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SENIOR LEADERS AND THOSE MOST RESPONSIBLE AT THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

*Stuart Ford**

While there is much that could be written about Professor Jalloh’s new book, *The Legal Legacy of the Special Court for Sierra Leone*, I will focus on Chapter Five, which addresses personal jurisdiction.¹ The Statute of the Special Court for Sierra Leone (SCSL) contained what was then unique language.² The Court was given “the power to prosecute persons who bear the greatest responsibility for serious violations” of international criminal law committed in Sierra Leone.³ As Professor Jalloh notes, this formulation—with its focus on those bearing greatest responsibility—has become “the informal gold standard for the framing of *ratione personae* jurisdiction in contemporary international criminal tribunals.”⁴

I chose this topic for personal reasons. Before I became a law professor, I worked at the Extraordinary Chambers in the Courts of Cambodia (ECCC) as an Assistant Prosecutor. I joined the ECCC in September 2006, shortly after it got off the ground. One of our first tasks was to decide who we⁵ should investigate, and the earliest assignment I can remember working on at the ECCC was a memo to my boss—International Co-Prosecutor Robert Petit—about the scope of the court’s personal jurisdiction. The language of the ECCC Law is not identical to the SCSL Statute. Instead of focusing on those bearing the “greatest responsibility,” the ECCC Law refers to the prosecution of “senior leaders” and “those who were most responsible.”⁶ Nevertheless, the similarities in the provisions made the SCSL an obvious source for understanding the ECCC’s personal jurisdiction.⁷ I do not have a copy of the memo I wrote, but I remember that it cited decisions from the SCSL.

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¹ See CHARLES C. JALLOH, *THE LEGAL LEGACY OF THE SPECIAL COURT FOR SIERRA LEONE* 107–49 (2020).

² *Id.* at 107 (noting that no prior court’s constitutive document had contained similar language about those who bear the greatest responsibility).

³ See Statute of the Special Court for Sierra Leone, art. 1(1); see also *id.* at art. 15(1) (noting that the Prosecutor is responsible for investigating and prosecuting those who bear the greatest responsibility).

⁴ See JALLOH, *supra* note 1, at 110.

⁵ Throughout this piece, “we” refers to the Office of the International Co-Prosecutor.

⁶ Law on the Establishment of Extraordinary Chambers, art. 1.

⁷ See JALLOH, *supra* note 1, at 145 (noting the similarities between the analogous provisions of the SCSL and ECCC).

Personal jurisdiction was also at the heart of one of the last things I did at the ECCC. After the successful filing of the Introductory Submission that led to Cases 001 and 002, one team worked to get those cases ready for trial, while another group began looking at the evidence that had already been collected to see whether we should seek charges against additional individuals. I was on the latter team. My work culminated in the drafting of the Introductory Submission in what would become Case 003.⁸

Unfortunately, Case 003 (and its companion Case 004) were mired in controversy from the start. Neither the Cambodian government⁹ nor the national judges within the ECCC¹⁰ wanted the court to proceed with either case. Whatever the political reasons for the government's opposition,¹¹ the principle legal argument that was used by the National Co-Investigating Judge was that the court lacked personal jurisdiction over the suspect.¹²

Case 003 involved two suspects—Sou Met and Meas Muth.¹³ Sou Met died prior to being charged, while Meas Muth was eventually charged and investigated.¹⁴ At the end of the investigation, the National Co-Investigating Judge concluded that Meas Muth was not within the personal jurisdiction of the court because he was neither a senior leader nor someone most responsible.¹⁵ As a result, he dismissed the charges against Meas Muth.¹⁶ The International Co-Prosecutor appealed from the dismissal, and the issue is currently before the Pre-Trial Chamber.¹⁷ There was a hearing on the matter in late 2019,¹⁸ but there is no timetable for a decision by the Pre-Trial

⁸ See *Case 003*, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, <https://www.eccc.gov.kh/en/case/topic/287> (last visited Feb. 15, 2021) (describing Case 003).

⁹ See Randle DeFalco, *Cases 003 and 004 at the Khmer Rouge Tribunal: The Definition of "Most Responsible" Individuals According to International Criminal Law*, 8 GENOCIDE STUD. & PREVENTION 45, 46 (2014); see also OPEN SOCIETY JUSTICE INITIATIVE, THE FUTURE OF CASES 003/004 AT THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA 2 (Oct. 2012).

¹⁰ See DeFalco, *supra* note 9, at 46–47; see also OPEN SOCIETY JUSTICE INITIATIVE, *supra* note 9, at 9–16.

¹¹ Unfortunately, a discussion of the politics of the Khmer Rouge in Cambodia in the 2000s is beyond the scope of this piece. I will simply note in passing that Professor Jalloh says that the government of Cambodia "might not necessarily have been acting in good faith." See JALLOH, *supra* note 1, at 119.

¹² See *Co-Prosecutors v. Muth*, 003/07-09-2009/ECCC/OCIJ, Doc No. D266, Order Dismissing the Case Against Meas Muth, ¶¶ 91–107 (Nov. 28, 2018).

¹³ See Extraordinary Chambers in the Courts of Cambodia, *supra* note 8.

¹⁴ *Id.*

¹⁵ See *Co-Prosecutors v. Muth*, 003/07-09-2009/ECCC/OCIJ, Doc No. D266, Order Dismissing the Case Against Meas Muth, ¶¶ 91–107 (Nov. 28, 2018).

¹⁶ *Id.* ¶¶ 429–30.

¹⁷ See Extraordinary Chambers in the Courts of Cambodia, *supra* note 8.

¹⁸ See *Co-Prosecutors v. Muth*, 003/07-09-2009-ECCC/OCIJ (PTC35), Doc. No. D266/18.2, Appeals Hearing Public (Nov. 29, 2019).

Chamber. Given that a majority of the Pre-Trial Chamber are national judges,¹⁹ I expect they will find a way to affirm the dismissal of Case 003.²⁰

I will return to the merits of the decision about Meas Muth at the end of this piece. But first, I want to compare the SCSL and the ECCC's approaches to personal jurisdiction. Both courts had to resolve the question of whether their respective constitutive documents contained a jurisdictional requirement related to personal jurisdiction. At the SCSL, Trial Chamber I initially held that Article 1 of the SCSL Statute did contain a jurisdictional requirement that limited the court's personal jurisdiction to those who bore the greatest responsibility.²¹ Trial Chamber II disagreed and concluded that the greatest responsibility language was simply intended as a guide to prosecutorial strategy, rather than a formal legal requirement that could be adjudicated.²² Thus, it fell to the Appeals Chamber to resolve the issue. The Appeals Chamber ultimately sided with Trial Chamber II and concluded that the reference to those bearing the greatest responsibility was not a jurisdictional requirement but simply prosecutorial guidance.²³ As such, a defendant at the SCSL could not litigate the court's personal jurisdiction over him or her.

The ECCC's Supreme Chamber agreed with the SCSL Appeals Chamber that the phrase "most responsible" was not a jurisdictional requirement.²⁴ It held that the question of whether a defendant was a most responsible person was "not justiciable before the Trial Chamber."²⁵ At the same time, however, it noted that the "most responsible" language was supposed to guide both "investigatorial and prosecutorial policy."²⁶ Consequently, the investigating judges²⁷ could dismiss a case on the grounds that the charged person was not most responsible even though the prosecutors

¹⁹ See *Judicial Chambers*, ECCC, <https://www.eccc.gov.kh/en/organs/judicial-chambers> (last visited Feb. 15, 2021).

²⁰ See DeFalco, *supra* note 9, at 45–46; see also OPEN SOCIETY JUSTICE INITIATIVE, *supra* note 9 (noting that both the Cambodian government and Cambodian judiciary are opposed to Cases 003 and 004).

²¹ See JALLOH, *supra* note 1, at 125–29.

²² *Id.* at 129–33.

²³ *Id.* at 133–34.

²⁴ See DeFalco, *supra* note 9, at 48; see also *Co-Prosecutors v. Kaing*, Case No. 001/18-07-2007-ECCC/SC, Appeal Judgment, ¶¶ 63–66, 76–79 (Feb. 3, 2012). The Supreme Chamber even cites the SCSL's jurisprudence in support of this interpretation. See *id.* ¶ 73.

²⁵ *Id.* ¶ 63.

²⁶ *Id.*

²⁷ Because the ECCC was modeled on the Cambodian legal system, which is a civil law system, it has both prosecutors and investigating judges. The preliminary investigations and the trials are the province of the prosecutors, while the formal investigation is carried out by the investigating judges. See *Office of Co-Investigating Judges*, ECCC, <https://www.eccc.gov.kh/en/organs/office-co-investigating-judges/> (last visited Feb. 16, 2021).

disagreed.²⁸ Any dispute over whether a defendant was most responsible would then be resolved by the Pre-Trial Chamber.²⁹ The result is that the “most responsible” language in the ECCC Law does not constitute a jurisdictional requirement *per se*, but the question of whether a defendant is most responsible is justiciable. It just cannot be raised by the defendant and must arise out of a disagreement between the co-prosecutors and co-investigating judges.

At least on the meaning of the key terms, the SCSL and ECCC do broadly agree. The judges at the SCSL interpreted “greatest responsibility” to incorporate both a person’s position within a political or military hierarchy and the gravity of the particular crimes a person committed.³⁰ This was even more explicit at the ECCC, where the relevant provision talks about “senior leaders” and those “most responsible.” While saying that it was ultimately a question for the prosecutors and investigating judges, the Supreme Chamber of the ECCC acknowledged that “senior leader” and “those most responsible” were two disjunctive categories.³¹ “Senior leader” refers to a person’s role within the Khmer Rouge hierarchy,³² while “most responsible” refers to those responsible for the most serious crimes, even if they were not at the top of the hierarchy.³³

Now let me return briefly to Case 003 at the ECCC. At the close of the investigation, the National Co-Investigating Judge (NCIJ) concluded that Meas Muth was neither a senior leader nor a person most responsible and dismissed the charges against him.³⁴ On the same day, the International Co-Investigating Judge (ICIJ) issued an order finding Meas Muth to be “most responsible” and ordering a trial.³⁵ If you read the two orders, it looks like the NCIJ and the ICIJ are talking about different cases.

²⁸ See *Co-Prosecutors v. Kaing*, 001/18-07-2007-ECCC/SC, Appeal Judgment, ¶ 64 (Feb. 3, 2012).

²⁹ *Id.* ¶ 65.

³⁰ See JALLOH, *supra* note 1, at 129 (describing views of Trial Chamber I); *id.* at 131 (describing views of Trial Chamber II); *id.* at 124 (noting that “the SCSL judges were in general agreement that the phrase . . . included what I have here characterized as the political-military leadership and killer perpetrator categories”).

³¹ See *Co-Prosecutors v. Kaing*, 001/18-07-2007-ECCC/SC, Appeal Judgment, ¶¶ 45–57 (Feb. 3, 2012).

³² *Id.* ¶¶ 53–54.

³³ *Id.*

³⁴ See *generally* *Co-Prosecutors v. Muth*, 003/07-09-2009/ECCC/OCIJ, Doc. No. D266, Order Dismissing the Case Against Meas Muth, (Nov. 28, 2018).

³⁵ See *generally* *Co-Prosecutors v. Muth*, 003/07-09-2009/ECCC/OCIJ, Doc. No. D267, Closing Order, (Nov. 28, 2018).

The ICIJ concluded that Meas Muth held an “elevated role” in the Khmer Rouge hierarchy.³⁶ He was commander of Division 164 of the Cambodian armed forces and served as commander of the country’s Navy.³⁷ In addition, he was a “willing and driven participant”³⁸ in a number of crimes, including the genocide of the Vietnamese and the mass murder of Thai nationals.³⁹ He also played a key role in the purge (and subsequent execution) of thousands of members of the Khmer Rouge military.⁴⁰ For these reasons, the ICIJ found him to be “among those most responsible because of the combination of his rank and scope of authority . . . and the character and magnitude of his crimes.”⁴¹

The NCIJ acknowledged that Meas Muth commanded Division 164,⁴² but otherwise tried to minimize his responsibility. So, for example, Division 164 is described as being “under SON Sen’s direct control,” and thus the decision to purge members of the Division was made by Meas Muth’s superiors.⁴³ The NCIJ acknowledges that Division 164 was purged but minimizes the number of deaths and only obliquely refers to the murder of Thai and Vietnamese nationals by saying “some others were arrested from the sea and sent to S-21.”⁴⁴ Ultimately, the NCIJ concluded that Meas Muth “had several roles, but he did not exercise much power. His participation was inactive, unimportant, and not proximate to the commission of the crimes.”⁴⁵

I am biased because I wrote the Introductory Submission calling for an investigation of Meas Muth. But, at the same time, I spent months analyzing every bit of information we could find about him. In my opinion, the National Co-Investigating Judge’s decision is a travesty. It essentially blames everything bad that happened in Cambodia on a small handful of people at the very top of the Khmer Rouge hierarchy, while minimizing the culpability of everyone else. While the leaders of the Khmer Rouge may have come up with the plans that resulted in the deaths of so many Cambodians, they could not have carried them out on their own. They relied on large numbers of willing helpers⁴⁶—people like Meas Muth who sent thousands of others to

³⁶ *Id.* ¶ 461.

³⁷ *Id.* ¶ 459.

³⁸ *Id.* ¶ 469.

³⁹ *Id.* ¶ 463–65.

⁴⁰ *Id.* ¶ 466–67.

⁴¹ *Id.* ¶ 460.

⁴² Co-Prosecutors v. Muth, 003/07-09-2009/ECCC/OCIJ, Doc. No. D266, Order Dismissing the Case Against Meas Muth, ¶ 416 (Nov. 28, 2018).

⁴³ *Id.* ¶ 424.

⁴⁴ *Id.* ¶ 426.

⁴⁵ *Id.* ¶ 428.

⁴⁶ See DeFalco, *supra* note 9, at 45 (“The commission of genocide and other international crimes are typically large-scale group undertakings.”).

their deaths. The idea that Meas Muth's participation was "inactive and unimportant" is incorrect and offensive. By any reasonable measure, Meas Muth had sufficient authority and culpability to be considered "most responsible."⁴⁷

So, what does all this mean? Professor Jalloh argues that the focus on those bearing greatest responsibility at international tribunals reflects a deliberate decision by the international community to leave the prosecution of low and middle-ranking suspects to domestic courts.⁴⁸ It was a decision driven by tribunal fatigue,⁴⁹ a desire to control the costs of international justice,⁵⁰ and "reduced political will amongst states to ensure the broadest possible investigations and prosecutions of perpetrators of serious international offenses"⁵¹ This decision may have been driven by "pragmatic, political, economic and other realpolitik considerations,"⁵² but it is a decision with real consequences. As the handling of Cases 003 and 004 at the ECCC demonstrate, when international criminal tribunals focus only on a handful of the most senior leaders, there is a very real risk of an impunity gap where mid-ranking political and military leaders who are themselves responsible for very serious crimes are never prosecuted.⁵³

⁴⁷ This is my opinion, but others who have looked at this question have come to similar conclusions. *See id.* at 58. Obviously, the International Co-Investigating Judge agreed as well. *See supra* text accompanying note 36.

⁴⁸ *See* JALLOH, *supra* note 1, at 113–14 ("This de facto arrangement anticipates that middle and lower-ranking suspects would be investigated and prosecuted in domestic courts so there is no impunity gap.").

⁴⁹ *Id.* at 117–18.

⁵⁰ *Id.* at 121.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *See* DeFalco, *supra* note 9, at 55 ("There has never been any suggestion that if some or all Case 003/004 suspects are not committed to trial, they may nonetheless be prosecuted by an ordinary Cambodian criminal court. Instead, should the cases be ended prior to trial at the ECCC, the suspects would escape criminal liability altogether.").