EXTRAORDINARY LANGUAGE IN THE COURTS OF CAMBODIA: INTERPRETING THE LIMITING LANGUAGE AND PERSONAL JURISDICTION OF THE CAMBODIAN TRIBUNAL

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I. INTRODUCTION

Over the last two decades, the world has resurrected the use of international criminal tribunals to try those culpable of war crimes, genocide, and crimes against humanity. More than forty years elapsed between the International Military Tribunals at Nuremburg and Tokyo and the modern system. The modern practice began with the ad-hoc tribunals for the former Yugoslavia and Rwanda, and culminated in the United Nations' International Criminal Court ("ICC"). Part of this new regime of international criminal justice has arisen in the form of the so-called "hybrid" tribunals. These courts mix international and domestic laws and are established through agreements between the United Nations and the host country. Despite the emergence of the ICC, the global community has embraced these hybrid tribunals as the preferred course forward.

The latest hybrid tribunal to begin proceedings is the Extraordinary Chambers for the Courts of Cambodia ("ECCC"). The new court was established to prosecute those responsible for the atrocities committed during the Khmer Rouge regime in the 1970s. The ECCC has continued the common practice in hybrid tribunals of limiting its prosecutions, but there are still procedural questions facing the court as it prepares to conduct its trials. One of the most pressing questions the ECCC needs to address is the meaning of its limiting language found in the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea ("ECCC Statute"); specifically, whether this language is a description of personal jurisdiction, and if so, what the language means.

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This article will attempt to understand the function of the language of the ECCC Statute as well as interpret its scope. As the ECCC is a new institution, much of the analysis will rely on the procedures and structures of the other international criminal tribunals including the ICC, the ad-hoc tribunals, and the Special Court for Sierra Leone ("SCSL"). This comparison will create a spectrum against which the ECCC can compare itself in order to better understand where its own establishing language fits in the wider international criminal tribunal community.

II. THE EVOLUTION OF INTERNATIONAL CRIMINAL JUSTICE: FROM THE AD-HOC TRIBUNALS TO THE ECCC

To better put the ECCC in perspective, it is important to understand its place among the tribunals that came before it. Each new tribunal was established with the previous ones in mind. Each one has attempted to avoid the pitfalls of its predecessors and better serve the causes it purports to advance. Some of the factors that have evolved include the size, duration, and costs. Understanding the issues facing the other tribunals will help facilitate the ECCC in moving forward.

A. The Ad-Hoc Tribunals

The Ad-Hoc Tribunals, the International Criminal Tribunal for the former Yugoslavia ("ICTY")[1] and the International Criminal Tribunal for Rwanda ("ICTR"),[2] were the first international criminal courts established since the International Military Tribunals in Nuremburg and Tokyo.[3] They were admittedly experimental, and it is widely recognized that the model will not be followed in the future.

Both the ICTY and the ICTR have failed to gain the support of the local populations they are supposed to represent. Within Rwanda and the countries that made up the former Yugoslavia, the ad-hoc tribunals are widely considered to be Western, imperialistic courts run by and for

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[1] S.C. Res. 808, ¶ 1, U.N. Doc. S/RES/808 (Feb. 22, 1993); S.C. Res. 827, ¶ 2, U.N. Doc. S/RES/827 (May 25, 1993).

[2] S.C. Res. 955, ¶ 1, U.N. Doc. S/RES/955 (Nov. 8, 1994).

[3] WILLIAM A. SCHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA, AND SIERRA LEONE 3 (2006).

outsiders.[4] Meanwhile, the local citizens have little or no access to information about the courts and trials, except through local media, which is often biased against the tribunals.[5]

This lack of outreach to the communities the tribunals represent is largely the fault of the tribunals themselves. The ICTY did not even establish an outreach program until 1999, a full six years after its creation.[6] Similarly, the ICTR information center in Kigali did not open until 2000, five years after the ICTR's creation.[7] Both courts have been accused of ignoring the citizens and governments of the former Yugoslavia and Rwanda, respectively.[8] The opinion within Rwanda of the ICTR was so bad that at one point the Rwandan government temporarily severed diplomatic relations with the tribunal after the court ordered the release of a defendant due to procedural violations.[9]

One of the reasons the ad-hoc tribunals are so disconnected from the populations they are purporting to serve is that they are held too far away from the target countries. With the ICTY in The Hague and the ICTR in Arusha, Tanzania, there is no practical way for the population to keep abreast of what is occurring in the tribunals. Particularly in Rwanda, where most of the population does not even have electricity, up-to-date information on the court is almost nonexistent. The distance and lack of information also fails to aid in improving the local legal systems. This is an area where the hybrid tribunals have an advantage over the ad-hoc tribunals, as they tend to be held in the country in which the conflict took place. This brings the trials closer to the people.

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[4] Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform*, 23 ARIZ. J. INT'L & COMP. L. 347, 423 (2006).

[5] *Id.* at 423–24.

[6] *See* The Secretary-General, *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, ¶¶ 146–53, *delivered to the Security Council and the General Assembly*, U.N. Doc. S/1999/846, A/54/187 (Aug. 25, 1999), *available at* http://www.un.org/icty/rappannu-e/1999/AR99e.pdf.

[7] Press Briefing, Int'l Criminal Tribunal for Rwanda (Sep. 19, 2000), *available at* http://69.94.11.53/ENGLISH/pressbrief/2000/brief190900.htm.

[8] Higonnet, *supra* note 4, at 418–19, 423–24.

[9] *Id.* at 420.

B. The International Criminal Court

The ICC was established in 2002 by the Rome Statute.[10] The ICC was meant to be the final court of international criminal justice. Yet, the first trial before the ICC was just beginning in January 2009,[11] and hybrid tribunals are still being established. The ICC is presently unprepared to carry out the world's ever increasing demand for criminal justice.

One problem facing the ICC is its lack of jurisdiction. The ICC cannot prosecute individuals for crimes that were committed before the Rome Statute took place and only Rome Statute signatory nations are subject to its control.[12] While there are mechanisms for expanding this territorial jurisdiction, there will be major practical hurdles to doing so. The ICC will also be limited to trying only a small group of senior leaders in any given conflict. The logistics of moving witnesses, evidence, and the accused from their home country to The Hague will hinder the ICC's ability to carry out extensive prosecutions.

The ICC is further limited by its binary approach to international criminal law. Prosecutions brought before the court will be either wholly related to international criminal law, or referred back to the local courts for domestic trials.[13] Most post-conflict national courts will be unable to handle such an immense task, and are often beset by corruption and politicization.[14]

There are also political restrictions plaguing the ICC. While the court was established without the United States' ratification,[15] it has suffered

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[10] Rome Statute of the International Criminal Court art. 1, July 17, 1998, 2187 U.N.T.S. 90, 91 [hereinafter Rome Statute]. The Rome Statute was signed in 1998, but did not go into force until sixty countries had ratified it in 2002. Int'l Criminal Ct., About the Court, http://www.icc-cpi.int/Menus/ICC/About+the+Court/ (last visited Mar. 8, 2009).

[11] Marcus Bleasdale, *DRC: ICC's First Trial Focuses on Child Soldiers*, HUM. RTS. WATCH, Jan. 23, 2009, http://www.hrw.org/en/news/2009/01/22/drc-icc-s-first-trial-focuses-child-soldiers.

[12] Rome Statute arts. 11(1), 12(1), *supra* note 10, at 99.

[13] Higonnet, *supra* note 4, at 349.

[14] *Id.*

[15] The United States signed the Rome Statute on December 31, 2000, but did not ratify it and instead "unsigned" the Statute in May 2002. Dominic McGoldrick, *Political and Legal Responses to the ICC*, *in* THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES 389 app. II at 414 (Dominic McGoldrick et al. eds., 2004).

greatly for the lack of U.S. cooperation. In fact, one way in which the United States is attempting to prevent the emergence of a powerful ICC is by promoting the establishment of hybrid tribunals to counter the influence of the ICC.[16]

C. The Hybrid Tribunals

For evidence of the continuing emergence of hybrid tribunals, one need not look far. Hybrid courts have been established in Sierra Leone, Kosovo, and East Timor,[17] and trials are just starting in Cambodia.[18] There are already discussions to establish a Special Tribunal in Lebanon to prosecute the alleged killers of former Prime Minister Rafik Hariri,[19] and another Special Chamber in Burundi.[20]

Part of the reason the hybrid tribunals are preferred is the desire to lower the costs of international justice. The ad-hoc tribunals have been much more expensive and gone on much longer than originally anticipated.[21] The ICTR currently costs about $133.7 million per year,[22] and the ICTY will cost about $155.5 million per year.[23] Compare this to the 2007 budget for the Special Court for Sierra Leone (SCSL) which

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[16] William H. Taft, IV, Legal Advisor, Dep't of State, Address to the Judicial Conference of the U.S. Court of Appeals for the Armed Forces, concerning the International Criminal Court: The United States and the International Criminal Court: One Year Out (May 13, 2003), *available at* http://www.state.gov/s/l/2003/44392.htm.

[17] Higgonet, *supra* note 4, at 353–54.

[18] Extraordinary Chambers in the Courts of Cambodia, FAQ: When Will the Trials Begin? (Aug. 1, 2008), http://www.eccc.gov.kh/english/faq.view.aspx?doc_id=47.

[19] *Hariri Murder Tribunal Awaits Approval after UN and Lebanon Sign Deal*, UN NEWS CENTER, Feb. 6, 2007, http://www.un.org/apps/news/story.asp?NewsID=21477&Cr=leban&Cr1=.

[20] *See* S.C. Res. 1606, at 1, U.N. Doc. S/RES/1606 (June 20, 2005).

[21] Higonnet, *supra* note 4, at 347.

[22] Figure based on the two-year budget for 2008–2009 of $267,356,200. Int'l Criminal Tribunal for Rwanda, General Information, http://69.94.11.53/ENGLISH/geninfo/index.htm (last visited Mar. 9, 2009).

[23] Figure based on the two-year budget for 2008–2009 of $310,952,100. Int'l Criminal Tribunal for the Former Yugoslavia, General Information, http://www.un.org/icty/cases-e/factsheets/generalinfo-e.htm (last visited Mar. 9, 2009).

amounted to about $36 million.[24] The global community prefers the hybrid tribunals because they offer lower costs and shorter trials—justice on the cheap.[25]

One way in which the hybrid tribunals keep costs down is by focusing prosecutions only on the worst offenders of the worst crimes. The SCSL was innovative in that it limited its prosecutions to those who bore the "greatest responsibility" for the crimes committed during the civil war in Sierra Leone.[26] As such, it only issued thirteen indictments, and has nine defendants.[27] This compared to over seventy indictments at the ICTR and over one hundred fifty at the ICTY.[28]

D. The Extraordinary Chambers for the Courts of Cambodia

The latest hybrid tribunal to emerge on the scene is the ECCC. The ECCC was created to prosecute members of the Khmer Rouge, which ruled Cambodia between 1975 and 1979 under the leadership of Pol Pot.[29]

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[24] This is actually about $10 million more than the previous years due to the costs of the Charles Taylor trial in The Hague. *See* FOURTH ANNUAL REPORT OF THE PRESIDENT OF THE SPECIAL COURT FOR SIERRA LEONE 41 (2007), *available at* http://www.sc-sl.org/LinkClick.aspx?fileticket=SaCsn9u8MzE%3d&tabid=176.

[25] Higonnet, *supra* note 4, at 434.

[26] Statute of the Special Court for Sierra Leone art. 1(1), Jan. 16, 2002, 2178 U.N.T.S. 145, 145 [hereinafter SCSL Statute].

[27] *See* The Special Court for Sierra Leone, Cases, http://www.sc-sl.org/CASES/tabid/71/Default.aspx (last visited Mar. 9, 2009) ("Currently, eleven persons associated with all three of the country's former warring factions stand indicted by the Special Court. . . . Indictments against two other persons were withdrawn in December 2003 due to the deaths of the accused."). Charles Taylor is currently in trial, which is being held in The Hague. *Id.* Issa Hassan Sesay, Augustine Gbao, Morris Kallon, Moinina Fofana, Allieu Kondewa, Alex Tamba Brima, Santigie Borbor Kanu, and Ibrahim Bazzy Kamara were already tried and found guilty. *Id.* The indictments for Sam Bockarie and Foday Saybana Sankoh were dropped due to their deaths. *Id.* The indictment for Johnny Paul Koroma is still outstanding, though he is still at large. *Id.* The trial of Sam Hinga Norman was awaiting judgment when he died during surgery and the case was dismissed. *Id.*

[28] Int'l Criminal Tribunal for Rwanda, Status of Cases, http://69.94.11.53/ENGLISH/cases/status.htm (last visited Mar. 9, 2009); Int'l Criminal Tribunal for the Former Yugoslavia, The Cases, http://www.icty.org/action/cases/4 (last visited Mar. 9, 2009).

[29] *See* Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, *as amended*, Reach Kram No. NS/RKM/1004/006, Oct. 27, 2004, ch. II, art. 2 (Cambodia), (*continued*)

Researchers estimate that over two million people died under the Khmer Rouge regime,[30] with particular atrocities carried out in the "killing fields" and in torture centers.[31]

In 1997, the government of Cambodia sought the United Nations' help in establishing a court to prosecute the top members of the Khmer Rouge.[32] By 2003, an agreement was reached and the ECCC was established.[33] Since then, the new court has been beset with delays and political wrangling, but trials are expected to commence soon.[34] Five indictments have been issued and those individuals have been detained.[35] In March 2009, the first trial began with Kaing Khek Iev.[36]

Like the SCSL, the ECCC Statute also introduces language meant to limit the focus of prosecutions. Article 2 of the ECCC Statute limits the competence of the court to those who were "senior leaders of Democratic Kampuchea" and those who were "most responsible" for atrocities committed during the Democratic Kampuchea regime.[37] This language

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available at http://www.eccc.gov.kh/english/cabinet/law/4/KR_Law_as_amended_27_Oct_2004_Eng.pdf [hereinafter ECCC Statute].

[30] Craig Etcheson, *The Politics of Genocide Justice in Cambodia*, *in* INTERNATIONALIZED CRIMINAL COURTS AND TRIBUNALS: SIERRA LEONE, EAST TIMOR, KOSOVO, AND CAMBODIA 181, 181 (Cesare P.R. Romano et al. eds, 2002).

[31] David J. Lynch, *Cambodians Hope Justice Will Close Dark Chapter,* USA TODAY, Mar. 21, 2005, at 14A.

[32] Peter J. Hammer & Tara Urs, *The Elusive Face of Cambodian Justice*, *in* BRINGING THE KHMER ROUGE TO JUSTICE: PROSECUTING MASS VIOLENCE BEFORE THE CAMBODIAN COURTS 13, 42 (Jaya Ramji & Beth Van Schaack eds., 2005).

[33] Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democractic Kampuchea art. 2(1), United Nations-Cambodia, June 6, 2003, *available at* http://www.eccc.gov.kh/english/cabinet/agreement/5/Agreement_between_UN_and_RGC.pdf [hereinafter United Nations-Cambodia Agreement].

[34] *See supra* note 18 and accompanying text.

[35] The indictees are Kaing Guek Eav, alias "Duch"; Ieng Sary, alias "Van"; Ieng Thirith, alias "Phea"; Khieu Samphan, alias "Hem"; and Nuon Chea. U.S. INST. OF PEACE, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA: INDICTMENT MATRIX 1–3 (2007), http://www.usip.org/on_the_issues/cambodia_matrix.pdf.

[36] Tim Johnston, *Trial of Khmer Rouge Torture Boss Opens*, WASH. POST, Mar. 31, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/03/30/AR2009033000118.html.

[37] ECCC Statute ch. II, art. 2, *supra* note 29.

raises two important issues: (1) whether this limiting language describes the court's personal jurisdiction and is thus reviewable by the courts, and if so, (2) what the terms "senior leaders" and "most responsible" mean.

This article will attempt to analyze these issues and determine what they mean for the new ECCC. Hopefully, this will also help clarify the issues of personal jurisdiction for future hybrid tribunals.[38] In order to determine the meaning of the language used in Article 2, it is necessary to compare the personal jurisdiction of the various tribunals, including the ICC, the ad-hoc tribunals, and the SCSL. By comparing the ECCC's language to the spectrum of jurisdiction created by the other tribunals, it will become clear how best to interpret the language of Article 2.

III. THE FUNCTION OF THE LANGUAGE IN ARTICLE 2 OF THE ECCC STATUTE

The ECCC has introduced new terms of limiting language in its Statute. Article 2 of the ECCC Statute empowers the court to "bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes" committed during the Khmer Rouge regime.[39] The new ECCC will have to interpret the function of this language. On the one hand, the language may describe the personal jurisdiction of the ECCC; on the other hand, it may simply act as a guide to the prosecutors in exercising their discretion.[40] The defense will argue the former while the prosecution argues the latter.

Jurisdiction is a court's power to decide a case.[41] There are four main types of jurisdiction controlling an international criminal tribunal: subject-matter jurisdiction, temporal jurisdiction, territorial jurisdiction, and

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[38] For example, the proposed Special Tribunal for Burundi has discussed the use of the term, "greatest responsibility," to limit its prosecutions. *See* S.C. Res. 1606, *supra* note 20, at 1. This is the same term currently used by the Special Court for Sierra Leone. *See* SCSL Statute art. 1(1), *supra* note 26, at 145.

[39] ECCC Statute ch I, art. 1, *supra* note 29.

[40] Prosecutorial discretion is the prosecutor's power to use the options available in a criminal trial, such as filing charges, prosecuting or not prosecuting, plea-bargaining, or recommending sentence. BLACK'S LAW DICTIONARY 499 (8th ed. 2004).

[41] *Id.* at 867.

personal jurisdiction.[42] The tribunal must have competence over all four jurisdictional elements in order to try an accused.[43]

The ECCC's subject-matter jurisdiction is defined in Articles 3 through 8 of the ECCC Statute.[44] These provisions enumerate the crimes for which an individual can be tried in the ECCC.[45] The temporal jurisdiction is the time period during which the crimes must have been committed in order for the court to have jurisdiction. In the case of the ECCC, the temporal jurisdiction is between April 17, 1975, and January, 6 1979.[46] The territorial jurisdiction defines the geographical scope of the court's jurisdiction. The ECCC limits prosecution to the territory of Cambodia.[47]

Personal jurisdiction is the "court's power to bring a person into its adjudicative process."[48] Personal jurisdiction in the international criminal tribunals is limited by the seriousness of the crime, the practical limitations of the tribunal, and in some cases, the statutes of the courts.[49] For the ECCC, the issue of personal jurisdiction lies in the interpretation of Article 2 of the ECCC Statute. The new tribunal will have to decide whether the terms "senior leaders of Democratic Kampuchea" and "those who were most responsible"[50] describe the personal jurisdiction of the court.

This issue is new to the international criminal justice system, and there is, as yet, no clear answer. The only other active court to have similar limiting language is the SCSL, but it only recently made a final decision on the issue after lengthy debate between the two different SCSL trial chambers.

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[42] Bert Swart, *Internationalized Courts and Substantive Criminal Law*, *in* INTERNATIONALIZED CRIMINAL COURTS AND TRIBUNALS: SIERRA LEONE, EAST TIMOR, KOSOVO, AND CAMBODIA, *supra* note 30, at 291, 293.

[43] *See id.*

[44] ECCC Statute ch II, arts. 3–8, *supra* note 29.

[45] *Id.* (listing crimes such as crimes of genocide, crimes against humanity, and crimes against internationally protected persons).

[46] *Id.*

[47] *Id.* ch. I, art. 1.

[48] BLACK'S LAW DICTIONARY 870 (8th ed. 2004).

[49] *See* David J. Scheffer, *The Future of Atrocity Law*, 25 SUFFOLK TRANSNAT'L L. REV. 389, 417 (2002).

[50] ECCC Statute ch II, art. 2, *supra* note 29.

A. The Function of the Language of the SCSL

Like the ECCC, the SCSL's limiting language is found in the court's establishing Statute. Article 1 of the Statute of the Special Court for Sierra Leone ("SCSL Statute") states:

> The Special Court shall . . . have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.[51]

The phrase "greatest responsibility" closely echoes, in both manner and location in the statute, the terms "senior leaders" and "most responsible" described in the ECCC Statute.[52] Thus, the SCSL interpretation would be very useful in determining how to interpret the ECCC terms.

Until recently, the SCSL had been split on this issue. The court's two trial chambers had come to different conclusions as to the function of the "greatest responsibility" language. Trial Chamber II held that the language is solely a guide to the prosecutor, and is not meant to act as a jurisdictional requirement.[53] Trial Chamber I interpreted the language as a description of personal jurisdiction, which is reviewable by the court.[54]

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[51] SCSL Statute art. 1(1), *supra* note 26, at 145.

[52] Compare the "greatest responsibility" language of the SCSL, *id.*; the "senior leaders" and "most responsible" language of the ECCC Statute ch. I, art. 1, *supra* note 29; and the broad "those responsible" language used in establishing a governing body in East Timor. S.C. Res. 1272, ¶ 16, U.N. Doc. S/RES/1272 (Oct. 25, 1999).

[53] *See* Prosecutor v. Brima, Case No. SCSL-04-16-T, Judgment, ¶ 653 (June 20, 2007) [hereinafter Brima Trial Judgment].

[54] *See* Prosecutor v. Norman, Case No. SCSL-04-14-PT, Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction Filed on Behalf of Accused Fofana, ¶ 27 (Mar. 3, 2004) [hereinafter Norman Pretrial Motion].

The Appeals Chamber more recently settled the matter by upholding Trial Chamber II's position that the language is just a guide to the prosecutor.[55]

Both trial chambers considered the SCSL's establishing documents in coming to their conclusions. The SCSL's language was discussed between the United Nations Secretary-General and the United Nations Security Council, and later between the United Nations and the Government of Sierra Leone, as the court was being established. These discussions are recorded in a series of United Nations documents and letters.

The issue began with Security Council Resolution 1315, in which the Security Council recommended that the new SCSL have "personal jurisdiction over persons who bear the greatest responsibility."[56] The Secretary-General initially disagreed and responded in his report on the establishment of the SCSL by proposing the term "most responsible" in lieu of "greatest responsibility," adding that the language should not be "a test criterion or a distinct jurisdictional threshold, but as a guidance to the Prosecutor."[57]

The Security Council stood by its previous stance that the language should be "greatest responsibility" and that it should describe the court's personal jurisdiction.[58] In a letter dated January 12, 2001, the Secretary-General agreed to the use of the "greatest responsibility" language.[59]

While both chambers agree on the events thus far, they are split in their interpretation of the correspondence that followed.

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[55] Prosecutor v. Brima, Case No. SCSL-2004-16-A, Judgment, ¶ 282 (Feb. 22, 2008) [hereinafter Brima Appeals Judgment].

[56] S.C. Res. 1315, ¶ 3, U.N. Doc. S/RES/1315 (Aug. 14, 2000).

[57] The Secretary-General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, ¶¶ 29–30, *delivered to the Security Council*, U.N. Doc. S/2000/915 (Oct. 4, 2000) [hereinafter Secretary-General SCSL Report].

[58] Letter from the President of the Security Council Addressed to the Secretary-General, ¶ 1, U.N. Doc. S/2000/1234 (Dec. 22, 2000) [hereinafter First Security Council President Letter on SCSL].

[59] Letter from the Secretary-General Addressed to the President of the Security Council, ¶¶ 2–3, U.N. Doc. S/2001/40 (Jan. 12, 2001) [hereinafter Secretary-General Letter on the SCSL].

1. Trial Chamber II's Interpretation

Trial Chamber II held that the "greatest responsibility" language was not a jurisdictional requirement, but simply a guide to the prosecutor.[60] In so holding, Trial Chamber II cited the January 12, 2001 letter in which the Secretary-General wrote that "the determination of the meaning of the term 'persons who bear the greatest responsibility' in any given case falls initially to the prosecutor and ultimately to the Special Court itself."[61] The Secretary-General also wrote that the words in Article 1, "those leaders who . . . threatened the establishment of and implementation of the peace process," were meant solely as a guide to the prosecutor.[62] The Security Council later agreed with the Secretary-General's interpretation.[63]

2. Trial Chamber I's Interpretation

Trail Chamber I interpreted the same correspondence quite differently and found some key evidence that contradicted Trial Chamber II's decision.[64] It considered the same letter from the Secretary-General dated January 12, 2001, but in its full context. Whereas Trial Chamber II focused solely on the end of paragraph two, Trial Chamber I quoted the entire paragraph,[65] which reads:

> Members of the Council expressed preference for the language contained in Security Council resolution 1315 (2000), *extending the personal jurisdiction* of the Court to "persons who bear the greatest responsibility," thus limiting the focus of the Special Court to those who played a leadership role. However, the wording . . . does not mean that the *personal jurisdiction* is limited to the political and military leaders only. Therefore, the determination of the meaning of the term "persons who bear the greatest responsibility" in any given case falls

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[60] Brima Trial Judgment, *supra* note 53, ¶ 653.

[61] *Id.* ¶ 652 (quoting Secretary-General Letter on the SCSL, *supra* note 59, ¶ 2).

[62] Secretary-General Letter on the SCSL, *supra* note 59, ¶ 3.

[63] *See* Letter from the President of the Security Council addressed to the Secretary-General, U.N. Doc. S/2001/95 (Jan. 31, 2001).

[64] *See* Norman Pretrial Motion, *supra* note 54, ¶ 27.

[65] *See id.* ¶ 24 (quoting Secretary-General Letter on the SCSL, *supra* note 59, ¶ 2).

> *initially* to the prosecutor and *ultimately to the Special Court itself*.[66]

The Secretary-General appeared to concede that the phrase "greatest responsibility" is a term of personal jurisdiction which is reviewable by the Court. Trial Chamber I better considered the Secretary-General's position by examining the letter in its entire context.

Trial Chamber I also considered paragraph three of the letter in which the Secretary-General expressed his opinion that the words, "those leaders who . . . threaten the establishment of and implementation of the peace process," is not a jurisdictional element, but a guide to the prosecutor.[67] Trial Chamber I recognized that the Secretary-General was referring to a different section of Article 1 that did not include, and was separate from, the "greatest responsibility" language.[68] The Secretary-General made this clear when he wrote: "[T]he commission of any of the statutory crimes without necessarily threatening the establishment and implementation of the peace process would not detract from the international criminal responsibility otherwise entailed for the accused."[69] Essentially, Article 1 was split in two parts, with the "greatest responsibility" language acting as a term of personal jurisdiction, and the "those leaders who [. . .]" language acting as a guide to prosecutorial discretion. Trial Chamber I recognized this distinction, while Trial Chamber II attributed the latter interpretation to the former language.

For these reasons, Trial Chamber I held that the "greatest responsibility" language is "a jurisdictional limitation upon the Court, the determination of which is a judicial function."[70] Trial Chamber I found that due to this agreement between the Secretary-General and the Security Council, the SCSL Statute was amended and approved by the government of Sierra Leone.[71]

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[66] Secretary-General Letter on the SCSL, *supra* note 59, ¶ 2 (emphasis added).

[67] Norman Pretrial Motion, *supra* note 54, ¶ 24 (quoting Secretary-General Letter on the SCSL, *supra* note 59, ¶ 3).

[68] *Id.*

[69] Secretary-General Letter on the SCSL, *supra* note 59, ¶ 3.

[70] Prosecutor v. Fofana, Case No. SCSL-04-14-T, Judgment, ¶ 91 (Aug. 2, 2007) [hereinafter Fofana Judgment].

[71] Norman Pretrial Motion, *supra* note 54, ¶ 26.

Further evidence that the United Nations felt that the language "greatest responsibility" was meant to define the personal jurisdiction was revealed in a later letter from the Secretary-General. He wrote: "Members of the Council reiterated their understanding that, without prejudice to the independence of the Prosecutor, the *personal jurisdiction* of the Special Court remains limited to the few who bear the greatest responsibility for the crimes committed."[72] This shows that both the Security Council and the Secretary-General agreed that the function of the language is a definition of personal jurisdiction.

3. The Appeals Chamber's Interpretation

The Appeals Chamber decided the issue in agreement with Trial Chamber II's view that the language was not a jurisdictional threshold.[73] The Appeals Chamber did not discuss the establishing documents, but rather focused on the structure of the court and the practical implications of its findings.[74]

First, the Appeals Chamber considered the structure of the SCSL. Article 11 of the SCSL Statute divides the court into three separate organs: the Chambers, the Prosecutor, and the Registry.[75] Article 15 outlines the Prosecutor's role and states that the Prosecutor "shall act . . . as a separate organ" and "shall not . . . receive instructions from any Government or from any other source."[76] Trial Chamber II considered this and found it to mean that the prosecutor's discretion could not be reviewed by the court.[77] The Appeals Chamber agreed that it is the Prosecutor's duty to identify those who bear the greatest responsibility, while the Chambers' role is to try those individuals for the charged crimes.[78]

The Appeals Chamber also considered the absurdity of dismissing a case based solely on personal jurisdiction after it had spent the time and money deciding the case based on the merits.[79] The Prosecution had

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[72] Letter from the Secretary-General Addressed to the President of the Security Council, para. 5, U.N. Doc. S/2001/693 (July 13, 2001) (emphasis added).

[73] Brima Appeals Judgment, *supra* note 55, at ¶ 282.

[74] *Id.* ¶¶ 278–84.

[75] SCSL Statute art. 11, *supra* note 26, at 148.

[76] *Id.* art. 15(1), at 149.

[77] Brima Trial Judgment, *supra* note 53, ¶ 654.

[78] Brima Appeals Judgment, *supra* note 55, ¶ 281.

[79] *Id.* ¶ 283.

argued that a judicial review of the "greatest responsibility" language at the pre-trial stage would force the court to make a factual finding that no other individuals bore even greater responsibility than the accused.[80] It also made an analogy to the language of the ad-hoc tribunals. If the "greatest responsibility" language was a jurisdictional requirement for the SCSL, then the "those responsible" language must be a jurisdictional requirement for the ad-hoc tribunals.[81] This would lead to the "absurd" result that the ad-hoc tribunals would only be competent to try those who were actually guilty.[82]

The Appeals Chamber agreed with this "absurd" result, stating:

> [I]t is 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.[83]

The Appeals Court upheld Trial Chamber II's interpretation of Article I and dismissed the appeal.[84]

The United Nations establishing documents show an intent that the "greatest responsibility" language was to act as a jurisdictional requirement.[85] However, for practical reasons, the Appeals Chamber ruled that the phrase is to be understood solely as a guide to the prosecutor in exercising discretion. The ECCC should take this into account in interpreting the function of its own language, but there are some important distinctions between the ECCC and the SCSL that may lead to a different conclusion.

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[80] *Id.* ¶ 274.
[81] *Id.*
[82] *Id.*
[83] *Id.* ¶ 283.
[84] *Id.* ¶ 285.
[85] First Security Council President Letter on SCSL, *supra* note 58, ¶ 1.

B. The Function of the Language of the ECCC

The ECCC was established through a series of agreements between the United Nations and the Government of Cambodia.[86] Included among these are the Report of the Group of Experts for Cambodia,[87] and the establishing documents including the ECCC Statute,[88] the ECCC's Internal Rules,[89] and the United Nations-Cambodia Agreement on the establishment of the ECCC.[90] These may offer clues as to the intended function of the ECCC's limiting language.

A possible source of persuasion for the ECCC in deciding the function of its limiting language is the Report of the Group of Experts for Cambodia ("Group of Experts"). The Group of Experts was a team of scholars appointed by the United Nations Secretary-General and given the task to assess the feasibility of bringing former Khmer Rouge to justice.[91] The report was presented to the President of the United Nations General Assembly and the President of the United Nations Security Council.[92]

In their report, the Group of Experts argued that the terms "senior leaders" and "most responsible" should be understood solely as a guide for the prosecutor.[93] The report suggested that the ECCC should define its personal jurisdiction using the phrase, "persons responsible for serious violations of human rights committed in Cambodia," similar to the jurisdictions of the ICTY and ICTR.[94]

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[86] Hammer & Urs, *supra* note 32, at 42–49.

[87] *See generally* Group of Experts for Cambodia, *Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135*, U.N. Doc. S/1999/231/Annex, A/53/850/Annex (Mar. 16, 1999) [hereinafter Group of Experts Report].

[88] *See generally* ECCC Statute, *supra* note 29.

[89] Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 3) (Mar. 6, 2009), *available at* http://www.eccc.gov.kh/english/cabinet/fileUpload/121/IRv3-EN.pdf [hereinafter ECCC Internal Rules].

[90] *See generally* United Nations-Cambodia Agreement, *supra* note 33.

[91] Group of Experts Report, *supra* note 87, ¶ 6.

[92] Identical Letters from the Secretary-General to the President of the General Assembly and the President of the Security Council, at 1, U.N. Doc. S/1999/231, A/53/850 (Mar. 16, 1999).

[93] Group of Experts Report, *supra* note 87, ¶¶ 109–11.

[94] *Id.* ¶ 154.

Like the SCSL, the ECCC Co-Prosecutors are considered a separate and independent organ of the court.[95] The SCSL Appeals Chamber found this to be sufficient to conclude that the term "greatest responsibility" was a term of prosecutorial discretion, and not jurisdiction.[96] The ECCC may also come to the same conclusion.

However, the SCSL decision is not binding precedent and the ECCC seems to have rejected the Group of Experts' recommendation on jurisdiction. The Cambodian Government continued to draft the language of the ECCC Statute counter to the Group of Experts' recommendation by rejecting the "those responsible" language in favor of "senior leaders" and "most responsible."[97]

Like the SCSL, the limiting language of the ECCC is in Article 1 of the ECCC Statute, describing the goals of the court.[98] However, the language is repeated in Article 2 which falls under Chapter II, entitled "COMPETENCE."[99] Chapter II of the Statute lists the jurisdictional powers of the court suggesting that "senior leaders" and "those most responsible" are jurisdictional terms.[100]

Perhaps the strongest evidence that the ECCC's limiting language is a jurisdictional element is the agreement between the Government of Cambodia and the United Nations General Assembly establishing the ECCC. A similar establishing agreement between the United Nations and the Government of Sierra Leone never specifically identified the "greatest responsibility" language as the personal jurisdiction of the court.[101] The SCSL was left to rely on correspondence between the Secretary-General and the Security Council. On the other hand, the United Nations-Cambodia Agreement states: "The present Agreement . . . recognizes that the Extraordinary Chambers have personal jurisdiction over senior leaders

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[95] *See* ECCC Statute ch. VI, art. 19, *supra* note 29; *see also* ECCC Internal Rules, *supra* note 89, R. 13(1).

[96] *See* Brima Appeals Judgment, *supra* note 55, ¶¶ 280–82; *see also* Brima Trial Judgment, *supra* note 53, ¶ 653.

[97] *See* ECCC Statute ch. I, art. 1, *supra* note 29.

[98] *See id.*; *see also* SCSL Statute art. 1(1), *supra* note 26, at 145.

[99] *See* ECCC Statute ch. II, art. 2, *supra* note 29.

[100] *See id.* ch. II, arts. 2–8.

[101] *See* Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone art. 1(1), United Nations-Sierra Leone, Jan. 16, 2002, 2178 U.N.T.S. 137, 138.

of Democratic Kampuchea and those who were most responsible."[102] The Government of Cambodia and the United Nations clearly intended the phrases to be jurisdictional requirements and codified it in their agreement.

The ECCC still has a chance to avoid the confusion and "absurd" results that the SCSL Appeal Chamber relied on in its decision. The SCSL failed to decide the function of the "greatest responsibility" language until the final judgments.[103] This caused the Appeals Chamber to be reluctant to overturn any final decisions. As trials have not yet begun in Cambodia, the ECCC has the opportunity to decide the questions of its language's function at the very beginning of the proceedings. The court should find that the language does describe the personal jurisdiction of the court, but that the matter must be settled in its preliminary stages. In this way, it will avoid the possibility of a lengthy and expensive trial just to discover in the end that it never had jurisdiction in the first place.

As terms of personal jurisdiction, the words "senior leaders" and "most responsible" limit the ECCC's competence to bring to trial only those individuals falling within those categories. The court will have to interpret the scope of the phrases to determine whether an accused is indeed a senior leader or one most responsible.

IV. THE SCOPE OF THE ARTICLE 2 LANGUAGE

Since the terms "senior leaders" and "most responsible" describe the ECCC's personal jurisdiction, they must be considered and interpreted by the court. The question of whether a court has jurisdiction over an individual can often be complicated. Issues of jurisdiction may require factual submissions. Especially in international criminal tribunals, these factual submissions may be as extensive as would be submitted in the trial itself. The ICTY has consistently held that jurisdictional matters requiring factual submissions are to be dealt with at the trial stage, rather than the preliminary stages.[104] Trial Chamber I at the SCSL has also held that the

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[102] United Nations-Cambodia Agreement art. 2(1), *supra* note 33.

[103] *See* Brima Trial Judgment, *supra* note 53, ¶¶ 640–59.

[104] *See, e.g.*, Prosecutor v. Krajišnik, Case No. IT-00-39, Decision on Motion Challenging Jurisdiction—With Reasons, ¶ 25 (Sept. 22, 2000); Prosecutor v. Blaškić, Case No. IT-95-14, Decision Rejecting a Motion of the Defence to Dismiss Counts 4, 7, 10, 14, 16, and 18 Based on the Failure to Adequately Plead the Existence of an International Armed Conflict, ¶ 7 (Apr. 4, 1997).

ultimate analysis of personal jurisdiction is an evidentiary matter to be determined at the trial stage.[105]

A. Considerations of Personal Jurisdiction During the Trial Process

The ECCC considers jurisdictional issues at various stages throughout the trial process. Jurisdiction is initially an issue for the Co-Prosecutors during their preliminary investigations. The Co-Prosecutors must exercise their prosecutorial discretion to identify those suspects that they believe could fall within the jurisdiction of the court.[106] When the Co-Prosecutors have determined that crimes committed within the jurisdiction of the court have been committed, they prepare an Introductory Submission and send it to the Co-Investigating Judges.[107]

The Co-Investigating Judges then investigate the matter further, and determine whether the suspect and the crimes do indeed fall within the jurisdiction of the court.[108] They conclude their work by either dismissing the case or sending it to trial.[109] They must dismiss the case if the crimes do not fall within the jurisdiction of the ECCC.[110] The accused have the opportunity to appeal the Co-Investigating Judges' finding of jurisdiction during a Pre-Trial Appeal.[111]

If the case proceeds to trial, the issue can again be brought before the Trial Chamber during preliminary objections.[112] The ECCC's preliminary objections are at a similar stage in the process to the SCSL's preliminary hearings. In the SCSL, issues of jurisdiction are first decided during the preliminary hearing.[113] This judicial review must take into account all limits on the court's jurisdiction.[114] For a jurisdictional challenge during a pre-trial review to be dismissed, the SCSL has held that the judge must be

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[105] Norman Pretrial Motion, *supra* note 54, ¶ 44.

[106] ECCC Internal Rules, *supra* note 89, R. 50(1).

[107] *Id.* R. 53(1).

[108] *Id.* R. 55(2), (4).

[109] *Id.* R. 67(1).

[110] *Id.* R. 67(3)(a).

[111] *Id.* R. 74(3)(a).

[112] *Id.* R. 89(1).

[113] Special Court for Sierra Leone, Rules of Procedure and Evidence, R. 47(E)(i) (Mar. 7, 2003) (amended May 27, 2008), *available at* http://www.sc-sl.org/LinkClick.aspx?fileticket=zXPrwoukovM%3d&tabid=200.

[114] Norman Pretrial Motion, *supra* note 54, ¶ 31.

satisfied that there is sufficient information to provide reasonable grounds that the accused is a person who bears the greatest responsibility for the crimes.[115] This standard of review may be applicable to the ECCC as well.

Finally, upon completion of the entire trial, the ECCC trial chamber must make an explicit finding of jurisdiction in its final judgment.[116] Again, the ECCC standard of review may also be similar to the SCSL's. The SCSL held that upon completion of a case, the prosecution must have produced evidence sufficient to show that the accused bore the greatest responsibility.[117] However, evidence of others who may also bear the greatest responsibility in no way diminishes the culpability of the accused.[118]

The SCSL's Trial Chamber II did not come to a final conclusion about whether the defendants in *Prosecutor v. Brima* bore the greatest responsibility, arguing that the term "greatest responsibility" was not a term of personal jurisdiction at all.[119] Trial Chamber I held that "greatest responsibility" was a jurisdictional limitation,[120] but did not specifically make a finding of jurisdiction in the *Prosecutor v. Fofana* Judgment:

> Whether or not *in actuality* the Accused could be said to bear the greatest responsibility can only be determined by the Chamber after considering all the evidence presented during trial. However, the Chamber is of the view that given its finding that this is a jurisdictional element only, the issue of whether or not the Accused in fact bear the greatest responsibility is not a material element that needs to be proved beyond a reasonable doubt.[121]

Despite having held that the Trial Chamber must determine whether the accused bear the greatest responsibility, whatever the burden of proof, Trial Chamber I failed to ever make such a finding in the judgment.

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[115] *Id.* ¶ 38.

[116] ECCC Internal Rules, *supra* note 89, R. 98(7).

[117] Prosecutor v. Brima, Case No. SCSL-04-16-T, Decision on Defence Motions for Judgment of Acquittal Pursuant to Rule 98, ¶ 39 (Mar. 31, 2006) [hereinafter Brima Motion for Acquittal].

[118] *Id.*

[119] Brima Trial Judgment, *supra* note 53, ¶ 653.

[120] Norman Pretrial Motion, *supra* note 54, ¶ 27.

[121] Fofana Judgment, *supra* note 70, ¶ 92 (emphasis in original).

The question of jurisdiction is constantly reviewed and checked in the ECCC system. It begins with the Co-Prosecutors' discretion, is reviewed by the Co-Investigating Judges, is re-reviewed by the Pre-Trial Appeals, and is finally decided in the Trial Chamber's final judgment. This still leaves the question open about the scope of the language and who, in fact, is a "senior leader" or one who is "most responsible." While only the SCSL and ECCC have distinct, limiting language, all of the international criminal tribunals have considered the issue.

B. Personal Jurisdiction in the International Criminal Justice System

The personal jurisdiction of the ECCC did not arise in a vacuum. The expressions "senior leaders" and "most responsible" were carefully selected to distinguish the ECCC's jurisdiction from that of the other tribunals. The different statutes of the various international criminal tribunals have established different levels of competence for each court and different descriptions of their personal jurisdiction. The statutes and case law of these courts have created a spectrum of personal jurisdiction to which the ECCC can look for guidance. By comparing the ECCC's language with that of the ICC, ICTY, ICTR, and SCSL, the ECCC will be better able to define the extent of its own jurisdiction.

1. The International Criminal Court

The ICC is still in its infancy and does not yet have a substantial case history. However, it was created through widespread international cooperation, and as such, it has become the gold standard of international criminal law. Because the ICC was meant to be the last international criminal tribunal, arguably it has the broadest personal jurisdiction of all the international criminal tribunals. Article 1 of the Rome Statute, the treaty which established the ICC, gives the court "power to exercise its jurisdiction over persons for the most serious crimes of international concern."[122] The crimes referred to are enumerated in the Rome Statute and define the subject-matter jurisdiction of the ICC.[123]

The ICC's jurisdiction "over persons" is facially quite broad, but is further defined elsewhere in the Rome Statute. Article 25 provides the

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[122] Rome Statute art. 1, *supra* note 10, at 91.

[123] *Id.* arts. 5–8, at 92–98.

court "jurisdiction over natural persons pursuant to the Statute."[124] Article 26 prohibits the prosecution of children under the age of 18 (at the time of the crime).[125] These broad definitions give the court jurisdiction over almost any adult person so long as they fall within the subject-matter and temporal jurisdiction requirements of the court.

However, the personal jurisdiction of the ICC is limited by the treaty obligations and procedural steps to initiate prosecution. Article 12 of the Rome Statute states that the ICC only has personal jurisdiction if the crime was committed within the territory of a State which has become a member of the Rome Statute, or the accused is a national of a member State.[126] Non-member States may also temporarily accept ICC jurisdiction for a particular crime.[127] If an individual is not connected to a Rome Statute member State, the ICC as an organization cannot force the State in which the investigation would take place to cooperate if that State has not consented to be bound (i.e., signed the Rome Treaty).[128] This limits the ICC's competence to those individuals who are directly associated with a Rome Statute member.

One aspect that differentiates the ICC from other international criminal tribunals is the way personal jurisdiction is related to the procedures used to initiate an investigation. Article 12 controls where the prosecutor initiates an investigation *proprio motu* or a State refers a situation to the prosecutor.[129] However, when the Security Council refers a case it could theoretically use its power to force any United Nations member State to cooperate.[130] Since Security Council resolutions are binding on all United Nations members, the Security Council could legally bind a United Nations member State to cooperate with the ICC, even if that State is not

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[124] *Id.* art. 25(1), at 105.

[125] *Id.* art. 26, at 106.

[126] *Id.* art. 12(1)–(2), at 99.

[127] *Id.* art. 12(3), at 99.

[128] Kenneth S. Gallant, *Jurisdiction to Adjudicate and Jurisdiction to Prescribe in International Criminal Courts*, 48 VILL. L. REV. 763, 801 (2003).

[129] Rome Statute art. 12, *supra* note 10, at 99.

[130] The Security Council has the option to refer cases to the Prosecutor of the ICC. *Id.* art. 13(b), at 99. Under Chapter VII of the Charter of the United Nations, the Security Council also has the power to make resolutions that are binding on all United Nation member states. *See* U.N. Charter arts. 48–49.

party to the Rome Statute.[131] Of course, this course of action is extremely unlikely given that the Security Council would be unwilling to implement such strict enforcement, and even if they did, a non-cooperating state would be unlikely to offer up the intended indictee.

The ICC's personal jurisdiction is very complicated because of its near universal jurisdiction. The ICC has no personal jurisdiction over an individual who is not associated with a Rome Statute member State, but if the Security Council is willing to act along with the ICC, then the ICC effectively has universal personal jurisdiction.[132]

Much of the confusion arising from the ICC's personal jurisdiction comes from the fact that there are no solid geographical restrictions to the ICC's jurisdiction.[133] As will be seen below, that is not the case with the ad-hoc or hybrid tribunals.

2. The Ad-Hoc Tribunals

The ad-hoc tribunals, the ICTY and ICTR, share a similar phraseology in regards to their personal jurisdiction. Both tribunals have "the power to prosecute persons responsible for serious violations of international humanitarian law."[134] On its face, this jurisdiction appears incredibly broad, but each tribunal has other rules and limitations that control their personal jurisdiction as well.

a. The International Criminal Tribunal for the Former Yugoslavia

Articles 6 and 7 of the ICTY Statute add to the jurisdictional definition of "persons responsible" provided in Article 1. Article 6 states that the court has jurisdiction only over natural persons.[135] As such, it does not prosecute members of ethnic groups based on their ethnicity,[136] nor does it

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[131] Gallant, *supra* note 128, at 801.

[132] *Id.* at 820–21.

[133] Rome Statute arts. 11–13, *supra* note 10, at 99.

[134] Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, art. 1, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute]; Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, Annex, art. 1, U.N. Doc. S/RES/955/Annex (Nov. 8, 1994) [hereinafter ICTR Statute].

[135] ICTY Statute, *supra* note 134, art. 6.

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

(*continued*)

have competence to try juridical persons, such as associations or organizations.[137] This limitation of personal jurisdiction to natural persons is modeled on the practice of the International Military Tribunal of Nuremburg ("IMT").[138]

The Secretary-General has confirmed that an important element of personal jurisdiction is the principle of individual criminal responsibility.[139] Article 7 defines individual criminal responsibility for the ICTY, providing the court jurisdiction over any "person who planned, instigated, ordered, committed or otherwise aided and abetted" one of the subject-matter crimes of the ICTY.[140] This may include both military personnel and civilians.

This issue of individual criminal responsibility was considered by the Appeals Chamber in *Prosecutor v. Tadić*.[141] In *Tadić*, the court looked to the IMT for guidance.[142] The IMT considered three factors to determine individual criminal responsibility: (1) "the clear and unequivocal recognition of the rules of warfare"; (2) State practice indicating intent to criminalize those who breach the rules of warfare; and (3) "punishment of violations by national courts and military tribunals."[143] The ICTY adopted these criteria in its analysis.[144] In the *Tadić* Appeals Judgment, the court held that individual criminal responsibility is not strictly limited to

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the Security Council and the General Assembly, U.N. Doc. S/1995/728, A/50/365 (Aug. 23, 1995) [hereinafter Secretary-General Second Annual Report of the ICTY].

[137] The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, ¶¶ 50–51, *delivered to the Security Council*, U.N. Doc. S/25704 (May 3, 1993) [hereinafter Secretary-General Report on ICTY].

[138] M. CHERIF BASSIOUNI, THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 303 (1996); *see also* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis arts. 9–10, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

[139] Secretary-General Report on ICTY, *supra* note 137, ¶ 53.

[140] ICTY Statute, *supra* note 134, art. 7(1).

[141] Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 128–36 (Oct. 2, 1995).

[142] *Id.* ¶ 128.

[143] *Id.*

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

prosecuting only those who materially perform the criminal acts, but also those whose actions enabled the perpetrators to carry out the acts.[145]

The ICTY's jurisprudence suggests that its personal jurisdiction is very broad. It extends to any individual that committed or aided "serious violations of international humanitarian law."[146] In fact, in 1999 the Prosecutor of the ICTY indicated an intent to investigate NATO personnel for possible crimes committed during operations in the former Yugoslavia.[147] Though this never produced any indictments, it is clear that there would be no jurisdictional problem so long as there was a territorial link to the former Yugoslavia.[148] Due to the wide scope of personal jurisdiction exercised by the ICTY, serious challenges rarely arise.

b. The ICTY Completion Strategy (Rule 11 bis)

As part of a broad completion strategy to conclude the ICTY trials by 2008, the ICTY's Rule 11 *bis* was adopted in November 1997 and amended in September 2002.[149] The rule allows for the transfer of defendants from the ICTY to the national courts based on the judgment of a referral bench.[150] In determining a referral, the referral bench must consider the completion strategy as summarized by Security Council Resolution 1503, which states that all future ICTY activities must "concentrat[e] on the prosecution and trial of the *most senior leaders* suspected of being *most responsible* for crimes within the ICTY's jurisdiction" and transfer all others to the national courts.[151] This language

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[145] Prosecutor v. Du[Ko Tadi], Case No. IT-94-1-A, Judgment, ¶ 189 (July 15, 1999).

[146] *Id.* ¶ 190.

[147] Luc Côté, *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, 3 J. INT'L CRIM. JUST. 162, 179–80 (2005).

[148] *See* ICTY Statute, *supra* note 134, art. 1. The investigations ended up being inconclusive and when another prosecutor was appointed, the matter was dropped. *See* Côté, *supra* note 147, at 180, 183.

[149] International Criminal Tribunal for the former Yugoslavia, Rules of Procedure and Evidence, R. 11 *bis*, U.N. Doc. IT/32/Rev.42 (Nov. 4, 2008), *available at* http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_Rev42_en.pdf [hereinafter ICTY Rules].

[150] *Id.* R. 11 *bis* (A).

[151] S.C. Res. 1503, at 1–2, U.N. Doc. S/RES/1503 (Aug. 28, 2003) (emphasis added). The ICTY also modified the language of Rule 28 to reflect the language of Resolution 1503. *See* ICTY Rules, *supra* note 149, R. 28(A); Côté, *supra* note 147, at 185–86.

was reflected again in Rule 28.[152] While not a jurisdictional element, the ICTY's interpretation of the Rule 11 *bis* language considerably aids an interpretation of the ECCC's jurisdiction, due to the similar language.

Rule 11 *bis* (C) states that the referral bench must consider two factors in determining whether to defer a case: "the gravity of the crimes charged and the level of responsibility of the accused."[153] In a statement on July 22, 2002, the President of the Security Council recognized that this strategy should concentrate on prosecuting civilians, military, and paramilitary leaders rather than "minor actors."[154] A later statement emphasized the importance of referring cases involving "lower and intermediate ranked accused" to the national courts.[155]

The ICTY has considered the gravity of the crime and the level of responsibility of the accused in accordance with Rule 11 *bis* to determine who is to be referred to the national courts.[156] In determining the level of responsibility, the court considers the accused's leadership position. This can be *de facto* or *de jure* leadership, but must show the accused had a high level of command responsibility.[157] The gravity of the crime is measured by the geographic and temporal aspects of the crime as well as the number of people affected.[158]

These elements of command responsibility will be discussed in more detail below.[159] Though Rule 11 *bis* does not limit the ICTY's jurisdiction,

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[152] *See* ICTY Rules, *supra* note 148, R. 28(A).

[153] ICTY Rules, *supra* note 149, R. 11 *bis* (C).

[154] Statement by the President of the Security Council, U.N. Doc. S/Prst/2002/21 (July 23, 2002).

[155] Statement by the President of the Security Council, U.N. Doc. S/Prst/2004/28 (Aug. 4, 2004).

[156] *See* Prosecutor v. Todović, Case Nos. IT-97-25/1-AR11*bis*.1, IT-97-25/1-AR11*bis*.2, Decision on Savo Todović's Appeal Against Decisions on Referral Under Rule 11 *bis*, ¶ 13 (Sept. 4, 2006) [hereinafter Todović R. 11 *bis* Appeal Decision]; Prosecutor v. Kovačević, Case No. IT-01-42/2-I, Decision on Referral of Case Pursuant to Rule 11 *bis* with Confidential and Partly Ex Parte Annexes, ¶ 19 (Nov. 17, 2006) [hereinafter Kovačević R. 11 *bis* Decision]; Prosecutor v. Milošević, Case No. IT-98-29/1-PT, Decision on Referral of Case Pursuant to Rule 11 *bis*, ¶¶ 19–24 (July 8, 2005) [hereinafter Milošević R. 11 *bis* Decision].

[157] Milošević R. 11 *bis* Decision, *supra* note 156, ¶ 22.

[158] Todović R. 11 *bis* Appeal Decision, *supra* note 156, ¶¶ 10–26.

[159] *See* discussion *infra* Part IV.D.2.a.

the language and analysis of the Rule will be very similar to that of the ECCC's jurisdictional language.

c. The International Criminal Tribunal for Rwanda

Article 1 of the ICTR Statute mirrors the "persons responsible" language in Article 1 of the ICTY Statute.[160] Article 5 of the ICTR Statute is identical to Article 6 of the ICTY Statute.[161] Like the ICTY, the ICTR only has jurisdiction over natural persons, not organizations,[162] and the personal jurisdiction of the ICTR extends to civilians as well as combatants.[163] Both tribunals utilize an analysis of individual criminal responsibility in determining jurisdiction. While the ICTR does not express a limitation with respect to the level of responsibility of the accused, there is a focus on those who are responsible for genocide.[164]

Despite the many similarities, the ICTR has taken a slightly different approach than the ICTY. The ICTR considers two distinct issues in determining personal jurisdiction: the class of the perpetrators, and the class of the victims.[165]

(a) The Perpetrators

In determining the class of the perpetrators, the ICTR limits its jurisdiction according to nationality.[166] Article 1 of the ICTR Statute gives the court personal jurisdiction over those who committed crimes in Rwanda, as well as Rwandan citizens who committed crimes in neighboring States.[167] Thus, the court has jurisdiction over three classes of perpetrators: (1) Rwandan citizens committing crimes in Rwanda; (2)

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[160] ICTR Statute, *supra* note 134, art. 1; ICTY Statute, *supra* note 134, art. 1.

[161] Both courts identically state that they have "jurisdiction over natural persons pursuant to the provisions of the present Statute." *See* ICTR Statute, *supra* note 134, art. 5; ICTY Statute, *supra* note 134, art. 6.

[162] See JOHN R.W.D. JONES & STEVEN POWLES, INTERNATIONAL CRIMINAL PRACTICE 348 (Transnational Publishers, Inc. 2003) (1998).

[163] Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 634 (Sept. 2, 1998) [hereinafter Akayesu Judgment].

[164] SCHABAS, *supra* note 3, at 147.

[165] Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgment and Sentence, ¶ 263 (Jan. 27, 2000) [hereinafter Musema Judgment and Sentence].

[166] SCHABAS, *supra* note 3, at 142.

[167] ICTR Statute, *supra* note 134, art. 1.

Rwandan citizens committing crimes outside Rwanda; and (3) Non-Rwandan individuals committing crimes within Rwanda. Noticeably absent are non-Rwandan citizens committing crimes outside of Rwanda, even where they are closely related to the conflict. The court does not have jurisdiction over this class of perpetrators.[168]

Neither the ICTY nor the ICC is limited in this way.[169] As discussed above, the ICTY does not prosecute individuals based on ethnicity,[170] yet the ICTR seems to limit prosecutions based on nationality.

(b) The Victims

The victims of the conflict must be those "not taking an active part in the hostilities,"[171] as described in Common Article 3 of the Geneva Conventions. The court accepts a negative definition of civilians to be anyone that is *not* a combatant.[172] Being so broadly defined, it is left to the court to determine the class of victims on a case-by-case basis.

Only where the accused is alleged to be within the perpetrator class and allegedly attacked those in the victims class, does the ICTR have personal jurisdiction. While the ICTY and ICTR have limitations on personal jurisdiction, particularly when compared to the ICC, none of these courts have specific limiting language of jurisdiction to the extent seen in the hybrid tribunals.

3. The Special Court for Sierra Leone

The SCSL is the only other international criminal tribunal with similar limiting terms written into its statute. Compared to the ad-hoc tribunals, the SCSL is also the tribunal that most closely resembles the organization of the ECCC. While the SCSL ultimately held that "greatest responsibility" was not a jurisdictional term, it did make some findings about the scope of the phrase.[173] Its interpretation should be given special

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[168] *Id.*

[169] SCHABAS, *supra* note 3, at 142.

[170] Secretary-General Second Annual Report of the ICTY, *supra* note 136, ¶ 196.

[171] Akayesu Judgment, *supra* note 163, ¶ 629.

[172] Musema Judgment and Sentence, *supra* note 165, ¶ 280; *see also* Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-T, Judgment, ¶ 180 (May 21, 1999).

[173] Brima Trial Judgment, *supra* note 53, ¶¶ 658–59.

consideration by the ECCC in interpreting the ECCC's jurisdictional language.

Article 1 of the SCSL Statute grants the court the power to prosecute those who "bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law" committed during the Sierra Leone civil war.[174] The SCSL has discussed the meaning of the term "greatest responsibility" extensively and has emphasized the distinction between this language and that of the ad-hoc tribunals.[175] To date, however, the court has yet to make clear the scope of the phrase "greatest responsibility."

The scope of the phrase was considered by the United Nations in establishing the SCSL, the SCSL Trial Chambers, and the SCSL Prosecutor.[176] An analysis of all three will shed some light on what "greatest responsibility" really means.

a. Interpretation in the United Nations

In determining the meaning of "greatest responsibility," the SCSL has paid special attention to the correspondence between the United Nations Secretary-General and the President of the Security Council during the negations to establish the SCSL. Initially, the Secretary-General, in his report on the establishment of the SCSL, advocated for the use of the phrase "most responsible" to define the court's jurisdiction.[177] The Security Council rejected this proposal, opting for the term "greatest responsibility."[178] In so doing, the Security Council believed it would be "limiting the focus of the Special Court to those who played a leadership role."[179] In a later letter, the Secretary-General acquiesced to the use of the "greatest responsibility" language and agreed with the Security Council's interpretation.[180]

In their correspondence, both the Security Council and the Secretary-General agreed that "greatest responsibility" did not limit the court's

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[174] SCSL Statute art. 1(1), *supra* note 26, at 145.

[175] Côté, *supra* note 147, at 184–85.

[176] *Id.* at 184.

[177] Secretary-General SCSL Report, *supra* note 57, ¶¶ 29–31.

[178] First Security Council President Letter on SCSL, *supra* note 58, ¶ 1.

[179] *Id.*

[180] Secretary-General Letter on the SCSL, *supra* note 59, ¶ 2–3.

jurisdiction solely to political and military leaders, but could extend even to children.[181] As such, the SCSL Statute was drafted in order to allow for the prosecution of minors. The Statute prohibits the prosecution of children who were under the age of fifteen during the time of the crimes, and has specific, limiting rules for trying those between the ages of fifteen to eighteen.[182]

b. Interpretation by the SCSL Chambers

The SCSL chambers ultimately concluded that the "greatest responsibility" language was not a term of personal jurisdiction.[183] Even so, there was some discussion regarding the scope of the language. According to the court, to measure the scope of "greatest responsibility," the court must consider whether the accused was (1) a senior member of their particular group and (2) implicated in serious crimes within the jurisdiction of the court.[184] If so, they could be considered as those bearing the greatest responsibility. The court acknowledged that the language was intended to limit the number of accused brought before the court, but maintained that the language should be interpreted broadly enough to encompass even persons who were as young as fifteen at the time of their crimes.[185] The fact that evidence may identify others who also bear the greatest responsibility does not eliminate the accused's liability or the court's competence over them.[186]

c. The Prosecutor's Interpretation

The phrase "greatest responsibility" was meant to narrow the prosecutor's focus to the key players in the conflict, but the phrase still offers considerable discretion.[187] In the SCSL, the prosecutor utilized the

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[181] *Id.* ¶ 2.

[182] SCSL Statute art. 7(1), *supra* note 26, at 147.

[183] Brima Trial Judgment, *supra* note 53, ¶ 653.

[184] Brima Motion for Acquittal, *supra* note 117, ¶ 38.

[185] Brima Trial Judgment, *supra* note 53, ¶¶ 658–59.

[186] Brima Motion for Acquittal, *supra* note 117, ¶ 39.

[187] TOM PERRIELLO & MARIEKE WIERDA, INT'L CTR. FOR TRANSITIONAL JUSTICE, THE SPECIAL COURT FOR SIERRA LEONE UNDER SCRUTINY 15 (2006), *available at* http://www.ictj.org/static/Prosecutions/Sierra.study.pdf. The SCSL was trying to avoid the fierce criticism that befell the ICTY and ICTR for indicting very low level actors. *See* Côté, *supra* note 147, at 169.

discretion very conservatively. While "greatest responsibility" is already quite narrow, the prosecutor viewed the language as a political compromise and narrowed it further out of political and financial considerations.[188] Fearing that a large number of indictees under the Statute's mandate could threaten the stability of the region and the life of the court, the prosecutor adopted "an internal standard of 'beyond reasonable doubt' before issuing indictments."[189] This effectively limited the number of accused beyond that required by the Statute.

There were also practical reasons for the narrow use of the prosecutor's discretion. Others who could be considered as bearing the greatest responsibility were found to be deceased, incarcerated for other reasons, or assisting the prosecution as insider witnesses.[190] The prosecution tended to indict only those who were highest on the chain of command, rather than simply those who bore the greatest responsibility.[191] Though this method has been criticized, it is within the prosecutor's discretion to further limit the mandate as he sees fit.[192]

It is important to note that the prosecution did not limit itself to indicting rebels and soldiers blamed for starting the war and causing the most atrocities.[193] The court also tried members of the Civil Defence Forces, traditional hunting groups that mobilized in order to defend the

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[188] SARA KENDALL & MICHELLE STAGGS, UNIV. OF CAL. BERKELEY WAR CRIMES STUDIES CTR., FROM MANDATE TO LEGACY: THE SPECIAL COURT FOR SIERRA LEONE AS A MODEL FOR "HYBRID JUSTICE" 6 (2005), *available at* http://socrates.berkeley.edu/~warcrime/ SL.htm#analyses (follow "Interim Report on the Special Court for Sierra Leone issued Spring 2005 PDF" hyperlink).

[189] *Id.*

[190] *Id.*

[191] *See, e.g.*, Prosecutor v. Sesay, Case No. SCSL-04-15-PT, Corrected Amended Consolidated Indictment (Aug. 2, 2006) [hereinafter Sesay Corrected Amended Consolidated Indictment]; Prosecutor v. Brima, Case No. SCSL-04-16-PT, Further Amended Consolidated Indictment (Feb. 18, 2005). In considering the responsibility of the accused, the Prosecutor also considered the accused's position during specific periods. For example, Santigie Kanu of the AFRC was a top ranking commander, but was particularly high ranking during the Freetown invasion when a large number of crimes took place. Similarly, Augustine Gbao of the RUF was just a mid-level commander for much of the war, but was promoted and played a major role in the kidnapping and killing of U.N. troops.

[192] KENDALL & STAGGS, *supra* note 188, at 6–7.

[193] *See, e.g.*, Prosecutor v. Norman, Case No. SCSL-03-14-I, Indictment (Feb. 5, 2004).

democratic government.[194] While peacekeepers may fall under the scope of "greatest responsibility," the prosecution is limited by the SCSL Statute, which states that peacekeepers fall within the jurisdiction of their own countries.[195]

Both the United Nations and the SCSL Chambers agreed that minors could be considered among those bearing the greatest responsibility.[196] However, the prosecutor decided that the standard of "greatest responsibility" was too high to include minors.[197]

d. Conclusion

The term "greatest responsibility" in the SCSL Statute is meant to limit the trials to those who played a leadership role in the war. The court must consider whether the accused was (1) a senior member of his/her respective group and (2) is implicated in serious crimes before the court. The leadership role of the individual is the primary consideration, though the language is broad enough to extend beyond political and military leaders. As such, the "greatest responsibility" language is a significantly narrow term.

C. The Spectrum of Personal Jurisdiction

In determining the scope of the ECCC's personal jurisdiction, it is useful to compare it to the jurisdictions of the other international criminal tribunals. The analysis of the other courts helps draw a spectrum of personal jurisdiction and limiting language. Considering the powers of the other courts, a possible spectrum may look something like Figure 1.

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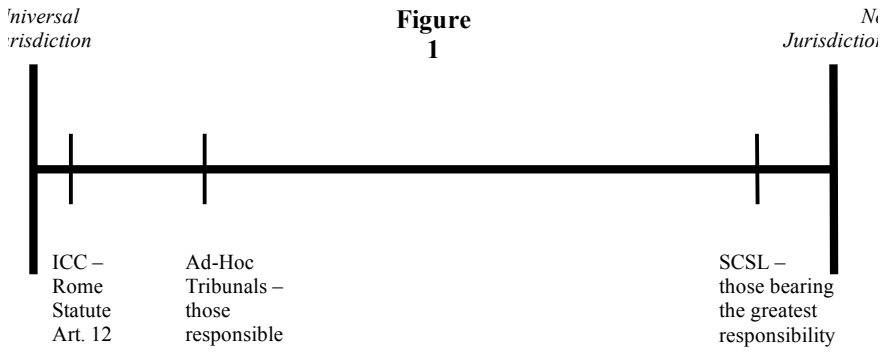
[194] Fofana Judgment, *supra* note 70, ¶ 2.

[195] SCSL Statute art. 1(2), *supra* note 26, at 145.

[196] *Id.* art. 7(1), at 147.

[197] Press Release, Special Court for Sierra Leone, Special Court Prosecutor Says He Will Not Prosecute Children (Nov. 2, 2002), *available at* http://www.sc-sl.org/LinkClick.aspx?fileticket=XRwCUe%2baVhw%3d&tabid=196.

Figure 1



The ICC is on one end, near universal jurisdiction. The ICC has personal jurisdiction over all individuals so long as the individual is connected to a member state of the Rome Statute.[198] On the opposite end is the SCSL, which limits its competence to those bearing the greatest responsibility.[199] The ad-hoc tribunals' jurisdiction is narrower than the ICC's, as the ad-hoc tribunals are limited to prosecuting only those "responsible for serious violations" of international humanitarian law committed within their respective conflicts.[200] However, the personal jurisdiction of the ad-hoc tribunals remains quite broad because they can also try those who aided and abetted the physical perpetrators.[201]

The SCSL is limited to those who bear the "greatest responsibility,"[202] which only allows for the prosecution of the worst offenders. This language is much narrower than that of either the ICC or the ad-hoc tribunals. In conjunction with the prosecutor's decision to narrow it even further, it has become a very limiting and belongs on the opposite side of the spectrum.

Inserting the ECCC's language into this spectrum of jurisdictional language will help clarify how best to interpret it during trial.

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[198] Rome Statute art. 12(1), *supra* note 10, at 99.

[199] SCSL Statute art. 1(1), *supra* note 26, at 145.

[200] ICTY Statute, *supra* note 134, art. 1; ICTR Statute, *supra* note 134, art. 1.

[201] ICTY Statute, *supra* note 134, art. 7(1); ICTR Statute, *supra* note 134, art. 6(1).

[202] SCSL Statute art. 1(1), *supra* note 26, at 145.

D. The Jurisdiction of the ECCC

When the Cambodian Government originally approached the United Nations about establishing an international tribunal, it asked for assistance in "bringing to justice those persons responsible" for the crimes of the Democratic Kampuchea.[203] This language echoes that of the ICTY and ICTR. However, due to concerns about a large number of indictees, that language was changed. After long negotiations, the language was modified until it reached its present form in the ECCC Statute.[204]

The ECCC Statute defines its personal jurisdiction in Article 2:

> Extraordinary Chambers shall be established in the existing court structure . . . to bring to trial *senior leaders of Democratic Kampuchea* and those who were *most responsible* for the crimes and serious violations of Cambodian laws related to crimes, international humanitarian law and custom, and international conventions recognized by Cambodia . . . .[205]

The description essentially describes two classes of persons that are subject to the ECCC's jurisdiction: (1) senior leaders of Democratic Kampuchea and (2) those most responsible for the crimes. These phrases have never been used to define an international criminal tribunal's personal jurisdiction before.

1. The Link Between "Senior Leaders" and "Most Responsible"

One argument may be that the phrase "senior leaders of Democratic Kampuchea and those who were most responsible" combines two terms, as if the phrase refers to senior leaders *that* were most responsible. Essentially, the argument is that the word "and" requires that the accused must be both a senior leader and one who is most responsible. This would greatly restrict the meaning of both phrases. If this were the case, the language would correspond closely to the ICTY's Rule 11*bis*, which connects the two terms. As discussed above, the ICTY Rule 11*bis*

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[203] Letter from the First and Second Prime Ministers of Cambodia Addressed to the Secretary-General, U.N. Doc. S/1997/488/Annex, A/51/930/Annex (June 24, 1997).

[204] *See* ECCC ch. I, art. 1; ch. II, art. 2, *supra* note 29.

[205] *Id.* ch. I, art. 2 (emphasis added).

concentrates on "the most senior leaders suspected of being most responsible."[206]

However, the use of the word "and" in the ECCC Statute separates the two terms rather than connects them. The clearest indication that the terms are not linked is the structure of the sentence itself. The ECCC Statute, though containing similar phrases to the ICTY Rule 11 *bis* and Rule 28 language, has a markedly different grammatical structure.[207] If the purpose of the sentence was to link the phrases, the words "and those" could have been changed to clearly identify the connection. For example, the phrase could have read, "senior leaders of Democratic Kampuchea *who were* most responsible," or "*and were* most responsible." This is clearly not the case, and a plain text reading of the words suggests a split between the categories.

The history of the ECCC's establishment also suggests that the terms are separate. The Group of Experts recommended that the tribunal should focus on "senior leaders with responsibility over the abuses *as well as* those at lower levels who are directly implicated in the most serious atrocities."[208] In fact, the phrase "most responsible" was inserted specifically to allow for the prosecution of S-21 Chairman Kaing "Duch" Guek Eav and other high-ranking S-21 commanders, who were not considered senior leaders.[209] This strongly suggests that the phrase "most responsible" was intended to be separate from "senior leaders" and must be interpreted to extend to anyone that was most responsible, "regardless of their position within the Democratic Kampuchea hierarchy."[210]

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[206] ICTY Rules, *supra* note 149, R. 11 *bis* (C).

[207] The difference is clear when the language is compared side by side. The ECCC Statute describes "senior leaders of Democratic Kampuchea *and those* who were most responsible." ECCC Statute ch. II, art. 2, *supra* note 29 (emphasis added). ICTY Rules 11 *bis* and 28 concern "the most senior leaders *suspected of being* most responsible for crimes within the ICTY's jurisdiction." S.C. Res. 1503, *supra* note 151, at 1 (emphasis added).

[208] Group of Experts Report, *supra* note 87, ¶ 110 (emphasis added).

[209] Steve Heder, *Reassessing the Role of Senior Leaders and Local Officials in Democratic Kampuchea Crimes: Cambodian Accountability in Comparative Perspective*, *in* BRINGING THE KHMER ROUGE TO JUSTICE: PROSECUTING MASS VIOLENCE BEFORE THE CAMBODIAN COURTS, *supra* note 32, at 377, 409–10.

[210] Scott Worden, *An Anatomy of the Extraordinary Chambers*, *in* BRINGING THE KHMER ROUGE TO JUSTICE: PROSECUTING MASS VIOLENCE BEFORE THE CAMBODIAN COURTS, *supra* note 32, at 171, 179.

The two separate phrases, defining different classes of individuals, must still be interpreted to determine which individuals fall within the jurisdiction of the ECCC. Since the phrases are separate, they require separate analyses.

2. "Senior Leaders of Democratic Kampuchea"

The jurisdictional requirement of "senior leaders of Democratic Kampuchea" creates three elements that must be met in order for an individual to be prosecuted. The person must have (1) had a leadership position; (2) held a senior position in the military or government; and (3) been a member of Democratic Kampuchea.

a. Leaders

The term "leader" refers to an individual's command responsibility.[211] Liability based on command responsibility can be positive and/or negative. A commander can take a positive action in ordering a subordinate to commit a crime.[212] This type of command liability is relatively straight-forward. A commander can also be negatively liable for failing to prevent or punish crimes performed by subordinates.[213] In order for the individual to be liable for negative command responsibility, there must be an obligation to act.[214] Negative command responsibility requires three elements: (1) there must exist a superior-subordinate relationship; (2) the superior had *mens rea*—he knew or had reason to know subordinates were committing or had committed crimes; and (3) the superior failed to take necessary and reasonable measures to prevent or punish the perpetrators.[215]

The superior-subordinate relationship applies to both *de jure* and *de facto* authority.[216] Thus, it extends beyond the military and civilian commanders to any individual with superior authority.[217] The converse is also true—the formal status of a position does not automatically create

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[211] *See* Prosecutor v. Delalić, Case No. IT-96-21-T, Judgment, ¶ 331 (Nov. 16, 1998) [hereinafter Delalić Judgment] ("The type of individual criminal responsibility for the illegal acts of subordinates . . . is commonly referred to as 'command responsibility.'").

[212] *Id.* ¶ 333.

[213] *Id.*

[214] *Id.* ¶ 334.

[215] *Id.* ¶ 346.

[216] *Id.* ¶ 354.

[217] *Id.* ¶ 363.

command responsibility.[218] The person must have had actual power of control over the subordinates.[219]

The ECCC Group of Experts recognized that a determination of command responsibility is necessary to determine an individual's liability:

> Military commanders and civilian leaders are criminally responsible in the obvious case where they order atrocities and they are also generally responsible if they knew or should have known that atrocities were being or about to be committed by their subordinates and they failed to prevent, stop or punish them. This would suggest the need to investigate the roles of those Khmer Rouge officials in responsible governmental positions with actual or constructive knowledge of the atrocities.[220]

The Group of Experts also recognized that the term "leaders" should not automatically be used to prosecute all persons at senior positions of the Democratic Kampuchea or even the Communist Party of Kampuchea.[221] This is because the list of senior members may not necessarily correspond to a list of those most responsible for the crimes committed.[222] There may very well be senior leaders who had no knowledge or control over the crimes, while others slightly below the senior level may have been very actively involved.[223]

b. Senior

The question of whether an individual was in a senior position within the organization depends largely on the structure of the organization itself and the larger context. For example, in the SCSL, the accused Alex Tamba Brima claimed that he never rose above the rank of corporal, and thus could not be considered a senior leader or one who bore the greatest responsibility.[224] However, during the war Brima was able to promote

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[218] *Id.* ¶ 370.
[219] *Id.*
[220] Group of Experts Report, *supra* note 87, ¶ 81.
[221] *Id.* ¶ 109.
[222] *Id.*
[223] *Id.*
[224] *See* Brima Trial Judgment, *supra* note 53, ¶¶ 11, 649.

himself and others even if these ranks were not recognized outside their own faction.[225] The Trial Chamber held that Brima had the necessary command, particularly during the invasion of Freetown, to have *de facto*, if not *de jure* command responsibility.[226]

The ICTY also offers some jurisprudence in its interpretation of Rule 11 *bis*. As noted above, Rule 11 *bis* requires a referral bench to refer cases to a national court unless the bench determines that an indictee is a "most senior leader suspected of being most responsible" for the crimes within the ICTY's jurisdiction.[227] This section will focus on the ICTY's interpretation of the words, "most senior leaders."

In *Prosecutor v. Dragomir Milošević*, the Referral Bench considered the gravity of the crimes charged and the level of responsibility of the accused in holding that the trial should remain at the ICTY because the accused was a most senior leader who was most responsible for the crimes.[228] The bench considered the gravity of the crimes: a fifteen month campaign that killed and wounded thousands of civilians.[229] It also found that the accused had a high level of command responsibility because he was subordinate only to the highest military commanders.[230] He was in command of about 18,000 men, and the fact that he joined an already established campaign did not diminish his responsibility.[231]

More importantly, the referral bench rejected the prosecution's interpretation of the phrase, "most senior leaders."[232] The prosecution submitted that the words apply where the accused was "the architect of the overall policy underpinning the alleged crimes and driving their commission."[233] The referral bench rejected this narrow interpretation, and instead held that "most senior leaders" covers those who, "by virtue of their position and function in the relevant hierarchy, both *de jure* and *de facto*, are alleged to have exercised such a degree of authority that it is

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[225] *Id.* ¶ 602.
[226] *Id.* ¶ 420.
[227] S.C. Res. 1503, *supra* note 151, at 1–2.
[228] Milošević R. 11 *bis* Decision, *supra* note 156, ¶¶ 19–24.
[229] *Id.* ¶ 19.
[230] *Id.* ¶ 23.
[231] *Id.* ¶¶ 21, 23.
[232] *Id.* ¶ 22.
[233] *Id.*

appropriate to describe them as among the 'most senior,' rather than 'intermediate.'"[234]

In *Prosecutor v. Todović*,[235] the Appeals Chamber determined that the accused Todovic was a proper candidate for referral. The bench agreed that an accused need not be the architect of the overall policy to be considered a "most senior leader."[236] However, it ultimately agreed that, due to the limited geographic scope of the crimes and the fact that a higher-ranking member had already been tried, the accused was just an intermediary actor.[237] Similarly, in *Prosecutor v. Kovačević*, the Referral Bench found that the accused was just a battalion commander following orders, and two higher senior leaders had already been convicted for their roles in the crimes.[238] Therefore, the accused was not a "most senior leader."[239]

The ECCC will have to determine whether there is a significant difference between its "senior leaders" language and the ICTY Rule 11 *bis* and Rule 28 "most senior leaders." Clearly the word "most" would suggest that the ICTY language is narrower, though it is difficult to comprehend much practical difference between the two phrases. Even so, the theoretically narrower ICTY language still leaves considerable room for prosecution.

As the SCSL and ICTY jurisprudence makes clear, the level a leader has in the chain of command is dependent on the hierarchy and the totality of the circumstances. There is no specific legal jurisprudence that determines precisely what rank or title is sufficient to be considered "senior," especially considering differing definitions depending on the country and context. This element must be considered on a case-by-case basis using knowledge of the political and military leadership of, and the accused's role in, the Khmer Rouge and Democratic Kampuchea.

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[234] *Id.*
[235] Todović R. 11 *bis* Appeal Decision, *supra* note 156.
[236] *Id.* ¶ 20.
[237] *Id.* ¶¶ 21–22.
[238] Kovačević R. 11 *bis* Decision, *supra* note 156, ¶ 20.
[239] *Id.*

c. Democratic Kampuchea

The language clearly identifies a particular element of personal jurisdiction—the individual's affiliation with the Democratic Kampuchea.[240] Only those who were members of the Democratic Kampuchea can be tried under this part of the Statute. This excludes the prosecution of non-Democratic Kampuchea actors, including other political factions, regardless of their connection with the Democratic Kampuchea.[241] It also excludes Vietnamese and Thai officials who may have been involved.[242]

The SCSL, by comparison, does not have such a limitation. During the establishment of the SCSL, President Kabbah of Sierra Leone initially requested the Special Court to try "members of the Revolutionary United Front (RUF) and their accomplices responsible for committing crimes."[243] The United Nations rejected this limitation and adopted the broader "greatest responsibility" language. While "greatest responsibility" is a very narrow term, it did open up the court to prosecuting actors from other factions in the conflict. In the end, only five members of the Revolutionary United Front were indicted,[244] while the other indictees were members of other factions. In this sense, the ECCC jurisdiction is narrower than that of the SCSL.

d. Conclusion

Under the "senior leaders" provision, the ECCC has jurisdiction over only those individuals that were at the senior level of Democratic

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[240] ECCC Statute ch. II, art. 2, *supra* note 29.

[241] Rachel Williams, *The Cambodian Extraordinary Chambers—A Dangerous Precedent for International Justice?*, 53 INT'L & COMP. L.Q. 227, 238 (2004).

[242] *Id.*

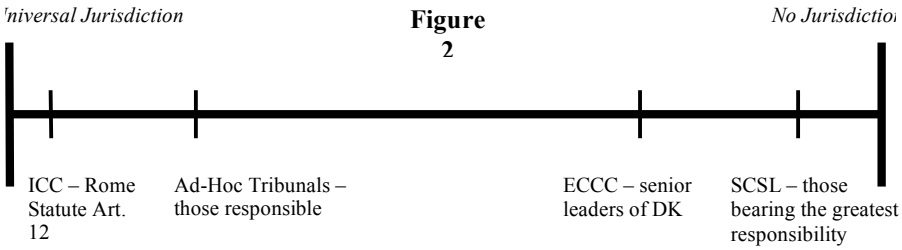
[243] Letter from Ibrahim M. Kamara, Permanent Representative of Sierra Leone to the United Nations, to the President of the Security Council, U.N. Doc. S/2000/786 (Aug. 10, 2000).

[244] *See* Sesay Corrected Amended Consolidated Indictment, *supra* note 191. This indictment only covers Issa Hassan Sesay, Morris Kallon, and Augustine Gbao. *Id.* Two other RUF members were indicted, namely Foday Sankoh and Sam Bockarie, but both died before their trials could begin. Jane E. Stromseth, *Pursuing Accountability for Atrocities After Conflict: What Impact on Building the Rule of Law?*, 38 GEO. J. INT'L L. 251, 300 (2007).

Kampuchea, and could be liable based on command responsibility. There does not seem to be much difference between the "senior leaders" of the ECCC and those bearing the "greatest responsibility" in the SCSL. Those bearing the greatest responsibility must be 1) a senior member of their faction and 2) implicated in serious crimes.[245] This is essentially the same analysis that the ECCC will use for prosecuting its senior leaders. The SCSL language may still be narrower in that the accused must bear the *greatest* responsibility; the use of the superlative suggesting that no unindicted individuals bear more responsibility than the accused. However, the ECCC is still limited to prosecuting only members of Democratic Kampuchea, which actually limits its jurisdiction.

On the spectrum of personal jurisdiction, the "senior leaders" language could be viewed as slightly less limiting than "greatest responsibility," since there remains the possibility that those who bear greater responsibility than the accused may still be unindicted. Figure 2 shows where "senior leaders" would fall on the spectrum of jurisdiction.

Figure 2



While the court is thus limited, it may still have competence over other lower-ranking members of Democratic Kampuchea, through the "most responsible" jurisdiction.

3. "Those Most Responsible"

The ECCC Statute's use of the phrase, "those who were most responsible,"[246] suggests that the drafters did not intend the court to be limited to prosecuting only senior leaders of Democratic Kampuchea. The Group of Experts recognized that many individuals that were not in the charts of senior leaders may have played a significant role in the atrocities:

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[245] Brima Motion for Acquittal, *supra* note 117, ¶ 38.

[246] ECCC Statute ch. II, art. 2, *supra* note 29.

"This seems especially true with respect to certain leaders at the zonal level, as well as officials of torture and interrogation centres such as Tuol Sleng."[247] To determine the scope of "most responsible," it is again useful to consider other courts' interpretations of the same language.

c. The SCSL

The SCSL has already provided some discussion of the scope of "most responsible." The Secretary-General originally advocated for the use of the phrase, "persons most responsible," for the SCSL, rather than "greatest responsibility."[248] The Secretary-General suggested that "most responsible" should be understood to "denote[] both a leadership or authority position of the accused, and a sense of the gravity, seriousness or massive scale of the crime."[249] This would open the court's competence to include not only political and military leadership, but also those further down the line of command depending of the severity of the crime.[250]

When the Security Council rejected the use of the phrase "most responsible" in favor of "greatest responsibility," it stated that doing so would be "limiting the focus of the Special Court to those who played a leadership role."[251] Thus, "most responsible" was understood to be broader than "greatest responsibility."

b. ICTY Rule 11 bis

The ICTY's jurisprudence on Rule 11 *bis* offers a useful guide to determining whether an accused is one of those "most responsible." In *Prosecutor v. Todović*,[252] the Appeals Chamber formulated some factors to consider when deciding whether an accused was most responsible under Rule 11 *bis*:

> (1) The temporal scope of the crimes charged. The court should consider the amount of time that the accused

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[247] Group of Experts Report, *supra* note 87, ¶ 109.
[248] Secretary-General SCSL Report, *supra* note 57, ¶ 29.
[249] *Id.* ¶ 30.
[250] *Id.*
[251] First Security Council President Letter on SCSL, *supra* note 58, ¶ 1.
[252] Todović R. 11 *bis* Appeal Decision, *supra* note 156.

> committed the charged crime as one of several relevant factors.[253]
>
> (2) The geographic scope of the crimes charged, or how wide the physical area was in which the crime took place.[254]
>
> (3) The number of persons affected by the crimes charged. How many people were victimized by the accused's actions?[255]

The accused's leadership position was also considered.[256] The referral bench used these factors to determine that the accused *Todović* was a proper candidate for referral.[257] In determining who was "most responsible," the ECCC can use the *Todović* test. Though an accused need not be a senior leader to be most responsible under the ECCC Statute, the individual's *de facto* leadership position must still be sufficient to show criminal command responsibility.

c. Conclusion

The Group of Experts suggested that leaders at lower levels "who are directly implicated in the most serious atrocities" should be prosecuted as most responsible.[258] Therefore, an analysis of who is "most responsible" should focus more on the severity of the crime than the *de jure* leadership position of the accused, perhaps using the *Todović* test. These individuals must still have had command responsibility in order to be liable.[259] As discussed above, a determination of command responsibility must include whether a superior-subordinate relationship existed, whether the superior fulfilled the *mens rea* requirements, and whether the superior failed to take necessary steps to prevent the atrocities.[260]

This broader jurisdiction is important for prosecuting mid-level commanders that acted as a link between the Central Committee and those

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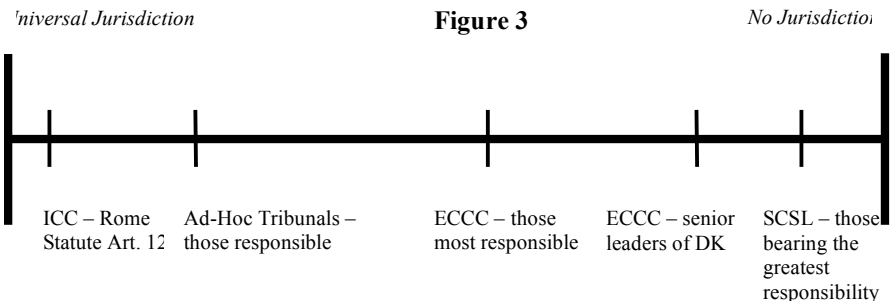
[253] *Id.* ¶ 13.
[254] *Id.* ¶ 16.
[255] *Id.* ¶ 25.
[256] *Id.* ¶¶ 17–22.
[257] *Id.* ¶ 125.
[258] Group of Experts Report, *supra* note 87, ¶ 110.
[259] Milošević R. 11 *bis* Decision, *supra* note 156, ¶ 22.
[260] Delalić Judgment, *supra* note 211, ¶ 346.

on the ground.[261] However, this still excludes low-level commanders.[262] In practice, only senior and mid-level commanders should be prosecuted. While there is some political concern about the number of possible indictees, there is also a risk that interpreting the phrase too narrowly will hurt the prosecutors' ability to trade insider witness testimony for leniency or impunity. Without a credible threat, many potential witnesses may not come forward.[263] Losing this ability would hinder the trials of the most important accused.

While the scope of the term "most responsible" is technically wide enough to include a variety of actors, the ECCC is probably still politically limited to prosecuting only members of the Democratic Kampuchea and Khmer Rouge. The Group of Experts recommended that the ECCC's mandate extend only to Khmer Rouge members, which was based on a request by the Cambodian Government.[264]

The phrase "most responsible" is narrower than "those responsible" used by the ad-hoc tribunals, as it would not include those who aided and abetted the crimes. It is still much broader than "greatest responsibility" used by the SCSL. Thus, on the spectrum of personal jurisdiction, it would fall between the ad-hoc tribunals and the SCSL, as shown in Figure 3.

Figure 3



Considering the ECCC's language in relation to the spectrum of personal jurisdiction of the other international criminal tribunals will help

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[261] Kelly Dawn Askin, *Prosecuting Senior Leaders of Khmer Rouge Crimes*, OPEN SOC'Y JUST. INITIATIVE, Apr. 16, 2008, at 72, 76, *available at* http://www.justiceinitiative.org/publications/jinitiatives (follow "Justice Initiatives, April 2006" hyperlink).

[262] Williams, *supra* note 241, at 238–39.

[263] Worden, *supra* note 210, at 180–81; *see also* Askin, *supra* note 261, at 76–77.

[264] Group of Experts Report, *supra* note 87, ¶ 10.

focus future consideration of an accused's responsibility. One can use the spectrum to analyze cases from the other tribunals compared with the case at hand. This will aid in the determination, both for the parties and the chambers of the ECCC, of whether the court has personal jurisdiction over the accused.

V. CONCLUSION

The terms "senior leaders" and "most responsible" codified in Article 2 of the ECCC Statute are limiting terms of personal jurisdiction. As such, the ECCC only has competence to prosecute individuals that fall into one of those categories. The use of two phrases allows for a broader scope of indictees to be prosecuted before the chambers.

Any analysis of whether an accused fits into one of these categories must consider the gravity of the crime for which the accused is indicted, and the level of responsibility of the accused. This should be done utilizing the *Todović* test from the ICTY.

Under the "senior leaders" provision of the jurisdiction, an accused must have held a high ranking position in the government or military, had command responsibility for the crimes committed, and have been a member of Democratic Kampuchea. The phrase was likely intended to encompass members of the Central Committee. Regardless of their rank, they must have had command responsibility over the atrocities committed. Thus, all indictees that are senior leaders should also be most responsible, but not all those most responsible must be senior leaders.

The phrase "most responsible" allows for the prosecution of lower level leaders involved in particularly heinous crimes. While this includes the military and political leadership, it may also include those lower on the chain of command so long as it is shown that they had *de facto* leadership. This phrase is broader than the "greatest responsibility" terminology used in the SCSL, so allows for more individuals to be tried under the provision. "Most responsible" allows for a wider range of indictees, but is still probably limited to those who were members of the Khmer Rouge. In determining whether someone is most responsible, it will be useful to consider the *Todović* test developed in the ICTY.

Since all senior leaders must also be most responsible, the use of two phrases is technically redundant. However, the addition of "senior leaders" to the jurisdiction of the court helps focus the prosecution. Even if "senior leaders" is held to not be a jurisdictional requirement, "most responsible" should remain so.

Comparing the ECCC's language to the spectrum of personal jurisdiction in the international criminal tribunals will help facilitate an

understanding of who is a senior leader or most responsible. Initially it will fall to the prosecutor to determine who falls in these categories, but it is subject to judicial review. The interpretation of personal jurisdiction will ultimately rest with the ECCC chambers. This is especially true since it is currently the only tribunal using these phrases to define its personal jurisdiction.

VI. MOVING FORWARD

The Cambodian Government and the contributing States want to keep the number of indictees in the ECCC low to minimize expenses and political tension.[265] The largest problem facing the ECCC is the delay between the time of the crimes and the trials. Many of the senior and intermediate level commanders have died in the three decades since the crimes were committed.[266] It has been estimated that no more than roughly sixty individuals that could be considered "senior leaders" or "most responsible" are still alive to stand trial.[267] This may explain why the "most responsible" language was added to the "senior leaders" language.

To date, five individuals have been indicted and detained for trial at the ECCC. They are Kaing Guek Eav, Ieng Sary, Ieng Thirith, Khieu Samphan, and Nuon Chea.[268] With the exception of Kaing Guek Eav, the indictees were all senior leaders being part of the Central Committee.[269] Kaing Guek Eav, alias Duch, commanded the Tuol Sleng torture center.[270] He is the most likely to be indicted solely under the "most responsible" language of the ECCC Statute. His trial began in March 2009.[271]

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[265] Dinah PoKempner, *The Khmer Rouge Tribunal: Criticisms and Concerns*, OPEN SOC'Y JUST. INITIATIVE, Apr. 16, 2008, at 32, 39 (April 18, 2006), *available at* http://www.justiceinitiative.org/publications/jinitiatives (follow "Justice Initiatives, April 2006" hyperlink).

[266] Steve Heder, *The Senior Leaders and Those Most Responsible*, OPEN SOC'Y JUST. INITIATIVE, Apr. 16, 2008, at 53, 55 (April 18, 2006), *available at* http://www.justiceinitiative.org/publications/jinitiatives (follow "Justice Initiatives, April 2006" hyperlink).

[267] *Id.*

[268] U.S. INST. OF PEACE, *supra* note 35, at 1–3.

[269] *Id.*

[270] *Id.* at 3.

[271] *See* Johnston, *supra* note 36.

Interpreting the jurisdictional language of the individual hybrid tribunals is just the beginning. As more hybrid tribunals are established, the limiting language of personal jurisdiction will be seen again, perhaps even expanding the vocabulary. Already, there are talks within the United Nations and the Government of Burundi to establish a Special Chamber to try those "bearing the greatest responsibility" for crimes committed in Burundi.[272] The hybrid system will need consistent and reliable interpretations of jurisdictional language in order to continue prosecuting trials that retain the appearance of fairness.

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[272] S.C. Res. 1606, *supra* note 20, at 1.