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Interpreting The Phrases “Senior Leaders” And “Those Most Responsible” In The Extraordinary Chambers In The Courts Of Cambodia

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CASE WESTERN RESERVE UNIVERSITY
SCHOOL OF LAW

MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR
OF THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

INTERPRETING THE PHRASES “SENIOR LEADERS” AND “THOSE MOST RESPONSIBLE” IN THE
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

Prepared by Sean Morrison
J.D. Candidate, 2007
Spring Semester, 2007

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I. ISSUE AND SUMMARY OF CONCLUSIONS

A. Issue*

The language of Article 2 of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) Statute defines the competence of the court as being over those who were “senior leaders of Democratic Kampuchea” and those who were “most responsible” for atrocities during the Democratic Kampuchea regime. This language raises two important issues: (1) whether this is limiting language of jurisdiction, and if so (2) what the terms “senior leaders” and “most responsible” mean?

The hybrid tribunals face a uniquely difficult task in interpreting new language defining their competence. The ad-hoc tribunals and the International Criminal Court (“ICC”) are limited mostly by subject-matter and temporal restrictions. The Special Court for Sierra Leone (“SCSL”) has yet to make a final decision on how to apply the term “greatest responsibility” to the individual accused. The ECCC will face an equally daunting task in interpreting the new “most responsible” language.

In order to determine the meaning of the language used in Article 2, it is necessary to compare the versions of personal jurisdiction used in the various tribunals, including the ICC, ad-hoc tribunals, and the SCSL. By comparing the ECCC’s language to the spectrum of jurisdiction created by the other tribunals, it will become clear how best to interpret the language.

* Article 2 of the ECCC Statute states that the Extraordinary Chambers shall be established to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes committed...during the period 17 April 1975 to 6 January 1979. Do the terms “senior leaders” and “persons most responsible” limit the Extraordinary Chambers jurisdiction to bring to trial only those individuals falling in those categories? More significantly, what is the meaning of these two terms? Discuss (Here reference should be made to other international or hybrid tribunals, especially Sierra Leone).

B. SUMMARY OF CONCLUSIONS

1. The Language in Article 2 of the ECCC Statute Defines the Personal Jurisdiction of the ECCC.

The phrases “senior leaders of Democratic Kampuchea” and those “most responsible” refer to the personal jurisdiction of the ECCC. As such, they act first as a guide to the prosecutor. However, while they are not an element of any crime, they do define the jurisdiction of the court. If an accused does not fall into one of these categories, the ECCC does not have competence to try him. The chambers will have to decide not only the interpretation of these words, but also whether an individual accused falls into one of these categories.

Initially, this matter must be addressed at the preliminary hearing. It is best to specifically identify an accused as falling into one or both of these categories in the indictment in order to avoid challenges. The matter can again be addressed during a motion for acquittal after the prosecution case closes. The final determination will be considered and decided upon during the judgment.

2. The Phrase “Senior Leaders” Refers to the Top Level of Command in the Democratic Kampuchea, but is Limited to Those who Bear Command Responsibility.

The phrase “senior leaders of Democratic Kampuchea” has three elements. An individual must be senior, or high ranking. In the case of the Democratic Kampuchea, this probably means they were a member of the Central Committee. They must also be a leader, which suggests that they hold command responsibility for atrocities that happened under their control. Finally, they must be a member of Democratic Kampuchea. Any non-member, or member of a separate group cannot be included in this category.

3. The Phrase “Most Responsible” Allows for the Prosecution of Lower Ranking Leaders of Democratic Kampuchea Leaders Who Are Still Criminally Liable.

The phrase “most responsible” is a limiting phrase of personal jurisdiction.

Compared with the other international criminal tribunals, it is narrower than the ICC and ad-hoc tribunals, but broader than the SCSL’s “greatest responsibility” language.

The term is most likely intended to allow for the prosecution of lower level commanders within the Democratic Kampuchea government. While the language itself is fairly broad, and leaves the prosecutor with a wide scope of discretion, there may be other factors to consider. It is still probably limited to members of the Democratic Kampuchea, and the financial and political limitations of the ECCC.¹ The *Todovic* test, developed in the ICTY, is the best tool in determining whether an individual can be considered most responsible.

II. ARTICLE 2 AS PERSONAL JURISDICTION

There are four main types of jurisdiction to consider in an international criminal tribunal: personal jurisdiction, subject-matter jurisdiction, temporal jurisdiction, and territorial jurisdiction. The tribunal must have competence over all four jurisdictional elements in order to try an accused.

The ECCC’s subject-matter jurisdiction is defined in Articles 3-8 of the ECCC Statute. These provisions enumerate the crimes for which an individual can be tried in the ECCC. The temporal jurisdiction is simply the time period during which the crimes must have been committed for the ECCC to have jurisdiction. In this case, the ECCC has

¹ See DRAFT AGREEMENT BETWEEN THE UNITED NATIONS AND THE ROYAL GOVERNMENT OF CAMBODIA CONCERNING THE PROSECUTION UNDER CAMBODIA LAW OF CRIMES COMMITTED DURING THE PERIOD OF DEMOCRATIC KAMPUCHEA, G.A. Res. 57/228, U.N. GOAR, 57th Sess., ¶ 3, U.N. Doc. A/Res/57/228B (22 May 2003) [reproduced in the accompanying notebook at Tab 2].

temporal jurisdiction is between 17 April 1975 and 6 January 1979.² The territorial jurisdiction defines the geographical scope of the court's jurisdiction. The ECCC Statute does not specify a territorial limitation.

Personal jurisdiction is the court's power to bring an individual person into its adjudicative process.³ Personal jurisdiction in the international criminal tribunals is limited by the seriousness of the crime and the practical limitations of the tribunal.⁴ In the case of the ECCC and the SCSL, it is explicitly stated in the terms of the respective statutes.⁵

Article 2 of the Extraordinary Chambers of Cambodia Statute ("ECCC Statute") reads:

Extraordinary Chambers shall be established in the existing court structure, namely the trial court and the supreme court to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian laws related to crimes, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.

The particular phrase "senior leaders of Democratic Kampuchea and those who were most responsible for the crime," defines the limits of the ECCC's personal jurisdiction.⁶

An indictee must fall within one of these two categories to be tried before the ECCC.

² LAW ON THE ESTABLISHMENT OF EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA FOR THE PROSECUTION OF CRIMES COMMITTED DURING THE PERIOD OF DEMOCRATIC KAMPUCHEA, Arts. 2, Reach Kret No. NS/RKM/1004/006 (27 Oct. 2004) (hereinafter "ECCC Statute") [reproduced in the accompanying notebook at Tab 5].

³ BLACK'S LAW DICTIONARY (8th ed. 2004), *personal jurisdiction* [reproduced in the accompanying notebook at Tab 56].

⁴ David J. Scheffer, *The Future of Atrocity Law*, 25 Suffolk Transnat'l L. Rev. 389, 417 (Summer 2002) [reproduced in the accompanying notebook at Tab 49].

⁵ *Id.*

⁶ ECCC Statute, *supra* note 2 at Art. 2 [reproduced in the accompanying notebook at Tab 5].

The SCSL Statute contains similar limiting language. Article 1 of the SCSL Statute reads:

The Special Court shall...have the power to prosecute persons who bear the *greatest responsibility* for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.⁷

The term “greatest responsibility” closely echoes the terms “senior leaders” and “most responsible” in the ECCC Statute. Early on, the prosecutor of the SCSL argued that this language was simply a guide to the prosecution as they exercised their discretion.⁸ This argument was based on documents establishing the SCSL. In particular, the United Nations (“U.N.”) Secretary-General had argued in his report on the establishment of the SCSL that the language should be a guide to the prosecutor, and specifically stated that it should *not* be understood as a jurisdictional threshold.⁹

The SCSL chambers rejected the argument that the language was simply a prosecutorial guide. It read the language “greatest responsibility” to be a description of personal jurisdiction. As such, it could guide the prosecutor, but it is not limited to prosecutorial discretion.¹⁰ In deciding this, the court paid particular attention to the

⁷ STATUTE OF THE SPECIAL COURT FOR SIERRA LEONE, Art. 1 (2000) (hereinafter “SCSL Statute”) (emphasis added) [reproduced in the accompanying notebook at Tab 14]. Compare the “greatest responsibility” language of the SCSL, the “senior leaders” and “most responsible” language of the ECCC and the broad “those responsible” language used in establishing a governing body in East Timor; *see* U.N. SCOR, 54th Sess., 4057th mtg., U.N. Doc. S/Res/1272 (25 Oct. 1999) [reproduced in the accompanying notebook at Tab 15].

⁸ *See* Prosecutor v. Sam Hinga Norman et al., Case No. SCSL-04-14-PT, Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction Filed on Behalf of Accused Fofana, ¶ 5 (3 March 2004) (hereinafter “SCSL Fofana Decision”) [reproduced in the accompanying notebook at Tab 32].

⁹ The Secretary-General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, delivered to the Security Council*, ¶ 30, U.N. Doc. S/2000/915 (4 Oct. 2000) [reproduced in the accompanying notebook at Tab 6].

¹⁰ SCSL Fofana Decision, ¶ 27.

Security Council's interpretation of "greatest responsibility" as a jurisdictional threshold.¹¹

While the phrase "greatest responsibility" was held to be a description of personal jurisdiction, other sections of the same paragraph were not. The later section of Article 1 reads, "including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone."¹² The court held that this language was solely a guide to the prosecutor and not an element of personal jurisdiction.¹³ Again, the court looked to the correspondence between the Secretary-General and the Security Council for guidance. Both agreed that this was not language defining competence, but rather a guide to the prosecutor.¹⁴ The court found that due to this agreement, the SCSL Statute was amended and approved by the government of Sierra Leone.¹⁵ Thus, this overrode any argument that the language described the personal jurisdiction of the court.¹⁶

¹¹ Letter from the President of the Security Council to the Secretary General, U.N. Doc. S/2001/95 (31 Jan. 2001) [reproduced in the accompanying notebook at Tab 59].

¹² This language was used in considering the indictment of Augustine Gbao. Gbao was a mid-level commander in the RUF, but led the operation that kidnapped and killed U.N. personnel, thus "impeding" the peace process. *See* Prosecutor v. Issa Sesay et al., Case No. SCSL-04-15-PT, Corrected Amended Consolidated Indictment (2 August 2006) [reproduced in the accompanying notebook at Tab 25].

¹³ SCSL Fofana Decision, *supra* note 8 at ¶¶ 24-25 [reproduced in the accompanying notebook at Tab 32].

¹⁴ *See* Letter from the Secretary General to the President of the Security Council, U.N. Doc. S/2001/40 (12 Jan. 2001) [reproduced in the accompanying notebook at Tab 61]; and the response at Letter from the President of the Security Council to the Secretary General, U.N. Doc. S/2001/95 (31 Jan. 2001) [reproduced in the accompanying notebook at Tab 59].

¹⁵ *See* Letter from the Secretary General to the President of the Security Council, U.N. Doc. S/2001/693 (12 July 2001) [reproduced in the accompanying notebook at Tab 62].

¹⁶ SCSL Fofana Decision, *supra* note 8 at ¶ 26.

Possibly guiding the ECCC is the Report of the Group of Experts for Cambodia (“Group of Experts”).¹⁷ The Group of Experts argued that the terms “senior leaders” and “most responsible” should be understood solely as a guide for the prosecutor.¹⁸ The report suggested that the ECCC should define its personal jurisdiction using the phrase, “persons responsible for serious violations of human rights committed in Cambodia,” similar to the jurisdictions of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”).¹⁹

However, as the SCSL rejected the Secretary-General’s suggestions in this matter, so the ECCC seems to have rejected the Group of Experts’ suggestion. The Cambodian Government continued to draft the language of the ECCC Statute counter to the Group of Experts’ recommendation.²⁰ In the agreement between the Government of Cambodia and the U.N. General Assembly, the language specifically identifies the terms “senior leaders” and “most responsible” as the personal jurisdiction of the court.²¹ In fact, Article 2 of the ECCC Statute specifically falls under Chapter II, entitled, “COMPETENCE”. For this reason, the SCSL’s holding that the language is a description of jurisdiction should carry more weight in determining the meaning of “senior leaders” and “most

¹⁷ Group of Experts for Cambodia, REPORT OF THE GROUP OF EXPERTS FOR CAMBODIA ESTABLISHED PURSUANT TO GENERAL ASSEMBLY RESOLUTION 52/135, delivered to the Security Council and the General Assembly, U.N. Doc. S/1999/231, A/53/850 (16 March 1999) (hereinafter “Group of Experts”) [reproduced in the accompanying notebook at Tab 4].

¹⁸ *Id.* at ¶ 111.

¹⁹ *Id.* at ¶ 154.

²⁰ See ECCC Statute, *supra* note 2 at Arts. 1-2 [reproduced in the accompanying notebook at Tab 5].

²¹ DRAFT AGREEMENT BETWEEN THE UNITED NATIONS AND THE ROYAL GOVERNMENT OF CAMBODIA CONCERNING THE PROSECUTION UNDER CAMBODIA LAW OF CRIMES COMMITTED DURING THE PERIOD OF DEMOCRATIC KAMPUCHEA, G.A. Res. 57/228, U.N. GOAR, 57th Sess., U.N. Doc. A/Res/57/228B (22 May 2003) [reproduced in the accompanying notebook at Tab 2].

responsible”. The SCSL’s decisions regarding “greatest responsibility”, along with the wording and position of the terms “senior leaders” and “most responsible” within the ECCC Statute, suggest that they are words of personal jurisdiction, not solely prosecutorial guidance.

As terms of personal jurisdiction, the words “senior leaders” and “most responsible” limit the ECCC’s competence to bring to trial only those individuals falling within those categories.

A. CONSIDERATIONS OF PERSONAL JURISDICTION DURING THE TRIAL PROCESS

Though a court cannot adjudicate an individual unless it has jurisdiction, the issue of whether the court has jurisdiction can often be complicated. If a court does not have jurisdiction over a person, then it cannot proceed with the trial. However, issues of jurisdiction often require factual submissions to determine whether the court has competence. Especially in the matter of international criminal tribunals, these factual submissions may be as extensive as would be submitted in the trial itself.

The ICTY has consistently held that jurisdictional matters requiring factual submissions are to be dealt with at the trial stage, rather than the preliminary stages.²²

The SCSL has also held that the ultimate analysis of personal jurisdiction is an evidentiary matter to be determined at the trial stage.²³

²² See e.g., Prosecutor v. Tihomir Blaskić, Case No. IT-95-15, Decision Rejecting a Motion of the Defence to Dismiss Counts 4, 7, 10, 14, 16, and 18 based on the Failure to Adequately Plead the Existence of an International Armed Conflict, ¶ 7 (4 April 1997) [reproduced in the accompanying notebook at Tab 35]; and Prosecutor v. Momčilo Krajišnik, Case No. IT-00-39 & 40-PT, Decision on Motion Challenging Jurisdiction – with Reasons, ¶ 25 (22 September 2000) [reproduced in the accompanying notebook at Tab 29].

²³ SCSL Fofana Decision, *supra* note 8 at ¶ 44 [reproduced in the accompanying notebook at Tab 32].

The SCSL initially considers the issue during the preliminary hearing. According to Rule 47 of the SCSL Statute, the prosecutor must make out an indictment which includes the name of the suspect, a statement of the charged offenses, and particulars of the offenses. The indictment must also include a case summary.²⁴

Thereafter, a judge must be satisfied that (1) the indictment charges the accused with a crime within the jurisdiction of the SCSL and (2) the case summary, if proven, amounts to a crime particularized in the indictment.²⁵ This judicial review must take into account the personal, substantive, temporal, and territorial limits on the court's jurisdiction.²⁶

In nine of the indictments before the SCSL, the reviewing judge explicitly found that the indictments showed sufficient grounds for believing the accused “has committed crimes *within the jurisdiction* of the court.”²⁷ The court found this sufficient to show that the reviewing magistrate was satisfied that there was some evidence of jurisdiction. Even in a decision that did not use this language to accept an indictment, the SCSL held that

²⁴ SCSL Statute, *supra* note 7 at Art. 47(C) [reproduced in the accompanying notebook at Tab 14]. Compare to the ECCC which requires a submission of the suspect's name, a summary of the facts, the offences charged, the relevant law and the crimes, and dates with signatures of both Co-Prosecutors; Extraordinary Chambers in the Courts of Cambodia, DRAFT INTERNAL RULES, Rule 57 (3 Nov. 2006) [reproduced in the accompanying notebook at Tab 3].

²⁵ *Id.* at art. 47(E).

²⁶ SCSL Fofana Decision, ¶ 31 [reproduced in the accompanying notebook at Tab 32].

²⁷ *See e.g.*, Prosecutor v. Charles Taylor, Case No. SCSL-03-11-I, Decision Approving the Indictment and Order for Non-Disclosure (7 March 2003) [reproduced in the accompanying notebook at Tab 21]; and Prosecutor v. Issa Sessay, Case No. SCSL-03-05-I, Decision Approving the Indictment and Order for Non-Disclosure (7 March 2003) (emphasis added) [reproduced in the accompanying notebook at Tab 26].

the simple fact that the reviewing judge approved the indictment meant that he must have been satisfied that the jurisdictional requirements were met.²⁸

During the pre-trial review of the indictment, the SCSL has held that the standard of review for personal jurisdiction issues should be the same for subject-matter jurisdiction issues: the judge must be satisfied that there is sufficient information to provide reasonable grounds that the accused is a person who bears the greatest responsibility for the crimes.²⁹

The issue of jurisdiction may be brought again at the motion for acquittal stage. When the prosecution case has rested, the defence may bring a motion for acquittal. The court may consider jurisdictional challenges again at this point.³⁰ During the motion for acquittal stage of the AFRC trial at the SCSL, the defence argued that the term “greatest responsibility” amounted to a jurisdictional limitation, and as such, the prosecution must have produced evidence sufficient to show the accused bore the greatest responsibility.³¹ The court agreed that the prosecution must produce evidence to show the accused bore the greatest responsibility, but rejected the defence’s argument that evidence of others bearing the greatest responsibility would lessen the accused’s own culpability.³²

²⁸ SCSL Fofana Decision, ¶ 36.

²⁹ *Id.* at ¶ 38.

³⁰ Prosecutor v. Alex Tamba Brima et al., Case No. SCSL-04-16-T, Decision on Defence Motions for Judgment of Acquittal Pursuant to Rule 98, ¶ 31 (31 March 2006) [reproduced in the accompanying notebook at Tab 17].

³¹ *Id.* at ¶ 31.

³² *Id.* at ¶¶ 38-39.

The SCSL has held that the standard of review for a motion of acquittal must be granted if the prosecution's evidence "could" not support a conviction of one or more counts.³³ A full extensive review of the accused's guilt is not necessary.³⁴

The final determination of the court's competence will ultimately arise during the judgment stage. The ECCC's Rule 97 specifically requires the judgment to include a finding whether the accused falls within the jurisdiction of the court.³⁵ The SCSL has yet to file a judgment in any of its cases, so a final application of the phrase "greatest responsibility" has yet to be decided.³⁶

III. THE SPECTRUM OF PERSONAL JURISDICTION

The personal jurisdiction of the ECCC did not arise in a vacuum. The expression was carefully selected to distinguish it from the phraseology of the other tribunals. The different statutes of the various international criminal tribunals have established different levels of competence for each court and different descriptions of their personal jurisdiction. The statutes and case law of these courts have created a spectrum of personal jurisdiction to which the ECCC can look for guidance. Through an analysis of the jurisdiction of the various courts, the spectrum becomes recognizable.

³³ The rule reads, "If, after the close of the case for the prosecution, the evidence is such that no reasonable tribunal or fact could be satisfied beyond a reasonable doubt of the accused's guilt on one or more counts of the indictment, the Trial Chamber shall enter a judgment of acquittal on those counts." Special Court for Sierra Leone, RULES OF PROCEDURE AND EVIDENCE, adopted 16 Jan. 2002, amended 14 March 2004, Rule 98 (4th rev.) [reproduced in the accompanying notebook at Tab 11].

³⁴ Prosecutor v. Sam Hinga Norman et al., Case No. SCSL-04-14-T, Decision on Motions for Judgment of Acquittal Pursuant to Rule 98, ¶¶ 42-45 (21 October 2005) [reproduced in the accompanying notebook at Tab 31].

³⁵ Extraordinary Chambers in the Courts of Cambodia, DRAFT INTERNAL RULES, Rule 97(3) (3 Nov. 2006) [reproduced in the accompanying notebook at Tab 3].

³⁶ Judgments for the AFRC and CDF trials in the SCSL are expected very soon, but were not released as of the time of writing.

A. THE INTERNATIONAL CRIMINAL COURT

The ICC has the broadest personal jurisdiction of all the international criminal tribunals. Article 1 of the Rome Statute gives the court “power to exercise its jurisdiction over persons for the most serious crimes of international concern.”³⁷ The crimes referred to are enumerated in the Rome Statute and define the subject-matter jurisdiction of the ICC.³⁸

Article 25 provides the court “jurisdiction over natural persons pursuant to the Statute.”³⁹ Article 26 limits the competence of the court, prohibiting the prosecution of children under the age of 18 (at the time of the crime).⁴⁰ These broad definitions give the court has jurisdiction over almost anyone so long as they fall within the subject-matter and temporal jurisdictional requirements, and are adults.

However, the personal jurisdiction of the ICC is limited by the treaty obligations and procedural steps to initiate prosecution. Article 12 states that the ICC only has personal jurisdiction if the crime was committed within the territory of a member state, or the accused is a national of a member state. Non-member states may also temporarily accept ICC jurisdiction for a particular crime.⁴¹ Thus, the ICC only has personal jurisdiction if the accused is associated with a Rome Statute member state.

³⁷ ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, Art. 1, U.N. Doc. A/CONF.183/9 (17 July 1998) (hereinafter “Rome Statute”) [reproduced in the accompanying notebook at Tab 9].

³⁸ *Id.* at Arts. 5-8.

³⁹ *Id.* at Art. 25.

⁴⁰ *Id.* at Art. 26.

⁴¹ *Id.* at Art. 12.

One aspect that differentiates the ICC from other international criminal tribunals is the way personal jurisdiction is related to the procedures used to initiate an investigation. Article 12 controls where the prosecutor initiates an investigation *proprio motu* or a State refers a situation to the prosecutor.⁴² If that individual is not connected to a Rome Statute member State, the ICC as an organization cannot force the State in which the investigation would take place to cooperate if that State has not consented to be bound.⁴³ In other words, the ICC has no power over a non-member State. If the prosecution is to proceed, it can only do so within the confines of Article 12.

However, when the Security Council refers a case it can use its power to force any U.N. member State to cooperate.⁴⁴ Since Security Council resolutions are binding on all U.N. members, the Security Council could legally bind a U.N. member State to cooperate with the ICC, even if that State is not party to the Rome Statute.⁴⁵

Thus, the ICC has no personal jurisdiction over an individual who is not associated with a Rome Statute member State, unless the Security Council refers the situation to the ICC.⁴⁶ But if the Security Council is willing to act along with the ICC, then the ICC effectively has universal personal jurisdiction.⁴⁷

⁴² *Id.* at Art. 12.

⁴³ Kenneth S. Gallant, *Jurisdiction to Adjudicate and Jurisdiction to Prescribe in International Criminal Courts*, 48 Vill. L. Rev. 763, 801 (2003) [reproduced in the accompanying notebook at Tab 40].

⁴⁴ The Security Council has the option to refer cases to the Prosecutor of the ICC. *See* Rome Statute, *supra* note 33 at Art. 13(b). Under Chapter VII of the UN Charter, the Security Council also has the power to make resolutions that are binding on all UN member states.

⁴⁵ Gallant, *supra* note 39, at 801.

⁴⁶ *Id.*

⁴⁷ *Id.* at 820.

Much of the confusion arising from the ICC's personal jurisdiction comes from the fact that there are no solid geographical restrictions to the ICC's jurisdiction. As will be seen below, that is not the case with the ad-hoc or hybrid tribunals.

B. THE AD-HOC TRIBUNALS

The ad-hoc tribunals, the ICTY and ICTR, share a similar phraseology in regards to their personal jurisdiction. The tribunals have “the power to prosecute persons responsible for serious violations of international humanitarian law.”⁴⁸ On its face, this jurisdiction still seems incredibly broad, but each tribunal has other rules and limitations that control their personal jurisdiction as well.

1. The International Criminal Tribunal for the former Yugoslavia

Articles 6 and 7 of the ICTY Statute add to the jurisdictional definition provided in Article 1. Article 6 states that the court has jurisdiction over natural persons.⁴⁹ As such, the court does not have competence over juridical persons, such as associations or organizations.⁵⁰ The ICTY also does not prosecute members of ethnic groups based on their ethnicity.⁵¹ This limitation of personal jurisdiction to natural persons is modeled on the practice of the International Military Tribunal of Nuremberg (“IMT”).⁵²

⁴⁸ See STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, adopted 25 May 1993, amended 28 Feb. 2006, Art. 1 (8th rev.) (hereinafter “ICTY Statute”) [reproduced in the accompanying notebook at Tab 12]; and STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, adopted 8 Nov. 1994, amended 26 March 2004, Art. 1 (8th rev.) (hereinafter “ICTR Statute”) [reproduced in the accompanying notebook at Tab 13].

⁴⁹ ICTY Statute, Art. 6.

⁵⁰ The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), delivered to the Security Council*, ¶¶ 50-51, U.N. Doc. S/25704 (3 May 1993) [reproduced in the accompanying notebook at Tab 7].

⁵¹ The Secretary-General, *Second Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, delivered to the Security Council and the General Assembly*, ¶ 196,

The Secretary-General has confirmed that an important element of personal jurisdiction is the principle of individual criminal responsibility.⁵³ Article 7 defines individual criminal responsibility for the ICTY, providing the court jurisdiction over any “person who planned, instigated, ordered, committed or otherwise aided and abetted” one of the subject-matter crimes of the ICTY.⁵⁴ This may include both military personnel and civilians.

This issue of individual criminal responsibility was considered by the Appeals Chamber in *Tadic*.⁵⁵ In *Tadic*, the defence argued that individual criminal responsibility does not apply during internal armed conflicts.⁵⁶ In deciding the case, the court looked to the IMT. The IMT considered three factors to determine individual criminal responsibility: (1) the clear and unequivocal recognition of the rules of warfare; (2) State practice indicating intent to criminalize those who breach the rules of warfare; and (3)

U.N. Doc. S/1995/728, A/50/365 (23 Aug. 1995) (*prepared by Antonio Cassese, President of the ICTY*) [reproduced in the accompanying notebook at Tab 8].

⁵² M. Cherif Bassiouni, *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 303 (Transnational Publishers, 1996) [reproduced in the accompanying notebook at Tab 51]. *See also* AGREEMENT FOR THE PROSECUTION AND PUNISHMENT OF THE MAJOR WAR CRIMINALS OF THE EUROPEAN AXIS, AND CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL, Arts. 9-10, 82 U.N.T.S. 280 (entered into force 8 Aug. 1945) (hereinafter “IMT Charter”) [reproduced in the accompanying notebook at Tab 1].

⁵³ The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), delivered to the Security Council*, ¶ 53, U.N. Doc. S/25704 (3 May 1993) [reproduced in the accompanying notebook at Tab 7].

⁵⁴ ICTY Statute, *supra* note 48 at Art. 7(1) [reproduced in the accompanying notebook at Tab 40].

⁵⁵ Prosecutor v. Dusko Tadic, Case No. IT-94-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995) [reproduced in the accompanying notebook at Tab 24].

⁵⁶ *Id.* at ¶ 65.

punishment of violations by national courts and military tribunals.⁵⁷ The ICTY adopted these criteria to determine individual criminal responsibility.⁵⁸

In its analysis, the court held that individual criminal responsibility is not strictly limited to the definition found in Article 7 of the ICTY Statute. The court is not limited to prosecuting only those who materially perform the criminal acts, but also those whose actions enabled the perpetrators to carry out the acts.⁵⁹

The words “serious violations” within the ICTY Statute could also raise personal jurisdiction issues. One interpretation is that the words “serious violations” were meant to limit the individual criminal responsibility to leaders and commanders. The argument has been made in relation to contempt charges. The defence in *Jovic* argued that he could not be tried for contempt because contempt was not a “serious violation of international humanitarian law” and thus, the court had no personal jurisdiction over him.⁶⁰ The court agreed that contempt was not a “serious violation” of international humanitarian law, but never addressed whether “serious violation” was indeed a matter of personal jurisdiction. The court held that it has a separate and inherent power to prosecute contempt.⁶¹

It is likely that the phrase “serious violations” relates to the subject-matter jurisdiction of the court. Since the enumerated crimes are already considered “serious

⁵⁷ *Id.* at ¶¶ 128-129.

⁵⁸ *Id.* at ¶¶ 128-129. The Appeals Chamber held that all of these criteria applied to the current situation and thus to internal armed conflicts. For this reason, individual criminal responsibility applied to the conflict in Yugoslavia.

⁵⁹ *Id.* at ¶¶ 191-193.

⁶⁰ Prosecutor v. Josip Jovic, Case No. IT-95-14 & 14/2-R77, Decision to Deny the Accused Josip Jovic’s Preliminary Motion to Dismiss the Indictment on the Grounds of Lack of Jurisdiction and Defects in the Form of the Indictment, ¶ 7 (21 December 2005) [reproduced in the accompanying notebook at Tab 28].

⁶¹ *Id.* at ¶¶ 9-10.

violations of international humanitarian law” any challenge to this section of the ICTY Statute would be related to subject-matter.

The argument that “serious violations” relates to personal jurisdiction is unlikely to be upheld, and has yet to be seriously challenged in the court. If the drafters of the ICTY Statute had intended to limit the jurisdiction to high level leaders and commanders, they would likely have made it clearer, perhaps by using the “major war criminals” language used in the IMT⁶² or by using the phrase “senior leaders” like in the ECCC.⁶³

The ICTY’s jurisprudence suggests that its personal jurisdiction is very broad. It extends to any individual that committed or aided serious violations of international humanitarian law. Due to the wide scope of personal jurisdiction exercised by the ICTY, serious challenges rarely arise.

2. The International Criminal Tribunal for Rwanda

Article 5 of the ICTR Statute is identical to Article 6 of the ICTY Statute.⁶⁴ Like the ICTY, the ICTR only has jurisdiction over natural persons, and not organizations.⁶⁵

⁶² M. Cherif Bassiouni, *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 297-301 (Transnational Publishers, 1996) (citing IMT Charter, Art. 6) [reproduced in the accompanying notebook at Tab 51].

⁶³ ECCC Statute, *supra* note 2 at Art. 2 [reproduced in the accompanying notebook at Tab 5].

⁶⁴ Both courts identically state that they have “jurisdiction over natural persons pursuant to the provisions of the present Statute.” *See* ICTR Statute, *supra* note 48 at Art. 5 [reproduced in the accompanying notebook at Tab 13]; and ICTY Statute, *supra* note 48 at Art. 6 [reproduced in the accompanying notebook at Tab 40].

⁶⁵ *See* John R.W.D. Jones, *THE PRACTICE OF THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA* 500 (Second ed., Transnational Publishers 2000) [reproduced in the accompanying notebook at Tab 53].

And, like the ICTY, the personal jurisdiction of the ICTR extends to civilians as well as combatants.⁶⁶

The ICTR Statute also defines its competence as over “those responsible for serious violations of international humanitarian law.”⁶⁷ The ICTR does not express a limitation with respect to the level of responsibility of the accused, but there is a focus on those who are responsible for genocide.⁶⁸

The ICTR has taken a slightly different approach to analyzing personal jurisdiction than the ICTY. The ICTR considers two distinct issues in determining personal jurisdiction: the class of the perpetrators, and the class of the victims.⁶⁹

i. The Perpetrators

In determining the class of the perpetrators, the ICTR limits its jurisdiction according to nationality.⁷⁰ Article 1 of the ICTR Statute gives the court personal jurisdiction over those who committed crimes in Rwanda, as well as Rwandan citizens who committed crimes in neighboring States.⁷¹ Thus, the court has jurisdiction over three classes of perpetrators: (1) Rwandan citizens committing crimes in Rwanda; (2) Rwandan citizens committing crimes outside Rwanda; and (3) Non-Rwandan individuals

⁶⁶ Prosecutor v. Jean-Paul Akayesu., Case No. ICTR-96-4-T, Judgement, ¶ 634 (2 September 1998) [reproduced in the accompanying notebook at Tab 27].

⁶⁷ ICTR Statute, *supra* note 48 at Art. 1 [reproduced in the accompanying notebook at Tab 13].

⁶⁸ William A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda, and Sierra Leone* 147 (Cambridge University Press 2006) [reproduced in the accompanying notebook at Tab 54].

⁶⁹ Prosecutor v. Alfred Musema., Case No. ICTR-96-13, Judgement and Sentence, ¶ 263 (27 January 2000) [reproduced in the accompanying notebook at Tab 19].

⁷⁰ Schabas, *supra* note 68 at 142.

⁷¹ ICTR Statute, *supra* note 48 at Art. 1.

committing crimes within Rwanda. Noticeably absent are non-Rwandan citizens committing crimes outside of Rwanda, even if they may be related to the conflict. The court does not have jurisdiction over this class of perpetrators.⁷²

Neither the ICTY nor the ICC is limited in this way. In fact, in 1999 the Prosecutor of the ICTY indicated her intent to investigate NATO personnel. Though this never produced any indictments, it is clear that there would be no jurisdictional problem so long as there was a territorial link to the former Yugoslavia.⁷³

ii. The Victims

The victims of the conflict must be those “not taking an active part in the hostilities,”⁷⁴ as described in Common Article 3 of the Geneva Conventions. The court accepts a negative definition of civilians to be anyone that is *not* a combatant. Being so broadly defined, it is left to the court to determine the class of victims on a case-by-case basis.⁷⁵

⁷² Norman G. Printer, Jr., *Establishing an International Criminal Tribunal for Iraq: The Time is Now*, 36 UWLJ L. Rev. 27, 48 (2005) [reproduced in the accompanying notebook at Tab 47]. The investigations ended up being ‘inconclusive’ and when another prosecutor was appointed, the matter was dropped; see Luc Côté, *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, 3 J. Int’l Crim. Just. 162, 181-182 (March 2005) [reproduced in the accompanying notebook at Tab 39].

⁷³ Schabas, *supra* note 68 at 142 [reproduced in the accompanying notebook at Tab 54].

⁷⁴ Prosecutor v. Jean-Paul Akayesu., Case No. ICTR-96-4-T, Judgement, ¶ 629 (2 September 1998) [reproduced in the accompanying notebook at Tab 27].

⁷⁵ Prosecutor v. Alfred Musema., Case No. ICTR-96-13, Judgement and Sentence, ¶ 280 (27 January 2000) [reproduced in the accompanying notebook at Tab 19]. See also Prosecutor v. Clément Kayishema et al., Case No. ICTR-95-1-T, Judgement, ¶ 180 (21 May 1999) [reproduced in the accompanying notebook at Tab 22].

3. Rule 11 *bis* of the ICTY Statute

The ICTY's Rule 11 *bis* was adopted in November 1997 and amended in September 2002.⁷⁶ The rule allows for the transfer of defendants from the ICTY to the national courts after a referral bench considers the gravity of the crimes charged and the level of responsibility of the accused.⁷⁷ The rule was part of a broader strategy to ensure the completion of all ICTY trials by 2008.⁷⁸

In determining a referral, the referral bench must consider the completion strategy as summarized by Security Council Resolution 1503 (2003), which states that all future ICTY activities must concentrate on the “prosecution and trial of the *most senior leaders* suspected of being *most responsible* for crimes within the ICTY's jurisdiction” and transfer all others to the national courts.⁷⁹ While not a jurisdictional element, the ICTY's interpretation of the Rule 11 *bis* language considerably aids an interpretation of the ECCC's jurisdiction.

⁷⁶ ICTY Statute, *supra* note 48 at Rule 11 *bis* [reproduced in the accompanying notebook at Tab 40].

⁷⁷ *Id.* at Rule 11 *bis* (C) and Prosecutor v. Dragomir Milosevic, Case No. IT-98-29/1-PT, Decision on Referral of Case Pursuant to Rule 11 *bis*, ¶¶ 19-23 (8 July 2005) [reproduced in the accompanying notebook at Tab 23]. Compare this to the Secretary General's interpretation of “most responsible” noted above which included a determination of the severity of the crime or the massiveness of its scale: The Secretary-General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, delivered to the Security Council*, ¶ 30, U.N. Doc. S/2000/915 (4 Oct. 2000) [reproduced in the accompanying notebook at Tab 6].

⁷⁸ See Statement by the President of the Security Council, U.N. Doc. S/Prst/2002/21 (23 July 2002) [reproduced in the accompanying notebook at Tab 64]; and U.N. SCOR, 55th Sess., 4240th mtg., U.N. Doc. S/Res/1329 (5 Dec. 2000) [reproduced in the accompanying notebook at Tab 16].

⁷⁹ S.C. Res. 1503, U.N. Doc. S/RES/1503 (28 Aug. 2003) (emphasis added) [reproduced in the accompanying notebook at Tab 10]. The ICTY also modified the language of Rule 28 to reflect the language of Resolution 1503; see Luc Côté, *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, 3 J. Int'l Crim. Just. 162, 185-186 (March 2005) [reproduced in the accompanying notebook at Tab 39].

In *Prosecutor v. Dragomir Milosevic*, the referral bench considered the gravity of the crimes charged and the level of responsibility of the accused in holding that the accused should not be referred because he was a most senior leader that was most responsible for the crimes.⁸⁰ The court considered the gravity of the crimes: a fifteen month campaign that killed and wounded thousands of civilians.⁸¹ It also found that the accused had a high level of command responsibility because he was subordinate only to the highest military commanders.⁸² He was in command of about 18,000 men, and the fact that he joined an already established campaign did not diminish his responsibility.⁸³

More importantly, the referral bench rejected the prosecution’s interpretation of the phrase, “most senior leaders.” The prosecution submitted that the words apply where the accused was “the architect of the overall policy underpinning the alleged crimes and driving their commission.”⁸⁴ The referral bench rejected this narrow interpretation, and instead held that “most senior leaders” covers those who, “by virtue of their position and function in the relevant hierarchy, both *de jure* and *de facto*, are alleged to have exercised such a degree of authority that it is appropriate to describe them as among the ‘most senior’, rather than ‘intermediate’.”⁸⁵

⁸⁰ *Prosecutor v. Dragomir Milosevic*, Case No. IT-98-29/1-PT, Decision on Referral of Case Pursuant to Rule 11 *bis*, ¶¶ 19-23 (8 July 2005) [reproduced in the accompanying notebook at Tab 23].

⁸¹ *Id.* at ¶ 19.

⁸² *Id.* at ¶ 23.

⁸³ *Id.*

⁸⁴ *Id.* at ¶ 22.

⁸⁵ *Id.*

In *Prosecutor v. Todovic*,⁸⁶ the Appeals Chamber formulated four factors to consider when deciding a ruling under Rule 11 *bis*:

- (1) **The temporal scope of the crimes charged.** The court should consider the amount of time that the accused committed the charged crime as one of several relevant factors.⁸⁷
- (2) **The geographic scope of the crimes charged.** The geographic scope, or how wide the physical area was in which the crime took place.⁸⁸
- (3) **The accused's position.** Whether the accused was a “most senior leader” or was just an “intermediary actor”.⁸⁹
- (4) **The number of persons affected by the crimes charged.** How many people were victimized by the accused's actions.⁹⁰

The referral bench used these factors to determine that the accused *Todovic* was a proper candidate for referral. Though the bench agreed that the accused need not be the architect of the overall policy to be considered a “most senior leader”, it ultimately held that in this case the accused was just an intermediary actor.⁹¹

In *Prosecutor v. Kovacevic*, the court used the *Todovic* test when it referred the accused to the national courts. The referral bench found that the Accused was just a

⁸⁶ *Prosecutor v. Savo Todovic*, Case No. IT-97-25/1, Decision on Savo Todovic's Appeal Against Decisions on Referral Under Rule 11*bis* (4 September 2006) [reproduced in the accompanying notebook at Tab 34].

⁸⁷ *Id.* at ¶ 13.

⁸⁸ *Id.* at ¶ 16.

⁸⁹ *Id.* at ¶¶ 17-22.

⁹⁰ *Id.* at ¶¶ 23-26.

⁹¹ *Id.* at ¶¶ 21-22.

battalion commander following orders, and two higher senior leaders had already been convicted for their roles in the crimes. Therefore, the accused was not a “most senior leader.”⁹²

The ICTY’s analysis of the terms “most senior leaders” and “most responsible” is very useful in analyzing the personal jurisdiction of the ECCC.

C. THE SPECIAL COURT FOR SIERRA LEONE

Article 1 of the SCSL Statute reads:

The Special Court shall...have the power to prosecute persons who bear the *greatest responsibility* for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.⁹³

The SCSL has discussed the meaning of the term “greatest responsibility” extensively.

The court has recognized that “greatest responsibility” refers to the court’s personal jurisdiction.⁹⁴ It has also emphasized the distinction between “greatest responsibility” and the language of the ad-hoc tribunals.

1. Interpretation in the U.N. and SCSL

In determining the meaning of “greatest responsibility”, the SCSL has paid special attention to the correspondence between the U.N. Secretary-General and the President of the Security Council during the negotiations to establish the SCSL.

⁹² Prosecutor v. Vladimir Kovacevic, Case No. IT-01-42/2-1, Decision on Referral of Case Pursuant to Rule 11 bis with Confidential and Partly Ex Parte Annexes, ¶ 20 (17 November 2006) [reproduced in the accompanying notebook at Tab 36].

⁹³ SCSL Statute, *supra* note 7 at Art. 1 (emphasis added) [reproduced in the accompanying notebook at Tab 14].

⁹⁴ SCSL Fofana Decision, *supra* note 8 at ¶ 27 [reproduced in the accompanying notebook at Tab 32].

Initially, the Secretary-General, in his report on the establishment of the SCSL, advocated for the use of the phrase “most responsible” to define the court’s jurisdiction.⁹⁵ The Security Council rejected this proposal, opting for the term “greatest responsibility”.⁹⁶ In so doing, the Security Council believed it would be “limiting the focus of the Special Court to those who played a leadership role.”⁹⁷ In a later letter, the Secretary-General agreed with this interpretation.⁹⁸ The Security Council overrode the Secretary-General and the “greatest responsibility” was adopted into the SCSL Statute.

In their correspondence, both the Security Council and the Secretary-General agreed that “greatest responsibility” did not limit the court’s jurisdiction solely to political and military leaders.⁹⁹ But the fact that the individual had a leadership role should be the primary consideration, rather than the severity or scale of the crime.¹⁰⁰

The SCSL has held that a review of “greatest responsibility” should consider whether the accused was (1) a senior member of their particular group and (2) implicated in serious crimes within the jurisdiction of the court.¹⁰¹ If so, they could be considered as

⁹⁵ The Secretary-General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, delivered to the Security Council*, ¶¶ 29-31, U.N. Doc. S/2000/915 (4 Oct. 2000) [reproduced in the accompanying notebook at Tab 6].

⁹⁶ Letter from the President of the Security Council to the Secretary General, ¶ 1, U.N. Doc. S/2000/1234 (22 Dec. 2000) [reproduced in the accompanying notebook at Tab 58].

⁹⁷ *Id.*

⁹⁸ Letter from the Secretary General to the President of the Security Council, ¶ 2, U.N. Doc. S/2001/40 (12 Jan. 2001) [reproduced in the accompanying notebook at Tab 61].

⁹⁹ *Id.*

¹⁰⁰ Letter from the President of the Security Council to the Secretary General, U.N. Doc. S/2000/1234 (22 Dec. 2000) [reproduced in the accompanying notebook at Tab 58].

¹⁰¹ *Prosecutor v. Alex Tamba Brima et al.*, Case No. SCSL-04-16-T, Decision on Defence Motions for Judgment of Acquittal Pursuant to Rule 98, ¶ 38 (31 March 2006) [reproduced in the accompanying

those bearing the greatest responsibility. The fact that evidence may also identify others who bear the greatest responsibility does not eliminate the accused's liability or the court's competence over them.¹⁰²

In the correspondence between the Secretary-General and the President of the Security Council, particular mention was made concerning the phrase, "including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone."¹⁰³ The correspondence suggests, and the SCSL has held, that this part of the Statute is not a jurisdictional limitation. It is to be understood simply as a guide to the prosecutor. An accused can still be found guilty and within the jurisdiction of the SCSL even if he is not found to have threatened the peace process.¹⁰⁴

2. The Prosecutor's Interpretation

The purpose of the "greatest responsibility" language was to focus the prosecutor on the key players in the conflict, but the phrase still offers the prosecutor considerable discretion.¹⁰⁵ In the SCSL, the prosecutor utilized the discretion very conservatively.

notebook at Tab 17]. When the court refers to the "jurisdiction of the court," they are clearly referring to the subject-matter and temporal restrictions.

¹⁰² *Id.* at ¶ 39.

¹⁰³ SCSL Statute, *supra* note 7 at Art. 1 [reproduced in the accompanying notebook at Tab 14].

¹⁰⁴ *See* Letter from Sec Gen to Pres, S/2001/40 [reproduced in the accompanying notebook at Tab 61]; and Letter from Pres to Sec Gen, S/2001/95 [reproduced in the accompanying notebook at Tab 59]; discussed in detail in *Prosecutor v. Alex Tamba Brima et al.*, Case No. SCSL-04-16-T, Decision on Defence Motions for Judgment of Acquittal Pursuant to Rule 98, ¶¶ 32-34 (31 March 2006).

¹⁰⁵ Tom Perriello and Marieke Wierda, *The Special Court for Sierra Leone Under Scrutiny*, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE: PROSECUTIONS CASE STUDIES SERIES 21 (March 2006) [reproduced in the accompanying notebook at Tab 45]. The SCSL was trying to avoid the fierce criticism that befell the ICTY and ICTR for indicting very low level actors; *see* Luc Côté, *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, 3 J. Int'l Crim. Just. 162, 169 (March 2005) [reproduced in the accompanying notebook at Tab 39].

While “greatest responsibility” suggests very narrow jurisdiction, the prosecutor viewed the language as a political compromise and narrowed it further, out of political and financial considerations.¹⁰⁶ Fearing that a large number of indictees under the Statute’s mandate could threaten the stability of the region and the life of the court, the prosecutor adopted an internal standard of “beyond a reasonable doubt” before issuing indictments.¹⁰⁷ This effectively limited the number of accused before the SCSL beyond that required by the Statute.

There were also practical reasons for the narrow use of the prosecutor’s discretion. Others who could be considered as bearing the greatest responsibility were found to be deceased, incarcerated for other reasons, or assisting the prosecution as insider witnesses.¹⁰⁸ For this reason, the prosecution tended to indict only those who were highest on the chain of command, rather than simply those who bore the greatest responsibility.¹⁰⁹ Though this method has been criticized, it is within the prosecutor’s discretion to further limit the mandate as he sees fit.¹¹⁰

¹⁰⁶ Sara Kendall and Michelle Staggs, *From Mandate to Legacy: The Special Court for Sierra Leone as a Model for “Hybrid Justice”*, INTERIM REPORT ON THE SPECIAL COURT FOR SIERRA LEONE, University of California, Berkeley War Crimes Studies Center 6 (April 2005) [reproduced in the accompanying notebook at Tab 43].

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *See e.g.*, Prosecutor v. Issa Sesay et al., Case No. SCSL-04-15-PT, Corrected Amended Consolidated Indictment (2 August 2006) [reproduced in the accompanying notebook at Tab 25]; and Prosecutor v. Alex Tamba Brima et al., Case No. SCSL-04-16-PT, Further Amended Consolidated Indictment (18 February 2005) [reproduced in the accompanying notebook at Tab 18]. In considering the responsibility of the accused, the Prosecutor also considered the accused’s position during specific periods. For example, Santigie Kanu of the AFRC was a top ranking commander, but was particularly high ranking during the Freetown invasion when a large number of crimes took place. Similarly, Augustine Gbao of the RUF was just a mid-level commander for much of the war, but was promoted and played a major role in the kidnapping and killing of UN troops.

¹¹⁰ Kendall & Staggs, *supra* note 106 at 6-7.

It is important to note that the prosecution did not limit itself to indicting rebels and soldiers blamed for starting the war and causing the most atrocities. The court is also trying members of the Civil Defence Force (“CDF”), traditional hunting groups that mobilized in order to defend the democratic government.¹¹¹ The court is considering whether they also bear the greatest responsibility for the crimes during the conflict.

The SCSL Statute specifically singles out peacekeepers and children under the age of 15. Peacekeepers fall within the jurisdiction of their own countries.¹¹² The SCSL is not competent to try those who were under the age of 15 during the time of the crimes, and has specific, limiting rules for trying those between the ages of 15-18.¹¹³ The need for these sections suggests that the drafters were concerned that these groups *could* fall within the jurisdiction of “greatest responsibility”. However, despite the fact that some minors could fall within the jurisdiction of the SCSL, the prosecutor has decided that the standard of “greatest responsibility” was too high to include minors.¹¹⁴

D. THE SPECTRUM OF PERSONAL JURISDICTION

In determining the scope of the ECCC’s personal jurisdiction, it is useful to compare it to the jurisdictions of the other international criminal tribunals. The analysis of the other courts helps us draw a spectrum of personal jurisdiction. On one end is the ICC, which can prosecute all persons so long as the accused is connected to a member

¹¹¹ See Prosecutor v. Samuel Hinga Norman et al., Case No. SCSL-03-14-I, Indictment (5 February 2004) [reproduced in the accompanying notebook at Tab 33].

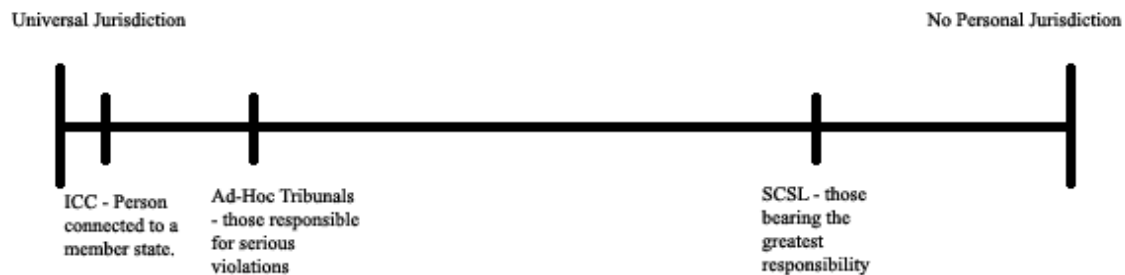
¹¹² SCSL Statute, *supra* note 7 at Art. 1(2)-(3) [reproduced in the accompanying notebook at Tab 14].

¹¹³ *Id.* at Art. 7.

¹¹⁴ Press Release, Special Court for Sierra Leone, Special Court Prosecutor Says He Will Not Prosecute Children (2 November 2002) [reproduced in the accompanying notebook at Tab 63].

state of the Rome Statute or the Security Council uses its power to initiate an investigation. On the opposite end is the SCSL, which limits its jurisdiction to those bearing the greatest responsibility.

Considering the jurisdiction of the other courts, a possible spectrum may look something like this:



The ad-hoc tribunals' jurisdiction is narrower than the ICC's, since they can only prosecute those "responsible for serious violations" of international humanitarian law. As discussed above, this is limited to those who committed crimes in connection with the conflicts in either the former Yugoslavia for the ICTY, or Rwanda for the ICTR. Since the overall personal jurisdiction is not much more limiting than that of the ICC, the language used for the ad-hoc tribunals is jurisdictional similar to the ICC on the spectrum, if slightly more limited.

The SCSL's jurisdiction is limited to those who bear the "greatest responsibility". This language is much narrower than that of either the ICC or the ad-hoc tribunals. And considering the way the prosecutor's decision to narrow it even further, it has become a very limiting jurisdictional element and belongs on the opposite side of the spectrum.

IV. THE JURISDICTION OF THE ECCC

When the Cambodian government originally wrote to the U.N., it asked for assistance in "bringing to justice those persons responsible" for the crimes of the

Democratic Kampuchea.¹¹⁵ This language echoes that of the ICTY and ICTR. Due to concerns about a large number of indictees that language was changed. After long negotiations, the language was modified until it reached its present form in the ECCC Statute.

The ECCC Statute defines its personal jurisdiction in Article 2:

Extraordinary Chambers shall be established in the existing court structure, namely the trial court and the supreme court to bring to trial *senior leaders of Democratic Kampuchea* and those who were *most responsible* for the crimes and serious violations of Cambodian laws related to crimes, international humanitarian law and custom, and international conventions recognized by Cambodia.”¹¹⁶

The description essentially describes two classes of persons that are subject to the ECCC’s jurisdiction: (1) senior leaders of Democratic Kampuchea and (2) those most responsible for the crimes. These phrases have never been used to define an international criminal tribunal’s personal jurisdiction before. However, the ICTY has considered similar language in its Rule 11 *bis*.¹¹⁷

A. SENIOR LEADERS OF DEMOCRATIC KAMPUCHEA

The jurisdictional requirement of “senior leaders of Democratic Kampuchea” creates three elements that must be met in order for an individual to be prosecuted. The person must: (1) hold a senior position in the military or government; (2) have a leadership position (command responsibility); and (3) be a member of Democratic Kampuchea. These elements will be considered in reverse order.

¹¹⁵ Letter from the Secretary-General to the President of the General Assembly and the President of the Security Council, U.N. Doc. S/1997/488, A/51/930 (24 June 1997) [reproduced in the accompanying notebook at Tab 60].

¹¹⁶ ECCC Statute, *supra* note 2 at Art. 2 (emphasis added) [reproduced in the accompanying notebook at Tab 5].

¹¹⁷ *See* above discussion pp. 19-23.

1. Democratic Kampuchea

The language clearly specifies a particular element of personal jurisdiction: namely the individual's affiliation with the Democratic Kampuchea. Only those who were members of the Democratic Kampuchea can be tried under this part of the Statute. This excludes the prosecution of non-Democratic Kampuchea actors, including other political factions regardless of their involvement with the Democratic Kampuchea. It also excludes Vietnamese and Thai officials who may have been involved.¹¹⁸

The SCSL, by comparison, does not have such a limitation. During the establishment of the SCSL, President Kabbah of Sierra Leone initially requested the Special Court to try “members of the Revolutionary United Front (“RUF”) and their accomplices responsible for committing crimes.”¹¹⁹ The U.N. rejected this limitation, and adopted the broader “greatest responsibility” language. While “greatest responsibility” is very a narrow term, it did open up the court to prosecuting other actors in the conflict. In the end, only five members of the RUF were indicted.¹²⁰ While the SCSL's competence is theoretically narrower than the ECCC, it can encompass members of other groups.¹²¹

¹¹⁸ Sarah Williams, *The Cambodian Extraordinary Chambers – A Dangerous Precedent for International Justice?* 53 *International and Comparative Law Quarterly* 227, 238 (January 2004) [reproduced in the accompanying notebook at Tab 50].

¹¹⁹ Letter from the Permanent Representative of Sierra Leone to the United Nations to the President of the Security Council, U.N. Doc. S/2000/786 (10 Aug. 2000) [reproduced in the accompanying notebook at Tab 57].

¹²⁰ *See* Prosecutor v. Issa Sesay et al., Case No. SCSL-04-15-PT, Corrected Amended Consolidated Indictment (2 August 2006) [reproduced in the accompanying notebook at Tab 25]. This indictment only covers Issa Sesay, Morris Kallon, and Augustine Gbao. Two other RUF members were indicted, namely Foday Sankoh and Sam Bockarie, but both died before their trials could begin.

¹²¹ *See* Prosecutor v. Alex Tamba Brima et al., Case No. SCSL-04-16-PT, Further Amended Consolidated Indictment (18 February 2005) [reproduced in the accompanying notebook at Tab 18]; and *See* Prosecutor

2. Senior

The level a leader has in the chain of command is dependent on the hierarchy. There is no specific legal jurisprudence that determines precisely what rank or title is sufficient to be considered ‘senior’, especially considering differing definitions depending on the country and context. This element has to be considered on a case-by-case basis using knowledge of the political and military leadership of the Khmer Rouge and Democratic Kampuchea.

3. Leaders

The term “leader” refers to an individual’s command responsibility. In the ICTY, command responsibility is guided by Article 7(3) of the ICTY Statute. Liability under command responsibility can be both positive and negative. A commander can take a positive action in ordering a subordinate to commit a crime. A commander can also be liable for failing to prevent or punish crimes by subordinates. In order for the person to be liable for negative command responsibility, there needs to be some obligation to act.¹²²

Negative command responsibility has three elements: (1) there must exist a superior-subordinate relationship; (2) the superior had *mens rea* – he knew or had reason to know subordinates were committing or had committed crimes; and (3) the superior failed to take necessary and reasonable measures to prevent or punish the perpetrators.¹²³

v. Samuel Hinga Norman et al., Case No. SCSL-03-14-I, Indictment (5 February 2004) [reproduced in the accompanying notebook at Tab 33].

¹²² Prosecutor v. Zejnil Delalić et al., Case No. IT-96-21, Judgement, ¶ 334 (16 November 1998) [reproduced in the accompanying notebook at Tab 37].

¹²³ *Id.* at ¶ 346.

The superior-subordinate relationship applies to both *de jure* and *de facto* authority.¹²⁴ Thus, it extends beyond the military and civilian commanders to any individual with superior authority.¹²⁵ The converse is also true – the formal status of a position does not automatically create command responsibility. The person must have had actual power of control over the subordinates.¹²⁶

The Group of Experts for Cambodia recognized that the term “leaders” should not automatically be used to prosecute all persons at senior positions of the Democratic Kampuchea or even the Communist Party of Kampuchea.¹²⁷ This is because the list of senior members may not necessarily correspond to a list of those most responsible for the crimes committed. There may very well be senior leaders who had no knowledge or control over the crimes, while others slightly below the senior level may have been very actively involved.¹²⁸

Under the “senior leaders” provision, the ECCC has jurisdiction over only those individuals that were at the senior level of Democratic Kampuchea, and could be liable for command responsibility. While the court is thus limited, it may still have competence over others who bore *de facto* authority, or were lower-ranking members of Democratic Kampuchea, through the “most responsible” jurisdiction.

¹²⁴ *Id.* at ¶ 354.

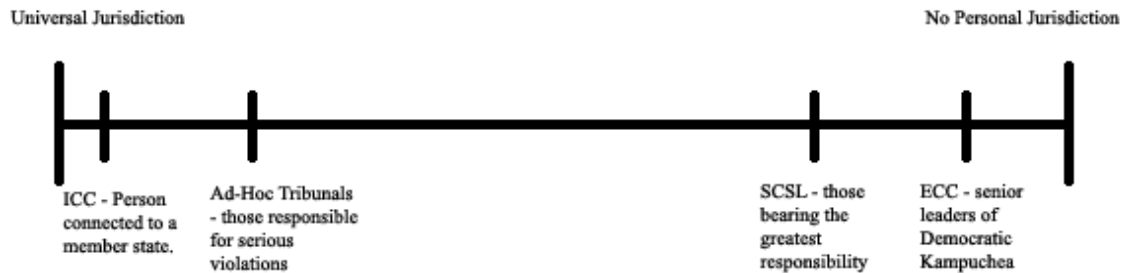
¹²⁵ *Id.* at ¶ 363.

¹²⁶ *Id.* at ¶ 370.

¹²⁷ Group of Experts, *supra* note 17 at ¶ 109 [reproduced in the accompanying notebook at Tab 4].

¹²⁸ *Id.*

On the spectrum of personal jurisdiction, the “senior leaders” language could be viewed as the most limiting. It is narrower than that of the SCSL:



B. MOST RESPONSIBLE

The ECCC Statute’s use of the phrase, “those who were most responsible”¹²⁹ suggests that the drafters did not intend the court to be limited to prosecuting only senior leaders of Democratic Kampuchea. The Group of Experts recognized that many individuals that were not in the charts of senior leaders may have played a significant role in the atrocities: “This seems especially true with respect to certain leaders at the zonal level, as well as officials of torture and interrogation centres such as Tuol Sleng.”¹³⁰

The Group of Experts suggested that leaders at lower levels “who are directly implicated in the most serious atrocities” should be prosecuted as most responsible.¹³¹ A determination of command responsibility is again necessary to determine an individual’s responsibility. The Group of Experts recognized this:

Military commanders and civilian leaders are criminally responsible in the obvious case where they order atrocities and they are also generally responsible if they knew or should have known that atrocities were being or about to be committed by their subordinates and they failed to prevent, stop, or punish them. This would suggest the need to investigate

¹²⁹ ECCC Statute, *supra* note 2 at Art. 2 [reproduced in the accompanying notebook at Tab 5].

¹³⁰ Group of Experts, *supra* note 17 at ¶ 109 [reproduced in the accompanying notebook at Tab 4].

¹³¹ *Id.* at ¶ 110.

the roles of those Khmer Rouge officials in responsible government positions with actual or constructive knowledge of the atrocities.¹³²

As discussed above, a determination must include whether a superior-subordinate relationship exists, whether the superior fulfilled the *mens rea* requirements, and whether the superior failed to take necessary steps to prevent the atrocities.¹³³

Unlike the “senior leaders” jurisdiction, the “most responsible” jurisdiction allows more room to prosecute *de facto* leaders. Any individual with leadership authority could be considered a leader that bears command responsibility. This broader authority is important for prosecuting mid-level commanders that acted as a link between the Central Committee and those on the ground.¹³⁴

The SCSL has already provided some discussion of the scope of “most responsible”. The Secretary-General originally advocated for the use of the term “most responsible” for the SCSL, rather than “greatest responsibility”. The Secretary-General suggested that “most responsibility” should be understood to “denote both a leadership or authority position of the accused, and a sense of the gravity, seriousness or massive scale of the crime.”¹³⁵ This would open the court’s competence to include not only political and military leadership, but also those further down the line of command depending of

¹³² *Id.* at ¶ 81. Compare the Group of Experts’ analysis with the discussion of command responsibility above, pp. 31-32.

¹³³ Prosecutor v. Zejnil Delalić et al., Case No. IT-96-21, Judgement, ¶ 346 (16 November 1998) [reproduced in the accompanying notebook at Tab 18].

¹³⁴ Kelly Dawn Askin, *Prosecuting Senior Leaders of Khmer Rouge Crimes*, JUSTICE INITIATIVES, Open Society Justice Initiative, 72, 76 (18 April 2006) [reproduced in the accompanying notebook at Tab 38].

¹³⁵ The Secretary-General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, delivered to the Security Council*, ¶ 30, U.N. Doc. S/2000/915 (4 Oct. 2000) [reproduced in the accompanying notebook at Tab 6]. Some of this language echoes the jurisprudence of the ICTY Rule 11 *bis* discussed above, pp. 14-23.

the severity of the crime.¹³⁶ This includes a determination not only of the formal position of the suspect, but also the seriousness of the crime.

When the Security Council rejected the use of the phrase “most responsible” in favor of “greatest responsibility”, it stated that doing so would be “limiting the focus of the Special Court to those who played a leadership role.”¹³⁷ The use of the word “limiting” suggests that “most responsible” is broader than “greatest responsibility”.

The ICTY’s jurisprudence on Rule 11 *bis* offers a useful guide to determining whether an accused is one of those “most responsible”. In determining who was “most responsible”, the *Todovic* test can be used. As stated above, the *Todovic* test considers the temporal scope, the geographic scope, the accused’s position, and the number of victims.¹³⁸

While the term “most responsible” does expand the jurisdiction beyond just those senior leaders, it still excludes low-level commanders.¹³⁹ In practice, only senior and mid-level commanders should be prosecuted. While there is some political concern about the number of possible indictees, there is also a risk that interpreting the phrase too narrowly will hurt the prosecutor’s ability to trade insider witness testimony for leniency

¹³⁶ *Id.*

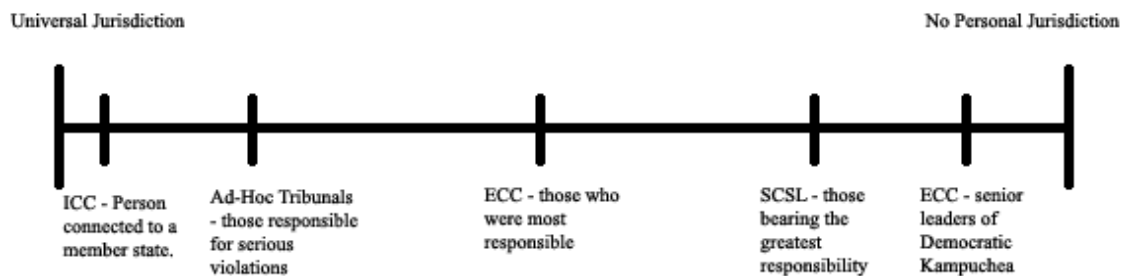
¹³⁷ Letter from the President of the Security Council to the Secretary General, ¶ 1, U.N. Doc. S/2000/1234 (22 Dec. 2000) [reproduced in the accompanying notebook at Tab 58].

¹³⁸ Prosecutor v. Savo Todovic, Case No. IT-97-25/1, Decision on Savo Todovic’s Appeal Against Decisions on Referral Under Rule 11*bis* (4 September 2006) [reproduced in the accompanying notebook at Tab 34].

¹³⁹ Sarah Williams, *The Cambodian Extraordinary Chambers – A Dangerous Precedent for International Justice?* 53 *International and Comparative Law Quarterly* 227, 238-239 (January 2004) [reproduced in the accompanying notebook at Tab 50].

or impunity. Without a credible threat, many potential witnesses may not come forward.¹⁴⁰ Losing this ability may hurt the trials of the most important accused.

The phrase “most responsible” is narrower than the word “responsible” used by the ad-hoc tribunals. “Most responsible” is also broader than “greatest responsibility” used by the SCSL. Thus, on the spectrum of personal jurisdiction, it would fall between the ad-hoc tribunals and the SCSL:



C. THE LINK BETWEEN SENIOR LEADERS AND THOSE MOST RESPONSIBLE

In interpreting Article 2 of the ECCC Statute, the defence may argue that the terms “senior leaders” and “most responsible” are linked, as in they refer to senior leaders *that* were most responsible. However, this argument does not pass muster.

The defence argument would be that “senior leaders of Democratic Kampuchea and those who were most responsible” suggests a link between the two terms. Essentially, that the word ‘and’ requires that the accused must be both a senior leader and one who is most responsible. This would greatly restrict the meaning of both phrases. A senior leader would also have to be most responsible, and anyone deemed most responsible would also have to be a senior leader.

¹⁴⁰ Scott Worden, *An Anatomy of the Extraordinary Chambers*, in BRINGING THE KHMER ROUGE TO JUSTICE: PROSECUTING MASS VIOLENCE BEFORE THE CAMBODIAN COURTS 171, 180-181 (Jaya Ramji and Beth Van Schaack ed., 2005) [reproduced in the accompanying notebook at Tab 55].

This argument would correspond closely to the ICTY’s Rule 11 *bis*, which connects the two terms. As noted above, the ICTY Rule 11 *bis* concentrates on “the most senior leaders suspected of being most responsible.”¹⁴¹ In determining whether an accused falls within this category, the court looks at the gravity of the crimes charged and the level of responsibility of the accused.¹⁴² The defence may argue that the ECCC’s language also requires a similar analysis.

The clearest indication that the terms are not linked is the structure of the sentence itself. ECCC Statute Article 2 provides competence over “senior leaders of Democratic Kampuchea and those who were most responsible for the crimes committed.” The use of the word ‘and’ here separates the two terms rather than connects them. If the purpose of the sentence was to link the phrases, the words ‘and those’ would be eliminated to read, “senior leaders of Democratic Kampuchea who were most responsible.” Since it does not read like this, it is clear that the terms are distinct.

The history of the ECCC’s establishment also suggests that the terms are separate. The Group of Experts recommended that the tribunal should focus on “senior leaders with responsibility over the abuses *as well as* those at lower levels who are directly implicated in the most serious atrocities.”¹⁴³ In fact, the phrase “most responsible” was actually inserted specifically to allow for the prosecution of S-21 Chairman Duch and

¹⁴¹ ICTY Statute, *supra* note 48 at Rule 11 *bis* [reproduced in the accompanying notebook at Tab 40].

¹⁴² Prosecutor v. Dragomir Milosevic, Case No. IT-98-29/1-PT, Decision on Referral of Case Pursuant to Rule 11 *bis*, ¶¶ 19-23 (8 July 2005) [reproduced in the accompanying notebook at Tab 23].

¹⁴³ Group of Experts, *supra* note 17 at ¶ 110 (emphasis added) [reproduced in the accompanying notebook at Tab 4].

other high-ranking S-21 commanders.¹⁴⁴ This strongly suggests that the phrase “most responsible” was intended to be separate from “senior leaders” and must be interpreted to extend to anyone that was most responsible, regardless of their position within the Democratic Kampuchea hierarchy.¹⁴⁵

In practice, all indictees that are senior leaders should also be most responsible, but not all those most responsible must be senior leaders.

D. MOVING FORWARD

While the scope of the term “most responsible” is technically wide enough to include a variety of actors, the ECCC is probably still politically limited to prosecuting members of the Democratic Kampuchea and Khmer Rouge only. The Group of Experts recommends that the ECCC’s mandate only extend to Khmer Rouge members. This recommendation was based on a request by the Cambodian Government.¹⁴⁶

Like the SCSL, both the Cambodian government and the contributing States want to keep the number of indictees low, to minimize expenses and political tension.¹⁴⁷ It is expected that the ECCC will focus on 10-15 individuals who were members of the

¹⁴⁴ Steve Heder, *Reassessing the Role of Senior Leaders and Local Officials in Democratic Kampuchea Crimes: Cambodian Accountability in Comparative Perspective*, in BRINGING THE KHMER ROUGE TO JUSTICE: PROSECUTING MASS VIOLENCE BEFORE THE CAMBODIAN COURTS 377, 409-410 (Jaya Ramji and Beth Van Schaack ed., 2005) [reproduced in the accompanying notebook at Tab 52].

¹⁴⁵ Scott Worden, *An Anatomy of the Extraordinary Chambers*, in BRINGING THE KHMER ROUGE TO JUSTICE: PROSECUTING MASS VIOLENCE BEFORE THE CAMBODIAN COURTS 171, 179 (Jaya Ramji and Beth Van Schaack ed., 2005) [reproduced in the accompanying notebook at Tab 55].

¹⁴⁶ Group of Experts, *supra* note 17 at ¶ 10 [reproduced in the accompanying notebook at Tab 4].

¹⁴⁷ Dinah PoKempner, *The Khmer Rouge Tribunal: Criticisms and Concerns*, JUSTICE INITIATIVES, Open Society Justice Initiative, 32, 36 (18 April 2006) [reproduced in the accompanying notebook at Tab 46].

Central Committee, the most feared physical perpetrators, or military and regional leaders who enforced the policies.¹⁴⁸

The largest problem facing the ECCC is the delay between the time of the crimes and the trials. Many of the senior and intermediate level commanders have died in the roughly 30 years since the crimes were committed. It has been estimated that no more than roughly 60 individuals that could be considered “senior leaders” or “most responsible” are still alive to stand trial.¹⁴⁹ This may be why the “most responsible” language was added to the “senior leaders” language.

Steven Heder and Brian Tittmore have compiled a list of seven candidates for prosecution in the ECCC.¹⁵⁰ One of them, Kae Pok, a member of the Central Committee, has already died.¹⁵¹ Each one documented was a senior leader that could be considered most responsible for the atrocities that occurred during the Democratic Kampuchea regime.

E. A NOTE ON CHILD SOLDIERS

¹⁴⁸ Kelly Dawn Askin, *Prosecuting Senior Leaders of Khmer Rouge Crimes*, JUSTICE INITIATIVES, Open Society Justice Initiative, 72, 76 (18 April 2006) [reproduced in the accompanying notebook at Tab 38]. This should be contrasted with the estimate of a possible 60 individuals falling within the “most responsible” element, see Steve Heder, *The Senior Leaders and Those Most Responsible*, JUSTICE INITIATIVES, Open Society Justice Initiative, 53, 55 (18 April 2006) [reproduced in the accompanying notebook at Tab 41].

¹⁴⁹ Steve Heder, *The Senior Leaders and Those Most Responsible*, JUSTICE INITIATIVES, Open Society Justice Initiative, 53, 55 (18 April 2006) [reproduced in the accompanying notebook at Tab 41].

¹⁵⁰ Steve Heder & Brian D. Tittmore, *Seven Candidates for Prosecution: Accountability for the Crimes of the Khmer Rouge*, War Crimes Research Office of the Washington College of Law, American University, and the Coalition for International Justice, June 2001 [reproduced in the accompanying notebook at Tab 42]. The seven candidates are Nuon Chea, Ieng Sary, Khieu Samphan, Ta Mok, Kae Pok, Sou Met, and Meah Mut.

¹⁵¹ Steve Heder, *The Senior Leaders and Those Most Responsible*, JUSTICE INITIATIVES, Open Society Justice Initiative, 53, 55 (18 April 2006).

Given the difficulty in finding suspects to be prosecuted in the ECCC, it may be tempting to try individuals who were child soldiers at the time of the crimes as those “most responsible”. There is well documented evidence of the use of child soldiers in the Khmer Rouge. It may even be possible that a child could fall within the jurisdiction of the ECCC. However, there is a continuing practice of avoiding prosecution of minors.

The issue of child soldiers has not been raised in either the ICTY or ICTR. The indictees before these tribunals have all been middle-aged men, none of whom was under the age of 18 at the time of the crime.¹⁵² The ICC limits its jurisdiction to those over the age of 18 at the time of the crime.¹⁵³ It has been suggested that a child under the age of 18 does not have the mental capacity to fulfill the *mens rea* requirement of any crimes under the jurisdiction of the ICC.¹⁵⁴

The issue was heavily debated in establishing the SCSL.¹⁵⁵ The war in Sierra Leone was infamous for the use of child soldiers. In discussing the possibility of trying them at the SCSL, the Secretary-General said, “Though feared by many for their brutality, most if not all of these children have been subjected to a process of psychological and physical abuse and duress which has transformed them from victims

¹⁵² William A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda, and Sierra Leone* 140 (Cambridge University Press 2006) [reproduced in the accompanying notebook at Tab 54].

¹⁵³ Rome Statute, *supra* note 33 at Art. 26 [reproduced in the accompanying notebook at Tab 9].

¹⁵⁴ Schabas, *supra* note 64 at 141. This is the same argument made by the SCSL prosecutor in deciding not to prosecute children, *see* Press Release, Special Court for Sierra Leone, Special Court Prosecutor Says He Will Not Prosecute Children (2 November 2002) [reproduced in the accompanying notebook at Tab 63].

¹⁵⁵ Michael Scharf, *The Special Court for Sierra Leone*, American Society of International Law Insights (October 2000) [reproduced in the accompanying notebook at Tab 48].

into perpetrators.”¹⁵⁶ In response to concerns held by the government of Sierra Leone, the jurisdiction was broadened to allow for the prosecution of children, but with limitations.¹⁵⁷ The SCSL’s jurisdiction is limited to those over the age of 15 at the time of the crime and adds procedural limitations for those between 15 and 18.¹⁵⁸ While the jurisdiction of the SCSL could encompass child soldiers, the prosecutor instead used his discretion to decide that no child’s acts could fall within the personal jurisdiction of the SCSL.¹⁵⁹

The Group of Experts also touched on the issue. They suggested that child soldiers should not be tried before the ECCC.¹⁶⁰ For these reasons, child soldiers should not be indicted in the ECCC.

V. CONCLUSION

The terms “senior leaders” and “most responsible” codified in Article 2 of the ECCC Statute are limiting terms of personal jurisdiction. As such, the ECCC only has competence to prosecute individuals that fall into one of those categories. The interpretation of personal jurisdiction will ultimately rest with the ECCC chambers. This is especially true since it is currently the only tribunal using these phrases to define its personal jurisdiction.

¹⁵⁶ The Secretary-General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, delivered to the Security Council*, ¶ 32, U.N. Doc. S/2000/915 (4 Oct. 2000) [reproduced in the accompanying notebook at Tab 6].

¹⁵⁷ Schabas, *supra* note 64 at 141.

¹⁵⁸ SCSL Statute, *supra* note 7 at Art. 7 [reproduced in the accompanying notebook at Tab 14].

¹⁵⁹ Press Release, Special Court for Sierra Leone, Special Court Prosecutor Says He Will Not Prosecute Children (2 November 2002) [reproduced in the accompanying notebook at Tab 63].

¹⁶⁰ Group of Experts, *supra* note 17 at ¶ 106 [reproduced in the accompanying notebook at Tab 4].

The ECCC's personal jurisdiction relates to "senior leaders" *and* those "most responsible" for the atrocities. This allows for a broader scope of indictees to be prosecuted before the chambers. Senior leaders include those who were high ranking members of the Democratic Kampuchea and was likely intended to mean members of the Central Committee. Regardless of their rank, they must have had command responsibility over the atrocities committed.

The phrase "most responsible" allows for the prosecution of lower level leaders. This phrase is broader than the "greatest responsibility" terminology used in the SCSL. It allows for a wider range of indictees, but is still probably limited to those who were members of the Khmer Rouge. In determining whether someone is most responsible, it will be useful to consider the *Todovic* test developed in the ICTY.

Comparing the ECCC's language to the spectrum of personal jurisdiction in the international criminal tribunals will help facilitate an understanding of who is a senior leader or most responsible. Initially it will fall to the prosecutor to determine who falls in these categories, but it is subject to judicial review. The chambers will decide the issue at the end of the trial, after the evidence has been presented.