived in Preah Net Preah, people had been arrested”). *See also*, Interview of IM Chaem by Smiling Toad Productions, 26 April 2007, D1.3.12.1, p. 11 (“I arrived in Preah Net Preah at a difficult time since this district was extremely poor ... I found out that people were very poor because of the lacks of food ... I visited every village and commune – there were six communes in Preah Net Preah – but I found

Prosecutor is relevant to crimes allegedly committed at Spean Sreng worksite at the time or after Ms. IM Chaem became District Secretary of Preah Net Preah. Ms. IM Chaem simply identified issues people were facing in the District as a whole,<sup>54</sup> upon her arrival, and made plans to tackle them.<sup>55</sup> It therefore comes as no surprise that the International Co-Prosecutor's allegations regarding Spean Sreng worksite are not supported by the evidence gathered in an investigation that has lasted more than six years. What *is* surprising, however, is that the International Co-Prosecutor should persist with these allegations despite the absence of any evidence to sustain them.

27. No probative evidence in the case file suggests that crimes were committed at Spean Sreng worksite after Ms. IM Chaem's arrival in Preah Net Preah District. Consistent evidence establishes that the eight to ten-kilometer long Spean Sreng canal was completed before the arrival of the Southwest Zone cadres and Ms. IM Chaem in the Northwest Zone.<sup>56</sup> This is confirmed by the majority of witness statements describing events Spean Sreng canal before the Southwest Zone cadres arrived,<sup>57</sup> *i.e.* outside the temporal scope of the charges against

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nothing... nothing left even clothes/shirt.”), p. 12 (It resulted in “people [being] sick” and thousands of people dying due to “starving sickness”), p. 16 (“[B]efore my arrival, my predecessors/previous people were all captured and taken away to an unknown place”).

<sup>54</sup> See, e.g., Weekly Report of the Committee of Region 5, 21 May 1977, D1.3.10.1, pp. 10-11 (confirming Ms. IM Chaem's description of Preah Net Preah District in relation to the lack of food upon her arrival).

<sup>55</sup> See, e.g., Transcript of interview of Im Chaem, 4 March 2007, D1.3.28.4, p. 6 (“After identifying these problems, I divided human forces into two. I came up with a plan.”), p. 9 (“I also made a request to Phnom Penh that my people lacked clothes ... I set up a garment workshop to make clothes for people”), p. 10 (“People, however, had nothing to eat ... I felt so pitiful when seeing such a circumstance given my previous miserable life and experience without parents. I then set out plans.”), p. 12 (It “was hard to see such a bad thing [arrests]. Therefore, I confiscated all the weapons from military unit and district militiamen”); Interview of IM Chaem by Smiling Toad Productions, 26 April 2007, D1.3.12.1, p. 14 (“I ordered to open the doors of the warehouses”).

<sup>56</sup> Written Record of Interview of TAK Buy, 3 April 2012, D106/9, p. 5; Transcript of Interview of TAK Buy, 3 April 2012, D219/422.8, p. 19; Site Identification Report, 11 April 2012, D106/19, p.2; Written Record of Interview of CHHAY Pan, 19 May 2013, D119/40, p.5; Written Record of Investigative Action, 8 May 2014, D119/129, p. 2.

<sup>57</sup> See, e.g., Written Record of Interview of CHHAO Chat, 18 December 2014, D219/130, pp. 30-31 (saying that he worked at Spean Sreng before the arrival of the Southwest zone group); Written Record of Interview of RIM Seut, 4 April 2012, D106/10, pp. 3-4 (saying that he worked at Prey Roniem before the Khmer New Year in 1977); Written Record of Interview of CHHAY Phan, 19 May 2013, D119/40, p. 3 (saying that he worked at Spean Sreng in 1975); Written Record of Interview of KROCH Toem, 4 December 2013, D119/69, p. 12 (saying that he worked at Spean Sreng worksite during the dry season, early 1977).

IM CHAEM'S OBSERVATIONS ON WHETHER SHE SHOULD BE CONSIDERED A  
“SENIOR LEADER” OR AMONG “THOSE WHO WERE MOST RESPONSIBLE”

Ms. IM Chaem. This is further confirmed by workers at Spean Sreng stating that they never witnessed Ms. IM Chaem visiting the canal,<sup>58</sup> or had even heard of her.<sup>59</sup>

28. With regards to the South part of Spean Sreng canal, starting from National Road 6, some witnesses mentioned that Ms. IM Chaem monitored O Lieb canal. They, however, confirmed Ms. IM Chaem's declarations that she would help workers by carrying soil herself<sup>60</sup> or tell them to pick up food to eat.<sup>61</sup> In addition, there is no probative evidence suggesting that arrests and killings occurred at O Lieb canal after Ms. IM Chaem's arrival in the Northwest Zone.
29. With regards to the geographical and temporal scope of the alleged crimes, the International Co-Prosecutor submitted that they took place on a ten-kilometer long and fifteen-meter wide canal for three months. In this case, given that the eight to ten-kilometer long Spean Sreng canal had already been built before Ms. IM Chaem arrived in Preah Net Preah District, the geographical and temporal scope of the alleged crimes at O Lieb canal is therefore of two kilometers for three months at most.<sup>62</sup> It falls well below the geographical and temporal threshold set for Duch, who was convicted of national scale crimes which took place for over three years.<sup>63</sup> It therefore cannot be argued that the geographical and temporal scope of the alleged crimes at Spean Sreng worksite passes the required "most responsible" gravity threshold, as intended by the drafters of the Agreement.

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<sup>58</sup> Written Record of Interview of TAK Buy, 3 April 2012, D106/9, p. 5; Written Record of Interview of SVA Nung, 23 May 2013, D119/43, p. 6; Written Record of Interview of CHHAO Chat, 18 December 2014, D219/130, p. 35; Written Record of Interview of KHOR Mot, 18 August 2011, D53, p. 4.

<sup>59</sup> Written Record of Interview of YOU Mut, 8 September 2014, D219/1, p. 16.

<sup>60</sup> Written Record of Interview of KOR Len, 11 March 2014, D119/98, p. 10.

<sup>61</sup> Written Record of Interview of KRET Ret, 20 May 2013, D119/42, p. 5.

<sup>62</sup> Spean Sreng worksite is comprised of Spean Sreng canal, starting at Spean Sreng River in Phnum Srok District, O Lieb canal starting at the South of National Road 6, and Prey Roneam reservoir in Preah Net Preah District. Given that OCIJ investigators evaluated the worksite to be of ten kilometers, and given that Spean Sreng canal was evaluated to be of approximately eight to ten kilometers, the South part of the canal, called "O Lieb canal" and linked to Prey Roneam dam is of approximately two kilometers. See, Site Identification Report, 11 April 2012, D106/19; Written Record of Investigative Action, 8 May 2014, D119/129.

<sup>63</sup> *Duch Appeal Judgement*, paras. 2-3.

Level of responsibility

30. A charged person's level of responsibility is evaluated on the basis of his or her level of participation in the crimes, hierarchical rank or position, and the permanence of such position.<sup>64</sup> In assessing Ms. IM Chaem's level of responsibility for any crimes that might have been committed at Spean Sreng worksite, the Co-Investigating Judges must take into account her *de facto* authority and her *de jure* authority.<sup>65</sup> This was illustrated in Case 001. The Co-Investigating Judges concluded that Duch "may be considered in the category of most responsible for crimes ... due both to his formal and effective hierarchical authority and his personal participation as Deputy Secretary then Secretary of S21, a security centre which was directly controlled by the Central Committee."<sup>66</sup>
31. The International Co-Prosecutor has failed to cite any reliable evidence suggesting that Ms. IM Chaem had a *de facto* or *de jure* authority over Spean Sreng worksite. Ms. IM Chaem's declarations that she came up with the plan to build Spean Sreng worksite, and called people for a meeting in this regard,<sup>67</sup> are uncorroborated by the evidence gathered in the case file.
32. The absence of reliability of her own declarations is striking given that—while accurately describing the canal identified by the International Co-Prosecutor and OCIJ investigators<sup>68</sup>—Ms. IM Chaem is the only person to assert that the canal was given her name. TUM Soeun and CHHAO Chat, the two witnesses asked about a supposedly existing "Yeay Chaem canal", both denied having ever heard that designation.<sup>69</sup> Ms. IM Chaem is also the only person to assert that she reported to and received orders from the highest levels of the regime, such as Pol Pot<sup>70</sup> or the Zone Committee.<sup>71</sup> As the Trial Chamber held in Case 002/01, "[i]n

<sup>64</sup> Duch Trial Judgement, para. 22.

<sup>65</sup> See, *Case of MEAS Muth*, 003/07-09-2009-ECCC/OCIJ, Decision on Personal Jurisdiction and Investigative Policy regarding Suspect [Redacted], 2 May 2012, D49, para. 21.

<sup>66</sup> *Case of KAINING Guek Eav alias Duch*, 001/18-07-2007-ECCC/OCIJ, Closing Order indicting Kaing Guek Eav alias Duch, 8 August 2008, D99 ("Case 001 Closing Order"), para. 129.

<sup>67</sup> Transcript of interview of Im Chaem, 4 March 2007, D1.3.28.4, pp. 5-7; Interview of IM Chaem by Smiling Toad Productions, 26 April 2007, D1.3.12.1, p. 17.

<sup>68</sup> See, Third Introductory Submission, para. 79; Site Identification Report, 11 April 2012, D106/19, p. 2.

<sup>69</sup> Written Record of Interview of TUM Soeun, 16 October 2013, D119/65, p. 26; Written Record of Interview of CHHAO Chat, 18 December 2014, D219/130, p. 28.

<sup>70</sup> Interview of IM Chaem by Smiling Toad Productions, 26 April 2007, D1.3.12.1, p. 17.

practice, each level in the [Communist Party of Kampuchea] hierarchy communicated for the most part only with the levels immediately above and below it.”<sup>72</sup> In particular, “[d]istricts and sub-district entities did not generally communicate with the Party Centre directly”.<sup>73</sup> Further evidence of the unreliability of Ms. IM Chaem’s declarations to DC-Cam and Smiling Toad Productions is the confirmation that Ms. IM Chaem never created a new worksite but continued the existing ones from her predecessor.<sup>74</sup> There is, therefore, no evidence as to Ms. IM Chaem’s authority over Spean Sreng worksite except her own uncorroborated version of the events, which can be attributed to a desire—whether conscious or not—to gain status by exaggerating her importance in past events.

33. While the International Co-Investigating Judge charged Ms. IM Chaem with crimes at Spean Sreng worksite “in her capacity of Secretary of Preah Net Preah District”, the evidence establishes that Spean Sreng worksite was under the control and supervision of the sector level. This is logical given the pyramidal structure of the Democratic Kampuchea regime<sup>75</sup> and given that Spean Sreng worksite crosses two districts, namely Phnum Srok and Preah Net Preah.<sup>76</sup>
34. Ms. IM Chaem was appointed as Preah Net Preah District Secretary from mid-1977 and kept this position throughout the remainder of the Khmer Rouge Regime. The evidence placed in the case file suggests that her role as District Secretary was limited to supervising villages and communes in Preah Net Preah District.<sup>77</sup> In her position, she held meetings on rice cultivation so as to produce enough food for people to eat as well as on dam and canal

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<sup>71</sup> Transcript of interview of Im Chaem, 4 March 2007, D1.3.28.4, p. 7.

<sup>72</sup> *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC, Case 002/01 Judgement, 7 August 2014, E313, para.270.

<sup>73</sup> *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC, Case 002/01 Judgement, 7 August 2014, E313, para.270.

<sup>74</sup> Written Record of Interview of PUM Kho, 6 October 2014, D219/23, p. 20; DC-Cam Interview of CHHIT Yoek, 19 June 2011, D67.9, p. 38.

<sup>75</sup> *See*, Case 002 Closing Order, paras. 64, 68.

<sup>76</sup> Site Identification Report, 11 April 2012, D106/19, p. 2. *See also*, Map of Spean Sreng and Prey Roneam Dam Sites, Sector 5, Northwest Zone, 27 April 2012, D106/19.4.

<sup>77</sup> Written Record of Interview of CHHIM Phan, 13 April 2013, D119/32, p. 8; Written Record of Interview of YENG Chhan, 25 June 2014, D119/132, p. 6; Written Record of Interview of PUM Kho, 6 October 2014, D219/23, p. 6.

construction within the limits of the district she chaired.<sup>78</sup> Following the pyramidal structure of the regime, Preah Net Preah District was hierarchically under the authority of Sector 5;<sup>79</sup> and district secretaries had no authority over multiple districts<sup>80</sup> or at the sector level.

35. With regard to Spean Sreng worksite in particular, the evidence establishes that it was indeed under the supervision of the sector level.<sup>81</sup> Workers were under the authority of the Sector mobile unit chairman.<sup>82</sup> This was true before<sup>83</sup> and after<sup>84</sup> *Ta Val*, Sector 5 mobile unit chairman, was arrested in mid-1977.<sup>85</sup> Ms. IM Chaem's only role in relation to worksites, as District Secretary of Preah Net Preah, was to provide forces upon request from the sector level.<sup>86</sup> In particular, CHUM Kan, former Phnom Lieb Commune Committee chief, recalled a meeting held in Preah Net Preah District Office during which Sector 5 cadres requested people from the base for worksites.<sup>87</sup> Ms. IM Chaem, though present at the meeting, did not speak.<sup>88</sup> This not only confirms that worksites were under the sector level's authority, but also tends to establish that Ms. IM Chaem did not enjoy any significant position of

<sup>78</sup> Written Record of Interview of CHHIM Phan, 13 April 2013, D119/32, p. 7; Written Record of Interview of TUM Soeun, 16 October 2013, D119/65, pp. 14, 38; Written Record of Interview of IM Man, 26 February 2014, D119/96, p. 18; Written Record of Interview of KOR Len, 11 March 2014, D119/98, p. 10; Written Record of Interview of PUM Kho, 6 October 2014, D219/23, p. 6.

<sup>79</sup> See, Case 002 Closing Order, paras. 64, 68.

<sup>80</sup> See, *Duch* Trial Judgement, para. 90.

<sup>81</sup> Written Record of Interview of CHUM Kan, 26 March 2014, D119/110, p. 15; Written Record of Interview of PUM Kho, 6 October 2014, D219/23, p. 20.

<sup>82</sup> Written Record of Interview of CHEAM Kin, 13 February 2014, D119/100, p. 6; Written Record of Interview of KOR Len, 11 March 2014, D119/98, p. 10; Written Record of Interview of CHUM Kan, 26 March 2014, D119/110, p. 15; Written Record of Interview of PUM Kho, 6 October 2014, D219/23, p. 20.

<sup>83</sup> Written Record of Interview of PUM Kho, 6 October 2014, D219/23, p. 7; Written Record of Interview of MUN Mot, 25 July 2014, D119/139, p. 17; Written Record of Interview of TAK Buy, 3 April 2012, D106/9, p. 2; Written Record of Interview of CHHAY Phan, 19 May 2013, p. 4; Written Record of Interview of CHEAM Kin, 13 February 2014, D119/100, p. 6; Written Record of Interview of CHUM Chim, 20 January 2015, D219/149, p. 5; Written Record of Interview of SAM Sak, 23 April 2014, D119/120, p. 12.

<sup>84</sup> Written Record of Interview of CHHAO Chat, 18 December 2014, D219/130, p. 31.

<sup>85</sup> See, S-21 Execution Log, Uncatalogued Execution of 39 Prisoners, 6 March 1978, D6.1.1128, English ERN 00193556.

<sup>86</sup> Written Record of Interview of CHUM Kan, 26 March 2014, D119/110, p. 16; Written Record of Interview of PUM Kho, 6 October 2014, D219/23, p. 7.

<sup>87</sup> Written Record of Interview of CHUM Kan, 26 March 2014, D119/110, pp. 16-17.

<sup>88</sup> Written Record of Interview of CHUM Kan, 26 March 2014, D119/110, pp. 16-17.



authority—whether *de jure* or *de facto*—in relation to worksites; otherwise it is likely that she would have addressed the audience in this regard too.

**(iii) Phnom Trayoung security centre**

36. In the Third Introductory Submission, the International Co-Prosecutor alleged that:

The Phnom Trayoung Security Centre and a related rock quarry worksite were located in Preah Net Preah in Banteay Meanchey Province (part of Sector 5 of the Northwest Zone). It is estimated that as many as 40,000 people died at this location between 1977 and 1979. Phnom Trayoung Security Centre was the sector-level prison for Sector 5 and was the largest security centre in the Sector. Individuals from all over Sector 5, and even some prisoners from Sector 3, were detained there.

Phnom Trayoung Security Centre functioned as a tempering place for allegedly traitorous elements, a forced labour site, and an execution site for perceived enemies of the DK regime. Detainees classified as heavy offenders were forced to work in the quarry breaking rocks, and were fed only one spoonful of rice porridge per mealtime. Those who did not work hard enough were killed, and some died from starvation or overwork. Subdistrict *chhlop* and Southwest Zone cadre under the control of IM Chaem were responsible for arresting people and taking them to Phnom Trayoung to be killed. Executions, as many as 15 per night were conducted on the north side of Phnom Trayoung [M]ountain.<sup>89</sup>

37. On 3 March 2015, Judge Mark B. Harmon charged Ms. IM Chaem, in her capacity as Secretary of Preah Net Preah District, with crimes against humanity and violations of the 1956 Cambodian Penal Code at Phnom Trayoung Security Centre between April 1977 and 6 January 1979. Ms. IM Chaem was charged with these crimes through commission, planning, instigating, ordering, and aiding and abetting, and through superior responsibility.<sup>90</sup>

Gravity of the crimes

38. The gravity of the crimes with which Ms. IM Chaem was charged at Phnom Trayoung may be determined based on factors such as the number of victims, the geographic and temporal scope and manner in which the crimes were allegedly committed, as well as the number of separate incidents.<sup>91</sup> An analysis of the evidence in relation to Phnom Trayoung

<sup>89</sup> Third Introductory Submission, paras. 74-75 (references omitted).

<sup>90</sup> See, Notification of Charges against IM Chaem, 3 March 2015, D239.1.

<sup>91</sup> *Duch* Trial Judgement, para. 22.

demonstrates that the alleged crimes do not pass the gravity threshold required to fall within the “most responsible person” category.

39. The International Co-Prosecutor submitted that “as many as 40,000 persons died at [Phnom Trayoung] between 1977 and 1979.”<sup>92</sup> This allegation is based on a 1997 DC-Cam report giving the figure of 40,000 victims without any supporting authority. Indeed, the report explicitly states that the mapping team did not visit Phnom Trayoung and “could not wait to continue [its] research” on the site.<sup>93</sup> Given that the International Co-Prosecutor relied upon the 1997 DC-Cam report to submit the Third Introductory Submission some ten years after it was issued, it appears that DC-Cam never provided an update on the figure initially mentioned or its supporting sources. There was therefore no proper basis to claim that 40,000 victims died at Phnom Trayoung. In addition, the International Co-Prosecutor, relying upon a DC-Cam interview with TAK Buy, submitted that up to 15 people were executed per night at Phnom Trayoung.<sup>94</sup> Such allegation does not relate to alleged crimes at Phnom Trayoung, but at Trapeang Thma Dam.<sup>95</sup> The Third Introductory Submission, therefore, had no evidentiary basis whatsoever to allege that there were killings at Phnom Trayoung and that the death toll at the site reached 40,000 victims.
40. There is, therefore, no probative evidence in the case file to support the allegation that deaths occurred to the magnitude claimed by the International Co-Prosecutor. Witnesses who were asked about the 40,000 death figure either made far more conservative estimates,<sup>96</sup> or questioned the way numbers were collected.<sup>97</sup> In addition, LAY Khann, the only witness

<sup>92</sup> Third Introductory Submission, para. 74, *citing* Mapping the Killing Fields of Cambodia 1997: Khet Banteay Meanchey, 29 April 1997, D1.3.10.10, English ERN 00218610.

<sup>93</sup> Mapping the Killing Fields of Cambodia 1997: Khet Banteay Meanchey, 29 April 1997, D1.3.10.10, English ERN 00218610. *See also*, Written Record of Interview of SIN Khin, 5 March 2015, D219/206, p. 5 (confirming that the DC-Cam mapping team did not reach Phnom Trayoung during the 1997 mission).

<sup>94</sup> Third Introductory Submission, para. 75, *citing* DC-Cam Interview of TAK Buy, 5 March 2007, D1.3.11.52, p. 10.

<sup>95</sup> *See*, DC-Cam Interview of TAK Buy, 5 March 2007, D1.3.11.52, pp. 9-10.

<sup>96</sup> *See*, Written Record of Interview of THIB Samphat, 2 April 2012, D106/8, p. 7.

<sup>97</sup> *See*, Written Record of Interview of SIN Khin, 5 March 2015, D219/206, p. 6 (“[The person accompanying the team] told me that he heard from other people about this [figure] ... I don’t know [how DC-Cam got this number], I didn’t go there [at Phnom Trayoung]. And there is no witness who had been able to tell me about it ... When I listened to the tape, I did not hear about Trayaung Mountain.”).

who appeared to confirm the death numbers in his written record of interview actually never did so in his interview. Indeed, LAY Khann's evidence was misrepresented in the written record of his interview to appear more incriminating.<sup>98</sup> Without any forensic evidence, the only probative evidence comes from eyewitnesses to the alleged death toll at Phnom Trayoung.

41. With regard to alleged killings, the eyewitness evidence suggests that, far from being a regular occurrence, killings were rare and mainly isolated to the short period of time before the Vietnamese arrived. Only THIB Samphat claimed that killings occurred every night,<sup>99</sup> and even he subsequently admitted that he witnessed killings only once.<sup>100</sup> Similarly, KIM Yet, who initially stated that killings occurred weekly,<sup>101</sup> later on denied his statement<sup>102</sup> and admitted that he neither saw killings first-hand<sup>103</sup> nor did he hear TUM Soeun—the alleged chief of Phnom Trayoung—actually ordering prisoners to be killed.<sup>104</sup> Other witnesses provide little evidence on the alleged frequency of killings. In fact, despite major discrepancies in witness statements,<sup>105</sup> the highest figure given in relation to killings at Phnom Trayoung is of 90 victims, killed by soldiers, when the Vietnamese army was approaching.<sup>106</sup>

<sup>98</sup> *Compare*, Written Record of Interview of LAY Khann, 28 March 2012, D106/4, p. 4 (“I could estimate that many people died there, and the number [of 40,000 victims] may be correct.” (emphasis added)) and Transcript of Interview of LAY Khann, 28 March 2012, D219/422.2, p. 11 (“I think there could have been up to 40,000 people being detained there. There were many people.” (emphasis added)).

<sup>99</sup> Written Record of Interview of THIB Samphat, 15 June 2013, D119/49, p. 11; Written Record of Confrontation, 3-4 December 2014, D230, pp. 17-18.

<sup>100</sup> Written Record of Interview of THIB Samphat, 15 June 2013, D119/49, pp. 11-12.

<sup>101</sup> Written Record of Interview of KIM Yet, 13 March 2012, D106/6, p. 7.

<sup>102</sup> Written Record of Interview of KIM Yet, 1 December 2014, D219/94, p. 13.

<sup>103</sup> Written Record of Interview of KIM Yet, 1 December 2014, D219/94, p. 11.

<sup>104</sup> Written Record of Confrontation, 3-4 December 2014, D230, p. 42.

<sup>105</sup> *See*, Written Record of Interview of THIB Samphat, 15 June 2013, D119/49, pp. 11-12 (saying that, when the Vietnamese army approached, he witnessed soldiers killing 90 serious-offence prisoners); Written Record of Interview of PHON Mon, 1 December 2014, D219/95, p. 9 (saying that on one occasion, he was requested to bury seven bodies); Written Record of Interview of KIM Yet, 1 December 2014, D219/94, p.12 (saying that on one occasion, he was requested to bury 30 to 40 bodies); Written Record of Confrontation, 3-4 December 2014, D230, p. 29 (TUM Soeun saying that only four serious-offence prisoners were ever killed at Phnom Trayoung).

<sup>106</sup> Written Record of Interview of THIB Samphat, 15 June 2013, D119/49, pp. 11-12 (saying that, when the Vietnamese army approached, he witnessed soldiers killing 90 serious-offence prisoners). For the sake of clarity,

42. Outside of this single significant event, killings appeared to have been sporadic and isolated incidents. Therefore, the total number of murder victims cannot be much greater than those 90 serious-offence prisoners who were allegedly executed before the Vietnamese invasion. The difference between 90 killings—which is evidence-based—and 40,000 killings—which is not—is so vast that a real question arises as to how the International Co-Prosecutor can responsibly assert such a grotesquely inflated figure in the face of all the evidence. While 90 killings is, of course, a serious matter, in the context of the Cambodian “killing fields”, it is unfortunately very far from being an exceptional atrocity. To put it in numerical terms, 90 killings is less than 1/135<sup>th</sup> the number of killings at S-21, where 12,272 people were tortured and murdered<sup>107</sup> (and it is 1/444<sup>th</sup> of the figure of 40,000 killed). This figure is also far less than some of the crime sites examined at trial in Case 002.<sup>108</sup> In any event, the number of victims cannot have surpassed the total number of people, estimated between 200 and 500,<sup>109</sup> who inhabited Phnom Trayoung.
43. With regard to other alleged crimes at Phnom Trayoung, the International Co-Prosecutor submitted that the site was used as a forced labour site<sup>110</sup> where those “who did not work hard enough were killed”,<sup>111</sup> and where “some died from starvation and overwork.”<sup>112</sup> Such allegations are not supported by the evidence gathered during the course of the investigation.

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the Defence notes that TUM Soeun never acknowledged that “approximately 300 or 400 people died” at Phnom Trayoung as it is noted in his written record of interview; he said instead that this was the number of people who lived there. *Compare*, Written Record of Interview of TUM Soeun, 29 March 2012, D106/5, p. 5 and Transcript of Interview of TUM Soeun, 29 March 2012, D219/422.9, pp. 16, 26.

<sup>107</sup> See, *Duch Appeal Judgement*, para. 2.

<sup>108</sup> See, e.g., Case 002 Closing Order, paras. 500 (estimating that approximately 15,000 detainees were executed at Kraing Ta Chan), 783 (estimating that approximately 30,000 people were killed at Wat Au Trakuon).

<sup>109</sup> See, Written Record of Interview of KIM Yet, 30 March 2012, D106/6, p. 7; Transcript of Interview of TUM Soeun, 29 March 2012, D219/422.9, pp. 16, 26, 29; Written Record of Interview of PHOUN Sunty, 20 March 2013, D119/30, p. 6.

<sup>110</sup> Third Introductory Submission, para. 75, *citing* OCP Interview RIN Kheng, 6 August 2008, D1.3.11.43, p. 3.

<sup>111</sup> Third Introductory Submission, para. 75, *citing* OCP Interview of LAY Khann, 5 August 2005, D1.3.11.27, p. 3.

<sup>112</sup> Third Introductory Submission, para. 75, *citing* OCP Interview of YOUK Neam, 5 August 2008, D1.3.11.69, p. 4; Transcript of interview of Im Chaem, 4 March 2007, D1.3.28.4, pp. 8-10.

44. The claim that those who did not work hard enough were killed is based on speculation from a witness, LAY Khann, who lived nearby but could not enter the site,<sup>113</sup> as well as hearsay evidence. Indeed, LAY Khann later admitted that he “knew about [the arrests and killings] because [he] asked those close to [him].”<sup>114</sup>
45. In addition, the two interviews relied upon by the International Co-Prosecutor in support of the claim that some people at Phnom Trayoung died from starvation and overwork are not even remotely relevant to the crime site. The first source—an interview of YOUK Neam—explicitly states that the witness did not know what the conditions at Phnom Trayoung were like.<sup>115</sup> YOUK Neam later clarified that he learned about Phnom Trayoung after the fall of the regime.<sup>116</sup> His evidence is therefore devoid of any probative value. The second source—a DC-Cam interview with Ms. IM Chaem—only constitutes Ms. IM Chaem’s description of the situation in Preah Net Preah District as a whole upon her arrival.<sup>117</sup> While a couple of witnesses stated that some people at Phnom Trayoung died from overwork, starvation, or illness,<sup>118</sup> no probative evidence establishes that this was part of a policy rather than the result of more than two years of sustained difficulties in the District.<sup>119</sup> There is certainly no evidence that Ms. IM Chaem instituted or implemented a policy of killing people by overwork, starvation or illness.
46. There is some evidence to suggest that Phnom Trayoung was, in fact, a former security centre established between 1975 and 1976,<sup>120</sup> which ceased to exist upon Ms. IM Chaem’s arrival in Preah Net Preah District.<sup>121</sup> From 1977, Phnom Trayoung was established as a

<sup>113</sup> See, OCP Interview of LAY Khann, 5 August 2005, D1.3.11.27, p. 3; Written Record of Interview of LAY Khann, 28 March 2012, D106/4, p. 4.

<sup>114</sup> Written Record of Interview of LAY Khann, 28 March 2012, D106/4, p. 4.

<sup>115</sup> OCP Interview of YOUK Neam, 5 August 2008, D1.3.11.69, p. 3.

<sup>116</sup> Written Record of Interview of YOUK Neam, 12 January 2015, D219/140, p. 20.

<sup>117</sup> Transcript of interview of Im Chaem, 4 March 2007, D1.3.28.4, pp. 8-10.

<sup>118</sup> See, Written Record of Interview of SUM Sal, 31 March 2012, D106/7, p. 5; Written Record of Interview of PHOUN Sunt, 1 December 2014, D219/92, p. 12.

<sup>119</sup> See, e.g., Weekly Report of the Committee of Region 5, 21 May 1977, D1.3.10.1, pp. 10-11.

<sup>120</sup> See, Written Record of Interview of KHEANG Khun, 15 August 2014, D119/143, p. 16.

<sup>121</sup> Written Record of Interview of PUM Kho, 6 October 2014, D219/23, p. 21; Written Record of Confrontation, 3-4 December 2014, D230, p. 14.

model cooperative<sup>122</sup> where practices did not differ from what happened at other cooperatives throughout the country. While Phnom Trayoung was described as ‘a prison without walls’,<sup>123</sup> light offence prisoners lived there with their families<sup>124</sup> and had agricultural duties.<sup>125</sup> Serious offence prisoners worked in a rock quarry<sup>126</sup> for the purpose of being reeducated<sup>127</sup> so they could be reclassified as light offence prisoners<sup>128</sup> and eventually be released.<sup>129</sup> As such, the evidence suggests that the alleged crimes were not committed in a particularly grave manner compared to other Khmer Rouge crimes. The alleged crimes at Phnom Trayoung cannot therefore be described as “most serious” within the context of the Khmer Rouge atrocities as a whole. While the Defence acknowledges the seriousness of alleged crimes, Phnom Trayoung was not like S-21, which was established for the purpose of interrogating and killing those accused of being enemies of the Democratic Kampuchea regime;<sup>130</sup> it was merely a reeducation centre in the form of a cooperative.

#### Level of responsibility

47. A charged person’s level of responsibility is evaluated on the basis of his or her level of participation in the crimes, hierarchical rank or position, and the permanence of such position.<sup>131</sup> In assessing Ms. IM Chaem’s level of responsibility at Phnom Trayoung, the Co-Investigating Judges must take into account her *de facto* authority and her *de jure* authority.<sup>132</sup> This was illustrated in Case 001. The Co-Investigating Judges concluded that Duch “may be considered in the category of most responsible for crimes ... due both to his

<sup>122</sup> See, Written Record of Confrontation, 3-4 December 2014, D230, pp. 14, 27, 33.

<sup>123</sup> See, e.g., Written Record of Interview of LAY Khann, 28 March 2012, D106/4, p. 4; Written Record of Interview of YOUK Neam, 12 January 2015, D219/140, p. 5.

<sup>124</sup> Written Record of Confrontation, 3-4 December 2014, D230, p. 14. See also, Written Record of Confrontation, 3-4 December 2014, D230, p. 27.

<sup>125</sup> Written Record of Interview of PHOUN Sunty, 20 March 2013, D119/30, p. 6; Written Record of Confrontation, 3-4 December 2014, D230, pp. 8, 10.

<sup>126</sup> Written Record of Interview of TUM Soeun, 2 December 2014, D219/102, p. 9.

<sup>127</sup> Written Record of Interview of TUM Soeun, 2 December 2014, D219/102, p. 9.

<sup>128</sup> Written Record of Confrontation, 3-4 December 2014, D230, p. 13.

<sup>129</sup> Written Record of Confrontation, 3-4 December 2014, D230, pp. 14, 27.

<sup>130</sup> See, *Duch Appeal Judgement*, para. 2.

<sup>131</sup> *Duch Trial Judgement*, para. 22.

<sup>132</sup> See, *Case of MEAS Muth*, 003/07-09-2009-ECCC/OCIJ, Decision on Personal Jurisdiction and Investigative Policy regarding Suspect [Redacted], 2 May 2012, D49, para. 21.

formal and effective hierarchical authority and his personal participation as Deputy Secretary then Secretary of S21, a security centre which was directly controlled by the Central Committee.”<sup>133</sup>

48. The only basis for the International Co-Prosecutor’s submission that “[s]ubdistrict *chhlop* and Southwest Zone cadre under the control of [Ms.] IM Chaem were responsible for arresting people and taking them to Phnom Trayoung to be killed”<sup>134</sup> is a one-page long interview with YAEM Kaong, which he later retracted entirely.<sup>135</sup>
49. The only evidence suggesting that Ms. IM Chaem had authority at Phnom Trayoung comes from TUM Soeun—the alleged chief of Phnom Trayoung—who states that he received instructions from her.<sup>136</sup> His statement is uncorroborated by any other evidence, which is striking given that there is no proof of the existence of written reports between the two, and given that Ms. IM Chaem’s messengers were never found and interviewed. With the exception of TUM Soeun’s uncorroborated statements, therefore, there is no other evidence that Ms. IM Chaem had any sort of authority over anyone at Phnom Trayoung, including security guards.<sup>137</sup>
50. Moreover, TUM Soeun had the best (or rather worst) motives for wishing to shift responsibility on Ms. IM Chaem, and his evidence needs to be seen in that light. Witnesses consistently name him as Phnom Trayoung’s chief<sup>138</sup> and state that they received instructions

<sup>133</sup> Case 001 Closing Order, para. 129.

<sup>134</sup> Third Introductory Submission, para. 75, *citing* SOAS/HRW Interview of Yaem Kaong, 21 October 2005, D1.3.11.66.

<sup>135</sup> *See*, Written Record of Interview of YAEM Kao, 30 July 2011, D45. The Defence notes that YAEM Kao and YAEM Kaong are, in fact, the same person.

<sup>136</sup> Written Record of Interview of TUM Soeun, 29 March 2012, D106/5, pp. 5-6; Written Record of Interview of TUM Soeun, 16 October 2013, D119/65, p. 29; Written Record of Interview of TUM Soeun, 2 December 2014, D219/102, pp. 5-6; Written Record of Confrontation, 3-4 December 2014, D230, pp. 14-15, 28-29, 35, 37.

<sup>137</sup> For example, SUM Sal, who was a prison guard at Phnom Trayoung, stated that he never saw Ms. IM Chaem at the site. He further stated that TUM Soeun was the “only big chief” at Phnom Trayoung. *See*, Written Record of Interview of SUM Sal, 31 March 2012, D106/7, pp. 3-4, 6.

<sup>138</sup> *See*, Written Record of Interview of KIM Yet, 30 March 2012, D106/6, p. 5; Written Record of Interview of SUM Sal, 31 March 2012, D106/7, pp. 3-4; Written Record of Interview of THIB Samphat, 2 April 2012, D106/8, p. 4; Written Record of Interview of PHON Mon, 12 March 2013, D119/19, p. 8; Written Record of Interview of

from and reported to him.<sup>139</sup> TUM Soeun himself acknowledges that he enjoyed a high degree of autonomy at Phnom Trayoung. In this regard, he evaluated whether prisoners would be categorized as serious or light offence prisoners,<sup>140</sup> had the authority to appoint them to be security guards,<sup>141</sup> determined whether they should be released,<sup>142</sup> and even decided whether they should be killed.<sup>143</sup> Witnesses also confirm that TUM Soeun lived at the Mountain, merely a few metres away from where serious offence prisoners were allegedly killed.<sup>144</sup>

51. Even if Ms. IM Chaem, in her position of Preah Net Preah District Secretary, were to have a *de jure* authority over TUM Soeun because Phnom Trayoung was located in her district, no probative evidence establishes that she had the *de facto* authority required to actually control the alleged security centre itself or that she was in any way involved in its policy. Administrative and security structures were separated.<sup>145</sup> The evidence indeed suggests that Phnom Trayoung was controlled by TUM Soeun and that Ms. IM Chaem was concerned

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PHOUN Sunty, 20 March 2013, D119/30, p. 6; Written Record of Interview of CHUM Chim, 20 January 2015, D219/149, p. 11.

<sup>139</sup> See, Written Record of Interview of KIM Yet, 30 March 2012, D106/6, p. 7; Written Record of Interview of SUM Sal, 31 March 2012, D106/7, p. 3; Written Record of Interview of PHOUN Sunty, 20 March 2013, D119/30, pp. 6-7.

<sup>140</sup> Written Record of Confrontation, 3-4 December 2014, D230, p. 13 (“I received prisoners ... Then I evaluated the category in which each prisoner would fit ... I evaluated whether or not they were really traitors”), p. 29 (“Sometimes, I was the one who decided to re-classify prisoners”).

<sup>141</sup> Written Record of Confrontation, 3-4 December 2014, D230, p. 10 (“Some of them were prisoners with minor offences whom I selected to be guards”). See also, Written Record of Interview of PHOUN Sunty, 20 March 2013, D119/30, p. 6 (“When I told [TUM Soeun] that my name was Phoun Ty from Prasat, he said that I was a chief of all the prisoners here”).

<sup>142</sup> Written Record of Confrontation, 3-4 December 2014, D230, p. 27 (“I called a meeting when the Vietnamese entered, and I told them [the prisoners at Phnom Trayoung] to go back to where they had come from because I could no longer protect them.”), p. 28 (“Sometimes, I exceeded what we had discussed based on my own feelings ... I released [prisoners] based on my own examination”).

<sup>143</sup> Written Record of Confrontation, 3-4 December 2014, D230, p. 38 (“If they wanted to kill someone, they had to receive the information from me”). See also, Written Record of Interview of PHOUN Sunty, 20 March 2013, D119/30, p. 6 (TUM Soeun “said I would be killed if there was any prisoner disappearing.”); Written Record of Interview of THIB Samphat, 15 June 2013, D119/49, p. 11 (“Ta Soeun authorized the execution”).

<sup>144</sup> Written Record of Interview of PHON Mon, 1 December 2014, D219/95, p. 4; Written Record of Interview of PHOUN Sunty, 1 December 2014, D219/92, p. 11; Written Record of Interview of KIM Yet, 1 December 2014, D219/94, p. 12.

<sup>145</sup> Written Record of Interview of CHUM Kan, 26 March 2014, D119/110, p. 8.

IM CHAEM’S OBSERVATIONS ON WHETHER SHE SHOULD BE CONSIDERED A  
“SENIOR LEADER” OR AMONG “THOSE WHO WERE MOST RESPONSIBLE”



with its transformation into a village.<sup>146</sup> Ms. IM Chaem's role at Phnom Trayoung, if any, was an advisory one only.<sup>147</sup> This is consistent with witnesses saying that they never saw her at Phnom Trayoung<sup>148</sup> and with Ms. IM Chaem herself, in the numerous and comprehensive interviews she gave, who never—not even once—acknowledged that she had a role at the crime site.<sup>149</sup>

52. The evidence does not suggest that Ms. IM Chaem had any power beyond what a normal District Secretary possessed. She was appointed as Preah Net Preah District Secretary from mid-1977 and kept this position throughout the remainder of the Democratic Kampuchea regime. The evidence placed in the case file establishes that her role as District Secretary was limited to supervising villages and communes in Preah Net Preah District.<sup>150</sup> Witnesses recall Ms. IM Chaem only discussing food production during meetings.<sup>151</sup> TUM Soeun also acknowledges that her instructions were always about this theme.<sup>152</sup> The only other suggestions regarding Ms. IM Chaem's authority at Phnom Trayoung are based on pure

<sup>146</sup> See, Written Record of Interview of TUM Soeun, 29 March 2012, D106/5, p. 5.

<sup>147</sup> Written Record of Confrontation, 3-4 December 2014, D230, p. 14 (“I discussed it in person with [Ms. IM Chaem] when we wanted to release minor offence prisoners ... we agreed with each other to release them.”), p. 15 (Ms. IM Chaem “advised us [on] how to deal with our livelihood, and manage forces. She also advised us not to eat more than the people, and not to provide more food rations than [in] other places”).

<sup>148</sup> Written Record of Interview of SUM Sal, 31 March 2012, D106/7, p. 6; Written Record of Interview of PHON Mon, 12 March 2013, D119/19, p. 10; Written Record of Interview of PHOUN Sunty, 20 March 2013, D119/30, p. 7.

<sup>149</sup> See, Transcript of interview of Im Chaem, 4 March 2007, D1.3.28.4; Interview of IM Chaem by Smiling Toad Productions, 26 April 2007, D1.3.12.1; Transcript of recorded interview with Im Chaem, 26 April 2007, D6.1.75; Transcript of Interview of Im Chaem, 20 June 2008, D123/1/5.1b; Transcript of Interview of Im Chaem, 6 April 2012, D123/1/5.1c; Transcript of Interview of IM Chaem by Youth for Peace in 2011, no date, D219/264.1. The Defence notes that in one interview, Ms. IM Chaem states that she heard about Phnom Trayoung but that it was probably directly organized by the province and that she did not organize it. See, Transcript of Interview of Im Chaem, 6 April 2012, D123/1/5.1c, pp. 34-35.

<sup>150</sup> Written Record of Interview of CHHIM Phan, 13 April 2013, D119/32, p. 7; Written Record of Interview of YENG Chhan, 25 June 2014, D119/132, p. 6; Written Record of Interview of PUM Kho, 6 October 2014, D219/23, p. 6.

<sup>151</sup> See, e.g., Written Record of Interview of PHOUN Sunty, 20 March 2013, D119/30, p. 4; Written Record of Interview of CHHIM Phan, 13 April 2013, D119/32, p. 7.

<sup>152</sup> Written Record of Interview of TUM Soeun, 29 March 2012, D106/5, p. 6; Written Record of Interview of TUM Soeun, 16 October 2013, D119/65, p. 14; Written Record of Confrontation, 3-4 December 2014, D230, pp. 14-15.

speculation or association with her office,<sup>153</sup> which are entirely devoid of probative value. This is demonstrated by SUM Sal, who recalls a meeting held by Ms. IM Chaem in Phnom Lieb, where the only attendees were prison guards from Phnom Trayoung, including him. He states that Ms. IM Chaem did not mention Phnom Trayoung during the meeting, and addressed the arrival of the Vietnamese army instead.<sup>154</sup> Had Ms. IM Chaem been in position of authority at Phnom Trayoung, it is implausible that she would not have mentioned it at all at a meeting attended by Phnom Trayoung guards only, or otherwise manifested her authority at that meeting.

53. The only evidence linking Ms. IM Chaem to an order to arrest is a letter allegedly shown to THIB Samphat by TUM Soeun upon his arrival at Phnom Trayoung.<sup>155</sup> KIM Yet, who THIB Samphat says was also named in the letter, denied his previous statement according to which Ms. IM Chaem ordered his arrest.<sup>156</sup> Without making any admission as to the reliability of THIB Samphat's declaration,<sup>157</sup> this would, at best, constitute one single event at which Ms. IM Chaem sent a prisoner to Phnom Trayoung. There is also no evidence that the letter was, in fact, an order to arrest rather than an invitation to a meeting, as was the case for PHOUN Sunty and PHON Mon.<sup>158</sup> In any event, THIB Samphat's assertion is not supported by any physical evidence, and accordingly it should be accorded very little weight.

54. Lastly, the only evidence linking Ms. IM Chaem to any killing at Phnom Trayoung is uncorroborated and comes from TUM Soeun. TUM Soeun stated that, when the Vietnamese arrived, Ms. IM Chaem instructed him to kill four prisoners who could not walk and flee the

<sup>153</sup> See, e.g., Written Record of Interview of MUN Mot, 25 July 2014, D119/139, p. 17 ("In my experience during that regime, she was Preah Netr Preah District Committee, so she could have had the position and power to manage those two prisons because those prisons were located in Preah Netr Preah District.")

<sup>154</sup> Written Record of Interview of SUM Sal, 2 December 2014, D219/103, pp. 11-12.

<sup>155</sup> Written Record of Interview of THIB Samphat, 2 April 2012, D106/8, p. 3; Written Record of Interview of THIB Samphat, 15 June 2013, D119/49, p. 9.

<sup>156</sup> Written Record of Interview of KIM Yet, 1 December 2014, D219/94, pp. 4-5.

<sup>157</sup> The Defence notes that THIB Samphat informed OCIJ investigators that he "had mental problems because at one time a piece of wood fell on his head ... [and] that the accident happened before he provided the interview to the Documentation Center of Cambodia in September 2011", i.e. before he first asserted that Ms. IM Chaem issued a letter ordering his arrest. See, Written Record of Interview of THIB Samphat, 1 December 2014, D219/93, pp. 3-4.

<sup>158</sup> See, Written Record of Interview of PHOUN Sunty, 1 December 2014, D219/92, p. 6. See also, Written Record of Interview of PHON Mon, 1 December 2014, D219/95, pp. 4, 7 (referring to the letter received by PHOUN Sunty in 1978 and denying that it was an order to arrest him).

Vietnamese army.<sup>159</sup> This evidence is inconsistent with evidence from his previous interviews,<sup>160</sup> and comes only after sustained pressure over the course of several years from OCIJ investigators to implicate Ms. IM Chaem. Indeed, TUM Soeun has a strong motive to lie, given his own involvement in the alleged crime,<sup>161</sup> and his concomitant wish to distance himself from responsibility. Not only is this evidence *prima facie* unreliable, but Ms. IM Chaem's involvement in any such killings is unsuitable for consideration by the Co-Investigating Judges for lack of probative value. This leaves no direct evidence linking Ms. IM Chaem to any alleged killings. Even if TUM Soeun's disqualified evidence of Ms. IM Chaem's order to kill four prisoners is accepted at face value, there would only be evidence of her responsibility for four killings. While any allegation of killings is always a serious matter, she cannot be said to have had any instrumental role at Phnom Trayoung.

***(iv) Conclusion on Spean Sreng worksite and Phnom Trayoung security centre***

55. As submitted above,<sup>162</sup> Duch became a reference point to explain which Khmer Rouge officials would fall within the “person most responsible” category. Duch was the Deputy Chairman of S-21—a detention centre as well as an execution and re-education camp from October 1975 to 6 January 1979—which led to the death of 12,272 victims, a majority of whom had been systematically tortured.<sup>163</sup> S-21 is a national, indeed an international, symbol of Khmer Rouge atrocities and of man's inhumanity to man, and it is, therefore, only natural that international justice should require the punishment of its head, notwithstanding the fact that he was not a senior leader. Duch was indeed among “those at lower levels who are directly implicated in the most serious atrocities”,<sup>164</sup> and logically fell among “those who were most responsible” for crimes under the scope of the Agreement.

<sup>159</sup> Written Record of Confrontation, 3-4 December 2014, D230, p. 29.

<sup>160</sup> See, Transcript of Interview of TUM Soeun, 29 March 2012, D219/422.9, p. 30; Written Record of Interview of TUM Soeun, 16 October 2013, D119/65, pp. 37, 40.

<sup>161</sup> Written Record of Confrontation, 3-4 December 2014, D230, p. 29.

<sup>162</sup> See above, paras. 16-18.

<sup>163</sup> Duch Appeal Judgement, paras. 2-3.

<sup>164</sup> Group of Experts Report, para. 110.

56. The gravity of the crimes Ms. IM Chaem was charged with and her alleged level of responsibility at Spean Sreng worksite and Phnom Trayoung security centre do not even come close to those of Duch—the reference point to determine which individuals are among “those who were most responsible”—at S-21. There can be no sane or rational comparison between the two.
57. The evidence does not paint a picture of a District Secretary who committed, planned, instigated, ordered, or aided and abetted “most serious” crimes at Spean Sreng worksite and Phnom Trayoung security centre. The evidence does not portray Ms. IM Chaem as having any instrumental role at the two crime sites either. The evidence instead consistently portrays Ms. IM Chaem as a District Secretary concerned with food production and the livelihood of the people in Preah Net Preah District. Ms. IM Chaem, therefore, does not even remotely fall within the category of “those who were most responsible” for crimes at Spean Sreng worksite and Phnom Trayoung security centre. The Co-Investigating Judges would not be exercising their discretion reasonably if Ms. IM Chaem were being investigated on the basis that she is among “those who were most responsible” for crimes under the Court’s subject-matter jurisdiction.

**C. Singling out Ms. IM Chaem for prosecution and investigation is contrary to the intention of the parties to the Agreement**

58. In Case 001, the Supreme Court Chamber found that, “at a minimum, the term ‘senior leaders of Democratic Kampuchea and those who were most responsible’, reflects the intention of the United Nations and the Royal Government of Cambodia to focus finite resources on the criminal prosecution of certain surviving officials of the Khmer Rouge.”<sup>165</sup> This is consistent with the Group of Experts which, while opposed to the creation of a tribunal limited in advance to the prosecution of named individuals,<sup>166</sup> recommended that not all former Khmer

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<sup>165</sup> *Duch* Appeal Judgement, para. 52.

<sup>166</sup> Group of Experts Report, para. 111.

Rouge who committed violations of international or Cambodian law between 1975 and 1979 should be brought to trial.<sup>167</sup>

59. Singling out Ms. IM Chaem for prosecution and investigation, when the available evidence suggests that she falls into neither category and that other living individuals played a more instrumental role in crimes committed under the regime, is precisely the scenario which the United Nations sought to avoid when it established the ECCC; and would be anathema to it.<sup>168</sup> Ms. IM Chaem has been the subject of selective justice for over six years, only because she was named in the Third Introductory Submission. It would, therefore, be plainly contrary to the purpose of the Agreement to continue the operation of a form of selective justice investigating Ms. IM Chaem for Khmer Rouge crimes when the investigation does not even begin to establish that, on the balance of probabilities, she is among “senior leaders of Democratic Kampuchea and those who were most responsible” for crimes under the Court’s subject-matter jurisdiction.

#### IV. CONCLUSION

60. The evidence gathered thus far exhaustively establishes that, on the balance of probabilities, Ms. IM Chaem is neither a “senior leader” nor among “those who were most responsible” for crimes falling in the scope of the Agreement. Given that the investigation has been ongoing for more than six years and is nearing completion, there is no real likelihood that any new evidence will be discovered that could overturn this conclusion. The investigation cannot run forever with the slim hope that inculpatory evidence of her seniority or level of responsibility could be discovered. After six years, it is time to conclude that the evidence overwhelmingly demonstrates that Ms. IM Chaem is in neither category that the parties to the Agreement defined for prosecution.

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<sup>167</sup> Group of Experts Report, para. 110.

<sup>168</sup> See, Heder’s Negotiations History Review, p. 26 (recalling the United Nations Secretary General note dated 13 May 1999 according to which a “trial of selected Khmer Rouge leaders which would leave other key leaders unpunished ... would not serve the cause of justice and accountability”).

**V. RELIEF REQUESTED**

**WHEREFORE**, on the basis of the observations set out above, the Defence respectfully requests that, in the exercise of their discretion, and in the interests of justice, the Co-Investigating Judges a) decide that Ms. IM Chaem is neither a “senior leader” nor among “those who were most responsible” for crimes under the Court’s subject-matter jurisdiction; and b) dismiss the allegations against Ms. IM Chaem.

Respectfully submitted,



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BIT Seanglim



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John R.W.D. JONES QC

Co-Lawyers for Ms. IM Chaem

Signed on this 21<sup>st</sup> day of September, 2015