

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

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**MEAS MUTH'S REQUEST TO OBTAIN AND PLACE ON THE CASE FILE THE
UNITED NATIONS AND ROYAL GOVERNMENT OF CAMBODIA ARCHIVE
MATERIAL CONCERNING THE NEGOTIATIONS TO ESTABLISH THE ECCC**

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Mr. MEAS Muth, through his Co-Lawyers (“the Defence”), pursuant to Rules 21, 55(10), and 58(6) of the ECCC Internal Rules (“Rules”), hereby requests the Co-Investigating Judges to obtain and place on the Case File the United Nations’ (“UN”) and the Royal Government of Cambodia’s (“RGC”) archival material concerning the negotiations to establish the ECCC and the drafting of the Establishment Law. This Request is made necessary because this material will assist in determining whether the terms *senior leaders* and *most responsible* constitute jurisdictional limitations on the ECCC and the meaning of those terms. The Co-Investigating Judges are not bound by and may depart from the Supreme Court Chamber’s holdings that these terms do not limit the ECCC’s personal jurisdiction.¹ Once the Defence has been provided with the requested material, the Defence will make further submissions on these matters. This Request is filed in English with the Khmer translation to follow because the translation cannot be completed in a timely manner.²

I. BACKGROUND

A. Personal jurisdiction in Case 001

1. Duch did not challenge the ECCC’s jurisdiction over him as a preliminary objection.³ Instead, during his closing statement, Duch’s national lawyer contended that the ECCC lacked jurisdiction over Duch because he was neither one of the *senior leaders* nor one of those *most responsible* for the crimes within the ECCC’s jurisdiction.⁴
2. The Trial Chamber held that Duch failed to timely object to the ECCC’s jurisdiction over him. Nonetheless, the Trial Chamber evaluated on its own motion whether the ECCC had jurisdiction over him.⁵ It held: “[p]ersonal jurisdiction is confined either to ‘senior leaders of DK’ or ‘those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia.’”⁶ It noted: “Neither the ECCC Agreement nor the

¹ While civil law courts make an effort to treat like cases alike, the use of judicial precedent is not as strong as in the common law system. In France, for example, courts need not follow the doctrine of *stare decisis* and are not bound by prior decisions, nor do they need to justify a failure to follow any prior judicial decision. “Indeed, the Court of Cassations, the leading French appellate court, never mentions any judicial precedents in its opinions. Moreover, the French courts are prohibited from stating rules of law to justify their results except for rules already stated in statutes.” James Hardisty, *Reflections on Stare Decisis*, 55 IND. L.J. 41, 50-51 (1979).

² See Email from Chanmony Korm to Defence, “Re: translation request”, 10 November 2015, indicating that the translation cannot be completed until 11 December 2015.

³ The only preliminary objection raised by the *Duch* Defence related to the ECCC’s jurisdiction to apply national crimes, due to the expiry of the applicable statute of limitations for such crimes. See *Case of KAING Guek Eav*, 001/18-07-2007-ECCC/TC, Transcript, 17 February 2001, E1/3.1, p. 5-8.

⁴ *Case of KAING Guek Eav*, 001/18-07-2007-ECCC/TC, Transcript, 25 November 2009, E1/80.1, p. 84-104.

⁵ *Case of KAING Guek Eav*, 001/18-07-2007-ECCC/TC, Judgement, 26 July 2010, E188, paras. 14-15.

⁶ *Id.*, para. 17.

ECCC Law expressly defines ‘senior leaders of DK’ or ‘those who were most responsible.’”⁷

3. To determine the meaning of *most responsible*, the Trial Chamber cursorily considered the UN Group of Experts’ recommendations as well as language from the UN Secretary General and the Commission on Human Rights.⁸ The Trial Chamber then noted that the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and the International Criminal Court (“ICC”) examine both the gravity of the crimes charged and the level of responsibility of the accused.⁹ The Trial Chamber used these criteria to conclude that Duch “falls within the personal jurisdiction of the ECCC as one of those most responsible for crimes committed during the period from 17 April 1975 to 6 January 1979.”¹⁰ It found no need to consider whether he was also a senior leader.¹¹
4. On appeal, the parties did not challenge whether the term was jurisdictional or a discretionary matter of investigative and prosecutorial policy. Duch argued only that he was neither a *senior leader* nor one of the *most responsible*.¹² The Office of the Co-Prosecutors (“OCP”) and Civil Party Group Three argued that Duch’s challenge was untimely, but did not challenge the assumption that the terms *senior leaders* and *most responsible* limit the ECCC’s personal jurisdiction.¹³
5. The Supreme Court Chamber invited the parties to make oral submissions on the question of whether the term “senior leaders of Democratic Kampuchea and those who were most responsible” “constitutes a jurisdictional requirement that is subject to judicial review, or is a guide to the discretion of the Co-Prosecutors and Co-Investigating Judges that is not subject to judicial review.”¹⁴ At the Appeal hearing, the Duch Defence did not make specific submissions on this question, but argued that the ECCC did not have personal

⁷ *Id.*, para. 19.

⁸ *Id.*, paras. 19-21.

⁹ *Id.*, para. 22.

¹⁰ *Id.*, para. 25.

¹¹ *Id.*

¹² *Case of KAING Guek Eav*, 001/18-07-2007-ECCC/SC, Appeal Brief by the Co-Lawyers for Kaing Guek Eav Alias “Duch” Against the Trial Chamber Judgement of 26 July 2010, 18 November 2010, F14, paras. 1-65.

¹³ *Case of KAING Guek Eav*, 001/18-07-2007-ECCC/SC, Co-Prosecutors’ Response to the Appeal Brief by the Co-Lawyers for Kaing Guek Eav Alias “Duch” Against the Trial Chamber Judgement of 26 July 2010, 20 December 2010, F14/4; *Case of KAING Guek Eav*, 001/18-07-2007-ECCC/SC, Response of the Lawyers for the Group 3 Civil Parties, to the Appeal of the Co-Lawyers for Duch against the Judgement of 26 July 2010, 3 December 2010, F14/2.

¹⁴ *Case of KAING Guek Eav*, 001/18-07-2007-ECCC/SC, Order Scheduling Appeal Hearing, 4 March 2011, F20, p. 3.

jurisdiction over Duch. The National Co-Prosecutor stated without any elaboration, in response to a direct question by Judge Noguchi: “I think the issue is not related to the jurisdiction, rather it is related to the competence and the prosecutorial discretion.”¹⁵ The International Co-Prosecutor remained silent. The international lawyer representing Civil Party Group Three argued that the terms *senior leaders* and *most responsible* are “jurisdictional requirement[s].”¹⁶

6. The Supreme Court Chamber held that whether someone is considered a *senior leader* or *most responsible* is not a justiciable jurisdictional issue, but rather a matter of prosecutorial and investigatorial policy for the OCP and Office of the Co-Investigating Judges (“OCIJ”).¹⁷ It held that a decision to prosecute or investigate is subject to appellate review for abuse of discretion.¹⁸
7. The Supreme Court Chamber determined that in accordance with the Vienna Convention on the Law of Treaties (“VCLT”)¹⁹ it must consider the ordinary meaning of the terms of the Agreement²⁰ in light of its object, purpose, and context and could turn to supplementary means of interpretation, including preparatory work of the treaty, where it believed the meaning to be unclear. The Supreme Court Chamber also considered that it could “seek guidance in international jurisprudence on comparable provisions in other jurisdictions” in accordance with Article 12(1) of the Agreement.²¹
8. The Supreme Court Chamber noted that, in context, the words “personal jurisdiction” in Article 2(1) of the Agreement indicate that the terms operate as a legal requirement of the Trial Chamber’s jurisdiction.²² The Supreme Court Chamber explained that it would

¹⁵ *Case of KAINING Guek Eav*, 001/18-07-2007-ECCC/SC, Transcript of Appeal Proceedings, 28 March 2011, F1/2.1, p. 91.

¹⁶ *Id.*, p. 104.

¹⁷ *Case of KAINING Guek Eav*, 001/18-07-2007-ECCC/SC, Appeal Judgement, 3 February 2012, F28 (“Case 001 Appeal Judgement”), paras. 62-79.

¹⁸ *Id.*, para. 80. The Supreme Court Chamber first considered whether the phrase “senior leaders of Democratic Kampuchea and those who were most responsible” refers to one or two categories of persons, determining that it refers to two: “senior leaders of the Khmer Rouge who are among the most responsible” and “non-senior members of the Khmer Rouge who are also among the most responsible.” *Id.*, paras. 44-57.

¹⁹ Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331.

²⁰ Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea (“Agreement”).

²¹ Case 001 Appeal Judgement, para. 59.

²² It is unclear why the Supreme Court Chamber referred specifically to the *Trial Chamber’s* jurisdiction here, rather than that of the ECCC as a whole.

consider whether this interpretation is consistent with the object and purpose of the Agreement and whether it would lead to an absurd result.²³

9. The Supreme Court Chamber then considered three categories: “Khmer Rouge official,” “most responsible,” and “senior leader.” Concerning the category of *Khmer Rouge official*, it held that this constitutes a jurisdictional limitation because the Trial Chamber was well suited to decide this factual issue.²⁴ However, concerning the terms *senior leaders* and *most responsible*, it held that it would lead to an absurd result if these terms were interpreted as jurisdictional limits, considering the object and purpose of the Agreement. The Supreme Court Chamber reasoned:
- a. “[T]here is no objective method for the Trial Chamber to decide on, compare, and then rank the criminal responsibility of all Khmer Rouge officials”;²⁵
 - b. The notion of comparative criminal responsibility is inconsistent with Article 29 of the Establishment Law,²⁶ which says that the position or rank of any Suspect shall not relieve that person of criminal responsibility or mitigate punishment. Determining a person’s relative criminal liability would indirectly amount to permitting a defence of superior orders and frustrate the purpose of Article 29;²⁷ and
 - c. The determination of whether someone is *most responsible* requires a large amount of discretion.²⁸
10. The Supreme Court Chamber considered the competence afforded to the Co-Investigating Judges and Co-Prosecutors to be the “chief” indicator among “many” that the term *most responsible* should be interpreted as investigatory and prosecutorial policy that is not justiciable before the Trial Chamber.²⁹ Turning to the drafting history of the Agreement, the Supreme Court Chamber noted that the UN Group of Experts recommended interpreting *most responsible* as a policy guideline.³⁰ The Supreme Court Chamber also

²³ Case 001 Appeal Judgement, para. 60.

²⁴ *Id.*, para. 61.

²⁵ *Id.*, para. 62.

²⁶ Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (“Establishment Law”).

²⁷ Case 001 Appeal Judgement, para. 62.

²⁸ *Id.*

²⁹ *Id.*, paras. 63-64. Articles 5(3) and 6(3) of the Agreement vest the Co-Investigating Judges and Co-Prosecutors, respectively, with authority to determine whether a particular investigation or prosecution falls within the scope of the term “most responsible.”

³⁰ Case 001 Appeal Judgement, paras. 66-68.

turned to international jurisprudence, observing that a comparison of the ECCC with the ICTY and International Criminal Tribunal for Rwanda (“ICTR”) indicates the term is a policy guideline rather than a jurisdictional limitation.³¹ It held that the ICTY’s referral mechanism suggests that the term is not a jurisdictional requirement but rather reflects prosecutorial policy,³² and noted that the SCSL *Brima et al.* Appeals Chamber held the term “greatest responsibility” in the SCSL Statute is not jurisdictional.³³

11. Finally, the Supreme Court Chamber explained that it did not consider the term *senior leaders* to operate as a jurisdictional limit because the term is “sufficiently flexible” that it may not be limited to Central or Standing Committee members. It noted that debates in the Cambodian National Assembly confirm that the definition of the term is not fixed.³⁴

B. Personal jurisdiction in Case 003

12. Co-Investigating Judges You Bunleng and Siegfried Blunk filed a Notice of Conclusion of the Judicial Investigation in Case 003, without having charged any Suspects.³⁵ In an interview, Co-Investigating Judge Blunk explained: “For Cases 003 and 004 we have conducted an in-depth analysis of the origin and meaning of the term ‘most responsible’ and developed a set of criteria based on the ECCC Law, and the jurisprudence of international tribunals, especially the one for Sierra Leone because its jurisdiction was limited similarly to persons who bear ‘the greatest responsibility’.”³⁶
13. Reserve International Co-Investigating Judge Kasper-Ansermet (“RICIJ”) unilaterally reopened the case.³⁷ Two days before stepping down from his position, he issued a decision on personal jurisdiction and investigative policy “to ensure due process and transparency.”³⁸ The RICIJ determined that the issue of whether someone was a *senior leaders* or *most responsible* was a matter of investigative policy rather than jurisdiction,³⁹

³¹ At the ICTY, Rule 28(A) requires a bureau to examine whether an indictment concentrates on senior leaders suspected of being most responsible. If the bureau finds that the indictment does not do so, the indictment will not be confirmed. The Supreme Court Chamber observed that the ICTR has a similar rule, these provisions do not restrict the Chambers’ jurisdiction, and accused cannot object that the tribunals lack jurisdiction based on these provisions. *Id.*, para. 69.

³² *Id.*, para. 71.

³³ *Id.*, paras. 72-73.

³⁴ *Id.*, paras. 75-76.

³⁵ Notice of Conclusion of Judicial Investigation, 29 April 2011, D13.

³⁶ Thomas Miller, *KRT Judge Talks Court Controversies*, PHNOM PENH POST, 18 August 2011.

³⁷ Order on Resuming the Judicial Investigation, 2 December 2011, D28.

³⁸ Decision on Personal Jurisdiction and Investigative Policy Regarding Suspect, 2 May 2012, D48 (“Personal Jurisdiction Decision”), para. 1.

³⁹ *Id.*, paras. 11-13.

and laid out criteria based on ICTY jurisprudence to determine whether someone could be considered *most responsible*.⁴⁰ He then found that Mr. MEAS Muth was *most responsible* for crimes under the jurisdiction of the ECCC.⁴¹ [REDACTED]

[REDACTED],⁴²

14. On 17 October 2013, the Defence requested the OCIJ to provide its criteria for determining whether someone was a *senior leader* or *most responsible*.⁴³ On the same date, the Defence also requested the OCIJ to compel the OCP to provide its criteria for determining whether Suspects fit within the meaning of these terms.⁴⁴ To date, no criteria have been provided in answer to these Requests.

II. ADMISSIBILITY

15. This Request seeks material necessary to confirm that the terms *senior leaders* and *most responsible* operate as jurisdictional limitations on the ECCC and to confirm the meaning of these terms. This material is necessary so the Defence can present full arguments concerning the Supreme Court Chamber's holdings that the terms *senior leaders* and *most responsible* are not jurisdictional limitations and can demonstrate the proper interpretation of these terms.

16. The requested material may be sought by the OCIJ pursuant to Rule 55(5)(c). This Request is admissible under Rules 55(10) and 58(6) and meets the requirements of these Rules:⁴⁵ it precisely identifies the investigative action to be taken (obtaining all archival material from the UN and RGC concerning the negotiations to establish the ECCC and the drafting of the Establishment Law, and placing this material on the Case File). It is *prima facie* relevant to the scope of the investigation as set out in the Introductory

⁴⁰ *Id.*, paras. 15-16.

⁴¹ *Id.*, para. 27.

⁴² *See* [REDACTED]

⁴³ MEAS Muth's Request for the OCIJ's Criteria Concerning "Senior Leaders of Democratic Kampuchea and Those Who Were Most Responsible", 17 October 2013, D87/2/1.10.

⁴⁴ MEAS Muth's Request for the OCIJ to Compel the OCP to Provide the Defence With its Criteria Concerning "Senior Leaders of Democratic Kampuchea and Those Who Were Most Responsible", 17 October 2013, D87/2/1.11.

⁴⁵ *See Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC 67), Decision on Reconsideration of Co-Prosecutors' Appeal against the Co-Investigating Judges Order on Request to Place Additional Evidentiary Material on the Case File which Assists in Proving the Charged Persons' Knowledge of the Crimes, 27 September 2010, D365/2/17, paras. 47-48; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC24), Decision on the Appeal From the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 18 November 2009, D164/4/13, para. 44.

Submission: it relates to allegations in the Introductory and Supplementary Submissions concerning Mr. MEAS Muth's role and whether he may be considered a *senior leader* or *most responsible*. It is conducive to establishing the truth, and useful for the conduct of the investigation.⁴⁶

III. REQUEST

A. The Supreme Court Chamber erred in considering the terms *senior leaders* and *most responsible* to be matters of prosecutorial and investigatorial discretion rather than jurisdictional limits

17. According to both the VCLT⁴⁷ and general provisions on statutory interpretation,⁴⁸ consideration of the plain language of a provision is the starting point to determine its meaning. The Supreme Court Chamber held that the plain language of the Agreement and Establishment Law indicates that the terms *senior leaders* and *most responsible* limit the ECCC's jurisdiction.⁴⁹ However, the Supreme Court Chamber erroneously concluded that this plain language interpretation would lead to an absurd result.⁵⁰
18. The Supreme Court Chamber considers that the terms cannot be jurisdictional limitations because the notion of comparative criminal responsibility is inconsistent with Article 29 of the Establishment Law.⁵¹ However, Article 29 new only applies to those who fall within the jurisdiction of the ECCC. It is *those* people whose position or rank will not relieve them of responsibility or mitigate punishment. This Article says nothing about others who do not fall within the jurisdiction of the ECCC. A person who is found to be within the category of *most responsible* but has a relatively low rank may not, according to Article 29 new, rely on his low rank to mitigate his punishment. Such a person may not

⁴⁶ This situation is unlike that of Case 002, where the Defence teams requested the OCIJ to review the entire Shared Materials Drive ("SMD") and to place exculpatory documents from it on the Case File. There, the Pre-Trial Chamber considered the Defence teams' request insufficiently specific because the Defence teams had access to the SMD and could make their request more specific. *See Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC24), Decision on the Appeal From the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 18 November 2009, D164/4/13, paras. 44-46.

⁴⁷ Art. 31.

⁴⁸ Cambodian law does not have prescribed rules governing statutory interpretation. Since the Cambodian legal system is based on the French system, the French method of interpretation may be of assistance. Under this method, if the text of the legislation is unclear, courts will attempt to discern the will of the legislature, including by going to the *travaux préparatoires* to discover the legislature's thinking. *See* Claire M. Germain, *Approaches to Statutory Interpretation and Legislative History in France*, 13 DUKE J. COMP. & INT'L L. 195, 201-02 (2003).

⁴⁹ Case 001 Appeal Judgement, para. 60.

⁵⁰ Case 001 Appeal Judgement, para. 62. An "absurdity" is defined as "[t]he state or quality of being grossly unreasonable; esp., an interpretation that would lead to an unconscionable result, esp. one that the parties or (esp. for a statute) the drafters could not have intended and probably never considered." BLACK'S LAW DICTIONARY 10 (9th ed. 2009).

⁵¹ The Supreme Court Chamber reasons that this would indirectly amount to permitting a defence of superior orders and frustrate the purpose of Article 29. *See* Case 001 Appeal Judgement, para. 62.

rely on a defence of superior orders. Similarly, the ICTY's Statute states: "[t]he fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility...."⁵² Yet, the ICTY still considers whether someone acted pursuant to orders when determining whether that person meets the criteria for referral to national courts under ICTY Rule 11*bis*.⁵³ There is no inconsistency between determining whether someone falls within the ECCC's jurisdiction and applying Article 29 new. No absurd result follows.

19. On the contrary, an absurd result would occur if the terms are considered a mere guideline in exercising prosecutorial and investigatorial discretion. The Supreme Court Chamber held that "there is no *objective method* for the Trial Chamber to decide on, compare, and then rank the criminal responsibility of all Khmer Rouge officials."⁵⁴ If this were true, such categories of persons should not be prosecuted at the ECCC. The UN Human Rights Committee has indicated: "[i]f ... exceptional criminal procedures or specially constituted courts or tribunals apply in the determination of certain categories of cases, *objective and reasonable grounds must be provided to justify the distinction.*"⁵⁵ If, as the Supreme Court Chamber held,⁵⁶ a "large amount of discretion" is involved in a decision whether a person will be prosecuted or investigated at the ECCC and "there is no *objective method*" for the Trial Chamber to make this determination,⁵⁷ the right to equality before the courts⁵⁷ is violated. Similar cases may not be dealt with in similar ways. Without an objective method of determining who may be prosecuted, decisions to prosecute would be arbitrary and open to allegations of political interference. Leaving the matter of whether someone is a *senior leader* or *most responsible* to investigative policy would lead to an absurd interpretation of the Agreement and Establishment Law.

⁵² ICTY Statute, Art. 7(4).

⁵³ See *Prosecutor v. Lukić & Lukić*, IT-98-32/1-AR11*bis*.1, Decision on Milan Lukić's Appeal Regarding Referral, 11 July 2007, paras. 21-22.

⁵⁴ Case 001 Appeal Judgement, para. 62 (emphasis added).

⁵⁵ Human Rights Committee, CCPR/C/GC/32, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, 23 August 2007, para. 14 (emphasis added).

⁵⁶ Case 001 Appeal Judgement, para. 62.

⁵⁷ Constitution of the Kingdom of Cambodia dated 24 September 1993 Modified by Kram dated 8 March 1999 promulgating the amendments to Articles 11, 12, 13, 18, 22, 24, 26, 28, 30, 34, 51, 90, 91, 93 and other Articles from Chapter 8 through Chapter 14 of the Constitution of the Kingdom of Cambodia which was adopted by the National Assembly on the 4th of March 1999, Art. 31; Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), Art. 7; International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by United Nations General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976 in accordance with Article 49, Arts. 14(1), 26.

20. The negotiation history indicates that the UN and RGC intended the terms to limit the ECCC's jurisdiction, as the requested material should demonstrate. Because the wording of the Agreement and Establishment Law is clear that the terms "senior leaders" and "most responsible" operate as jurisdictional limitations on the ECCC and this interpretation does not lead to an ambiguous, obscure, absurd, or unreasonable result, it is unnecessary, and in fact not permitted, under the VCLT to look to the negotiation history. However, as the Supreme Court Chamber *did* look at the negotiation history, it should have looked at all the relevant history, rather than focusing on the UN Group of Experts' Report.⁵⁸ The *only* piece of available drafting history pointing to a contrary interpretation is the UN Group of Experts' report, one of the few pieces of negotiation history considered by the Supreme Court Chamber.⁵⁹ The UN Group of Experts recommended an international tribunal modeled on the ICTY and ICTR. The ICTY and ICTR have jurisdiction over *all* persons who committed certain crimes.⁶⁰ To ensure that hundreds or thousands of people were not prosecuted at the envisaged Khmer Rouge tribunal, the UN Group of Experts proposed that the prosecutor be given the discretion to limit prosecutions. Since the ICTY/ICTR model was *not* the model ultimately chosen in establishing the ECCC,⁶¹ the UN Group of Experts' recommendation concerning prosecutorial discretion is irrelevant. There is no evidence that either party to the negotiations ever accepted this recommendation.⁶²

⁵⁸ For example, UN Under-Secretary General Hans Corell stated in March 2003 that who would be investigated and prosecuted "would be for the co-investigating judges and the co-prosecutors to decide independently. *But it is clear from the text of the agreement that the Extraordinary Chambers would have jurisdiction only over senior leaders of Democratic Kampuchea and those who were most responsible for the crimes....*" Statement by Under-Secretary Hans Corell, 17 March 2003 (italicized emphasis added, underlined emphasis in original). This explains that the UN envisaged that within the defined personal jurisdiction of the ECCC, the Co-Prosecutors and Co-Investigating Judges would be able to exercise their discretion in choosing who to prosecute and investigate.

⁵⁹ The Supreme Court Chamber considered the following sources: **a.** A 21 June 1997 letter from the First and Second Prime Ministers of Cambodia to the Secretary General of the United Nations requesting the UN's assistance in bringing to justice those persons responsible for the genocide and crimes against humanity during the rule of the Khmer Rouge from 1975 to 1979 (Case 001 Appeal Judgement, n. 99); **b.** The UN Secretary General's summary of this request (*Id.*, n. 100); **c.** A 12 December 1997 UN General Assembly Resolution (*Id.*, n. 101, 108); **d.** The Group of Experts' Report (*Id.*, n. 102-04, 107-08, 128); **e.** *The First Session of the Third Term of the Cambodian National Assembly*, 4-5 October 2004, "Debate and Approval of the Agreement between the United Nations and the Royal Government of Cambodia and Debate and Approval of Amendments to the Law on Trying Khmer Rouge Leaders" (*Id.*, n. 105-06, 142); and **f.** Recent scholarly articles concerning the negotiations, including an article by Mr. Heder (*Id.*, n. 109-10, 141).

⁶⁰ See ICTY Statute, Art. 1; ICTR Statute, Art. 1.

⁶¹ Instead, a domestic court within the Cambodian court system was established. See Agreement, Art. 1.

⁶² For example, see Letter dated 3 March 1999 from the Prime Minister of Cambodia addressed to the Secretary-General, U.N. Doc. A/53/851 and S/1999/230, 3 March 1999; Hor Nam Hong, Aide-Memoire on Report of the UN Group of Experts for Cambodia of 18 February 1999, 12 March 1999.

21. At the SCSL, the *Brima et al.* Appeals Chamber determined that the phrase “persons bearing greatest responsibility” is a prosecutorial guideline rather than a jurisdictional limitation. The Supreme Court Chamber noted this decision, but did not state whether the decision was relevant to its own determination.⁶³ It appears that the *Brima et al.* Appeals Chamber decision strongly influenced the Supreme Court Chamber’s decision, since the Supreme Court Chamber used quite similar reasoning. However, such reliance is misplaced. Several differences between the SCSL and the ECCC warrant a different outcome.
22. The *Brima et al.* Appeals Chamber decision was issued after two Trial Chambers (*Norman* and *Brima et al.*) reached different conclusions on whether the phrase “persons who bear the greatest responsibility” in the SCSL Statute was a jurisdictional limitation.⁶⁴ The *Brima et al.* Appeals Chamber gave two reasons that the phrase is not jurisdictional.
23. First, Article 1 of the SCSL Statute states that “[t]he Special Court shall, except as provided in subparagraph (2), have the power to prosecute persons who bear the greatest responsibility....” Article 15 states that “[t]he Prosecutor shall be responsible for the investigation and prosecution of persons who bear the greatest responsibility....” The *Brima et al.* Appeals Chamber decided that the phrase was not jurisdictional because these Articles refer to the Prosecutor’s competence.⁶⁵ The *Brima et al.* Appeals Chamber rationale is likely the basis for the Supreme Court Chamber’s conclusion that Articles 5(3)⁶⁶ and 6(3)⁶⁷ of the Agreement are the “chief” indication that the phrase is discretionary and not jurisdictional. Second, the *Brima et al.* Appeals Chamber considered that it would be inconceivable to conclude after a lengthy and expensive trial

⁶³ Case 001 Appeal Judgement, paras. 72-73.

⁶⁴ *Prosecutor v. Norman et al.*, SCSL-04-14-PT, Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction Filed on Behalf of Accused Fofana, 3 March 2004; *Prosecutor v. Brima et al.*, SCSL-2004-16-T, Judgement, 20 July 2007, paras. 636-59. See Charles Chernor Jalloh, *Prosecuting Those Bearing “Greatest Responsibility”: The Lessons of the Special Court for Sierra Leone*, 96 MARQ. L. REV. 863 (2013). Professor Jalloh, having analyzed the relevant decisions and drafting history of the SCSL Statute, finds that the *Brima et al.* Trial and Appeals Chambers decided incorrectly and that the *Norman* Trial Chamber (which held that the phrase was jurisdictional) had the better approach.

⁶⁵ *Prosecutor v. Brima et al.*, SCSL-2004-16-A, Judgment, 22 February 2008, paras. 277-82.

⁶⁶ Article 5(3) provides: “The co-investigating judges shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source. It is understood, however, that the scope of the investigation is limited to senior leaders of Democratic Kampuchea and those who were most responsible...”

⁶⁷ Article 6(3) provides: “The co-prosecutors shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source. It is understood, however, that the scope of the prosecution is limited to senior leaders of Democratic Kampuchea and those who were most responsible...”

that the Court had no jurisdiction over the Accused, if it had determined beyond reasonable doubt that the crimes were committed.⁶⁸ Neither rationale applies at the ECCC.

24. Concerning the first rationale, the Establishment Law differs from the SCSL Statute. While the SCSL Statute's wording can be taken to indicate that it is the Prosecutor who has the competence to determine whether individuals bear the greatest responsibility for the crimes, the Establishment Law simply states in Article 16 (concerning the role of the Co-Prosecutors) that "[a]ll indictments in the Extraordinary Chambers shall be the responsibility of two prosecutors ... who shall work together to prepare indictments against the Suspects in the Extraordinary Chambers." If the terms "senior leader" or "most responsible" were intended to be a mere guide for prosecutorial discretion, they would have been included in *this* provision, rather than in the "competence" Article with the other jurisdictional requirements.⁶⁹
25. Further, limiting the personal jurisdiction of the ECCC does not limit the independence of the OCP or OCIJ any more than limiting the ECCC's subject matter jurisdiction does. As the International Judges of the Pre-Trial Chamber have held, the Co-Prosecutors have no discretion to determine who will be prosecuted: "there is no discretion to be exercised by the Co-Prosecutors under Internal Rule 53(1)... Once the conclusion is drawn that there is 'reason to believe that crimes within the jurisdiction of the ECCC have been committed', then the Co-Prosecutors are obliged to open a judicial investigation by sending an Introductory Submission."⁷⁰
26. Concerning the second rationale, the Pre-Trial Chamber is well placed to determine whether the Charged Persons fit within the ECCC's personal jurisdiction based on the Closing Order, prior to any trial ever taking place.⁷¹ The Pre-Trial Chamber has jurisdiction to hear challenges to the ECCC's jurisdiction,⁷² which are most likely to arise

⁶⁸ *Prosecutor v. Brima et al.*, SCSL-2004-16-A, Judgment, 22 February 2008, para. 283.

⁶⁹ Establishment Law, Art. 2 new.

⁷⁰ Considerations of the Pre-Trial Chamber Regarding the Disagreement between the Co-Prosecutors Pursuant to Internal Rule 71, Opinion of Judges Lahuis and Downing, 18 August 2009, para. 23.

⁷¹ The Supreme Court Chamber has recognized that avoiding trial on the basis of lack of jurisdiction promotes the orderly and efficient administration of justice. *See* Case 001 Appeal Judgement, para. 28. The Supreme Court Chamber held that the Pre-Trial Chamber's role in settling disagreements does not alter its conclusion that the phrase is not jurisdictional, but this ignores the Pre-Trial Chamber's role in determining challenges to the ECCC's jurisdiction.

⁷² Rule 74(3)(a).

as an appeal against an indictment (Closing Order). The Pre-Trial Chamber will thus have available to it the Closing Order with supporting evidence, to enable it to decide this jurisdictional challenge. In contrast, at the SCSL, there is no judicial investigation and no Pre-Trial Chamber with jurisdiction to settle challenges to jurisdiction. There, a determination on personal jurisdiction could not realistically be made until the conclusion of a lengthy and expensive trial.

27. Finally, at the SCSL nothing concerning the Court's personal jurisdiction was stated clearly in the agreement between the UN and Sierra Leone to establish the SCSL. The term "persons who bear greatest responsibility" was mentioned only in the SCSL Statute. The opposite is true at the ECCC, where the Agreement explicitly states that "the Extraordinary Chambers have *personal jurisdiction* over senior leaders of Democratic Kampuchea and those who were most responsible...."⁷³ According to one scholar, this is "perhaps the strongest evidence" that the ECCC's language is jurisdictional.⁷⁴

B. The UN and RGC archive material is necessary to determine the meaning of the terms *senior leaders* and *most responsible*

28. Although the Supreme Court Chamber considered that there is no objective method for the Trial Chamber to determine who falls within the categories of *senior leaders* and *most responsible*,⁷⁵ in Case 003, the RICJ set out criteria to determine whether someone was *most responsible*.⁷⁶ The Trial Chamber also applied criteria in Case 001.⁷⁷ The RICJ acknowledged that "[n]one of the texts directly applicable to the ECCC provide guidance on how these requirements should be applied,"⁷⁸ but considered that "the Co-Investigating Judges may seek guidance in the 'procedural rules established at the international level.'"⁷⁹ He considered mainly ICTY jurisprudence to develop the criteria

⁷³ Agreement, Art. 2 (emphasis added).

⁷⁴ Sean Morrison, *Extraordinary Language in the Courts of Cambodia: Interpreting the Limiting Language and Personal Jurisdiction of the Cambodian Tribunal*, 37 CAP. U. L. REV. 583, 599 (2009). Professor Jalloh makes the interesting assertion that "Although, even though it is expected to only prosecute a handful of people, Article (1) of the Statute of the Lebanon Tribunal has, perhaps as a reflection of a lesson learned by the Secretary-General about the controversies of greatest responsibility, returned to use of the phrase 'to prosecute persons responsible.'" Charles Chernor Jalloh, *Prosecuting Those Bearing "Greatest Responsibility": The Lessons of the Special Court for Sierra Leone*, 96 MARQ. L. REV. 863, n. 72 (2013).

⁷⁵ Case 001 Appeal Judgement, para. 62.

⁷⁶ Personal Jurisdiction Decision, paras. 15-16.

⁷⁷ See *Case of KAING Guek Eav*, 001/18-07-2007-ECCC/TC, Judgement, 26 July 2010, E188, paras. 22-25.

⁷⁸ Personal Jurisdiction Decision, para. 15.

⁷⁹ *Id.*, citing Establishment Law, Art. 23.

he would apply when considering whether Mr. MEAS Muth was *most responsible*.⁸⁰ This approach was incorrect.

29. If the RICIJ considered that the meaning of *senior leaders* or *most responsible* was unclear, he should have applied the methods of statutory interpretation set out in the VCLT. This would have led him to a consideration of the drafters' intent.⁸¹ Instead, he turned to "procedural rules established at the international level."⁸² He cited Article 23 of the Establishment Law for his authority to take this approach.⁸³
30. Article 23 new allows the Co-Investigating Judges to seek guidance in procedural rules at the international level when they are uncertain as to the interpretation of "existing procedures in force." It does not permit the Co-Investigating Judges to interpret the ECCC's personal jurisdiction – a substantive matter, rather than a procedural one – by considering international jurisprudence. Moreover, this approach is not logical. The ICTY and other international tribunals were not established with the same personal jurisdiction as the ECCC. Each tribunal's jurisdiction must be considered in light of the context in which that tribunal was established. Consideration of the ICTY's jurisdiction does not assist in determining the ECCC's intended personal jurisdiction. The intent of the drafters indicates that the most reasonable interpretation of the terms is that *senior leaders* are members of the Standing Committee and high-level members of the Central Committee,⁸⁴ and *most responsible* means someone at least as responsible as Duch.⁸⁵ The archive material is necessary to confirm this interpretation.

⁸⁰ *Id.*, para. 15.

⁸¹ The terms "senior leaders" and "most responsible" are ambiguous because they are relative terms. Because the plain language of the Agreement considered in context and in light of its object and purpose (Art. 31(1) of the VCLT) is ambiguous, the RICIJ should have considered the preparatory work of the Agreement and the circumstances of its conclusion in accordance with Article 32 of the VCLT.

⁸² Personal Jurisdiction Decision, para. 15.

⁸³ Article 23 new states in relevant part: "All investigations shall be the joint responsibility of two investigating judges, ... and shall follow existing procedures in force. If these existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standards, the Co-Investigating Judges may seek guidance in procedural rules established at the international level."

⁸⁴ According to David Scheffer, who was involved in the negotiations as the United States Ambassador-at-Large for War Crimes, "a fair estimate of how the personal jurisdiction was evolving in early 1999 would have identified Ke Pauk, Ta Mok, Khieu Samphan, Ieng Sary, Noun Chea [sic], and Ieng Thirith, and shortly would include the notorious Kaeng Guek Eav (alias "Duch") once he was discovered alive and fell into Cambodian custody in mid-1999." David Scheffer, *The Negotiating History of the ECCC's Personal Jurisdiction*, CAMBODIA TRIBUNAL MONITOR, 22 May 2011, p. 2.

⁸⁵ Once Duch came into the public eye in April 1999 and was placed into the custody of the military tribunal in May 1999, the phrase "most responsible" was added to discussions of the ECCC's jurisdiction to ensure that

31. Former OCP and OCIJ investigator / analyst⁸⁶ Stephen Heder provides one interpretation of the drafters' intent as to the meanings of the terms *senior leaders* and *most responsible*.⁸⁷ The Defence finds Mr. Heder's analysis lacking and not subject to full review as much of the material he relies on is unavailable to the public and not in the ECCC's possession.⁸⁸ Nonetheless, and relevant to the Request, according to Mr. Heder:

Former UN Under-Secretary-General for Legal Affairs Hans Corell, who played the key role in the negotiations to create the ECCC, has also spoken to the media about the negotiation's import for the ECCC's current processes.... In his forward to the forthcoming Luc Reydams, et al., eds., *International Prosecutors* (Oxford: Oxford University Press, 2012), **Ambassador Corell ... suggested that the UN archives should be opened to shed light on the course of the negotiations** (Hans Corell email to the author, 23 March 2012).⁸⁹

Mr. Heder further asserts:

I note that in any case it should be possible for the UN to take a discretionary decision to make all relevant records of the negotiations officially available to the ECCC along with certification of their authenticity, pursuant to Article 21 of the 1946 Convention on the Privileges and Immunities of the United Nations.⁹⁰

32. Material available in the UN archives is listed online;⁹¹ however only limited material is downloadable.⁹² The remainder must be requested and purchased from the UN. The material that appears most relevant to the negotiations has a classification level of

Duch could be prosecuted by any future tribunal even though he was not a senior leader. See Stephen Heder, *The Personal Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia as Regards Khmer Rouge "Senior Leaders" and Others "Most Responsible" for Khmer Rouge Crimes: A History and Recent Developments*, 26 April 2012 ("Heder, *Personal Jurisdiction*"), p. 27; Steve Heder, *Cambodia, Nazi Germany and the Stalinist Soviet Union: Intentionality, Totalitarianism, Functionalism and the Politics of Accountability*, (Draft for Presentation at the German Historical Institute, Washington, DC, 29 March 2003), p. 53. The term "most responsible" therefore was intended to refer to Duch. Although the drafters appear to have specifically intended Duch when they added the words "most responsible" to the legal texts, the term cannot be defined simply as Duch without the ECCC facing criticism for engaging in selective justice. Duch can, however, be used as a benchmark: to be considered "most responsible", a person must be at least as responsible for crimes within the ECCC's jurisdiction as Duch.

⁸⁶ See *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC, [REDACTED]; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ, Request for Information Concerning Potential Conflict of Interest, 10 January 2008, A121; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ, OCIJ Letter to the Defence, Request for Information Regarding an Eventual Conflict of Interest, 24 January 2008, A121/I, p. 1.

⁸⁷ Heder, *Personal Jurisdiction*.

⁸⁸ See Letter from Defence to Mr. Heder, Request for source material related to the personal jurisdiction of the Extraordinary Chambers in the Courts of Cambodia, 6 November 2015.

⁸⁹ Heder, *Personal Jurisdiction*, n. 1 (emphasis added).

⁹⁰ *Id.* (emphasis added).

⁹¹ Available at <https://archives.un.org>.

⁹² The Defence has already downloaded all material that is available for download and appears relevant.

