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Cases 003 and 004 at the Khmer Rouge Tribunal: The Definition of “Most Responsible” Individuals According to International Criminal Law

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Abstract: *The commission of genocide and other large-scale international crimes typically involves a multitude of perpetrators acting in concert. As such, the pursuit of individual criminal accountability following the perpetration of mass crimes has involved oft-controversial decisions of whom to prosecute. This challenge is exemplified by the ongoing controversy in Cambodia concerning the proper scope of prosecutions at the Extraordinary Chambers in the Courts of Cambodia (ECCC) for the crimes of the Khmer Rouge regime from 1975-1979, as the Court’s third and fourth cases have languished amidst considerable controversy for years. This paper examines whether the presumed suspects in the two cases legally qualify as individuals “most responsible” for the crimes of the Khmer Rouge period in Cambodia by considering known information about each suspect in light of available international criminal law jurisprudence and argues that all suspects fall well within any reasonable legal definition of the term “most responsible” as each is implicated directly in extremely grave crimes. As such, it is concluded that there is no viable legal alternative available to bring the two cases to a close save for trial.*

Keywords: *Khmer Rouge, Extraordinary Chambers in the Courts of Cambodia (ECCC), International Criminal Law, Personal Jurisdiction*

Introduction

The commission of genocide and other international crimes are typically large-scale group undertakings. As a result, the selection of whom to prosecute has presented a recurring challenge for international criminal law (“ICL”) practitioners in post-atrocity situations.¹ Within ICL practice to date, prosecutors have primarily targeted individuals who held positions of significant power or were implicated in especially grave crimes.² Meanwhile, lower-profile national or military courts have been sometimes utilized to prosecute less notorious perpetrators.³

The difficulty of selecting the proper scope of prosecutions following mass atrocity crimes is exemplified by the long-simmering controversy concerning how many suspects will ultimately be prosecuted at the Extraordinary Chambers in the Courts of Cambodia (“ECCC”), a special hybrid wing of the Cambodian judiciary created in collaboration with the United Nations (“UN”), commonly referred to as the Khmer Rouge Tribunal.⁴ The Khmer Rouge held power in Cambodia from 17 April 1975 to 6 January 1979.⁵ During this time, when the country was officially renamed Democratic Kampuchea (“DK”), extremely grave international crimes were undoubtedly committed against millions of victims by thousands of individual perpetrators. In designing the ECCC, the Cambodian government and UN agreed, following protracted negotiations, that the Court would have “personal jurisdiction over senior leaders of Democratic Kampuchea and those who were most responsible” for specified international and domestic crimes committed in Cambodia during the Khmer Rouge’s reign.⁶

This paper considers the meaning of the phrase “most responsible” at the ECCC in relation to highly controversial Cases 003 and 004 at the Court, which have languished in their pre-trial investigatory phases for years. More specifically, this paper argues that the term should be interpreted in accordance with prevailing ICL jurisprudence and suggests that all suspects in the two cases fall well within the purview of any reasonable legal interpretation of the term “most responsible.” As such, it is concluded that there is no legitimate legal mechanism – other than trials – available to bring Cases 003/004 to proper conclusions and thus, any effort to shutter the cases must be viewed as a product of considerations extraneous to the legal principles applicable to the ECCC.

To make this argument, a brief overview of the convoluted and controversial histories of Cases 003/004 is provided, followed by an explanation of why resort to ICL jurisprudence for the ECCC to properly interpret the term “most responsible” is warranted by both law and simple necessity. Next, an overview of relevant ICL jurisprudence concerning personal jurisdiction and relative culpability assessments, drawn from the Special Court for Sierra Leone (“SCSL”), International Criminal Tribunal for the former Yugoslavia (“ICTY”) and to a more limited extent, International Criminal Court (“ICC”) is provided.⁷ This jurisprudence is then compared

to the known facts concerning the suspects in ECCC Cases 003/004. Through this analysis it is argued that due to the extreme gravity of the criminal allegations against all suspects in both cases, combined with the apparent high degree of responsibility therein of each respective suspect, all four presumed suspects in the two cases fall squarely within the class of persons properly considered “most responsible” for the crimes committed during the DK period in Cambodia. While this conclusion may be politically and/or financially inconvenient for certain stakeholders and interested parties, from a legal standpoint this paper asserts it is essentially unavoidable and thus, should the cases be dismissed ostensibly on personal jurisdictional grounds, such action would deeply compromise the already fragile integrity of the ECCC as a legal institution. Thus, it is further concluded that should Case 003 or 004 be shuttered prior to trial, a better course would be for the ECCC, UN, Cambodian government, donors and other stakeholders to simply admit that a lack of resources and/or willpower to proceed with the cases are the cause in order to protect the overall legal integrity of the Court and by extension, any judgements reached in Cases 001 and 002.⁸

The Case 003/004 Controversy in Cambodia

The ECCC utilizes a civil law process involving an investigation instigated by the Court’s Co-Prosecutors⁹, but largely carried out by two Co-Investigating Judges (“CIJs”).¹⁰ The ECCC Co-Prosecutors are duty-bound to submit an “Introductory Submission” to the Office of the Co-Investigating Judges (“OCIJ”), triggering an official investigation of a suspect, when they develop “reason to believe” that the suspect(s) in question is implicated in crimes within the ECCC’s jurisdiction.¹¹ Once seized by an Introductory Submission, the CIJs have a “compulsory” duty to investigate the allegations contained in the submission, seeking both inculpatory and exculpatory evidence, and thereafter to issue a “Closing Order” that either commits the suspect(s) to trial and specifies which charge(s) will be adjudicated or alternatively, dismisses all charges effectively ending the case.¹² It is within this investigative phase that Cases 003/004 have languished amidst considerable controversy since being initiated by then-International Co-Prosecutor Robert Petit on 7 September 2009.¹³

There is widespread speculation that the Cambodian government is working to prevent both cases from proceeding to trial. National ECCC Co-Prosecutor Chea Leang opposed the initiation of Cases 003/004,¹⁴ leading to Petit proceeding alone with the filing of Introductory Submissions in both cases.¹⁵ One widely cited example of the government’s apparent opposition to Cases 003/004 occurred in 2010, when Cambodian Prime Minister Hun Sen reportedly “clearly affirmed that case three is not allowed” during a meeting with UN Secretary-General Ban Ki-moon.¹⁶ Although since such time, Cambodian government officials have been more equivocal when commenting on the two cases, the perception that the government monolithically opposes the two cases remains largely in place and is routinely repeated by international media outlets when discussing the cases. Such a perception undoubtedly sends powerful signals to Cambodians with some stake in either case and public perception of the wishes of elite political figures in Cambodia often strongly influences local decision-making processes. In regards to Cases 003/004, the perception that Prime Minister Hun Sen’s ruling Cambodian People’s Party continues to oppose trials is both reflected and further reinforced by the fact that Cambodian lawyers, judges and staff at the ECCC have consistently opposed efforts by their international colleagues to move either case along towards trial.

Throughout 2011, the OCIJ was subjected to a steady stream of criticism from rights groups and jurists, who accused National Co-Investigation Judge You Bunleng and then-International Co-Investigating Judge Siegfried Blunk of colluding to scuttle Cases 003/004 at the behest of the Cambodian government.¹⁷ These criticisms grew louder when the still-confidential Introductory Submissions in both cases were leaked by an online New Zealand news organization, as the two documents detailed allegations of extremely grave crimes.¹⁸ In April 2011, the Co-Investigating Judges closed the investigation into Case 003, but refrained from issuing the official Closing Order necessary to end the case or commit it for trial, leaving it in a state of legal limbo.¹⁹ Next, in August of 2011, Co-Investigating Judges You and Blunk released a list of crimes sites relevant to Case 004 in a document in which both judges expressed “serious doubts whether the suspects [in Case 004] are ‘most responsible.’”²⁰ This disclosure also confirmed that the Case 004 investigation focused on crime sites widely believed to be locations where hundreds of thousands of victims were killed during the DK period.²¹

Eventually, amidst mounting criticism and allegations of investigatory misconduct, Judge Blunk resigned in October 2011, citing the appearance of political interference as his motivation.²² Blunk’s replacement, Reserve International Co-Investigating Judge Laurent Kasper-Ansermet, publicly vowed to aggressively investigate Cases 003/004,²³ but was in turn, blocked from officially removing the “reserve” tag from his title by the Cambodian Supreme Council of Magistracy, which withheld its perfunctory acknowledgment

of Kasper-Ansermet's succession.²⁴ Judge You (who incidentally, sits on the Supreme Council of Magistracy along with ECCC National Co-Prosecutor Chea Leang) also refused to work with Judge Kasper-Ansermet in any capacity, stating in a press release that Judge Kasper-Ansermet "lack[ed] legal authority" to perform any duties as an investigating judge.²⁵ Nonetheless, Judge Kasper-Ansermet began to investigate both cases and attempted to officially reopen the Case 003 investigation.²⁶ Eventually, after being stonewalled in his efforts to investigate for months, Judge Kasper-Ansermet, clearly frustrated by the efforts to block his attempts to investigate Cases 003/004, stated that he was unable to continue fulfilling his duties due to the "dysfunctional" climate within the OCIJ and tendered his own resignation.²⁷ His resignation was followed in short order by Judge Kasper-Ansermet releasing a series of decisions revealing the steps taken by national ECCC staff members to stymie his attempts to investigate Cases 003/004.²⁸ Judge Kasper-Ansermet also released two further decisions in which he opined that both suspects in Case 003 qualify as "most responsible" under ECCC Law and therefore the Case 003 investigation should continue.²⁹

The UN appealed for cooperation from the Cambodian government in appointing a new International Co-Investigating Judge³⁰ and Judge Mark Harmon was approved as the new Co-Investigating Judge on 26 October 2012.³¹ The rift between the national and international officers at the ECCC over pursuing these cases appears to remain however. On 19 December 2012 Judge Harmon unilaterally released a document detailing fourteen additional crime sites he was investigating for Case 004 without any comment from his counterpart, Judge You.³² Next, on 28 February 2013, Judges Harmon and You issued a joint press release that contained separate and diametrically opposed statements concerning Case 003 and whether the investigation was ongoing or completed.³³ Since Judge Harmon's appointment he has proceeded with his investigatory duties, while Judge You has indicated that he will not investigate either case any further.³⁴ Meanwhile, the pressing need to move forward in a timely manner was underscored in March 2013 with the death of ECCC Case 002 accused Ieng Sary and again in June 2013 with the death of presumed Case 003 suspect Sou Met. Nevertheless, even as the ECCC's flagship Case 002 nears a trial judgment the first of a planned series of discrete trials, Cases 003/004 continue to languish amidst considerable uncertainty³⁵ and subject to a fundamental divide between the Court's national and international judges and staff.³⁶

While the fate of Cases 003/004 remains tenuously uncertain, this paper argues that as the ECCC was created to provide a measure of justice for the millions of Cambodians who suffered under the Khmer Rouge regime and to also help improve the rule of law in Cambodia by serving as a model judicial institution, the only legitimate course of action at this juncture is for the Court to pursue each existing case to its proper legal conclusion, based upon a thorough review of all available evidence. As pointed out by Robert Petit's successor, now-departed ECCC International Co-Prosecutor Andrew Cayley, "the importance of [Cases 003/004] more than anything, whatever happens at the end, is that the Cambodian people see a proper legal process taking place."³⁷ This statement underscores the importance of seeing Case 003/004 through for the overall integrity of the ECCC as a legal institution, to both protect the legacy of the Court's other cases and to ensure that the Court cannot be seen as condoning the political interference and corruption that currently runs rampant throughout Cambodia's national judicial system.³⁸ Thus, whether Cases 003/004 reach their proper legal conclusions will serve to either stand against, or reinforce the current rampant subversion of the rule of law in the service of the interests of Cambodia's political elite.

An Exercise in Discretion: Interpreting the Term "Most Responsible"

a. The Duch Appeal Judgment: A "Policy Guide"

While the controversy concerning the future of Cases 003/004 has endured, key jurisprudence concerning the meaning of the jurisdictional language covering those "most responsible" and "senior leaders" in the Agreement and ECCC Law has emerged. On 3 February 2012, the ECCC's highest body, the Supreme Court Chamber ("SCC"), handed down its first judgment, in Case 001, concluding the case against accused former Khmer Rouge prison chief Kaing Guek Eav alias Duch.³⁹ In its judgment, the Chamber dismissed the defence's argument that Duch falls outside of the personal jurisdiction of the ECCC and increased his sentence from 35 years to a life term.⁴⁰ On the issue of personal jurisdiction, the Chamber held that the jurisdiction of the ECCC is limited to "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."⁴¹ The Chamber therefore held any Khmer Rouge official considered "most responsible" is a proper prosecutorial target at the ECCC.

The Chamber retreated however, from interpreting the qualifiers "senior leaders" and "most responsible" as true justiciable jurisdictional requirements later in its judgment, holding further that:

The terms ‘senior leaders’ and ‘most responsible’ are not jurisdictional requirements [...], but operate exclusively as investigatorial and prosecutorial policy to guide the independent discretion of the [CIJs] and Co-Prosecutors as to how best to target their finite resources [...]⁴²

Concerning the phrase “most responsible”, the Chamber reasoned that the term must be interpreted as a guide to discretion rather than true jurisdictional requirement for three main reasons: (1) “[t]here is no objective method for the Trial Chamber to decide on, compare, and then rank the criminal responsibility of all Khmer Rouge officials”; (2) “the notion of comparative criminal responsibility is inconsistent” with the ban on “the defence of superior orders”; and (3) “the determination of whether an accused is ‘most responsible’ requires a large amount of discretion.”⁴³ The import of the SCC’s holding is that “an accused before the ECCC cannot object to the Trial Chamber’s jurisdiction on the basis that the [CIJs] did not limit the indictment to ‘senior leaders’ or the ‘most responsible,’ absent a showing that the [CIJs] abused their discretion.”⁴⁴ The Chamber further noted that the “power of review by the Trial Chamber [regarding personal jurisdiction decisions] is extremely narrow in scope” and requires demonstrating “bad faith, or a showing of unsound professional judgment.”⁴⁵ The Chamber also importantly noted that in the likely scenario that the two CIJs disagree and where the “reason for disagreement on the execution of an action, decision, or order is whether or not a suspect or charged person is a ‘senior leader’ or ‘most responsible’” then, absent a super-majority decision to the contrary by the appellate ECCC Pre-Trial Chamber, ‘the investigation shall proceed.’⁴⁶ The Case 001 Appeal Judgment thus renders determinations of who qualifies as “most responsible” a policy guidance tool, rather than true jurisdiction element, bounded solely by the outer limits of good-faith and sound professional decision-making.

While the Case 001 Appeal Judgment answered some of the most pressing questions concerning the meaning of the terms “senior leader” and “most responsible”, the SCC failed to indicate what factors are properly considered in making such inherently subjective determinations. As it currently stands, whether Cases 003/004 can be shuttered prior to trial without violating the ECCC’s foundational legal documents turns on the issues of the proper bounds of judicial discretion and sound professional judgment in interpreting the phrases “senior leader” and “most responsible” within the Agreement and ECCC Law. This paper argues that because the meaning of the term “most responsible” is not readily apparent, defined in the travaux préparatoires relevant to the ECCC or in any other source of law or interpretation directly applicable to the Court, guidance must be sought from international law in determining the proper factors that must be considered in order for relevant ECCC authorities to exercise sound professional judgment in determining whether a suspect before the ECCC qualifies as a “most responsible.” Furthermore, such jurisprudence dictates that to make such an assessment, the gravity of the alleged crime(s) and level of contribution thereto by the suspect in question must be considered and compared relative to other cases before the same court or tribunal. According to this process of analysis, because each of the presumed suspects in Cases 003/004 are implicated as key players in the perpetration of extremely grave crimes, involving the systematic abuse and killing of many thousands of victims, each suspect should be presumptively considered amongst those “most responsible.” Any other conclusion would be contrary to basic logic and therefore presumptively the product of bad faith and/or unsound professional judgment.

b. Interpreting ECCC Law

The Agreement establishing the ECCC is a bilateral treaty to which the UN and Cambodia are parties. The ECCC Law is legislation passed to effectuate the terms of the Agreement. As such, both documents are to be interpreted according to the Vienna Convention on the Law of Treaties, which states: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”⁴⁷

In his departing decisions regarding personal jurisdiction and the suspects in Case 003, Judge Laurent Kasper-Ansermet noted the holdings of the SCC in Case 001 and acknowledged that the gravity of the alleged crimes and the suspect’s relative degree of responsibility therein are the two main factors to consider regarding assessing whether a suspect qualifies as “most responsible.”⁴⁸ The decisions also conform with ICL practice, as is demonstrated *infra* in this paper.⁴⁹ Scholar Steve Heder and former United States Ambassador-at-Large for War Crimes Issues and current UN Special Expert on the ECCC David Scheffer⁵⁰ have both provided detailed overviews of the negotiations and associated travaux préparatoires leading to the Agreement and ultimate formation of the ECCC.⁵¹ While both scholars offer important insights into the protracted negotiations that culminated in the Court’s creation, they both only go so far as to reach the general conclusion that at no point

was there any agreement – tacit or otherwise – between the UN and Cambodia that the ECCC would prosecute a specific, limited number of individuals or that the precise identities of whom would be prosecuted were decided prior to the formation of the Court. Heder further concludes that while the Cambodian government may have not been pleased with the necessity of ceding power to ECCC investigators, prosecutors and judges to decide who would be investigated and tried, such a concession is inherent in Cambodia's signature, as UN officials were unequivocal that suspects could not be pre-selected.⁵² Scheffer similarly concludes that determinations of which suspects qualify as “most responsible” must be made pursuant to a reasonable interpretation of the term and questions whether under any such reasonable formulation, the likely suspects in Cases 003 and 004 could properly be considered to not qualify as “most responsible.”⁵³

The conclusions of both Heder and Scheffer thus both beg the question of how ECCC lawyers and judges are to arrive at a reasonable interpretation of the term “most responsible”, especially given that the term is not explicitly defined anywhere in the Agreement or ECCC Law. The Agreement itself provides for the procedure to be utilized in precisely such an instance of interpretive lack of clarity. Article 12(1) states:

The procedure shall be in accordance with Cambodian law. Where Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, guidance may also be sought in procedural rules established at the international level.

This process of interpretive guidance is echoed in the ECCC Law Articles 20 new, 23 new and 33 new, which direct the Co-Prosecutors, Co-Investigating Judges and Trial Chamber Judges respectively, to remedy uncertainty regarding interpretation or application of the procedures applicable to the ECCC by seeking guidance in procedural rules established at the international level.⁵⁴

c. The Bounds of Discretion and Sound Professional Judgment

Given that resort to the ordinary meaning of the term “most responsible” provides little guidance in the context of personal jurisdiction for international crimes and (as demonstrated by Heder and Scheffer) the negotiating history and travaux préparatoires simply establish that the precise number of suspects was never agreed upon, Article 12(1) of the Agreement clearly dictates that Cambodian law should next be canvassed for potential guidance. Personal jurisdictional regimes predicated on relative degrees of culpability, however, are inimical to the very foundation of typical domestic criminal legal regimes, as in most domestic criminal prosecutions it is assumed that any person suspected of a serious crime will be investigated and, if the evidence warrants, committed to trial. There is no space in such systems for prosecutors or judges to determine that an individual may be responsible for a very serious crime, yet is not a proper suspect to commit to trial because he or she does not fall amongst those “most responsible” for the crime in question. Instead, domestic penal codes presuppose that if there is sufficient evidence implicating an individual in a crime, they will be prosecuted without any further inquiry necessary.⁵⁵

In light of this general assumption that serious crimes will be prosecuted according to the evidence, unsurprisingly there are no provisions within Cambodian penal law that provide guidance in interpreting what individuals are properly considered “most responsible” for international crimes. Instead, the Criminal Procedure Code of the Kingdom of Cambodia, adopted and entered into force in 2007 by the Cambodian Ministry of Justice,⁵⁶ only provides limited guidance concerning the conduct of pre-trial investigatory procedures and duties and the basic boundaries of discretion in regard to these procedures. On this topic, the Code is similar in many ways to the investigatory procedures in place at the ECCC itself. The Code dictates that in domestic prosecutions, a prosecutor instigates an investigation. And via a “requisition”, the prosecutor confers mandatory jurisdiction on an investigating judge to complete an investigation.⁵⁷ In regards to investigatory discretion, Article 122 of the Code dictates that investigations are “mandatory” for felonies and “optional” for misdemeanors.⁵⁸ This limited discretion takes place when an investigating judge receives a requisition from the prosecutor and once an investigation commences, Article 127 of the Code dictates that the presiding investigating judge “shall perform all investigations that are useful to ascertaining the facts” and further, “shall have the obligation to investigate for charging or acquitting.”⁵⁹ These mandatory duties mirror those which appear in the ECCC's Internal Rules, which dictate that the Co-Prosecutors “shall” open an investigation when they have reason to believe a crime within the ECCC's jurisdiction has been committed⁶⁰ and that judicial investigations are “compulsory for crimes within the jurisdiction of the ECCC.”⁶¹

In order to conclude a domestic criminal investigation, an investigating Cambodian judge must issue a “settlement warrant”⁶² which is similar to the mandatory “Closing Order” at the ECCC.⁶³ The domestic settlement warrant forwards a case for trial or dismissal, the latter in the form of a “non-suit” order.⁶⁴ Article 247 of the Cambodian Criminal Procedure Code further states that the “investigating judge shall issue a non-suit order in the following circumstances: (1) The act committed was not a felony, misdemeanor or petty offense; (2) The perpetrators who committed acts are still not known; [or] (3) There is not enough evidence to charge the accused person.

There is no indication of other discretionary grounds upon which an investigating judge can issue a non-suit order or otherwise decline to forward a case for trial, but each settlement warrant “shall always bear reasons”⁶⁵ and is appealable to the appellate Investigation Chamber of the Cambodian judiciary. The settlement warrant procedure utilized in ordinary Cambodian criminal courts can be contrasted with Rule 67(3) of the ECCC’s Internal Rules, which states that the “Co-Investigating Judges shall issue a Dismissal Order in the following circumstances: (1) The acts in question do not amount to crimes within the jurisdiction of the ECCC; (2) The perpetrators of the acts have not been identified; or (3) There is not sufficient evidence against the Charged Person or persons of the charges.”⁶⁶

As with the Cambodian Criminal Procedure Code, nowhere in any law directly applicable to the ECCC, is it suggested that additional, discretionary grounds exist upon which the Co-Investigating Judges can choose to issue a Dismissal Order.

Article 261 of the Cambodian Criminal Code also dictates that when receiving a complaint concerning an investigation, the appellate Investigation Chamber “shall examine the regularity of the procedures and the good conduct of the proceedings [and if] a reason for annulling is found, the Investigation Chamber may discretionarily nullify the whole or parts of such proceedings.”⁶⁷ The Investigation Chamber may order further investigation if it deems such an act “useful” and can appoint one of its sitting judges to assume the authority of an investigating judge in order to do so.⁶⁸ If the Investigation Chamber takes over an investigation, the judge appointed by the Chamber conducts further investigation and the Chamber concludes the investigation in the same manner as the original investigating judge, by issuing a settlement warrant either committing a suspect to trial or directing issuance of a non-suit.⁶⁹

Consequently, Cambodian law provides scant guidance in sketching the boundaries of the discretion ECCC Co-Investigating Judges enjoy in assessing which suspects are properly considered either “senior leaders” or “most responsible” for the crimes committed during the DK period in Cambodia. For the most part, Cambodian criminal procedural law mirrors the provisions in place at the ECCC, found in the ECCC Law and ECCC Rules, which dictate that investigations are mandatory for crimes within the ECCC’s jurisdiction, all of which are clearly serious and that for such serious crimes, dismissal prior to trial is only a proper outcome when the evidence against a suspect is deficient in some way critical to a successful prosecution. Thus, if anything, a comparative analysis of Cambodian and ECCC procedural law governing investigatory powers suggests that discretion to dismiss charges against individuals who could likely be successfully prosecuted for serious crimes should be construed extremely narrowly, as such a power is not explicitly provided for in either body of law.

d. The Need for International Legal Guidance

In sum, there was no clear consensus amongst the drafters of the Agreement concerning the definition of the term “most responsible” within the Agreement and ECCC Law. Similarly, nowhere in law directly applicable to the ECCC or Cambodian penal law is there any mention of concept of discretionary investigatory trial committal powers predicated on assessments of the relative culpability amongst criminal suspects or suggesting a definition of the term “most responsible.” Indeed, this outcome is wholly unsurprising, as limited personal jurisdictional regimes over serious crimes based on relative assessments of individual culpability are solely and distinctly features of ICL.

Furthermore, resorting to the “object and purpose” of the Agreement to seek insight into the proper definition of the term, as dictated by the Vienna Convention, results in problems of circularity, as the stated object and purpose of the Agreement itself is to bring to justice “senior leaders” and others “most responsible” for the crimes of the Khmer Rouge period.⁷⁰ There is no apparent plain meaning of the term that would make any sense within criminal proceedings and because Cambodian law is predictably provides little help in defining this jurisdictional concept, both the Agreement and ECCC Law dictate that international law should be turned to for assistance in arriving at this critical determination.

As demonstrated below, while international law intentionally refrains from providing an explicit universal definition of relative levels of culpability, ICL jurisprudence does suggest what types of individuals presumptively qualify as amongst those “most responsible” and clearly dictates that any proper decision concerning the relative culpability of an individual must be based on an appraisal of the gravity of the alleged crime(s) and the suspect’s degree of responsibility therein. This assessment process must also use other suspects/accused tried by the same authority as comparative benchmarks in order to avoid inconsistent or conflicting results.

e. The Concept of “Most Responsible” According to International Criminal Law

Once one determines that it is necessary to look to international law for guidance in interpreting the term “most responsible” at the ECCC, one must next consider where to look for useful legal principles. Given that limited jurisdictional regimes based on relative culpability assessments are wholly unique to ICL, jurisprudence from this discipline appears to be good place to start. Indeed, a robust jurisprudence from the SCSL, ICTY and to a lesser extent, ICC on issues of relative culpability, personal jurisdiction and the selection of suspects, combine to offer some helpful guiding principles on the key issue of the proper process and considerations in assessing issues of relative culpability. Practice at these courts and tribunals clearly demonstrate that the two main considerations in determining culpability are the gravity of the alleged crimes and the degree of responsibility therein of the individual in question. Moreover, within existing ICL jurisprudence, gravity and responsibility are to be considered within the context of the overall historical narrative at issue and in comparison to other cases, though not in an overly formal or mathematical fashion.

The Special Court for Sierra Leone: The “Greatest Responsibility”

In 2000, the UN Security Council requested the formation of a court with “personal jurisdiction over persons who bear the greatest responsibility” for the commission of international crimes within Sierra Leone.⁷¹ The result was the SCSL, a hybrid court created pursuant to a treaty between the UN and the government of Sierra Leone with the mandate “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.”⁷² Article 1 of the SCSL Statute confers “the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law.”⁷³

The phrase “greatest responsibility” was a topic of much debate prior to the creation of the SCSL. Then UN Secretary-General Kofi Annan stated that this language should be “understood as an indication of a limitation on the number of accused by reference to their command authority and the gravity and scale of the crimes [and] propose[d] that the more general term ‘persons most responsible’ should be used” and observed:

While those ‘most responsible’ obviously include the political or military leadership, others in command authority down the chain of command may also be regarded ‘most responsible’ judging by the severity of the crime or its massive scale. ‘Most responsible’, therefore, denotes both a leadership or authority position of the Accused, and a sense of the gravity, seriousness or massive scale of the crime.⁷⁴

Ultimately, the SCSL employed the narrower term “greatest responsibility” in its Statute and this phrase was held to operate solely as a guide to prosecutorial discretion.⁷⁵ The Court’s Appeals Chamber held the SCSL Statute, which makes the Prosecutor responsible “for the investigation and prosecution of persons who bear the greatest responsibility,” renders determinations of which individuals are suitable for prosecution a matter of prosecutorial discretion unsuitable for judicial review.⁷⁶ The Chamber emphasized the need for the Prosecutor to “act independently [and] not seek or receive instructions from any Government or from any other source” and concluded in the Prosecutor v. Brima et al. judgment that it would be:

inconceivable that after a long and expensive trial the Trial Chamber could conclude that although the commission of serious crimes has been established beyond reasonable doubt against the Accused, the indictment ought to be struck out on the ground that it has not been proved that the Accused was not one of those who bore the greatest responsibility.⁷⁷

The Chamber did note however, that a “good-faith” standard applies to the exercise of discretion by the Prosecutor.⁷⁸

The SCSL Prosecutor ultimately brought charges against a total of twelve individuals, resulting in nine convictions and the deaths of three accused prior to judgment.⁷⁹ These twelve accused held various positions in the three main parties to the Sierra Leonean conflict the SCSL was created to account for: the Revolutionary United Front (“RUF”), Civil Defence Forces (“CDF”) and Armed Forces Revolutionary Council (“AFRC”). The accused ranged from overall commanders to others who held significant positions, but were clearly subordinated to the highest echelons of power. For example, in *Prosecutor v Sesay et al.*, The SCSL Trial Chamber found that accused Augustine Gbao “was not a member of the AFRC/RUF Supreme Council [responsible for decision-making]” and remained in a single district during the period the AFRC/RUF held power.⁸⁰ Nonetheless, the “Chamber found that Gbao was an ideology instructor and that ideology played a significant role in the RUF movement [and within] RUF controlled territory, [Gbao’s unit] was responsible for the enforcement of discipline and law and order.”⁸¹ In *Prosecutor v Fofana & Kondewa*, accused Allieu Kondewa was the “High Priest” of the CDF responsible for recruitment of new members and holding ceremonies that supposedly immunized combatants from bullets prior to battles.⁸² The Appeals Chamber upheld Kondewa’s convictions, finding that as High Priest, Kondewa “had authority and power to issue oral and written directives; that he could order investigations for misconduct and hold court hearings; and that he had the legal and material ability to issue orders.”⁸³ There was no intimation by the Chamber that the SCSL Prosecutor did not act well within the bounds of good-faith in determining that Gbao and Kondewa qualified as bearing the “greatest responsibility” for crimes committed in Sierra Leone.

ICTY Rule 11bis and Referral Decisions

Neither the International Criminal Tribunal for Rwanda (“ICTR”), nor the ICTY included specific provisions in their founding documents limiting personal jurisdiction to select classes of individuals. Instead, both Tribunals were conferred the “power to prosecute persons responsible” for crimes under their respective subject matter and temporal jurisdictions.⁸⁴ As a result, the ICTR and ICTY have indicted well over two hundred suspects in total.⁸⁵ In response to the ballooning case loads of the two Tribunals, the UN Security Council passed Resolution 1503 in August of 2003, which instructed both Tribunals to “transfer[] cases involving those who may not [qualify as most senior leaders who are most responsible] to competent national jurisdictions.”⁸⁶ The procedure for effectuating such transfers, through “Referral Benches” of judges, was then outlined in Rule 11 bis in the Rules of Procedure and Evidence (“RPE”) for both Tribunals.⁸⁷ Rule 11 bis(C) of the ICTY RPE states that the “Referral Bench shall, in accordance with Security Council resolution 1534⁸⁸ (2004), consider the gravity of the crimes charged and the level of responsibility of the Accused” when determining whether transfer is appropriate.⁸⁹ The ICTR on the other hand, has no similar jurisdictional language in its version of Rule 11 bis⁹⁰ and consequently, referral decisions have instead focused on other considerations, such as fair trial and security concerns.⁹¹

The ICTY eventually referred thirteen accused to national jurisdictions, denied motions for referral concerning four accused and the prosecution withdrew its referral requests concerning five accused.⁹² ICTY Rule 11 bis referral decisions principally turned on determinations of whether the accused in each case were considered “most senior leaders . . . most responsible” for crimes under the Tribunal’s jurisdiction.⁹³ Moreover, the decision of an ICTY Referral Bench whether to refer each case proposed by the prosecutor has been interpreted as a “discretionary one.”⁹⁴

In general terms, the more grave the charged crimes and the more directly an ICTY accused is implicated therein, the more likely such accused will be found ineligible for referral.⁹⁵ However, ICTY Referral Benches struggled to determine the precise line to draw between cases of a seriousness necessitating adjudication at the Tribunal and those suitable for referral.⁹⁶ Relevant factors considered by ICTY Referral Benches include: the number of alleged victims; the duration of the alleged criminal activity; the geographic scope of alleged criminal activity; and the accused’s alleged level of authority at the time(s) relevant to the indictment, when deciding whether referral is appropriate.⁹⁷ If the alleged crimes in the indictment “do not cover a wide area and are limited in duration” then referral becomes “likely.”⁹⁸ The process of assessing the relative gravity of charges in varying cases has not proved an easy task for ICTY judges. As noted by the Referral Bench in *Prosecutor v Ademi & Norac*, it is “impossible to measure the gravity of any crime in isolation” necessitating that each referral application “must also be viewed in the context of other cases tried by [the] Tribunal.”⁹⁹ The Bench however, not explicitly compare the relevant factual allegations to any specific previous ICTY case, leaving the degree of comparison utilized unclear.¹⁰⁰

a. The Referrals of Ljubičić and Trbić

The two most serious ICTY cases referred to national jurisdictions were *Prosecutor v Ljubičić and Prosecutor v Trbić*. Paško Ljubičić held several roles within the Croatian military and at the time relevant to the indictment was allegedly a Military Police Battalion Commander in Central Bosnia.¹⁰¹ The indictment further alleged that a special “Anti-Terrorist Group,” also known as the “Jokers” was created by Ljubičić, which, along with other personnel under Ljubičić’s command, were responsible for:

a series of attacks on Bosnian Muslim towns and villages...which were carried out in January and April 1993 and resulted in the death of more than 100 civilians, detention and cruel treatment of a high number of men, destruction of villages, and religious institutions, plunder and forcible transfer of the population.¹⁰²

Ljubičić was charged with 15 total counts of crimes against humanity and war crimes based on these facts.¹⁰³ The Referral Bench found that, while Ljubičić “was a military commander and had a position of authority, in the context of other cases being tried before [the ICTY], it is not apparent that he was one of the most senior leaders who were the most responsible for the crimes within the [ICTY’s] jurisdiction” and referred his case to Bosnia and Herzegovina (“BiH”).¹⁰⁴

The Trbić case meanwhile, stands out as the only ICTY Rule 11 bis case involving genocide charges.¹⁰⁵ The indictment alleged that Milorad Trbić was “a duty officer in the [Serbian Army], holding the rank of captain” but that “[d]espite his nominal rank, it is alleged that in fact Trbić was subordinated to Lieutenant Drago Nikolić, and that he was responsible, inter alia, for helping manage the Military Police of the Zvornik Brigade.”¹⁰⁶ Trbić was charged with being a member of two separate Joint Criminal Enterprises (JCEs), the objectives of which were “the summary execution and burial of thousands of Bosnian Muslim men and boys captured from the Srebrenica enclave from 12 July 1995 until about 19 July 1995” and “the forcible removal of the Bosnian Muslim population from the Srebrenica and Zepa enclaves to areas outside the control of Republika Srpska.”¹⁰⁷ The Indictment alleged that Trbić:

assisted [...] in organising, coordinating and facilitating the detention, transportation, summary execution and burial of [] Muslim victims[and] acting individually or in concert with other members of the Joint Criminal Enterprise and Conspiracy[,] summarily execute[d] and bur[ied] the able-bodied Muslim men from Srebrenica.¹⁰⁸

Specifically, the Referral Bench found that Trbić’s most significant involvement [was] alleged to have been at the Grbavci School in Orahovac on 14 July 1995, where it is claimed that he and Drago Nikolić personally supervised the Military Police in guarding Muslim prisoners and transporting them to a nearby field to be summarily executed; the Indictment further avers that the [Trbić] executed several of these prisoners himself.¹⁰⁹ Trbić was charged with genocide, conspiracy to commit genocide, crimes against humanity and war crimes.¹¹⁰

The Referral Bench first noted that there is no official hierarchy of crimes under the ICTY’s jurisdiction, and therefore genocide charges do not necessarily render a case non-referable.¹¹¹ Instead, the Bench opined that it “must instead look to the underlying conduct allegedly constituting a given crime, as well as the surrounding circumstances, to determine that crime’s gravity.”¹¹² The Bench then noted that the crimes charged in the Trbić indictment were the “most serious” it had examined in the context of a referral request and were “among the gravest ever charged at [the ICTY].”¹¹³ The Bench however, still referred the case to BiH, finding that among the “literally hundreds of persons involved” in the Srebrenica genocide, Trbić’s “level of responsibility was relatively low” because Trbić had no significant role in “formulating the objectives of the [two] JCEs or in planning or orchestrating how they would be brought to fruition.”¹¹⁴

b. The Denial of Referral for Milošević, Delić and Lukić

The ICTY denied referral requests made by the prosecution in regards to only four accused: Dragomir Milošević, Rasim Delić, Sredoje Lukić and Milan Lukić.¹¹⁵ In 2005, the ICTY Referral Bench denied the Prosecutor’s request to refer Dragomir Milošević’s case to BiH, holding “that the gravity of the crimes charged and the level of responsibility of the Accused, particularly when they are considered in combination, requires that the present case be tried at the [ICTY].”¹¹⁶ Milošević had been charged with fourteen counts of crimes against humanity and war crimes, all in relation to the shelling and sniping campaign in Sarajevo from 1994

to 1995.¹¹⁷ The indictment alleged that troops under Milošević's command had "shelled and sniped at civilians as they conducted their civilian activities such as tending vegetable plots, queuing for bread, collecting water, attending funerals, shopping in markets, riding on trams, riding bicycles, gathering wood, or simply walking with their children or friends."¹¹⁸ The campaign was intended to spread terror among the civilian population and also included indiscriminate aerial bombardments with modified explosives not designed for use against civilian targets.¹¹⁹

Overall, the campaign directed by Milošević was of such a scale that "[i]n addition to the death and injuries that the shelling and sniping caused, the constant threat of death and injury caused extensive trauma and psychological damage to the inhabitants of Sarajevo."¹²⁰ The Referral Bench noted that the original indictment had only charged "a small representative number of individual incidents for specificity of pleading."¹²¹

Milošević was alleged to have been the Chief of Staff of a wing of the Bosnian-Serb Army, the "Sarajevo-Romanija Corps ('SRK') ... from around March 1993 and [became overall Commander of the] SRK on or about 10 August 1994."¹²² Milošević commanded over 18,000 military personnel and also "negotiated, signed and implemented an anti-sniping agreement, local cease-fire agreements, and participated in negotiations relating to heavy weapons and access ... to territory around Sarajevo."¹²³ The Bench found that, although Milošević was subordinate to the supreme military and civilian commanders of the Bosnian-Serb forces, "the phrase 'most senior leaders' used by the Security Council is [not] restricted to individuals who are 'architects' of an 'overall policy' which forms the basis of alleged crimes."¹²⁴ Such an extreme restriction would, in the opinion of the Bench, "diminish the true level of responsibility of many commanders in the field and those at staff level, [who] 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.'"¹²⁵

The Bench also found that the crimes Milošević was charged with were of a gravity that "stand[s] out when compared with other cases before the [ICTY]" based on the extreme carnage wrought during the besieging of Sarajevo, which "killed and wounded thousands of civilians of both sexes and all ages' and caused extensive material destruction," over a period of fifteen months.¹²⁶ The Bench noted that the violence against civilians also escalated once Milošević assumed local command.¹²⁷ Finally, the fact that the specific crimes and underlying factual allegations contained in the indictment may have been already "fully addressed" by the ICTY in a previous case was dismissed by the Bench as "irrelevant."¹²⁸ Based on these findings, the Bench held that Milošević fell into the category of individuals Rule 11 bis "requires" be tried at the ICTY.¹²⁹

In 2007, the ICTY Referral Bench denied the Prosecutor's request to refer the case against Rasim Delić to the authorities of BiH.¹³⁰ According to the indictment, Delić was "commander of the Main Staff of the Army of [BiH] from 8 June 1993 until his retirement on 1 September 2000."¹³¹ In this position, Delić was "subordinate only to the President of [BiH]" and "exercised military command and control over all regular [Army] forces [of BiH]."¹³² In 1993, Delić also allegedly created "the 'El Mujahed Detachment', comprised of foreign volunteers who were prepared to conduct 'Holy War' against the enemies of Bosnian Muslims" and which subsequently "committed killings, maltreatment and rape of civilians and/or enemy soldiers who were captured or had surrendered."¹³³

Delić was charged with four counts of war crimes.¹³⁴ The allegations in the indictment "involve[d] around 100 victims of murder, cruel treatment and rape [...] committed in four locations in Central Bosnia and over a time-span not exceeding three months in 1993 and 1995."¹³⁵ Unlike the Milošević case, the Bench held that Delić's status as a "most senior leader" independently precluded referral, despite the fact that the charged crimes were of a similar gravity to those in previously referred cases.¹³⁶

The third case in which the ICTY denied a prosecution referral request involved cousins Milan and Sredoje Lukić, and initially ordered to be referred to BiH by the Referral Bench.¹³⁷ Milan Lukić sought to keep his case at the Tribunal and successfully appealed the Bench's decision to the ICTY Appeals Chamber.¹³⁸ Milan Lukić allegedly formed a paramilitary group known alternatively as the "White Eagles" or "Avengers" and Sredoje Lukić was alleged to have been a member of this group.¹³⁹ Both men were alleged to have, along with others, "brutally killed some 140 persons and [] severely injured others in two incidents by barricading them in houses and setting the homes on fire. Milan Lukić [was] additionally charged with having killed another 13 persons in three incidents."¹⁴⁰ The Referral Bench found these crimes "very serious" but ultimately concluded that neither accused was a "most senior leader", and ordered referral.¹⁴¹

The Appeals Chamber agreed with the Referral Bench's appraisal of gravity, but found the Bench's "conclusory" summation of Milan Lukić's degree of authority had improperly presupposed that "local" paramilitary leaders could never be considered "most senior leaders."¹⁴² The Appeals Chamber found that

“within his own sphere, [Milan Lukić] was a dominant presence” and that the Referral Bench had placed “undue emphasis on [the] geographic scope” of the alleged crimes.¹⁴³ The Chamber then noted that the White Eagles had acted with impunity and answered to no higher authority for over two years, making Milan Lukić “perhaps the most important paramilitary leader indicted at the [ICTY].”¹⁴⁴ The Appeals Chamber concluded consequently held that the case against Milan Lukić was “too significant to be appropriate for referral” and reversed the Referral Bench’s decision.¹⁴⁵

c. Prosecutorial Discretion at the ICC

The ICC has “jurisdiction over persons for the most serious crimes of international concern.”¹⁴⁶ The Rome Statute instructs the ICC Prosecutor to determine whether there are “substantial reasons to believe” that beginning an investigation would “serve the interests of justice” while “taking into account the gravity of the crime and the interests of victims.”¹⁴⁷ In 2003, the ICC Office of the Prosecutor released a Policy Paper defining its “general strategy” of evaluating potential cases for investigation, stating:

Although any crime falling within the jurisdiction of the Court is a serious matter, the [Rome] Statute clearly foresees and requires an additional consideration of ‘gravity’ whereby the Office must determine that a case is of sufficient gravity to justify further action by the Court. In the view of the Office, factors relevant in assessing gravity include: the scale of the crimes; the nature of the crimes; the manner of commission of the crimes; and the impact of the crimes.¹⁴⁸

In a subsequent publication, the Office further stated that it will “investigate and prosecute those who bear the greatest responsibility for the most serious crimes ... [encompassing] those situated at the highest echelons of responsibility, including those who ordered, financed, or otherwise organized the alleged crimes.”¹⁴⁹ These two publications further confirm the general focus of scarce prosecutorial resources within ICL practice on pursuing prosecutions of individuals who are key players in the perpetration of relatively serious crimes and fall in line with personal jurisdiction jurisprudence from the SCSL and ICTY.

Themes of International Personal Jurisdictional Jurisprudence

From an overview of practice at the SCSL, ICTY and to a lesser extent, ICC, a set of qualitative legal factors to be considered in determining whether an individual is properly considered “most responsible” can be gleaned. Generally, it is clear that individuals qualify as “most responsible” when implicated in especially serious crimes. To evaluate the conduct of an individual suspect, the two most important factors to consider are the relative gravity of the crimes the suspect is implicated in and the relative importance of the suspect’s alleged role in contributing to their commission. Gravity has been assessed in terms of the number of victims affected, the impact of the crimes on victims, the duration and geographic scope of the criminal conduct and nature and manner of perpetration.

While thus far, judges have avoided engaging in grim mathematical accounting by simply comparing death tolls or the overall number of victims affected, these assessments must be made using other ICL cases as reference points, especially those prosecuted by the same court or tribunal. A suspect’s role is evaluated by considering his degree of authority over others involved in the underlying criminal conduct and whether the suspect played a part in the decision-making process that ultimately led to the perpetration of the alleged crimes. Furthermore, these two factors of gravity and responsibility have been viewed holistically, rather than cumulatively. Aside from these qualitative assessments, a clear preference for prosecution is also evident, as only the ICTY has declined to prosecute a suspect based on finding him not amongst those “most responsible” and this finding merely resulted in the suspect’s prosecution in domestic courts. This is a major distinction between the ICTY’s Rule 11 bis decisions and the fate of Cases 003/004 at the ECCC, as there is a fundamental difference between a change from an international to national prosecutorial venue and the functional cessation of criminal proceedings against a person implicated in international crimes. There has never been any suggestion that if some or all Case 003/004 suspects are not committed to trial, they may nonetheless be prosecuted by an ordinary Cambodian criminal court. Instead, should the cases be ended prior to trial at the ECCC, the suspects would escape potential criminal liability altogether. This would be a major departure from the core principle of individual responsibility that defines ICL, as to date no case at one of the major international courts or tribunals has ever been dismissed prior based on a relative assessment of culpability despite the existence of sufficient evidence to otherwise warrant a trial.

The Presumed Suspects in Cases 003 and 004

Although Cases 003/004 both continue to languish in the investigative phase and therefore the identities of the suspects in the two cases remain technically confidential, the names of all five suspects in Cases 003 and 004 have been publicly reported in numerous news articles and some reported suspects have even granted interviews to journalists.¹⁵⁰ Indeed, this public knowledge goes well beyond mere speculation, as the Initial Submissions of the Office of the Co-Prosecutor initiating each case was leaked to New Zealand-based news website Scoop, which subsequently posted the documents for open public download on its website on 27 June 2011.¹⁵¹ In light of this publically available and widespread knowledge, this paper will discuss the roles of the currently presumed suspects. Originally Case 003 concerned two suspects: Meas Muth and Sou Met and Case 004 concerned three suspects: Ta An, Im Chaem and Ta Tith. Sou Met died from complications related to diabetes sometime in June 2013.¹⁵² The following is an overview of the identities and roles within the Khmer Rouge of the four surviving probable suspects drawn from the leaked documents and other publicly available information.

Case 003: Meas Muth and Sou Met

On 16 February 2012, Case 002 accused Nuon Chea's defense counsel named Meas Muth as one of the two suspects in Case 003 during oral argument, apparently confirming the accuracy of the leaked Case 003 Initial Submission.¹⁵³ Meas Muth has also long been considered a potential suspect at the ECCC candidate, as the case against him was previewed in a book on accountability for the crimes of the Khmer Rouge authored by researcher Steve Heder and lawyer Brian Tittmore.¹⁵⁴

Heder and Tittmore allege that Meas Muth, along with his deceased co-suspect Sou Met, rose through the ranks of the Khmer Rouge's Southwest Zone hierarchy¹⁵⁵ and "held predominantly military ranks ... just below the senior level, which positioned them to implement [Khmer Rouge] policies and influence the conduct of lower-level cadre."¹⁵⁶ Meas Muth became "Secretary of Central Committee Division 164, which incorporated the [Khmer Rouge] navy" and was also the son of a prominent Khmer Rouge official named Pang, who died in 1968.¹⁵⁷ According to a report published by Human Rights Watch, Meas Muth commanded "8,000 to 10,000" troops.¹⁵⁸

Case 004: Ta An, Im Chaem and Ta Tith

Ta An, Im Chaem and Ta Tith are all named as suspects in the Third Introductory Submission of the International Co-Prosecutor leaked by Scoop. On 30 January 2012, the Nuon Chea defense also named Ta An and Im Chaem as suspects in Case 004 during questioning of Case 002 witness Prak Yut.¹⁵⁹ The names of these individuals have also repeatedly been published in news articles; along with the name of reported third Case 004 suspect Ta Tith.¹⁶⁰

Ta An is alleged to have risen to the post of Deputy Secretary of the Central Zone in 1977, where approximately 150,000 people, including large numbers of Cham Muslims, were massacred in a series of executions.¹⁶¹ Im Chaem is alleged to have become the Secretary of Preah Net Preah district in Banteay Meanchey province during the 1977 Khmer Rouge purge of the Northwest Zone, where she is reported to have "overs[een] five labor camps and prisons where nearly 50,000 people died."¹⁶² Finally, according to Khmer Rouge researcher Ben Kiernan, Ta Tith was the brother-in-law of infamous Khmer Rouge Standing Committee member and Southwest Zone Secretary Ta Mok and initially held the position of Secretary of Kirivong (District 109) in the Southwest Zone.¹⁶³ Later, Ta Tith reportedly became Deputy Secretary of the Northwest Zone, where he "had knowledge of, ordered and possibly directly participated in the torture and mutilation of prisoners."¹⁶⁴

Gravity of Crimes Implicated in Cases 003 and 004

Just as the names of the suspects in Cases 003 and 004 have been widely reported, the factual bases underlying the cases are also largely matters of public knowledge. Regarding Case 003, then-acting ECCC International Co-Prosecutor William Smith issued a press release on 8 September 2009 stating that the prosecution had "request[ed] judicial investigation of eight (8) distinct factual situations of murder, torture, unlawful detention, forced labour and persecution, [which] if proved, would constitute crimes against humanity, grave breaches of the Geneva Conventions and violations of the 1956 Cambodian Penal Code."¹⁶⁵ Former International Co-Prosecutor Andrew Cayley subsequently issued a press release providing further information relevant to Case 003 on 9 May 2011.¹⁶⁶ Then-Co-Investigating Judges You and Blunk quickly admonished Cayley for releasing this information, but confirmed that the Case 003 investigation includes:

S-21 Security Centre, Kampong Chhang Airport Construction Site, purges of the East, Central and New North Zones, and incursions into Vietnam [which were also implicated in Cases 001 and 002], as well as the following new crime sites and criminal episodes: (1) S-22 Security Centre in the Phnom Penh area; (2) Wat Eng Tea Ngnien Security Centre in Kampong Som Province; (3) Stung Hav Rock Quarry forced labour site in Kampong Som Province; (4) Capture of foreign nationals off the coast of Cambodia and their unlawful imprisonment transfer to S-21 or murder; and (5) Security Centres operated in Rattanakiri Province.¹⁶⁷

Cayley's press release also discussed Case 004, stating that the prosecution had requested "investigation of thirty-two (32) distinct factual situations of murder, torture, unlawful detention, forced labour, and persecution [which] if proved, would constitute crimes against humanity, violations of the 1956 Cambodian Penal Code and genocide."¹⁶⁸ The two judges also published a list of crime sites and topics of investigation for Case 004, which includes eighteen security centres, two prisons, six execution sites and four dam construction/forced labour sites.¹⁶⁹ The CIJs also indicated that the Case 004 investigation involves allegations of genocide perpetrated against Cham Muslims in Kampong Cham province and crimes committed during the Khmer Rouge purges of the Central and Northwest Zones.¹⁷⁰

Security Centres, Prisons and Execution Sites

Security centres were created throughout Cambodia by the Khmer Rouge and were in reality, prisons and work camps used to detain, torture and execute perceived enemies. Typically, execution sites were located near detention centres and consisted of a series of mass graves containing anywhere from several dozen to tens of thousands of victims in each. For example, the Documentation Center of Cambodia ("DC-Cam") has estimated that at Tuol Ta Phuon Prison and Execution Site, which is among the Case 004 investigation sites, there are 250 to 500 mass graves containing between 50,000 and 150,000 victims executed by the Khmer Rouge.¹⁷¹ Other prison sites under investigation related to Cases 003/004 were the sites of similarly massive killing events during the DK period.¹⁷²

Purges

Internal party purges were also a major source of death and suffering during the reign of the Khmer Rouge. The purges of the Northwest and Central Zones, within the purview of Cases 003 and 004, were two of the three largest purges (along with the 1978 purge of the Eastern Zone) and involved mass killing and misery on a shocking scale. According to Kiernan, the standard purge process adopted by the Khmer Rouge was to send trusted cadres under the command of Ta Mok or Northern Zone Secretary Ke Pauk into an area and thereafter systematically arrest and execute local officials.¹⁷³ In 1976, Ke Pauk led a violent purge of the Central Zone and in 1977 Ta Mok's forces purged the Northwest Zone.¹⁷⁴ Kiernan estimates that the death toll "probably exceeded one hundred thousand" victims in 1977 alone during the purge of the Northwest Zone.¹⁷⁵

Worksites

Worksites and forced labour camps were another feature of the Khmer Rouge regime, which caused mass death through both on-site executions and the convergence of overwork, famine, disease and complete lack of medical care.¹⁷⁶ The purview of Case 004 covers Anglong Chrey, Trapeang Thma, Spean Spreng and Prey Roneam Khmer Rouge dam construction sites.¹⁷⁷ These locations were massive worksites involving huge numbers of forced labourers. For example, according to Human Rights Watch, Case 004 suspect Im Chaem assumed responsibility for the construction of Trapeang Thma dam in mid-1977 and "[t]he very harsh conditions imposed on the laborers allegedly under her control resulted in many deaths. Some laborers were executed at the water-control work site for complaining about conditions or being unable to cope with the demands."¹⁷⁸

Genocide of Cham Muslims

In addition to the various international crimes committed at security centres, prisons, execution sites, worksites and during purges, Cases 003/004 stand out as involving allegations of genocidal killings of Cham Muslims, a minority ethno-religious group in Cambodia who died at a much higher rate than ethnic Khmer-Cambodians under the Khmer Rouge period.¹⁷⁹ Indeed, the Khmer Rouge treated Cham Muslims with particular scorn and there is ample evidence suggesting that the regime committed genocide against the Chams.¹⁸⁰ Crimes related to the alleged Khmer Rouge genocide of the Cham are included in both Cases 003 and 004 and Ta An specifically has been implicated in overseeing large-scale massacres, including many thousands of Cham Muslims.¹⁸¹

Conclusion

Based on even a brief overview of known information related to ECCC Cases 003/004, it appears that all four surviving suspects in the cases clearly qualify as “most responsible” individuals. First, it appears to be uncontradicted that all four suspects were Khmer Rouge “officials” during the period from 1975 to 1979. Second and more importantly, the alleged crimes involved – including crimes against humanity, war crimes and genocide – are amongst the most serious crimes in existence, covered large geographic areas, were committed over multiple years and involved millions of total victims, including the deaths of hundreds of thousands of victims according to former International Co-Prosecutor Robert Petit.¹⁸² Indeed, journalist Douglas Gillison has estimated through his research that between 248,990 and 295,190 deaths are involved in the Case 004 allegations alone.¹⁸³

The sheer force of these numbers makes Cases 003/004 stand out among recent prosecutions for international crimes as especially grave. The ICTY for example, found Milan Lukić, Dragomir Milošević and Rasim Delić to all qualify as being amongst those “most responsible” for crimes committed in the former Yugoslavia and declined to refer their cases to national jurisdictions for prosecution. These conclusions were despite the fact that all three cases involved far less grave crimes than ECCC Cases 003/004 in terms of duration, total numbers of victims and the death toll, even though a referral decision resulted solely in a change of venue for trial to a domestic court and not cessation of prosecutions altogether. Moreover, the SCSL Prosecutor, operating pursuant an undoubtedly narrower jurisdictional policy, brought charges against twelve accused, two more than the total of ten suspects at the ECCC and the propriety of doing so was never in any serious doubt. In particular, the Prosecutor did not exceed the bounds of jurisdictional discretion in bringing cases against Augustine Gbao and Allieu Kondewa, who appear to have been subordinated to the highest echelons of power in Sierra Leone, just as the suspects in Cases 003/004 were within the Khmer Rouge hierarchy.

Equally importantly, while the overall number of death toll of the Khmer Rouge period in Cambodia, estimated at 1.7 to 2.2 million lives, dwarfs the total number of deaths in both Yugoslavia and Sierra Leone, making grim comparisons of relative culpability based on death toll percentages between the ECCC, ICTY and SCSL impracticable, ECCC Cases 003/004 still involve far more deaths than Case 001. Indeed, presumed Case 003 suspect Meas Muth is directly implicated in some of the crimes prosecuted in Case 001, as he allegedly sent victims to S-21 prison to be tortured and executed.¹⁸⁴ In Case 001, the Trial Chamber found that “at least 12,273” victims were killed under Duch’s authority.¹⁸⁵ The ECCC Supreme Court Chamber summarily dismissed Duch’s claim on appeal that the ECCC Co-Prosecutors and/or Co-Investigating Judges abused their discretion in considering Duch a “most responsible” person and committing him to trial. Thus, it would appear to be irreconcilable for Duch to be sentenced to life in prison as a person properly considered “most responsible” for the atrocities of the Khmer Rouge by the Co-Prosecutors and Co-Investigating Judges if individuals, some of whom appear to have been Duch’s superiors, and all of whom appear to be directly implicated in equally, if not far more, grave criminal behaviour than Duch, including potential responsibility for tens of thousands more deaths, have the cases against them dismissed.

In sum, it appears former ECCC International Co-Prosecutor Robert Petit was correct in asserting that that all of the suspects in Cases 003/004 “fall well under the jurisdiction of the ECCC.”¹⁸⁶ Furthermore, Judge Laurent Kasper-Ansermet’s outgoing decisions holding that both suspects in Case 003 qualified as “most responsible”¹⁸⁷ also appears strongly supported in both law and fact and it is difficult to envision any scenario wherein sound professional judgment led to any other conclusion. As such, while trials in Cases 003/004 may be politically inconvenient for certain interested parties, trials in both cases appear to be the only defensible course of action at this juncture and any other outcome should be viewed as a product of bad faith or unsound professional judgment. Thus, while Case 002 undoubtedly remains the ECCC’s flagship case, Cases 003/004 may very well determine the Court’s credibility as a legal institution and shape its ultimate legacy.

End Notes

1. Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Regime* (Cambridge: Cambridge UP, 2005).
2. For example, the Nuremberg Tribunal was tasked with prosecuting the “Major War Criminals.” See “Charter of the International Military Tribunal,” art. 6, in Control Council of Germany, “London Agreement” (8 Aug. 1945).
3. For example, following the creation of the International Military Tribunal (“IMT”) at Nuremberg, the victorious Allied forces passed Control Council Law Number 10 (CCL 10), which “establish[ed] a uniform legal basis in Germany for the prosecution

- of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal.” “Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity,” in *Official Gazette: Control Council for Germany*, #3 (1946): 50-55.
4. The ECCC is a hybrid Court formed pursuant to a 2003 treaty between Cambodia and the United Nations (“UN”) to account for the crimes of the Khmer Rouge regime in Cambodia from 1975-1979. See “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,” UN-Cambodia, (6 June 2003) [“Agreement”].
 5. For a historical overview of the Khmer Rouge movement, see Khamboly Dy, *A History of Democratic Kampuchea (1975-1979)* (Phnom Penh: Documentation Center of Cambodia, 2007).
 6. Agreement, *supra* note 4, art. 2(1). Nearly identical language is contained in the Law on the Establishment of the ECCC, which outlines the jurisdiction and composition of the Court. “Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004,” ECCC Doc. NS/RKM/1004/006 (Oct. 27, 2004) [“ECCC Law”]. Article 1 states:
 - a. The purpose of this law is to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.
 7. While each international criminal tribunal and court is distinct from one another and as such, decisions from each are not binding on one another, decisions on personal jurisdiction issues relating to relative degrees of responsibility from these courts and tribunals represent the best (and sole) source of international law analyzing limited personal jurisdictional regimes in circumstances where international crimes are implicated.
 8. This conclusion largely echoes that reached by the Open Society Justice Initiative (OSJI). See, Open Society Justice Initiative, “Recent Developments at the Extraordinary Chambers in the Courts of Cambodia” (Briefing Paper) (March 2013), at 16 [“OSJI March 2013 Briefing Paper”] (Concluding that the “only fully credible solution to [the Case 003/004] dilemma is for donors to commit to fully funding the court through completion of the cases, and for donors and the UN to send a clear message to the RGC that the cases must proceed on the law and evidence alone.”).
 9. The ECCC is a hybrid institution and each position is staffed by both a Cambodian national and international officer. As such, the ECCC has both a national and international co-prosecutor of equal authority. While there have been numerous instances of disagreements between the national and international prosecutors, including whether to pursue Cases 003/004, a fulsome discussion of the relationship between the two offices is outside the scope of this paper.
 10. The ECCC follows a civil law procedure, in which investigations are initiated by the Office of the Co-Prosecutors, but carried out by two Co-Investigating Judges, who are tasked with drafting a closing order in each case, which operates as the indicting document and thus, determines which suspects and charges are committed for trial.
 11. Extraordinary Chambers in the Courts of Cambodia, “Internal Rules (rev. 8),” Rule 53(1) (revised 3 Aug. 2011) [“ECCC Rules”] (“If the Co-Prosecutors have reason to believe that crimes within the jurisdiction of the ECCC have been committed, they shall open a judicial investigation”) (emphasis added).
 12. *Ibid.* Rule 55(1) (“A judicial investigation is compulsory for crimes within the jurisdiction of the ECCC.”); Rule 67 (requiring a Closing Order to conclude an investigation).
 13. See ECCC International Co-Prosecutor, “Statement from the International Co-Prosecutor regarding Case File 003,” *ECCC website*, <http://www.eccc.govkh/en/articles/statement-international-co-prosecutor-regarding-case-file-003> (accessed 1 Nov. 2013).
 14. ECCC National Co-Prosecutor Chea Leang, “Press Release: Statement by the National Co-Prosecutor Regarding Case File 003” (10 May 2011) (on file with author) (opining that “the suspects mentioned the Case File 003 were not either senior leaders or those who were most responsible ...”).
 15. See ECCC Pre-Trial Chamber, Disagreement No. 001/18-11-2008, “Annex 1: Public Redacted Version: Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71 (English),” (18 Aug. 2009); see also ECCC Acting International Co-Prosecutor, “Statement of the Acting International Co-Prosecutor,” *ECCC website* (8 Sept. 2009), http://www.eccc.govkh/sites/default/files/media/ECCC_Act_Int_Co_Prosecutor_8_Sep_2009_%28Eng%29.pdf (accessed 1 Nov. 2013).
 16. Suy Se, “Cambodian PM says no third Khmer Rouge trial,” AFP News, 27 Oct. 2010.
 17. For an overview of this controversy, see Douglas Gillison, “Justice Denied,” *Foreign Affairs* (23 Nov. 2011); see also OSJI March 2013 Briefing Paper, *supra* note 8 at 11 (internal citations omitted).
 18. See, e.g., OSJI March 2013 Briefing Paper, *supra* note 8; see also Human Rights Watch, “Cambodia: Judges Investigating Khmer Rouge Crimes Should Resign,” (3 Oct. 2011), <http://www.hrw.org/news/2011/10/03/cambodia-judges-investigating-khmer-rouge-crimes-should-resign> (accessed 2 Nov. 2013).
 19. ECCC Office of the Co-Investigating Judges, Case No. 003/07-09-2009-ECCC-OCIJ, “Notice of Conclusion of Judicial Investigation,” Doc. No. D13 (28 Apr. 2011).
 20. ECCC Office of the Co-Investigating Judges, “Statement by the Co-Investigating Judges Regarding Civil Parties in Case 004,” (8 Aug. 2011), <http://www.eccc.govkh/en/articles/statement-co-investigating-judges-regarding-civil-parties-case-004> (accessed 2 Nov. 2013).

21. An overview of the crimes implicated in Cases 003 and 004 is provided *infra*, at 29-32; *See also* Douglas Gillison, "Extraordinary Injustice," *The Investigative Fund* (27 Feb. 2012), <http://www.theinvestigativefund.org/investigations/international/1612/?page=2> (accessed 2 Nov. 2013).
22. Judge Siegfried Blunk, "Press Release by the International Co-Investigating Judge," (10 Oct. 2011) (on file with author) (announcing Judge Blunk's resignation).
23. Judge Laurent Kasper-Ansermet, "Press Release by the International Reserve Co-Investigating Judge," (6 Dec. 2011) (on file with author); Judge Laurent Kasper-Ansermet, "Statement by the International Reserve Co-Investigating Judge," (9 Jan. 2012) (on file with author).
24. The Supreme Council of Magistracy is the Cambodian body responsible for overseeing judicial appointments. *See* Bridget Di Certo & Sokheng Vong, "Judge Rejection 'a Breach,'" *Phnom Penh Post* (23 Jan. 2012). For an excellent summary of the progression of this issue, *see* OSJI March 2013 Briefing Paper, *supra* note 8.
25. Judge You Bunleng, "Press Statement of the National Co-Investigating Judge (unofficial translation)," (6 Dec. 2011) (on file with author); *see also* Judge You Bunleng, "Press Statement of the National Co-Investigating Judge (unofficial translation)" (9 Jan. 2012) (on file with author).
26. *See* Bridget Di Certo, "Case 004 Investigation Rolls On," *Phnom Penh Post* (1 Mar. 2012); *see also* May Titthara, Bridget Di Certo & Shane Worrell, "Ball Rolling on KRT Cases," *Phnom Penh Post* (Mar. 6, 2012).
27. Judge Laurent Kasper-Ansermet, "Press Release by the International Reserve Co-Investigating Judge" (19 Mar. 2012) (on file with author) (announcing Judge Kasper-Ansermet's resignation).
28. Judge Laurent Kasper-Ansermet, "Note of the International Reserve Co-Investigating Judge to the Parties on the Egregious Dysfunctions Within the ECCC Impeding the Proper Conduct of Investigations in Cases 003 and 004," Case File Nos. 003/07-09-2009-ECCC-OCIJ & 004/07-09-2009-ECCC-OCIJ, Doc. No. D38 (21 Mar. 2012).
29. ECCC Case No 003/07-09-2009-ECCC-OCIJ, "Decision on Personal Jurisdiction and Investigative Policy Regarding Suspect," Doc. D48 (2 May 2012); Case No. 003/07-09-2009-ECCC-OCIJ, "Decision on Personal Jurisdiction and Investigative Policy Regarding Suspect," Doc D49 (2 May 2012).
30. Michelle Nichols, "UN's Ban to Appoint New Judges for Cambodia Tribunal," *Reuters* (30 Mar. 2012).
31. ECCC Public Affairs Office, "Mark Harmon Sworn in as International Co-Investigating Judge" ECCC Press Release (26 Oct. 2012).
32. Judge Laurent Kasper-Ansermet, "Statement by the International Co-Investigating Judge Regarding Additional Crime Sites in Case File 004," (19 Dec. 2012).
33. Judges You Bunleng & Mark Harmon, "Statement by the Co-investigating Judges Regarding Case 003," (28 Feb. 2013). Judge You stated that he considered the Case 003 investigation closed with no indictment being issued. Meanwhile, Judge Harmon stated that he was actively investigating Case 003.
34. Laurent Crothers, "Government-Opposed KRT Investigation Proceeds," *The Cambodia Daily* (6 July 2013).
35. Anne Heindel, "Legal Commentary: Case 004 Suspect Denied Case File Access" *The Cambodia Tribunal Monitor*, <http://www.cambodiatribunal.org/2013/09/30/legal-commentary-case-004-suspect-denied-case-file-access/> (accessed 3 Nov. 2013).
36. Indeed, the national staff and judges at the ECCC have uniformly maintained the legally untenable position that the decision to even begin to investigate the suspects in Cases 003/004 has not been properly made. These individuals have consistently been of the opinion that because the National Co-Prosecutor and National Co-Investigating Judge opposed initiation of the two cases, that the cases were not truly and properly under investigation. National ECCC Pre-Trial Chamber judges have also stated that personal jurisdiction at the ECCC has yet to be finally decided, despite the ruling in the Case 001 Appeal Judgment on this issue by the Supreme Court Chamber. *See e.g.* ECCC Case File No. 004/07-09-2009-ECCC/OCIJ (PTC05), Public Redacted Version: Considerations of the Pre-Trial Chamber on [Redacted's] Appeal Against the Decision Denying his Requests to Access the Case File and Take Part in the Judicial Investigation (Opinion of Judge Prak Kimsan, Ney Thol and Huot Vuthy), para. 13, Doc. No. D12114/II4 (15 Jan. 2014) (ECCC Pre-Trial Chamber) "After being seized of the Third Introductory Submission, the Co-Investigating Judges have not yet decided to place any person under judicial investigation. In this sense, [redacted] et. al who are the suspects have not been accorded the status of the Charged Person or Accused as of now."). Furthermore, in references to Cases 003/004, the official Court Report of the ECCC states that "the international" side of the OCIJ is investigating the cases, clearly distancing National Co-Investigating Judge You Bunleng and his staff from the investigations. *See e.g.* ECCC Court Report (Feb. 2014) at 4 ("During the month of January, the international side of the Office of the Co-Investigating Judges (OCIJ) continued the investigations of Cases 003 and 004.").
37. *Quoted in* Mony Say, "With Trial Under Way, Tribunal Faces Questions of Legacy," *VOA (Voice of America) News* (5 Dec. 5, 2011), <http://www.voanews.com/khmer-english/news/With-Trial-Under-Way-Tribunal-Faces-Questions-of-Legacy-135024278.html> (accessed 2 Nov. 2013).
38. As pointed out by OSJI and other human rights organizations, the "Cambodian government regularly uses the domestic justice system to punish political opponents and secure impunity for political allies." OSJI March 2013 Briefing Paper, *supra* note 8 at 11 (internal citations omitted).
39. *Case of Kaing Guek Eav alias "Duch"*, Case No. 001/18-07-2007-ECCC/SC, Appeal Judgment, Doc. No. F28 (3 Feb. 2012) (ECCC Supreme Court Chamber) ["*Duch* Appeal Judgment"].
40. *Ibid* ¶ 383 (Judges Klonowiecka-Milart and Jayasinghe dissenting).

41. *Ibid* ¶¶ 53, 57.
42. *Ibid* ¶ 79.
43. *Ibid* ¶ 62, citing ECCC Law, art. 29.
44. *Ibid* ¶ 70.
45. *Ibid* ¶ 80.
46. *Ibid* ¶ 65, quoting ECCC Law, art. 23 new (subsequent citations omitted).
47. Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, art. 31(1) (entered into force 27 January 1980).
48. See ECCC Docs D48 & D49 *supra* note 29.
49. *Ibid* Doc D49, ¶ 16 (“With regard to the gravity of the crimes alleged, relevant factors include but are not limited to: (a) the number of victims; (b) the geographic and temporal scope of the crimes; and (c) the manner in which the crimes were committed and the number of separate incidents.”) (internal citations omitted), para 21 (With regard to level of responsibility “[r]elevant factors include, but are not limited to : (a) the Suspect’s position in the hierarchical structure; (b) the procedure followed for his appointment to said position; (c) the permanency of his position; (d) the number of subordinates; (e) the Suspect’s capacity to issue orders; (f) whether the orders were in fact followed by his subordinates; (g) the Suspect’s actual knowledge that his subordinates were committing crimes, including knowledge of the number, type and scope of the crimes, the time during which they were committed, their geographic location, as well as the eventual widespread nature of the acts; (h) the Suspect’s authority to negotiate, sign or implement agreements;47 (i) the temporal scope of the Suspect’s control; (j) control of access to territory; (k) the actual role of the Suspect in the commission of the crimes; (l) whether those more senior in rank than the Suspect have already been convicted.”) (internal citations omitted).
50. Ambassador Scheffer was also deeply involved in the negotiating process leading to the creation of the ECCC.
51. See Steve 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*, (2 Aug. 2011), <http://www.cambodiatribunal.org/sites/default/files/A%20Review%20of%20the%20Negotiations%20Leading%20to%20the%20Establishment%20of%20the%20Personal%20Jurisdiction%20of%20the%20ECCC.pdf> (accessed 1 Nov. 2013) [Heder, “Review”]; David Scheffer, “The Negotiating History of the ECCC’s Personal Jurisdiction,” *Cambodia Tribunal Monitor*, 22 May 2011, http://www.cambodiatribunal.org/sites/default/files/ctm_blog_5-22-2011.pdf (accessed 1 Nov. 2013).
52. Heder, “Review,” *ibid* at 41. Noting that:
 - a. [Case 001 suspect] Duch had been added to the list more or less explicitly as an example of another most responsible, bringing the total of named suspects to six. If four or more additional suspects were to be put forward as candidates for prosecution, it was most logical to assume that they should be drawn from among as yet unidentified or publicly unnamed members of the Central Committee, DK government ministers and mid-level CPK cadre, political or military. Certainly, despite some inconsistency, neither Hun Sen nor other authoritative RGC officials had definitively ruled out the possibility that middle-echelon CPK cadre could be prosecuted, as long as early defectors like Hun Sen himself, Chea Sim and Heng Samrin were excluded. This was so even if there was much to indicate such an expansive but qualified coverage was not their preference, and thus that there was reason to doubt the sincerity of RGC statements to the effect that they were prepared to accept an interpretation of the ECCC’s personal jurisdiction including middle level CPK —leaders.
53. Scheffer, *supra* note 51 at 11. Concluding that:
 - a. It is unfortunate that Cambodian Co-Prosecutor Chea Leang publicly declared on May 10, 2011, that the unnamed additional suspects in “Case File 003 were not either senior leaders or those who were most responsible during the period of Democratic Kampuchea.” How either she or even the Co-Investigating Judges could possibly arrive at that view, given what is publicly known now from media sources about the likely suspects and the crimes allegedly committed by them, and given any reasonable interpretation of those “most responsible” within the ECCC’s personal jurisdiction in light of the negotiating history of the ECCC Law, will be grist for historians for decades to come. Is this politics or law speaking to us?
54. ECCC Law, *supra* note 6, arts. 20 new, 23 new, 33 new.
55. For example, the Cambodian Penal Code states only in article 4 that “Each person is responsible for his/her act only” and makes no further mention of predicates for criminal responsibility. Cambodian Penal Code (2009), unofficial English translation.
56. “Code of Criminal Procedure of the Kingdom of Cambodia,” adopted by the National Assembly with 83/83 votes on 7 June 2007 and adopted by the Senate with 51/51 votes and entered into force on 24 July 2007, online: Organisation for Economic Co-Operation and Development (OECD) <http://www.oecd.org/site/adboeccanti-corruptioninitiative/46814242.pdf> [“Cambodian Code of Criminal Procedure”] (English translation of original text).
57. *Ibid*, arts. 44, 124.
58. *Ibid*, art. 122.
59. *Ibid*, art. 127 (emphasis added).
60. ECCC Rules, *supra* note 11, Rule 53(1).
61. *Ibid*, Rule 55(1).
62. Cambodian Code of Criminal Procedure, *supra* note 56, art. 247.

63. ECCC Rules, *supra* note 11, Rule 67.
64. Cambodian Code of Criminal Procedure, *supra* note 56, art. 247.
65. Cambodian Code of Criminal Procedure, *supra* note 56, art. 247.
66. ECCC Rules, *supra* note 11, Rule 67(3).
67. *Ibid*, art. 261.
68. *Ibid*, art. 262.
69. *Ibid*, art. 282.
70. The circularity occurs in that it would be impossible to define a term appearing in the phrase stating the object and purpose of a treaty by resorting to the same object and purpose.
71. S.C. Res. 1315, ¶¶ 1-3, UN Doc. S/Res/1315 (14 Aug. 2000).
72. Sierra Leone-United Nations, “Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone,” art. 1(1) (16 Jan. 2002) [“SCSL Agreement”].
73. “Statute of the Special Court for Sierra Leone,” art. 1(1) [“SCSL Statute”].
74. United Nations Secretary-General, “Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone,” ¶¶ 29-30, U.N. Doc. No. S/200/915 (4 Oct. 2000).
75. The final decision on the issue was rendered by the SCSL Appeals Chamber in *Prosecutor v Brima et al.*, following disagreement between two Trial Chambers. *Prosecutor v Fofana & Kondewa*, Case No. SCSL-04-14-T, Judgment, ¶91 (Trial Chamber I, 2 Aug. 2007); *cf. Prosecutor v Brima et al.*, Case No. SCSL-04-16-T, Judgment, ¶ 653 (Trial Chamber II, 20 June 2007).
76. *Prosecutor v Brima et al.*, Case No. SCSL-2004-16-A, Judgment, ¶¶ 280-281 (22 Feb. 2008) (Holding that “[i]t is evident that it is the Prosecutor who has the responsibility and competence to determine who are to be prosecuted as a result of investigation undertaken by him.”) (internal citations omitted).
77. *Ibid* ¶¶ 280, 283, cites SCSL Statute, art. 15(1) at ¶ 280.
78. *Ibid* ¶ 282.
79. Eight Accused have been convicted by the SCSL. See *Brima et al.*, Case No. SCSL-2004-16-A, Judgment; *Prosecutor v Fofana & Kondewa*, Case No. SCSL-04-14-A, Judgment (28 May 2008); *Prosecutor v Sesay et al.*, Case No. SCSL-04-15-A, Judgment (20 Oct. 2009); *Prosecutor v Taylor*, Case No. SCSL-03-1-T, Judgment (18 May 2012). Accused Sam Bockarie and Foday Saybana Sankoh died prior to Judgment and the cases against them were dismissed. *Prosecutor v Bockarie*, Case No. SCSL-2003-04-PT, Withdrawal of Indictment (8 Dec. 2003); *Prosecutor v Sankoh*, Case No. SCSL-2003-02-PT, Withdrawal of Indictment (8 Dec. 2003). Accused Johnny Paul Koroma is widely believed to be dead, but remains under indictment pending the receipt of sufficient evidence of his death. See *Prosecutor v Koroma*, SCSL website, <http://www.sc-sl.org/CASES/JohnnyPaulKoroma/tabid/188/Default.aspx> (accessed 12 Mar. 2012) (“Koroma fled Freetown in January 2003. His fate and whereabouts are unknown, and he is considered to be at large.”).
80. *Prosecutor v Sesay et al.*, Case No. SCSL-04-15-T, Judgment, ¶ 2010 (2 Mar. 2009).
81. *Ibid* ¶ 700.
82. *Fofana & Kondewa*, Case No. SCSL-04-14-A, Judgment, ¶ 186.
83. *Ibid*.
84. ICTY Statute, art. 1; ICTR Statute, art. 1.
85. See “Report of the International Tribunal for the former Yugoslavia,” ¶ 2, U.N. Doc. A/66/210-S/2011/473 (31 July 2011); “Status of Cases,” ICTR Website, <http://unictr.org/Cases/tabid/204/Default.aspx> (accessed 16 Apr. 2012). In the case of Rwanda, another 100,000 or so lower-level suspects implicated in the 1994 genocide awaited trial in national courts during the 1990s. See William A. Schabas, “Genocide Trials and Gacaca Courts,” *Journal of International Criminal Justice* 3 (2005) 879, at 878.
86. S.C. Res. 1503, U.N. Doc. S/RES/1503 (28 Aug. 2003). Resolution 1503 was shortly followed by Resolution 1534, which called on the Tribunals to move forward “to ensure that any [subsequent] indictments concentrate on the most senior leaders suspected of being most responsible ...” S.C. Res. 1534, U.N. Doc. S/RES/1534 (Mar. 26, 2004).
87. “ICTY Rules of Procedure and Evidence,” Rule 11 *bis* [“ICTY RPE”]; “ICTR Rules of Procedure and Evidence,” Rule 11 *bis* [“ICTR RPE”].
88. Security Council Resolution 1534 called on the ICTR and ICTY “in reviewing and confirming any new indictments, to ensure that any such indictments concentrate on the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the relevant Tribunal as set out in resolution 1503.” S.C. Res. 1534, U.N. Doc. S/RES/1534 (26 Mar. 2004), para. 5.
89. ICTY RPE, Rule 11 *bis*. The ICTY also amended its Internal Rules on 6 April 2004 to provide for an initial review period whereby ICTY Bureau judges, “determine whether the indictment, *prima facie*, concentrates on one or more of the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the Tribunal.” Indictments falling short of this standard are sent back to the Prosecutor by the ICTY President. “ICTY Rules (Rev 20),” Rule 28(A) (6 Apr. 2004).
90. The ICTR has focused instead on ensuring that transferred accused would be provided with sufficient protections and receive a fair trial, probably due to the enduring poor security in Rwanda and weakness of the country’s judiciary. ICTR RPE, Rule 11 *bis*(C).

91. See, e.g., *Prosecutor v Uwinkindi*, Case No. ICTR-2001-75-R11 *bis*, Decision on Prosecutor's Request for Referral to the Republic of Rwanda (28 June 2011) (Ordering referral to Rwandan authorities for prosecution without any significant discussion of the accused's relative culpability, instead focusing mainly on determining whether Rwanda has sufficient personal and subject matter jurisdiction to properly prosecute the case.).
92. See "Status of Transferred Cases," ICTY website, <http://icty.org/sid/8934> (accessed 16 April 2012).
93. See, e.g., Olympia Bekou, "Rule 11 Bis: An Examination of the Process of Referrals to National Courts in ICTY Jurisprudence," *Fordham International Law Journal* 33, 723, at 735-752.
94. *Prosecutor v Rašević & Todović*, Case Nos. IT-97-25/1-AR11 *bis*.17 & IT-97-25/1-AR11 *bis*.2, Decision on Savo Todović's Appeals Against Decisions on Referral Under Rule 11 *bis*, ¶ 8 (4 Sept. 2006).
95. See, e.g. Bekou, *supra* note 93, at 739 *et seq.*
96. *Ibid.* at 746-747.
97. See e.g. *Prosecutor v Delić*, Case No. IT-04-83-PT, Decision on Motion for Referral of Case Pursuant to Rule 11 *Bis*, ¶¶14-25 (9 July 2007). ICTY Referral Benches have limited their inquiry to the indictment and assumed all facts alleged therein to be true. See, e.g., *Prosecutor v Rašević & Todović*, Case No. IT-97-25/1-PT, Decision on Referral of Case under Rule 11 *Bis* with Confidential Annexes I and II, ¶ 22 (8 July 2005).
98. Bekou, *supra* note 93, at 744; see also *Prosecutor v Stanković*, Decision on Referral of Case Under rule 11 *Bis*, Case No. IT-96-23/2-PT, ¶ 19 (17 May 2005) (Finding that "[i]n the context of offences dealt with by this Tribunal, the Indictment alleges a factual basis for the crimes which is limited in scope both geographically and temporally, and also in terms of the number of victims affected " and approving referral.).
99. *Prosecutor v Ademi & Norac*, Case No.IT-04-78-PT, Decision for Referral to the Authorities of Croatia Pursuant to Rule 11 *bis*, ¶ 28 (14 Sept. 2005).
100. *Ibid.*
101. *Prosecutor v Ljubičić*, Case No. IT-00-41-PT, Decision to Refer the Case to Bosnia and Herzegovina Pursuant to Rule 11 *Bis*, ¶ 10 (12 Apr. 2006).
102. *Ibid* ¶ 18.
103. *Ibid* ¶ 14.
104. *Ibid* ¶¶ 19, 53.
105. *Trbić*, Case No. IT-05-88/1-PT, Decision on Referral of Case Under Rule 11 *Bis* (27 Apr. 2007).
106. *Ibid* ¶ 10.
107. *Ibid* ¶ 11.
108. *Prosecutor v Trbić*, Case No.IT-05-88/I-PT, Indictment, ¶ 29 (18 Aug. 2006).
109. *Trbić*, Decision on Referral of Case Under Rule 11 *Bis*, ¶11.
110. *Ibid* ¶ 12.
111. *Ibid* ¶ 19.
112. *Ibid.*
113. *Ibid* ¶ 21.
114. *Ibid* ¶¶ 22-23.
115. *Prosecutor v Dragomir Milošević*, Case No. IT-98-29/1-PT, Decision on Referral of Case Pursuant to Rule 11 *Bis* (8 July 2005); *Delić*, Case No. IT-04-93-PT, Decision on Motion for Referral of Case Pursuant to Rule 11 *Bis* (9 July 2007); *Prosecutor v Lukić & Lukić*, Case No. IT-98-31/1-AR11 *bis*.1, Decision on Milan Lukić's Appeal Regarding Referral, ¶ 25 (11 July 2007).
116. *Milošević*, Case No. IT-98-29/1-PT, Decision on Referral of Case Pursuant to Rule 11 *Bis*, ¶ 24 (8 July 2005).
117. *Ibid* ¶¶ 8-9.
118. *Prosecutor v Dragomir Milošević*, Case No. IT-98-29/1-PT, Prosecution's Submission of Amended Indictment Pursuant to Rule 50 and Trial Chamber's Decision dated 12 December 2006, ¶ 16 (18 Dec. 2006). Note, the Amended Indictment is the only version of the indictment available. The Referral Bench cited the original indictment in its decision. These citations have been indicated where pertinent and parallel citations to the Amended Indictment are provided where useful.
119. *Ibid* ¶ 17.
120. *Ibid* ¶ 18.
121. *Milošević*, Case No. IT-98-29/1-PT, Decision on Referral of Case Pursuant to Rule 11 *Bis*, ¶ 9 (8 July 2005) (*quoting* original indictment, ¶ 15).
122. *Ibid* ¶ 8.
123. *Ibid* ¶ 10.
124. *Ibid* ¶ 22.

125. *Ibid.*
126. *Ibid.* ¶¶ 24, 19 (quoting original indictment, ¶¶ 4(a), 4(c)); see also Milošević, IT-98-29/1-PT, Amended Indictment, ¶ 13 (18 Dec. 2006).
127. *Ibid.*
128. *Ibid.* ¶ 20.
129. *Ibid.* ¶ 24.
130. Delić, Case No. IT-04-93-PT, Decision on Motion for Referral of Case Pursuant to Rule 11 *Bis* (9 July 2007).
131. *Ibid.* ¶ 11.
132. *Ibid.*
133. *Ibid.*
134. *Ibid.* ¶ 13.
135. *Ibid.* ¶ 19.
136. *Ibid.* ¶¶ 19, 26 (finding that while the “gravity of the crimes are not *ipso facto* incompatible with referral” nonetheless, “the alleged level of responsibility of the Accused requires that the present case be tried before the [ICTY].”).
137. *Prosecutor v Lukić & Lukić*, Case No. IT-98-32/1-PT, Decision on Referral of Case Pursuant to Rule 11 *Bis* with Confidential Annex A and Annex B (5 Apr. 2007).
138. *Lukić*, Case No. IT-98-31/1-AR11 bis.1, Decision on Milan Lukić’s Appeal Regarding Referral (11 July 2007).
139. *Lukić*, Case No. IT-98-32/1-PT, Decision on Referral, ¶ 13 (5 Apr. 2007).
140. *Ibid.*
141. *Ibid.* ¶¶ 29-31.
142. *Lukić*, Case No. IT-98-31/1-AR11 bis.1, Decision on Milan Lukić’s Appeal Regarding Referral, ¶ 21 (11 July 2007).
143. *Ibid.* ¶¶ 21-22.
144. *Ibid.* ¶¶ 22-26.
145. *Ibid.* ¶ 25.
146. “Rome Statute of the International Criminal Court,” art. 1, U.N. Doc.A/CONF.183/9* (17 July 1999). A case can be found “inadmissible” by the ICC if “[t]he case is not of sufficient gravity to justify further action by the Court.” *Ibid.* art. 17(d).
147. *Ibid.* art. 53.
148. ICC Office of the Prosecutor, “Report on Prosecutorial Strategy,” at 5 (14 Sept. 2006).
149. ICC Office of the Prosecutor, “Prosecutorial Strategy 2009 – 2012,” ¶ 19 (1 Feb. 2010).
150. See, e.g., Sok Khemara, “Atrocities Suspect Says He’s ‘Not Fearful’ of Tribunal, Hell,” *Voice of America News (Khmer)* (11 Aug. 2011), VOA website, <http://www.voanews.com/khmer-english/news/kr-issues/Atrocities-Suspect-Says-Hes-Not-Fearful-of-Tribunal-Hell-127544968.html> (accessed 3 Nov. 2013); Gillison, “Extraordinary Injustice,” *supra* note 21.
151. *Scoop Independent News*, online <http://www.scoop.co.nz/stories/HL1106/S00165/leaked-documents-suggest-un-backing-off-khmer-rouge-trials.htm> (accessed 30 Oct. 2013).
152. Stuart White & Cheang Sokha, “Death of Sou Met Highlights Concerns Over Court: Monitors,” *Phnom Penh Post* (28 June 2013).
153. See Randle DeFalco, “Which Document List Is It? Case 002 Document Debate Continues” *Cambodia Tribunal Monitor* (16 Feb. 2012).
154. Stephen Heder with Brian D. Tittmore, *Seven Candidates for Prosecution: Accountability for the Crimes of the Khmer Rouge* (Washington: American University War Crimes Research Office, 2001), 99-113 (in the book, “Meas Muth” is spelled “Meah Mut”).
155. The Khmer Rouge officially renamed Cambodia “Democratic Kampuchea” and divided the country into a series of Zones, replacing provinces. See Dy, *supra* note 5.
156. Heder with Tittmore, *supra* note 154, at 99.
157. *Ibid.*
158. Human Rights Watch, *supra* note 18.
159. See Randle DeFalco, “Alleged Suspects in Case 004 Exposed During Case 002 Questioning: Testimony of Accused Nuon Chea and Witness Prak Yut,” *Cambodia Tribunal Monitor* (30 Jan. 30 2012).
160. See, e.g., Gillison, *Extraordinary Injustice*, *supra* note 21.
161. Third Introductory Submission, available at *Scoop* website, *supra* note 151; see also Sok, *supra* note 150; see also Gillison, *Extraordinary Injustice*, *supra* note 21.

162. Gillison, *Extraordinary Injustice*, *supra* note 21.
163. Ben Kiernan, *The Pol Pot Regime: Race, Power, and Genocide in Cambodia under the Khmer Rouge, 1975-79* (3rd ed. New Haven: Yale, 2008), 88.
164. Jared Ferrie, “Khmer Rouge crimes in legal limbo,” *The National* (24 July 2011).
165. “Acting International Co-Prosecutor requests investigation of additional suspects,” ECCC Website (8 Sept. 2009), <http://www.eccc.govkh/en/articles/acting-international-co-prosecutor-requests-investigation-additional-suspects> (accessed 4 Nov. 2013).
166. “Statement from the International Co-Prosecutor regarding Case File 003,” ECCC Website (9 May 2011) <http://www.eccc.govkh/en/articles/statement-international-co-prosecutor-regarding-case-file-003> (accessed 4 Nov. 2013).
167. Office of the Co-Investigating Judges, Case File No. 003/07-09-2009-ECCC-OCIJ, Order on International Co-Prosecutor’s Public Statement Regarding Case File 003, Doc. D14, ¶ 2 (11 May 2011).
168. Statement from the International Co-Prosecutor regarding Case File 003, *supra* note 166.
169. Statement by the Co-Investigating Judges Regarding Civil Parties in Case 004, ECCC Website (8 Aug. 2011), <http://www.eccc.govkh/en/articles/statement-co-investigating-judges-regarding-civil-parties-case-004> (accessed 4 Nov. 2013).
170. *Ibid.*
171. Documentation Center of Cambodia, “List of Democratic Kampuchea Burial” (last updated 5 Jan. 2005), http://www.dccam.org/Projects/Maps/TableList/List_of_Mass_Graves.pdf (accessed 4 Nov. 2013) (the prison and execution site is spelled as “Tuol Ta Phlorng” in DC-Cam’s report).
172. For an overview of the crime sites under investigation in Cases 003/004, see “Crime Sites in Cases 003 and 004,” ECCC Website <http://www.eccc.govkh/en/crime-sites-cases-003-and-004> (accessed 3 Nov. 2013).
173. Ben Kiernan, “The Cambodian Genocide,” in *Century of Genocide: Critical Essays and Eyewitness Accounts* (Samuel Totten & William S. Parsons eds., 3rd ed. 2009), 286.
174. *Ibid* at 286.
175. Kiernan, *The Pol Pot Regime*, *supra* note 163 at 244.
176. For a brief overview of famine and living conditions in DK, see Dy, *supra* note 5.
177. See “Statement by the Co-Investigating Judges Regarding Civil Parties in Case 004,” *supra* note 20.
178. Human Rights Watch, *supra* note 18.
179. Dr. Ewa Tabeau & They Kheam, “Demographic Expert Report (Public Redacted Version),” submitted to ECCC Office of the Co-Investigating Judges, Doc. No. D140/1/1, at 70 (30 Sept. 2009) (Estimating that approximately 36% of Cambodia’s Cham population perished under the Khmer Rouge, compared to approximately 18.7% of the ethnic Khmer majority.).
180. See generally, Alexander Laban Hinton, *Why Did They Kill?: Cambodia in the Shadow of Genocide* 206-208 (Berkeley: University of California Press, 2005) (discussing the targeting and mass killing of Cambodian Cham Muslim populations during the Khmer Rouge period).
181. Sok, *supra* note 150.
182. Robert Petit, “Lawfare and International Tribunals: A Question of Definition? A Reflection on the Creation of the ‘Khmer Rouge Tribunal,’” *Case Western Reserve Journal of International Law*, 43, 189 at 198 (2010).
183. Douglas Gillison, “Crimes Scenes of the Khmer,” *The Investigative Fund* (27 Feb. 2012), http://www.theinvestigativefund.org/investigations/international/1614/crime_scenes_of_the_khmer/?page=entire (accessed 4 Nov. 2013).
184. ECCC-appointed demographic experts estimated that that total death toll during the DK period was “most likely 1.747 to 2.2” million lives. Tabeau & Kheam, *supra* note 179.
185. *Duch* Trial Judgment, ¶ 630.
186. Petit, *supra* note 182 at 198 (emphasis added).
187. See *supra* note 29.