

**In the Matter of the disagreement between the Co-Prosecutors
On the issue of the scope of prosecutorial discretion and the standard of Pre-Trial
Chamber review to resolve a prosecutorial dispute**

I. INTEREST OF AMICUS CURIAE

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II. QUESTIONS PRESENTED

A. What is the scope of prosecutorial discretion for the Co-Prosecutors of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”)?

B. What scope and standard of review is to be applied by the ECCC Pre-Trial Chamber in order to resolve a prosecutorial dispute?

III. STATEMENT OF FACTS

To date, the ECCC has charged five suspects. On 1 December 2008, the International Co-Prosecutor filed a Statement of Disagreement under ECCC Internal Rule 71(2) concerning the appropriateness of commencing new investigations against additional suspects for crimes committed under the Khmer Rouge. The International Co-Prosecutor has proposed filing two new Introductory Submissions and one Supplementary Submission, arguing that there are reasons to think that (1) the crimes described in those submissions were committed; (2) those crimes were within the ECCC’s jurisdiction; and (3) the crimes should be investigated further by the Co-Investigating Judges.¹ The International Co-Prosecutor does not believe that such additional prosecutions would endanger Cambodia’s peace or stability.

¹ See Statement of the Co-Prosecutors, 5 Jan. 2009.

On 29 December 2008, the National Co-Prosecutor filed her Response to the Statement of Disagreement with the ECCC Pre-Trial Chamber. The National Co-Prosecutor believes that the crimes should not be investigated further due to (1) Cambodia's past instability and the need for national reconciliation; (2) the spirit of the Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of the Democratic Kampuchea ("Framework Agreement") and the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea ("ECCC Law"); and (3) the limited duration and resources of the Court.² Instead, the National Co-Prosecutor feels that the Court should focus on the trials of the five suspects who are already detained, arguing that such a prioritization would serve to fulfill the Court's mandate. The disagreement is now before the ECCC Pre-Trial Chamber awaiting resolution.³

The ECCC is facing a unique situation; none of the Cambodian national courts or international or hybrid tribunals possesses more than one prosecutor, rendering prosecutorial disputes impossible. Given this lack of precedential authority, this brief, in addressing the current dispute, will follow Article 12(1) of the Framework Agreement in seeking guidance in procedural rules established at the international level when Cambodian law and the Internal Rules do not deal with a particular matter.⁴

IV. SUMMARY OF ARGUMENT

The Framework Agreement and ECCC Law define the primary role of the ECCC Pre-

² *See id.*

³ Internal Rules, last revised 5 Sept. 2008, Rule 71(4).

⁴ Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of the Democratic Kampuchea, Phnom Penh, 6 June 2003 [hereinafter "Framework Agreement"]. *See* Article 12(1) which provides,

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

Trial Chamber: a dispute resolution mechanism for settling disagreements between the Co-Prosecutors and between the Co-Investigating Judges. Thus, when deciding internal disputes, the Pre-Trial Chamber acts within its core statutory mandate. Moreover, the ECCC Internal Rules have bestowed the Pre-Trial Chamber with the tools to conduct a fairly extensive factual review when such disputes arise. These considerations suggest that the Pre-Trial Chamber has the authority to conduct *de novo* review of the Co-Prosecutors' disagreement.

In the situation at hand, the Co-Prosecutors do not appear to disagree that they possess both the jurisdiction and sufficient evidence to file submissions requesting additional judicial investigations. Therefore, it appears most appropriate that the Pre-Trial Chamber not inquire into the existence of the objective threshold for an investigation, but instead limit its scope of review to the topics on which the Co-Prosecutors disagree: whether or not (1) it is appropriate for the National Co-Prosecutor to object to additional investigations on the basis of subjective factors and (2) if so, whether these factors outweigh Co-Prosecutors' statutory obligation to request an investigation once the objective threshold has been met. Two statutory presumptions, namely the general presumption that investigations and prosecutions will move forward when there is a reasonable basis to proceed and the specific presumption that an investigation will be opened unless four Pre-Trial Chamber Judges agree to stop it, appear to place the burden of proof on the National Co-Prosecutor. ICC practice suggests that to meet this burden, she should be required to show substantial reasons why the additional investigations should not proceed.

The ECCC Co-Prosecutors, like the prosecutors of the international/ized criminal tribunals, possess broad discretion in the selection of cases and alleged perpetrators for investigation and prosecution. However, the scope of their discretion is limited by several factors, including the requirement that once the Co-Prosecutors "have reason to believe" that crimes within the ECCC's jurisdiction have been committed, they are required to forward the

case to the Co-Investigating Judges. Other limitations include the necessity for the Co-Prosecutors to obey the mandate of the ECCC Law and to maintain prosecutorial independence, and the review authority of the Pre-Trial Chamber over prosecutorial disputes.

The ECCC Internal Rules explicitly require the Co-Prosecutors to consider only objective factors in the selection of cases for investigation. The Statutes of the International Criminal Tribunal for the former Yugoslavia (“ICTY”), the International Criminal Tribunal for Rwanda (“ICTR”) and the Special Court for Sierra Leone (“SCSL”) contain similar requirements. Nevertheless, the prosecutors of these courts frequently take subjective concerns into account in exercising their discretion. Moreover, the Prosecutor of the International Criminal Court (“ICC”) is statutorily required to consider additional criteria under the guise of “interests of justice” once a “reasonable basis to proceed” has been established. Thus, it appears to be appropriate for the ECCC Co-Prosecutors, in exercising their prosecutorial discretion, to take subjective factors into account in deciding whether to move forward with additional investigations.

Some subjective factors that international prosecutors have likely considered in determining who to investigate and prosecute echo the concerns raised by the National Co-Prosecutor. These include: the gravity of the crimes, the level of responsibility of the alleged perpetrators, and national reconciliation. However, none of the factors the National Co-Prosecutor raises appear to militate strongly against forwarding new submissions to the Co-Investigating Judges.

The National Co-Prosecutor’s first concern, national reconciliation, is emphasized by the ECCC’s Framework Agreement. However, it is not at all clear that the pursuit of reconciliation in Cambodia would be best served by a limit on the number of prosecutions; indeed, persons involved with the establishment of the ECCC believed that prosecutions would play a positive role in furthering reconciliation. Moreover, connected to national

reconciliation is the obligation of the Court to tell the “whole story” about what happened and who is responsible — a consideration that has frequently been cited by international prosecutors in explaining their selection of accused.

The Framework Agreement also links national reconciliation to peace and security. It is notable, however, that the UN experts considering the creation of the ECCC did not view public order as a relevant consideration and that no international prosecutors have mentioned public order concerns in discussing their discretionary decision-making. Although both the Co-Investigating Judges and the Pre-Trial Chamber have raised public order concerns in determining that continued detention of the charged individuals is necessary, they have not put forth any concrete evidence demonstrating that public order would in fact be put at risk by the suspects’ release. A recent survey indicates that a majority of the Cambodian public is not concerned about this threat, and there is every indication that the Cambodian Government has both the authority and the means to quell any disturbances that could arise.

The second concern raised by the National Co-Prosecutor, the “spirit of the agreement,” relates to the ECCC’s mandate to try only a limited number of persons: senior leaders and those most responsible for serious crimes. The practice of international/ized courts suggests that the level of defendant responsibility and the gravity of the crimes are not fully distinguishable categories, but instead must be considered holistically. In addition, these categories have not been narrowly circumscribed, but instead have been broadly applied down the chain of command. The expectation that more than five persons would be charged is supported by the Court’s *travaux préparatoires*, which suggest that an appropriately limited number of accused would be around 20-30. While the ECCC’s ability to bring justice to Cambodians cannot be evaluated solely by the number of prosecutions, many of the subjective factors considered by international courts imply that a greater number of prosecutions would be more supportive of the “spirit” of the Framework Agreement by

providing victims with a broader understanding of the workings of Democratic Kampuchea.

Finally, finite time and financial resources do not appear to have played a significant role in the prosecutorial decisions of international/ized courts, although all have been confronted with one or both of these considerations.

While the ECCC Co-Prosecutors may appropriately, and perhaps necessarily, consider a wide variety of factors in exercising their prosecutorial discretion, it does not appear that the subjective factors raised by the National Co-Prosecutor outweigh the statutory presumption that cases falling within the jurisdiction of the Court that meet the “reasonable basis to proceed” threshold will be investigated. If the National Co-Prosecutor is unable to meet her burden of proof, the new submissions should be forwarded to the Co-Investigating Judges.

V. ARGUMENT

A. The Scope of Prosecutorial Discretion

1. ECCC Co-Prosecutors Have a Statutory Duty to Request Judicial Investigation of Crimes Falling Within the Court’s Jurisdiction.

a. ECCC Law Creates a General Duty to Investigate and Prosecute Crimes within the Jurisdiction of the Court

The ECCC Internal Rules contain mandatory language that creates a duty to investigate and prosecute crimes when they fall within the jurisdiction of the Court. ECCC Internal Rule 53(1) states in part that “[i]f the Co-Prosecutors have reason to believe that crimes within the jurisdiction of the ECCC have been committed, they shall open a judicial investigation by sending an Introductory Submission to the Co-Investigating Judges[.]” The Co-Investigating Judges (“CIJs”) must then investigate those crimes: ECCC Internal Rule 55(1) makes judicial investigations by the CIJs “compulsory for crimes within the jurisdiction of the ECCC.” After completing their investigation, the CIJs must indict charged persons unless the acts do not amount to a crime within the jurisdiction of the ECCC or there is a lack

of evidence against particular perpetrators.⁵

The duty to investigate is further augmented by ECCC Internal Rule 71(4)(c), which provides that when there are disputes between the two Co-Prosecutors on whether to investigate, the investigation will go forward by default unless a majority of the Pre-Trial Chamber judges vote to stop it: “[i]f the required majority is not achieved before the Chamber...the default decision shall be that the action or decision done by one Co-Prosecutor shall stand, or that the action or decision proposed to be done by one Co-Prosecutor shall be executed.”

Unlike the ECCC, international and hybrid courts’ investigatory functions have not been split between the prosecutors and investigative judges, but reside entirely with the prosecutors. For that reason, the obligations to investigate and to indict are not always distinguished in these courts’ core documents. As with the ECCC, at the ICTY, the ICTR, the SCSL and the ICC it is presumed that crimes will be investigated and prosecuted if they fall within these courts’ jurisdictions. For example, Article 18(1) of the ICTY Statute provides that the prosecutor “shall initiate an investigation” once determining there is a sufficient basis to proceed.⁶ Likewise, Rule 47(B) of the ICTY Rules of Procedure and Evidence (“ICTY Rules”) limits the prosecutor’s discretion with respect to the preparation of indictments. It provides that “the Prosecutor, if satisfied in the course of an investigation that there is sufficient evidence to provide reasonable grounds for believing that a suspect has

⁵ See Internal Rules, Rule.67(1),(3). Rule 67(3) provides,

The Co-Investigating Judges shall issue a Dismissal Order in the following circumstances:

- a) The acts in question do not amount to crimes within the jurisdiction of the ECCC;
- b) The perpetrators of the acts have not been identified; or
- c) There is not sufficient evidence against the Charged Person or persons of the charges.

⁶ Updated Statute of the International Criminal Tribunal for the former Yugoslavia, adopted 25 May 1993, last amended 29 Sept. 2008 [hereinafter “ICTY Statute”], art. 18(1) (emphasis added) (“The Prosecutor shall initiate investigation *ex-officio* or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organisations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.”). Under Article 15(3) of the Statute of the International Criminal Tribunal for Rwanda, adopted 8 Nov. 1994, last amended 13 Oct. 2006 (“ICTR Statute”), the Prosecutor of the ICTY would also be the Prosecutor of the ICTR. This continued until 2003, when, by Resolution 1503 of 28 Aug. 2003, the Security Council amended the ICTR Statute to create a separate Office of the Prosecute for the ICTR. See United Nations Security Council Resolution 1503, 28 Aug. 2003, S/RES/1503 [hereinafter “UNSC Resolution 1503”].

committed a crime within the jurisdiction of the Tribunal, shall prepare and forward to the Registrar an indictment for confirmation by a Judge[.]”⁷ Identical provisions appear in Article 17(1) of the ICTR Statute and Rule 47(B) of the ICTR Rules of Procedure and Evidence.

Uniquely, the SCSL prosecutor does not have a statutory duty to investigate. It is unclear why this presumption was omitted from the SCSL foundation documents, but there is no indication that it was an intended variance from ICTY/R practice. Notably, like the practice at those courts, the SCSL prosecutor has a duty to indict for crimes within the Court’s jurisdiction: “If [the SCSL Prosecutor is] satisfied in the course of an investigation that a suspect has committed a crime or crimes within the jurisdiction of the Special Court,” he shall prepare and submit an indictment to the Registrar.⁸

The Rome Statute of the International Criminal Court ("Rome Statute") also includes a presumption to move forward with investigation and prosecution. Article 53(1) provides in part, “The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute.”⁹ If the prosecutor then does not find a sufficient basis for prosecution, he must inform the ICC Pre-Trial Chamber of his reasons.¹⁰

b. The ECCC Co-Prosecutors Duty to Request a Judicial

⁷ See also *id.* art. 18(4) (requiring that “[u]pon a determination that a *prima facie* case exists, the Prosecutor shall prepare an indictment”). Cf. ICTR Statute art. 17(4) (same).

⁸ See SCSL Rules of Procedure and Evidence, Rule 47(B) [hereinafter “SCSL Rules”] (“The Prosecutor, if satisfied in the course of an investigation that a suspect has committed a crime or crimes within the jurisdiction of the Special Court, shall prepare and submit to the Registrar an indictment for approval by the aforementioned Judge.”).

⁹ See Rome Statute art. 53(1) (emphasis added). Article 15 imposes limits upon the Prosecutor’s discretion when initiating an investigation of a “situation” on the basis of his or her own authority instead of based on a State Party or Security Council referral. See *id.* art. 15. Article 15(1) states that “[t]he Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court” and 15(3) states that “[i]f the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation[.]” However, the broad prosecutorial authority to pick which situation to investigate (meaning not only which crimes and suspects but also which state territory falling within the scope of ICC jurisdiction) does not exist at the ECCC or any other international/ized court and therefore will not be used as a basis for comparison regarding the general scope of prosecutorial discretion.

¹⁰ See *id.* art. 53(3).

Investigation Is Triggered When They Have an Objective Reason to Believe that Crimes Within the Court’s Jurisdiction Have Been Committed

The ECCC Co-Prosecutors must “have reason to believe that crimes within the jurisdiction of the ECCC have been committed” before opening a judicial investigation by sending an Introductory Submission to the Co-Investigating Judges.¹¹ This language is not defined by the Internal Rules; however, the ECCC Pre-Trial Chamber has interpreted the higher standard of “well founded reason to believe.”¹² In the *Decision on Appeal against Provisional Detention Order of Nuon Chea*, the Pre-Trial Chamber, relying upon the ICC *Harun* case,¹³ interpreted the expression “well founded reason” to mean “whether facts or information exist which would satisfy an objective observer that the person concerned may have committed the offence.”¹⁴ To demonstrate “reason to believe” for the purposes of Rule 53(1), the ECCC Co-Prosecutors thus must likely provide at least some objective indicia demonstrating that crimes within the jurisdiction of the Court have been committed by particular individuals. Notably, there is no public information indicating that the ECCC Co-Prosecutors disagree on whether this threshold requirement has been met. Rather, they apparently disagree only whether or not meeting this threshold is itself sufficient, or if additional subjective factors must also be considered.

On its face, the language of ECCC Internal Rule 53(1) requires the Co-Prosecutors to put a matter forward for investigation solely on the objective basis that crimes fall within the ECCC’s jurisdiction. As Co-Prosecutor Petit argues, neither the ECCC Law nor Internal

¹¹ Internal Rules, Rule 53(1).

¹² *See id.* Rule 63(3) (“The Co-Investigating Judges may order the Provisional Detention of the Charged Person only where the following conditions are met: a) there is well founded reason to believe that the person may have committed the crime or crimes specified in the Introductory or Supplementary Submissions...”).

¹³ *Prosecutor v. Ahmad Muhammad Harun (“Ahmad Harun”) and Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”)*, ICC-02/05-01/07, *Decision on the Prosecution Application under Article 58(7) of the Statute*, Pre-Trial Chamber, 27 April 2007, ¶ 28 [hereinafter “*Harun/Kushayb Decision*”] (“Thus, in interpreting and applying the expression ‘reasonable grounds to believe’, the Chamber will be guided by the ‘reasonable suspicion’ standard under article 5(1)(c) of the *European Convention on Human Rights* and the jurisprudence of the Inter-American Court of Human Rights...under article 7 of the *American Convention on Human Rights*.”).

¹⁴ *Nuon Chea, Decision on Appeal against Provisional Detention Order of Nuon Chea*, Pre-Trial Chamber, 20 March 2008, ¶¶ 45-46 [hereinafter “*Nuon Chea Detention Order Decision*”].

Rules mention any subjective factors in making the determination of whether to move forward with an investigation. Nevertheless, the broad discretion afforded to the ECCC Co-Prosecutors, discussed *infra*, together with the practice of international/ized and hybrid tribunals, suggests that it is both appropriate and necessarily for the Co-Prosecutors to also consider subjective factors in determining whether to request a judicial investigation.

2. The ECCC Co-Prosecutors, Like Those of International Criminal Tribunals, Generally Have Broad Discretion in the Initiation of Investigations and Prosecutions.

The Co-Prosecutors' duty to investigate and prosecute crimes falling within an international/ized court's jurisdiction coexists with broad prosecutorial discretion to decide which crimes and individuals to investigate and prosecute. For example, the ECCC Internal Rules provide that investigations and prosecutions may be initiated only by the Co-Prosecutors, either at their own discretion or based on other information received.¹⁵ While the Co-Prosecutors must consider all written complaints by victims or information alleging the commission of crimes within ECCC jurisdiction under ECCC Internal Rule 49(2), they have full discretion in deciding "whether to reject the complaint, include the complaint in an ongoing preliminary investigation, conduct a new preliminary investigation or forward the complaint directly to the Co-Investigating Judges."¹⁶ No explicit standard of discretion is specified for the review of victim complaints, which arguably serves to broaden the ECCC Co-Prosecutors' authority further. The Co-Prosecutors also have the authority to change their decision of whether to investigate at any time¹⁷ and ECCC Internal Rule 13(6) provides that no decisions of the Co-Prosecutors are subject to appeal.¹⁸

The ICTY/R Prosecutors also possess broad prosecutorial discretion. Under the

¹⁵ See Internal Rules, Rule 49(1) ("Prosecution of crimes within the jurisdiction of the ECCC may be initiated only by the Co-Prosecutors, whether at their own discretion or on the basis of a complaint.").

¹⁶ *Id.* Rule 49(4). The Co-Prosecutors can also conduct preliminary investigations in order to determine whether there is evidence indicating that crimes within the ECCC's jurisdiction have been committed. See *id.* Rule 50(1).

¹⁷ *Id.* Rule 49(5) ("The Co-Prosecutors may change their decision at any time[.]").

¹⁸ *Id.* Rule 13(6) ("Decisions of the Co-Prosecutors are not subject to appeal.").

statutes of each of these Courts, the ICTY/R Prosecutors can initiate investigations “*ex-officio* or on the basis of information obtained from any source.”¹⁹ Like the ECCC Co-Prosecutors, the ICTY/R Prosecutors do not need to wait for a complaint or other information in order to commence an investigation. The ICTY/R Prosecutors then have full discretion in determining whether a *prima facie* case exists before filing an indictment.²⁰

The broad discretion afforded to the ICTY Prosecutor is clearly highlighted by the Court’s selective prosecution decision in the case of the *Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landžo* (“*Celebici*”).²¹ In the 1998 Trial Judgment, the ICTY commented that “the decision of whom to indict is that of the Prosecutor alone.”²² On appeal, Landžo alleged that he was the subject of a selective prosecution policy based on an impermissible motive.²³ The prosecution responded that the Prosecutor has “broad discretion in deciding which cases should be investigated and which persons should be indicted.”²⁴ Agreeing with the prosecution, the ICTY Appeals Chamber noted that, according to Article 18(1) of the ICTY Statute, “[i]t is beyond question that the Prosecutor has a broad discretion in relation to the initiation of investigations and in the preparation of indictments”²⁵ and that the “breadth of discretion of the Prosecutor, and the fact of [his or her] statutory independence, imply a presumption that the prosecutorial functions [. . .] are exercised regularly.”²⁶

The ICTR Appeals Chamber also addressed a selective prosecution claim in the case

¹⁹ See ICTY Statute art. 18(1); ICTR Statute art. 17(1) (“The Prosecutor shall initiate investigations *ex-officio* or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organisations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.”).

²⁰ Article 18(4) of the ICTY Statute states in part, “Upon a determination that a *prima facie* case exists, the Prosecutor shall prepare an indictment[.]” An identical provision appears in Article 17(4) of the ICTR Statute.

²¹ *Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landžo*, Case No. IT-96-21, Trial Judgment, 16 Nov. 1998.

²² *Id.* at ¶ 179.

²³ *Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landžo*, Case No. IT-96-21, Judgment on Appeal, 20 Feb. 2001, ¶ 596 [hereinafter “*Celebici*”].

²⁴ *Id.* at ¶ 600.

²⁵ *Id.* at ¶ 602.

²⁶ *Id.* at ¶ 611.

of the *Prosecutor v. Jean-Paul Akayesu* ("Akayesu").²⁷ Citing *Celebici*, the ICTR held that the Court's failure to prosecute possible Tutsi perpetrators was not indicative of a selective prosecution policy since "'investigation and prosecution' of persons responsible for serious violations within the jurisdiction of the Tribunal fall to the Prosecutor and that it is her responsibility to 'assess the information received ... and decide whether there is sufficient basis to proceed.'"²⁸ The ICTR also noted, again citing *Celebici*, that evidence of discriminatory intent by the prosecutor must be coupled with evidence of discriminatory effect.²⁹ Proving a discriminatory intent is extremely difficult, making it nearly impossible to establish an improper motive for prosecution; this high burden on defendants thus protects broad prosecutorial discretion. In *Celebici*, the Appeals Chamber also noted that even if selective prosecution was successfully established, "a remedy favourable to the applicant may not necessary follow."³⁰ This comment implies that the ICTY or ICTR Appeals Chamber would be extremely reluctant to overturn a conviction – another strong protection for prosecutorial discretion.³¹

The Statute of the Special Court for Sierra Leone ("SCSL Statute") does not specify how the Prosecutor is to decide who to investigate and/or indict, an omission which arguably gives the Prosecutor extremely broad discretion; the Prosecutor must only be "satisfied in the course of an investigation that a suspect has committed a crime or crimes within the jurisdiction of the Special Court[.]"³² Furthermore, the Statute does not provide any guidance as to which factors the SCSL Prosecutor must consider in commencing an investigation. The

²⁷ *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-A, Judgment on Appeal, 1 June 2001, ¶¶ 93-97 [hereinafter "Akayesu"]; see also *Ndindiliyimana*, ICTR-2000-56-I, *Decision on Urgent Oral Motion for a Stay of the Indictment, or in the Alternative a Reference to the Security Council*, Trial Chamber, 26 March 2004; *Ntakirutimana*, ICTR 96-10-I and ICTR 96-17-T, *Decision on the Prosecutor's Motion to Join the Indictments*, Trial Chamber, 22 Feb. 2001.

²⁸ *Akayesu* at ¶ 94.

²⁹ *Id.* at ¶ 96; see also *Celebici* at ¶ 613; *Ntakirutimana* at ¶¶ 870-87.

³⁰ *Celebici* at ¶ 611.

³¹ See, e.g., *id.* at ¶¶ 607, 610; *Akayesu* at ¶ 96.

³² SCSL Rules, Rule 47(B).

SCSL Prosecutor can withdraw an indictment before its approval at any time.³³

On its face, the ICC Rome Statute affords the Prosecutor even broader discretion than the aforementioned courts in deciding who to investigate and/or indict. Article 53 explicitly mandates the ICC Prosecutor to consider not only objective factors, but also the “interests of justice” in determining whether to investigate and prosecute.³⁴ Like the ECCC Co-Prosecutors, the ICC Prosecutor can change his decision of whether to investigate or prosecute an individual at any time.³⁵

3. The Discretion of the Co-Prosecutors Is Limited by the ECCC’s Mandate, the Obligation of Prosecutorial Independence and Judicial Review Authority.

Prosecutorial discretion at the ECCC, as at international tribunals, is limited by the Court’s mandate (including temporal, geographic, subject matter, and personal jurisdiction), the obligation of prosecutorial independence and the Chambers’ judicial review authority.

a. Temporal and Geographic Restrictions

The ECCC has a limited temporal mandate; therefore the Co-Prosecutors can only charge individuals for crimes committed during the period from 17 April 1975 to 6 January 1979.³⁶ The ECCC does not have any explicit geographic restriction, but the Court’s mandate to try only “senior leaders of Democratic Kampuchea and those most responsible for the crimes and serious violations” committed during the Democratic Kampuchea period suggests that the Co-Prosecutors only can investigate acts committed in Cambodia and its neighbors.

Similarly, Article 1 of the ICTY Statute only allows the ICTY Prosecutor to charge

³³ *Id.* Rule 51(A). After the indictment’s approval, but before the commencement of the trial, the Prosecutor can still withdraw the indictment by providing the Trial Chamber with a statement of reasons for the withdrawal. *Id.*

³⁴ Rome Statute art. 53(1),(2).

³⁵ *See id.* arts. 15(6), 53(4). *But see id.* art. 53(3)(b) (providing that where the prosecutor decides not to prosecute solely on the basis of interests of justice, the Pre-Trial Chamber may review his decision and that decision “shall be effective only if confirmed by the Pre-Trial Chamber”).

³⁶ Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, promulgated 27 Oct. 2004, last revised 29 Sept. 2005, art. 1 [hereinafter “ECCC Law”].

for crimes committed in the territory of the former Yugoslavia since 1991; Article 1 of the ICTR Statute restricts the ICTR Prosecutor to crimes “committed in the territory of Rwanda and Rwanda citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994.” The SCSL Statute only allows prosecution of crimes committed in the territory of Sierra Leone since 30 November 1996.³⁷ Lastly, the ICC Prosecutor can only charge for crimes occurring after 1 July 2002, the date that the Rome Statute entered into force.³⁸ The ICC Prosecutor’s authority is further limited to crimes occurring in the territory of a state party unless committed by the national of a state party or referred by the Security Council, in which case the crimes may have been committed anywhere in the world.³⁹

Notably, the ICTY and ICTR Prosecutors are also now limited by an ending dates for the tribunals⁴⁰ — something which does not yet formally exist at the ECCC but might become an issue for the Court in the future.⁴¹

b. Gravity and Level of Responsibility Limitations

Article 1 of the ECCC Law limits the ECCC’s personal jurisdiction to “senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia[.]” This phrase is worded disjunctively and thus apparently “includes individuals who were *either* among the ‘senior leaders’ *or* those ‘most responsible’ for serious crimes within the jurisdiction of the Court.”⁴² This

³⁷ Statute of the Special Court for Sierra Leone, amended 16 Jan. 2002, art. 1(1) [hereinafter “SCSL Statute”].

³⁸ See Rome Statute art. 11(1).

³⁹ *Id.* arts. 12(2), 13.

⁴⁰ See UNSC Resolution 1503; for more on the ICTY completion strategy, see generally Dominic Raab, *Evaluating the ICTY and its Completion Strategy: Efforts to Achieve Accountability for War Crimes and their Tribunals*, 3 J. INT’L CRIM. JUST. 82 (2005).

⁴¹ See discussion of limited resources as a discretionary factor in prosecutorial decision-making *infra* § 4(f).

⁴² The Gravity Threshold of the International Criminal Court, American University Washington College of Law War Crimes Research Office, March 2008, 12 [hereinafter “American University Gravity Report”], available at <http://www.wcl.american.edu/warcrimes/icc/documents/WCROReportonGravityMarch2008.pdf?rd=1>; see also ECCC Law art. 1.

interpretation is supported by the UN Group of Experts,⁴³ who did not consider Kaing Guek Eav *alias* Duch to be among the top Khmer Rouge leadership but nevertheless determined that would be appropriate to indict him based on “the fact that the murder and torture of civilians was committed on such a widespread basis under his authority at the prison.”⁴⁴

As discussed below, a decision as to who is “most responsible for serious crimes” may include consideration of numerous factors, none of which are definitive. For that reason, the ECCC’s personal jurisdiction does not greatly limit the discretion of the Co-Prosecutors to choose who and how many to charge among a number of persons who may fall within this category.

i. Gravity Limitation

All existing international and hybrid courts limit prosecutions to grave crimes. The ICTR and SCSL Statutes limit prosecutions to persons responsible for “serious violations,” while the ICTY and the ICC employ the qualifier “most serious.”⁴⁵ The ICC Rome Statute also has an additional gravity consideration present in the “interests of justice”⁴⁶ criterion of Article 53, obligating the ICC Prosecutor to reconsider gravity in conjunction with various subjective factors in deciding whether to initiate a full investigation or prosecution.⁴⁷

ICTY Rule 11 *bis* decisions, determining whether cases should be transferred to

⁴³ The UN Group of Experts was established by the United Nations in order to assess the “existing evidence with a view to determining the nature of the crimes committed by the Khmer Rouge leaders in the years 1975-1979; to assess the feasibility of their apprehension; and to explore legal options for bringing them to justice before an international or national jurisdiction.” Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135, 18 Feb. 1999, Preamble [hereinafter “Report of the Group of Experts”]. The Group of Experts has three members: Rajsoomer Lallah, Ninian Stephen and Steven R. Ratner.
⁴⁴ *Id.* at 12.

⁴⁵ See ICTY Statute art. 1; ICTR Statute art. 1; Rome Statute art. 1.

⁴⁶ A lengthy memorandum could be written just on the meaning of “interests of justice.” For more information on the term, see e.g., Office of the Prosecutor, *Policy Paper on the Interests of Justice*, ICC-OPT-2007, September 2007; William Schabas, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, 6 J. INT’L CRIM. JUST. 731, 748-49 (2008); Human Rights Watch, *Policy Paper: The Meaning of ‘The Interests of Justice’ in Article 53 of the Rome Statute*, June 2005.

⁴⁷ With respect to the commencement of a full investigation, Article 53(1)(c) of the Rome Statute states: “[t]aking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.” Similarly, with respect to the initiation of a prosecution, Article 53(2)(c) provides that the Prosecutor must consider whether a prosecution is “is ... in the interests of justice, taking into account all of the circumstances, including the gravity of the crime[.]” See generally American University Gravity Report.

national courts based on “the gravity of the crimes charged and the level of responsibility of the accused,” offer factors which may be considered in assessing gravity.⁴⁸ In the *Dragomir Milosevic* case, for example, the ICTY Referral Bench declined to refer the case to the national authorities, noting that “[t]he campaign alleged in the Indictment and the crimes with which Dragomir Milosevic has been charged stand out when compared with other cases before the Tribunal, especially in terms of alleged duration, number of civilians affected, extent of property damaged, and number of military personnel involved.”⁴⁹

ICC Prosecutor Moreno-Ocampo has considered similar factors in determining which cases are most grave. A 2006 Report on Prosecutorial Strategy issued by the Office of the Prosecutor said that in selecting “the most serious crimes” the ICC Prosecutor would examine the crimes’ scale, nature, manner of commission and impact.⁵⁰ And in his 2006 Statement on Iraq, Moreno-Ocampo indicated that in assessing gravity, a key factor is the number of victims of particularly serious crimes, such as willful killing or rape.⁵¹

In the case of Thomas Lubanga Dyilo, the ICC Pre-Trial Chamber assessed whether his case was of sufficient gravity under the Rome Statute.⁵² It held that the conduct must be either systematic or large-scale and that due consideration must be given to the degree of “social alarm” created by the conduct in the international community.⁵³ The ICC Pre-Trial Chamber also held that a gravity assessment must include an examination of the suspects’ position, roles in State entities, organizations or groups and roles of such organizations in the

⁴⁸ The ICTR Statute has an almost identical Rule 11 *bis* provision; however, the ICTR version of the provision does not explicitly require the Referral Bench (although the ICTR uses the term “Trial Chamber”) to consider gravity of the crimes charged and the level of responsibility of the accused in making its decisions.

⁴⁹ *Prosecutor v. Dragomir Milosevic*, Case No. IT-98-29/1-PT, *Decision on Referral of Case Pursuant to Rule 11 bis*, Referral Bench, 8 July 2005, ¶ 24.

⁵⁰ Office of the Prosecutor, *Report on Prosecutorial Strategy*, The Hague, 14 Sept. 2006, 5; see also *Paper on some policy issues before the Office of the Prosecutor*, Sept. 2003, 7.

⁵¹ See *id.* For more on the “gravity” criterion and Moreno-Ocampo’s treatment of the factor, see also Schabas, *supra* note 46, at 736-41 (arguing that gravity is usually invoked not as a justification for selecting cases but for refusing to undertake cases and that the states themselves have ultimately selected the situations).

⁵² See *Prosecutor v. Lubanga*, ICC-01/04-01/06-8, *Decision on the Prosecutor’s Application for a Warrant of Arrest*, Pre-Trial Chamber I, 10 Feb. 2006 (filed as ICC-01/04-01/06-8-US-Corr), ¶¶ 42-63 (considering the gravity requirement under Article 17(1)(d)). While Article 17 focuses on the admissibility of cases, the Rome Statute does not draw a difference between the employments of the term “gravity” in that Article and in others.

⁵³ See *id.* at ¶ 46.

commission of the crimes at issue in order to ensure that only the “most senior leaders” were being tried.⁵⁴

Thus, a wide a variety of factors may be considered by the ECCC Co-Prosecutors in assessing gravity. Indeed, from ICC practice it appears that a sharp line may not be drawn between those responsible for the “most serious” crimes and the level of responsibility of the suspects. Rather, as will be highlighted below, these considerations appear to inherently overlap.

ii. Level of Defendant Responsibility Limitation

In addition to “senior leaders,” a category that is fairly easily circumscribed, the ECCC Law provides for prosecution of those “most responsible” for serious crimes. It does not appear that the category of “most responsible” was intended to be narrowly applied only to Duch, but rather it was envisioned that it might also be applied to a number of other individuals. Indeed, the UN Group of Experts explicitly rejected the idea that there should be strict limitations on which or how many individuals are prosecuted by the future ECCC, commenting, “[S]uch a limitation is arbitrary ... it ignores the principle that criminal culpability should be linked with the degree of personal responsibility of an individual and not partisan political factors – that justice is blind.”⁵⁵ Furthermore, they state in their Report, “We do not wish to offer a numerical limit on the number of ... persons who could be targets of investigation. It is the sense of the Group ... that the number of persons to be tried might well be in the range of some 20 to 30 the Group opposes the creation of a tribunal that would explicitly be limited in advance to the prosecution of named individuals.”⁵⁶

Similar to the ECCC Law, the SCSL Statute includes both a gravity limitation and a

⁵⁴ *Id.* at ¶¶ 50-53. The American University War Crimes Office also proposes that the Court should consider other factors in assessing gravity, including, among others, the amount of premeditation or planning, the methods used to commit the crimes and the vulnerability of the targeted group. *See* American University Gravity Report at 11.

⁵⁵ Report of the Group of Experts at 44, ¶ 107.

⁵⁶ *Id.* at 45, ¶ 110.

mandate to prosecute only those with the “greatest responsibility.”⁵⁷ While the ICTY and ICTR Statutes do not specify the necessary level of responsibility of defendants, the Security Council, in Resolution 1534, suggested that the Tribunals focus on the “most senior leaders suspected of being most responsible.”⁵⁸ This dual seniority/responsibility requirement was ultimately incorporated into Rule 28(A) of the ICTY Rules; the ICTR did not add a similar provision.⁵⁹ The ICC Rome Statute does not contain an explicit provision on level of responsibility; however, Article 53 requires the ICC Prosecutor, in evaluating the “interests of justice,” to consider the alleged perpetrator’s role in the crime.⁶⁰

Notably, the ECCC and the SCSL Statutes both employ similar but not identical terms: “most responsible” and “greatest responsibility,” respectively. The Secretary-General Report on the Establishment of a Special Court for Sierra Leone briefly outlines the debate between the Secretary-General and the Security Council on the relative merits of the terms “greatest responsibility” versus “most responsible” for inclusion in the SCSL Statute.⁶¹ Advocating the use of “most responsible,” the Secretary-General argued that “[w]hile those ‘most responsible’ obviously include the political or military leadership, others in command authority down the chain of command may also be regarded ‘most responsible’ judging by the severity of the crime or its massive scale. ‘Most responsible’ ... denotes both a leadership

⁵⁷ SCSL Statute art. 1(1). In the *Brima* case, the SCSL Appeals Chamber held that “greatest responsibility” was only a guideline to the exercise of prosecutorial discretion, and not a threshold jurisdictional requirement. *See Prosecutor v. Brima et. al*, SCSL-2004-16-A, Judgment on Appeal, 22 Feb. 2008 (overturning *Prosecutor v. Moinina Fofana* in which the Court held that “greatest responsibility” was a mandatory jurisdictional requirement. *See Prosecutor v. Moinina Fofana*, SCSL-04-14-PT, *Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction Filed on Behalf of the Accused Fofana*, 3 March 2004, ¶¶ 27).

⁵⁸ United Nations Security Council Resolution 1534, 26 March 2004, S/RES/1534 [hereinafter “UNSC Resolution 1534”]; UNSC Resolution 1503. *See* ICTY Rules of Evidence and Procedure, Rule 28(A), last amended 4 Nov. 2008, IT/32/Rev. 42 [hereinafter “ICTY Rules”] (“On receipt of an indictment for review from the Prosecutor, the Registrar shall consult with the President. The President shall refer the matter to the Bureau which shall determine whether the indictment, prima facie, concentrates on one or more of the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the Tribunal.”). *See also* Schabas, *supra* note 46, at 733.

⁵⁹ Rule 28(A) of the ICTY Rules requires the Bureau, not the Prosecutor, to review the indictment in order to determine whether it concentrates on the “most senior leaders suspected of being most responsible.” However, this implies that the Prosecutor must keep that consideration in mind in preparing indictments.

⁶⁰ *See* Rome Statute art. 53(1) (“...whether the prosecution would be in the interests of justice, taking into account all circumstances, including ... [the alleged perpetrator’s] role in the crime.”).

⁶¹ Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, 4 Oct. 2000, S/2000/915, ¶¶ 29-31.

or authority position of the accused, and a sense of the gravity, seriousness or massive scale of the crime.”⁶²

Although the phrase “greatest responsibility” ultimately prevailed in the SCSL Statute, the Secretary-General’s discussion is relevant to the ECCC because it suggests which factors, including the gravity or scale of the crime and the alleged perpetrator’s rank, the Co-Prosecutors may consider in assessing “most responsible.” This is reinforced by the fact that, in practice, the ICC, ICTY and ICTR Prosecutors employ similar criteria.⁶³ Here again, it is notable that the Secretary-General did not draw a sharp line of separation between gravity and level of responsibility, but considered them holistically, and moreover recognized that the breadth of this category extends “down the chain of command.”

ICTY/R Prosecutor del Ponte has also highlighted the legitimacy of looking at a variety of considerations in determining which individuals bear the highest level of responsibility. She argued that a prosecutor is required to look at both functional responsibility and the scope of the crimes.⁶⁴ Functional responsibility entails a close investigation of political leadership, security forces and possible paramilitary organizations, among others.⁶⁵ With regard to the scope of the crimes, del Ponte commented that “some individuals who have no particularly important functional role may have distinguished themselves in committing numerous crimes in the most overt, systematic or widespread

⁶² See *id.* at ¶ 30.

⁶³ Criteria employed by the ICTY/R, ICC and SCSL Prosecutors will be discussed in greater detail in the next section. See *infra* 4(a).

⁶⁴ See generally Carla del Ponte, *Prosecuting the Individuals Bearing the Highest Level of Responsibility*, 2 J. INT’L CRIM. JUST. 516 (2004); see also Carla del Ponte, *Investigation and Prosecution of Large-scale Crimes at the International Level: The Experience of the ICTY*, 4 J. INT’L CRIM. JUST. 539, 543 (2006) (“In preparing and issuing indictments, the Prosecutor considers a number of factors including, but not limited to: (1) the seriousness of the crime including its severity, magnitude, nature and impact ... (2) the leadership level and position in the military and hierarchical structures as well as information about the military formations, the political organizations, the de facto as well as the de jure command structures, the relationship between political, military, paramilitary and police organizations ... (3) the responsibility quotient among senior leaders in assessing their involvement, manner of participation, contribution to the crime and importance of their role.”).

⁶⁵ Del Ponte, *Prosecuting the Individuals Bearing the Highest Level of Responsibility*, *supra* note 64, at 2.

manner ... [s]uch individuals often play a great role in *setting the example* and encourage ... the commission of other gruesome crimes.”⁶⁶

c. Prosecutorial Independence

The ECCC Co-Prosecutors’ discretion is also limited by their obligation to not let their decisions be dictated by external authorities. Under Article 19 of the ECCC Law, the ECCC Co-Prosecutors must be independent and “shall not accept or seek instructions from any government or other source.”⁶⁷ The same caveat appears in the statutes of the international criminal courts. The wording in Article 15(1) of the SCSL Statute is identical to that in Article 19 of the ECCC Law. Article 16(2) of the ICTY Statute reads, “The Prosecutor shall act independently as a separate organ He or she shall not seek or receive instructions from any Government or from any other source.” An identical provision appears in Article 15(2) of the ICTR Statute. Article 42(1) of the Rome Statute states that “[t]he Office of the Prosecutor shall act independently as a separate organ of the Court A member of the Office shall not seek or act on instructions from any external source” and Article 42(5) forbids the Prosecutor and the Deputy Prosecutor from engaging in any activity which might “interfere with his or her prosecutorial functions or to affect confidence in his or her independence.”

d. Judicial Review Limitation

A third limitation on the discretion of the prosecutors of the international criminal tribunals is the scope of authority of the reviewing chambers or judges. In the present situation, the ECCC Pre-Trial Chamber has the authority to resolve the dispute between the Co-Prosecutors, power necessarily limiting the discretion of one Prosecutor unless some type of compromise is reached. At the ICTY, ICTR and SCSL tribunals, the prosecutors’ discretion is also limited by the judicial chambers; at the ICC, for example, the Pre-Trial

⁶⁶ *Id.*

⁶⁷ ECCC Law art. 19.

Chamber is required to review the prosecutor's request for an arrest warrant or summons to appear.⁶⁸ Moreover, once an indictment is confirmed, the prosecutors of the ICTY, ICTR and SCSL cannot amend or withdraw it without seeking judicial confirmation.⁶⁹ The scope of these bodies' review authority is discussed *infra* Part B, which will address the ECCC Pre-Trial Chamber's scope and standard of review of prosecutorial discretion.

4. In Exercising Their Discretion Whether to Investigate Crimes Falling Within the Court's Jurisdiction, the ECCC Co-Prosecutors May Appropriately Consider a Variety of Factors.

Like the ECCC Law, the ICTY, ICTR, and SCSL core documents on their face require only that their prosecutors consider objective factors before initiating an investigation or prosecution. The ICTY and ICTR Statutes indicate that only a "sufficient basis" is necessary to proceed with an investigation, and require a "*prima facie* case" to move forward with a prosecution.⁷⁰ A *prima facie* case — likely a higher standard than that the threshold for requesting an ECCC judicial investigation — was most famously defined by Judge MacDonald of the ICTY as "a credible case, which would (if not contradicted by the Defence) be a sufficient basis to convict the accused of the charge."⁷¹ Later cases followed Judge MacDonald's definition; in 1999, Judge Hunt altered the test, stating that a *prima facie* case exists "where the material facts pleaded in the indictment constitute a credible case[.]"⁷² In 2001, Judge May added a caveat to Judge MacDonald's test: "the case must be one which is based on evidence, which if it is accepted by a Trial Chamber, would be a sufficient basis

⁶⁸ See Rome Statute art. 58(1).

⁶⁹ See ICTY Rules, Rules 50(A), 51(A); ICTR Rules of Procedure and Evidence, adopted 29 June 1995, last revised 14 March 2008, Rules 50(A), 51(A); SCSL Rules, Rules 50(A), 51.

⁷⁰ ICTY Statute art. 18(1), (4); ICTR Statute art. 17(1), (4). Article 18(4) of the ICTY Statute and Article 17(4) of the ICTR Statute state that "[u]pon a determination that a *prima facie* case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute."

⁷¹ *Prosecutor v. Kordic et al*, Case IT-95-14-I, *Decision on the Review of the Indictment*, 10 Nov. 1995, 2-3. The test was originally formulated by the International Law Commission in its Draft Statute for an International Criminal Court. See Report of the International Law Commission on the work of its 46th Sess., U.N. GAOR, 49th Sess., U.N. Doc. A/49/10 (1994), 95.

⁷² *Prosecutor v. Milosevic et al*, Case IT-99-37-I, *Decision on Review of Indictment and Application for Consequential Orders*, 24 May 1999, ¶ 4.

for conviction it would appear more appropriate to speak of a *prima facie* case being a credible case which, if accepted and uncontradicted, would be a sufficient basis on which to convict the accused.”⁷³ Similar to the ICTY/R, at the SCSL, the prosecutor need only be “satisfied in the course of an investigation that a suspect has committed a crime or crimes” within the SCSL’s jurisdiction before issuing an indictment.⁷⁴

At the ICC, before initiating an investigation the prosecutor must also consider whether “[t]he information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed.”⁷⁵ Likewise, Article 53(2)(a) requires the ICC Prosecutor to assess whether there is a “sufficient legal or factual basis” to seek a warrant or summons. Notably however, alone among the core documents of international/ized courts, the Rome Statute also explicitly requires the ICC prosecutor to consider subjective criteria — the “interests of justice” — in deciding whether or not to proceed with an investigation.⁷⁶ ICC Prosecutor Moreno-Ocampo has thus emphasized that a “reasonable basis,” on its own, is insufficient for the initiation of an investigation by the ICC; he is statutorily required to consider other factors.⁷⁷

In practice, the prosecutors of other international courts have also taken into account a wide range of factors in selecting defendants for investigation and prosecution. As former ICTY/R Prosecutor Louise Arbour aptly acknowledged,

The discretion to prosecute [before an international criminal tribunal] is considerably larger [than before a domestic court], and the criteria upon which such Prosecutorial discretion is to be exercised are ill-defined, and complex. In my experience, based on the work of the two tribunals to date, I believe that the real challenge posed to a Prosecutor is to choose from many meritorious complaints the appropriate ones for international intervention.⁷⁸

⁷³ *Prosecutor v. Slobodan Milosevic, Decision on Review of Indictment*, 22 Nov. 2001, ¶ 14.

⁷⁴ SCSL Rules, Rule 47(B).

⁷⁵ Rome Statute art. 53(1)(a).

⁷⁶ *See id.* art. 53(1), (2).

⁷⁷ *Statement on communications concerning Iraq*, The Hague, 9 Feb. 2006, 8-9.

⁷⁸ Statement by Justice Louise Arbour to the Preparatory Committee on the Establishment of an International Criminal Court, 8 Dec. 1997, 7-8.

In fact, given the large number of potential defendants and practical constraints, the consideration of other factors by international prosecutors is arguably not only appropriate, but necessary.

Arbour's successor, Carla del Ponte, also suggested that the consideration of subjective factors in the selection of cases was permissible. In response to the NATO bombing campaign against the Federal Republic of Yugoslavia from 24 March 1999 to 9 June 1996, the ICTY began assessing allegations that senior political and military figures committed serious violations of international humanitarian law during the campaign. Ultimately, however, the ICTY declined to open an investigation or to indict any individuals.⁷⁹ Del Ponte released a statement stating that she largely based her decision not to move forward with the matter on the findings in the *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*. In this Report, the Committee commented,

The threshold test ... was that of 'credible evidence tending to show that crimes within the jurisdiction of the Tribunal may have been committed in Kosovo.' That test was advanced to explain in what situation the Prosecutor would consider, for jurisdiction purposes, that she had a legal entitlement to investigate the test represents a negative cut-off point for investigations. The Prosecutor may, in her discretion require that a higher threshold be met before making a positive decision that there is sufficient basis to proceed under Article 18(1) ... In practice, before deciding to open an investigation in any case, the Prosecutor will also take into account a number of other factors concerning the prospects for obtaining evidence sufficient to prove that the crime has been committed by an individual who merits prosecution in the international forum.⁸⁰

Notably, the Report says that the prosecutor "will take into account" and not "may take into account" a variety of factors, thus assuming that she will necessarily consider factors including whether the individual "merits prosecution," in addition to credible evidence

⁷⁹ See Security Council General Assembly, *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*, Annual Report, A/55/273-S/2000/777, Aug. 2000, ¶ 192.

⁸⁰ *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, II, 5.

needed to establish a *prima facie* case. Whether an individual “merits prosecution” is arguably a subjective and not objective consideration to be determined by the specific context of each case. Some of the factors that appear to have been considered by prosecutors of international/ized courts in determining who “merits prosecution” are discussed below.

a. Gravity/Level of Responsibility

As discussed *supra*, Article 53 of the ICC Rome Statute explicitly requires the prosecutor to consider gravity as one factor in determining whether there is a reasonable basis to investigate and/or prosecute. ICC Prosecutor Moreno Ocampo has said that he selected the first case in Northern Uganda based primarily on gravity considerations⁸¹ and that gravity played a central role in the investigation of the situations in the Democratic Republic of the Congo and in Darfur.⁸² Thus, for Moreno-Ocampo, gravity appears to be one of the foremost criteria in the selection of situations and cases.⁸³ Factors the ICC and other courts have considered in assessing gravity and the related “level of responsibility” criteria are discussed *supra* § (3)(b).

b. Political

The ICTY/R Prosecutor Richard Goldstone has explicitly stated that the ICTY’s early indictments were influenced by political considerations.⁸⁴ In an article authored by Goldstone, he commented that the United Nations, governments and NGOs were all impatient to begin so the Court was forced to produce an indictment quickly in order to prove that that the system was functioning and that the ICTY was worthy of financial support.⁸⁵

⁸¹ American University Gravity Report at 9 (“Indeed, the Prosecutor has repeatedly explained his decision by saying that the criterion upon which he selected his first case in Uganda was gravity, noting that crimes allegedly committed by the LRA were much more numerous and of a much higher gravity than alleged crimes committed by the UPDF.”).

⁸² *Id.*

⁸³ See Luis Moreno-Ocampo, *Integrating the Work of the ICC into Local Justice Initiatives, Keynote Address at the Symposium on International Criminal Tribunals in the 21st Century*, 21 AM. U. INT’L L. REV. 497, 498 (2006).

⁸⁴ A lower level commander.

⁸⁵ See Richard J. Goldstone, *Prosecuting Rape as a War Crime*, 34 CASE W. RES. J. INT’L L. 277, 281; see also RICHARD GOLDSTONE, FOR HUMANITY: REFLECTIONS OF A WAR CRIMES INVESTIGATOR 105 (2000).

Similarly, other former prosecutors have stated that lower level perpetrators were indicted initially by the ICTY and ICTR “primarily on the basis of the urgent need to prove to the international community that these first attempts at international justice after Nuremberg could work, rather than the relative importance of holding these specific men accountable.”⁸⁶

Goldstone’s successor, Louise Arbour, was accused of taking political considerations into account in waiting to indict Milosevic during the 1999 NATO campaign instead of earlier when his participation was crucial to the success of the Dayton Accords to end the war in Bosnia. Arbour denied all such claims, but did acknowledge that she had rushed the indictment due to the fear that NATO might make a deal granting Milosevic amnesty.⁸⁷

Like Arbour, other international prosecutors have been loath to admit the impact of political considerations on their work. They appear to agree that political considerations — at least ideally — should be irrelevant. ICC Prosecutor Moreno-Ocampo has commented that his duty

is to apply the law without political considerations yet, for each situation in which the ICC is exercising jurisdiction, we can hear voices challenging judicial decisions, their timing, their timeliness, asking the Prosecution to use its discretionary powers to adjust to the situations on the ground, to indict or withdraw indictments according to short term political goals. We also hear officials of States Parties calling for amnesties, the granting of immunities and other ways to avoid prosecutions, supposedly in the name of peace These proposals are not consistent with the Rome Statute. They undermine the law States Parties committed to.⁸⁸

Consequently, while political factors have undoubtedly been taken into account by some international prosecutors in certain situations, there is no consensus that they are an appropriate consideration in determining who to investigate and/or prosecute.

c. A Complete Narrative

⁸⁶ Luc Côté, *The Exercise of Prosecutorial Discretion in International Criminal Law*, 3 J. INT’L CRIM. JUST. 162, 169 (2005); see also Minna Schrag, *Yugoslav Crimes Tribunal: A Prosecutor’s View*, *The Comments*, 6 DUKE J. COMP. & INT’L L. 187, 193 (1995); Minna Schrag, *Lessons Learned from ICTY Experience*, 2 J. INT’L CRIM. JUST. 427 (2004).

⁸⁷ Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT’L L. 510, 544; see also Marlise Simons, *Proud but Concerned: Tribunal Prosecutor Leaves*, N.Y. TIMES, Sept. 15, 1999, at A3.

⁸⁸ Luis Moreno-Ocampo, *Building a Future on Peace and Justice*, Nuremberg, 24/25 June 2007.

The Report of the UN Group of Experts notes that the Government of Cambodia requested the assistance of the United Nations to “encourage a process of reflection among Cambodians to determine the desirability and, if appropriate, the modalities of a truth-telling mechanism to provide a fuller picture of the atrocities of the period of Democratic Kampuchea.”⁸⁹ The Report also stated that “the Government of Cambodia has responded to what we sense is the desire of the Cambodian people for justice and their knowledge that it is impossible to simply ignore the past. Rather, it is necessary to understand the past and move beyond it[.]”⁹⁰ Similarly, the ECCC Pre-Trial Chamber has noted that “the proceedings [of the ECCC], even in the pre-trial phase ... are still a matter of great concern today for the Cambodian population and the international community.”⁹¹ These reflections suggest that the ECCC Co-Prosecutors, in determining whether to move forward with an investigation, may have discretion to select cases that will provide information about events during the Democratic Kampuchea period in order to contribute to a more complete understanding of the crimes committed.

Notably, the ICTY Office of the Prosecutor has emphasized the importance of context, or history, from the beginning of the Tribunal’s work. Graham Blewitt, an ICTY deputy prosecutor, has explicitly stated that the Office of the Prosecutor has tried to look for cases that have particular historical resonance, such as the Srebrenica massacre.⁹² Similarly, Minna Schrag, another deputy prosecutor, stated with respect to the indictments against those responsible for crimes at the Omarska detention camp,

We charged the camp commander with genocide and he and the others were

⁸⁹ Report of the Group of Experts at 2.

⁹⁰ *Id.* at 81.

⁹¹ *Ieng Sary, Decision on Appeal against Provisional Detention Order*, Pre-Trial Chamber, 17 Oct. 2008, ¶ 115 [hereinafter “*Ieng Sary Detention Order Decision*”]. See also *Nuon Chea Detention Order Decision* at ¶¶ 78-79; *Kaing Guek Eav, Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav alias “Duch,”* Pre-Trial Chamber, 3 Dec. 2007, ¶ 51 [hereinafter “*Duch Detention Order Decision*”]; UN General Assembly, Preamble, Resolution adopted by the General Assembly – Khmer Rouge Trials, GA Res. A/RES/57/228, 27 Feb. 2003.

⁹² Danner, *supra* note 87, at 543.

also accused of other violations of the Tribunal Statute. That indictment is particularly significant, we think, because Omarska is the first camp in Bosnia that international journalists were permitted to see and film It is largely as a result of their work that the international community began to address the apparent human rights abuses occurring in the former Yugoslavia.⁹³

The UN Security Council has also recognized the importance of selecting prosecutions with consideration for the context within which the crimes took place. In the *Lukić* case, the ICTY Appeals Chamber commented, “[i]n light of the notorious role played by paramilitary organizations and their leaders during the conflict in the former Yugoslavia, and in light of the Security Council’s recognition that the Tribunal should try at least some of these leaders, the Appeals Chamber considers that the Appellant’s case should be retained by the Tribunal.”⁹⁴ The Appeals Chamber found that the necessity of trying a representative sampling of defendants in order to “tell the whole story” made the *Lukić* case “too significant” for referral to the national courts.⁹⁵ For the ICTY, this importance obliges the Prosecutor to consider not only statutory requirements, but as one commentator theorizes, the broader significance of the case as well; this issue is particularly relevant to the ICTY’s completion strategy, which has placed additional pressure on the Prosecutor to ensure that the Court has not neglected to investigate certain crimes or groups.⁹⁶

In addition, ICTR Prosecutor Hassan Jallow has highlighted the importance of telling the whole story of the crimes in Rwanda and has therefore emphasized a geographic spread in

⁹³ Schrag, *Yugoslav Crimes Tribunal: A Prosecutor’s View*, *supra* note 86, at 193.

⁹⁴ *Prosecutor v. Milan Lukić & Sredoje Lukić*, Case No. IT-98-32/1-AR11bis.1, *Decision on Milan Lukić’s Appeal Regarding Referral*, Appeals Chamber, 11 July 2007, ¶ 26 [hereinafter “*Lukić*”]; *see also* United Nations Security Council, Statement by the President of the Security Council, 23 July 2002, S/PRST/2002/21 (recognizing that “the ICTY should concentrate its work on the prosecution and trial of the civilian, military and paramilitary leaders suspected of being responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, rather than on minor actors”).

⁹⁵ *Lukić* at ¶ 25.

⁹⁶ *See* Raab, *supra* note 40, at 90 (“Equally, as the... deadline for the completion of investigations draws closer, there has been increasing attention to the legacy of the ICTY ... the Prosecutor may have been increasingly mindful of this when formulating her final plans for new indictments. Conscious of the need to ensure that the ICTY has not omitted investigation of any of the most serious crimes committed – by or against any particular ethnic or religious group – the Completion Strategy has placed significant additional pressure on the current Prosecutor”).

selecting targets for prosecution.⁹⁷ Similarly, the President of the ICTR has emphasized the need to cover the major geographical areas of Rwanda.⁹⁸ Geographic spread ensures, to a certain extent, that the different regional experiences are documented. This concept has been specifically discussed in ICTR case law, namely in the *Ntuyahaga* case in which the Trial Chamber granted the Prosecutor's motion to withdraw the indictment. The ICTR Trial Chamber upheld the Prosecutor's argument that the "withdrawal of the indictment would be justified because the objective of the Prosecutor is to shed light on the events that occurred in Rwanda in 1994 and highlighting the complete landscape of the criminal acts perpetrated at that time, and that such objective would not be achieved through the prosecution."⁹⁹ The ICTR further noted that it was the special duty of the Prosecutor to devise a prosecutorial strategy which includes the aim of "shedding light" on the atrocities in Rwanda.¹⁰⁰

The 2006 ICC Report on Prosecutorial Strategy stated that incidents should be selected to provide a sample reflecting the gravest incidents and primary types of victimization. This suggests that the ICC might not always focus on the most senior leaders or on those with the greatest responsibility and will, like the other tribunals, also be concerned with context and telling the full story.¹⁰¹ Indeed Moreno-Ocampo has emphasized the importance of remembering the broader context; he stated that "the focus on an investigation may go wider than high-ranking officers if, for example, investigation of certain types of crimes or those officers lower down the chain of command is necessary for the whole case."¹⁰²

The importance of telling the whole story is evidently frequently taken into account

⁹⁷ See generally Hassan Jallow, *Prosecutorial Discretion and International Criminal Justice*, 3 J. INT'L CRIM. JUST. 145 (2005).

⁹⁸ Completion strategy of the International Criminal Tribunal for Rwanda, Annex to Letter from the President of the ICTR addressed to the President of the Security Council, 3 May 2004, S/2004/341.

⁹⁹ *Prosecutor v. Bernard Ntuyahaga*, Case No. ICTR-98-40-T, *Decision on the Prosecutor's Motion to Withdraw the Indictment*, Trial Chamber I, 18 March 1999.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 5-6.

¹⁰² Office of the Prosecutor, *Paper on some policy issues before the Office of the Prosecutor*, Sept. 2003, 3.

by the prosecutors of the ICTY, ICTR and the ICC in selecting investigations, suggesting that it is an appropriate factor for the ECCC Co-Prosecutors to consider.

d. National Reconciliation

The Framework Agreement — as noted by Co-Prosecutor Chea Leang in the Statement of the Co-Prosecutors¹⁰³ — emphasizes the connection between national reconciliation and the ECCC mandate.¹⁰⁴ In this regard, it is notable that the Report of the UN Group of Experts advised that the future Khmer Rouge prosecutor should “as a matter of prosecutorial policy ... exercise his or her discretion regarding investigations, indictments and trials so as to fully take into account the twin goals of individual accountability and national reconciliation in Cambodia.”¹⁰⁵ The Report further commented that the ECCC was necessary to help Cambodia fully achieve national reconciliation: “If these and our other recommendations are pursued ... we believe they will lead to a process that will truly enable Cambodia to move away from its incalculably tragic past and create a genuine form of national reconciliation for the future.”¹⁰⁶ Significantly, there is no suggestion in the Report to support Co-Prosecutor Chea Leang’s contention that furthering the goal of national reconciliation necessarily entails limiting the number of prosecutions; rather, the Report advises striking a balance between national reconciliation and individual accountability.

International tribunals, especially the ICTY and the ICTR, have primarily addressed national reconciliation concerns by encouraging equal treatment of perpetrators from both sides of a conflict. Louise Arbour has commented that in order for a prosecutor to completely fulfill his or her mandate, serious crimes on both sides will have to be

¹⁰³ Statement of the Co-Prosecutors, *supra* note 1.

¹⁰⁴ Framework Agreement, Preamble (“**WHEREAS** in the same resolution [General Assembly Resolution 57/228 of 18 December 2002] the General Assembly recognized the legitimate concern of the Government and the people of Cambodia in the pursuit of justice and national reconciliation, stability, peace and security”).

¹⁰⁵ Report of the Group of Experts at 80, ¶ 219(2).

¹⁰⁶ *Id.* at 81.

examined.¹⁰⁷ For example, ICTR prosecutors have emphasized that their investigations have focused not only on Hutu but also on Tutsi perpetrators, despite the fact that there have been no Tutsi indictments to date.¹⁰⁸ Luc Côté, a former member of the ICTR Office of the Prosecutor, commented, “[i]n the light of the mandate given to international tribunals to ‘contribute to the process of national reconciliation and to the restoration and maintenance of peace,’ ... criteria [related to a defendant’s belonging or affiliation with a certain group] seem legitimate” in selecting defendants for prosecution.¹⁰⁹

At the ICC, the question of national reconciliation has been raised in the context of domestic amnesties and truth commissions. The Rome Statute does not refer to either; according to one commentator, the negotiators decided to leave it up to the ICC Prosecutor to consider national reconciliation under the rubric of “interests of justice” in Article 53.¹¹⁰ In a statement by Moreno-Ocampo on the Uganda situation, he acknowledged that domestic reconciliation processes should be taken into account in the ICC’s consideration of the situation in Uganda.¹¹¹

National reconciliation does appear to be a legitimate prosecutorial concern and it is apparent that international prosecutors may justifiably consider related criteria, including the availability of alternative justice mechanisms, in selecting alleged perpetrators for prosecution. As stated previously, however, there is no evidence that the aim of fostering such reconciliation requires limiting the number of prosecutions. In order for Cambodians to come to terms with an “incalculably tragic past,” it would appear that knowing and understanding the past are two steps which would require the Court to provide the fullest

¹⁰⁷ Côté, *supra* note 86, at 176 (citing L. Arbour, *Le Tribunal pénal international est devenu un processus irréversible*, LE MONDE, comments recorded by R. Ourdan and C. Tréan, updated on 14 Sept. 1999).

¹⁰⁸ *But see* Luc Reydam, *The ICTR Ten Years On: Back to the Nuremberg Paradigm*, 3 J. INT’L CRIM. JUST. 977 (2006) (arguing that the ICTR is failing to prosecute the crimes committed by the Tutsi dominating the Rwandese Patriotic Front).

¹⁰⁹ Côté, *supra* note 86, at 176-77.

¹¹⁰ Danner, *supra* note 87, at 544.

¹¹¹ Statements by ICC Chief Prosecutor and the visiting Delegation of Acholi leaders from northern Uganda, The Hague, 18 March 2005.

possible account of what happened. If anything, the importance of uncovering the full story of what happened mandate in favor of a greater number of prosecutions. Moreover, the lack of a truth commission or other mechanisms for reaching lower level offenders in Cambodia means that the ECCC Co-Prosecutors do not need to consider the impact of any additional investigations on alternative justice systems. Consequently, although national reconciliation is clearly an appropriate consideration for the Co-Prosecutors, it does not appear to be a factor weighing against additional ECCC prosecutions.

e. Public Order

To date, no prosecutors have openly taken public order considerations into account in deciding whether to move forward with an investigation. Nevertheless, the ECCC and the SCSL have addressed public order in different contexts. Public order is not mentioned in the ECCC Law, but the Internal Rules express a clear concern for its maintenance. Internal Rule 63(3) allows the ECCC Co-Investigating Judges to order provisional detention of charged persons if they consider it to be necessary to preserve public order, among other factors. Public order is also mentioned in four other Internal Rules: 72(4)(b)(iv) (settlement of disagreements between Co-Investigating Judges),¹¹² 77(6) (procedure for pre-trial appeals and applications),¹¹³ 79(6)(b) (general provisions for proceedings before the Trial Chamber),¹¹⁴ 109(3) (appeal hearings).¹¹⁵ All of these provisions address the measures which can be taken if necessary to protect public order.

The ECCC Co-Investigating Judges have also mentioned public order in select

¹¹² Internal Rules, Rule 72(4)(b)(iv) reads,

The Chamber may, on the motion of any judge or party, decide that all or part of a hearing be held in public, in particular where the case may be brought to an end by its decision...if the Chamber considers that it is in the interests of justice and it does not affect public order or any protective measures authorized by the court[.]

¹¹³ *Id.* Rule 77(6) contains an identical provision.

¹¹⁴ *Id.* Rule 79(6)(b) states,

Where the Chamber considers that a public hearing would be prejudicial to public order, or to give effect to protective measures ordered under these IRs, it may, by reasoned decision, order that all or part of the hearing be held *in camera*.

¹¹⁵ *Id.* Rule 109(3) contains an identical provision.

provisional detention orders. For example, in the *Nuon Chea Provisional Detention Order*, the Judges observed that Nuon's crimes "are of a gravity such that, 30 years after their commission, they still profoundly disrupt public order to such a degree that it is not excessive to conclude that the release of the charged ... risks provoking, in the fragile context of today's Cambodian society, protests of indignation which could lead to violence and perhaps imperil the very safety of the charged person."¹¹⁶ Similarly, in the *Kaing Guek Eav Provisional Detention Order*, the Co-Investigating Judges stated that "the acts alleged against the Charged Person are of a gravity such that, 30 years after their commission, they profoundly disrupt the public order[.]"¹¹⁷

In the aforementioned provisional detention orders, the Co-Investigating Judges put forth no facts to suggest the potential disruption of public order. The ECCC Pre-Trial Chamber, in its review of these detention orders, held that "facts capable of showing that the accused's release would actually disturb public order must exist."¹¹⁸ However, the Pre-Trial Chamber did not appear to apply this standard in its review, merely stating that

the perceived threat to security is not illusory. This is firstly demonstrated by everyday disturbances or even violent crimes, of which the Pre-Trial Chamber takes notice as facts of common knowledge. Secondly, the example of the anti-Thai riots in 2003 points towards the potential for politically motivated instability.¹¹⁹

The Court has thus provided no specific facts demonstrating a threat to public order, making the question of whether public order is at risk if additional prosecutions go forward difficult to assess; however, there have been no recent events suggesting that disturbances would result. The circumstances surrounding the anti-Thai riots are unique and it is not at all clear that additional ECCC investigations would similarly inflame nationalist sentiments. Notably,

¹¹⁶ *Nuon Chea, Provisional Detention Order*, Office of the Co-Investigating Judges, 19 Sept. 2007, ¶ 5 [hereinafter "*Nuon Chea Detention Order*"].

¹¹⁷ *Kaing Guek Eav, Provisional Detention Order*, Office of the Co-Investigating Judges, 31 July 2007, ¶22 [hereinafter "*Duch Detention Order*"].

¹¹⁸ *Nuon Chea Detention Order Decision* at ¶ 76 (citing European Court of Human Rights, *Letellier v. France*, 26 June 1991, ¶ 51).

¹¹⁹ *Id.* at ¶ 80.

a recent survey by the Documentation Center of Cambodia indicates that of the over 1000 Cambodians surveyed on their views regarding the Co-Prosecutorial dispute, over half did not believe that the investigation of additional suspects would result in public disorder or violence.¹²⁰

Similar problems apply to the related concern raised by the National Co-Prosecutor of renewed violence by former Khmer Rouge supporters. In the *Ieng Sary Detention Order Decision*, ECCC Pre-Trial Chamber stated:

the passage of time has not diminished the impact of the ... regime on society the commencement of judicial activities before the ECCC ‘may pose a fresh risk to the Cambodian society’ the commencement of judicial activities before the ECCC may ‘lead to the resurfacing of anxieties and a rise in the negative social consequences that may accompany them.’¹²¹

There has been no specific evidence to support these claims; moreover, judicial proceedings before the ECCC have already commenced without incident, making it unlikely that additional activities will suddenly produce “negative social consequences.” In addition, it is notable that this same concern was addressed by the UN Group of Experts before the creation of the Court, which found that public order considerations do “not warrant precluding ... prosecutions.”¹²² The Report of the Group of Experts noted,

many of the possible suspects do not now have armed forces at their disposal. As for the possibility that others who have surrendered might remobilize their forces to mount a renewed struggle against the Government, it is our sense that their followers in general do not exhibit the type of loyalty and military discipline necessary for such an outcome, but are rather interested in simply securing a decent life for themselves and their family. Most important, because the targets of investigation will be limited to those in leadership positions from 1975 to 1979 who were responsible for atrocities, and not Khmer Rouge officials who became leaders of the guerrilla army after 1979 and who did not commit atrocities during the period from 1975 to 1979, the

¹²⁰ Terith Chy, *A Thousand Voices: Questions on Additional Prosecutions as Proposed by the Co-Prosecutors of the Extraordinary Chambers in the Courts of Cambodia (ECCC)* (Documentation Center of Cambodia, March 2009), available at www.dccam.org.

¹²¹ *Ieng Sary Detention Order Decision* at ¶ 113 (citing *Nuon Chea Detention Order Decision* at ¶ 77); see also *Duch Detention Order Decision* at ¶¶ 49-50, 53 (“A large portion of today’s Cambodian population has not only been personally subject to the harsh regime imposed by the Khmer Rouge but has also lost one or more of their relatives or friends.”).

¹²² Report of the Group of Experts at 44, ¶ 107.

risk of troop defection becomes smaller.¹²³

A concern with public order also appears in the SCSL decisions on bail hearings and on requests for provisional release. For instance, in the SCSL Trial Chamber's decision in *Fofana*, the Judge, refusing bail, acknowledged the legitimacy of the Prosecution's arguments regarding public order. The Judge observed,

One of the arguments to be factored into the examination of this application is that the Applicant ... is alleged to be a member of the CDF which has sympathisers on the one hand, as well as many victims of their alleged crimes, on the other. In such a situation, it is normal to envisage a probability where granting a release on bail could provoke unrest and disgruntlement that could be prejudicial to public peace and security amongst supporters and opponents alike.¹²⁴

In the SCSL Trial Chamber's decision on an application for provisional release in the *Sesay* case, the Judge based his refusal to grant Sesay's release almost entirely on public order considerations:

In the present circumstances and, in particular, in consideration of the proximity of the trials, the lack of police enforcement capability by the Government of Sierra Leone and the potential threat to stability with the associated risk of affecting the public order would lead me to conclude that the public interest requirement in this case outweighs the Accused's right to be released on bail.¹²⁵

In making his decision, the Judge heavily emphasized the importance of making contextual decisions in light of the fact that the accused would be released in the same country where he allegedly committed the crimes for which he was charged:

Contrary to the ICTY and the ... ICTR ... the Special Court has its seat in Freetown, Sierra Leone, which makes the issue of bail somewhat different, not with respect to the applicable principles but when assessing the particular circumstances of an application for provisional release. Granting bail to an Accused before the Special Court entails that he will be released in the very country where he is alleged to have committed the crimes for which he has been indicted.¹²⁶

¹²³ *Id.* at 44, ¶ 109.

¹²⁴ *Fofana*, Case No. SCSL-04-14-T, *Decision on Application for Bail Pursuant to Rule 65*, Trial Chamber, 5 Aug. 2004, ¶ 83.

¹²⁵ *Prosecutor v. Issa Hassan Sesay*, Case No. SCSL-04-15-PT, 31 March 2004, ¶ 57.

¹²⁶ *Id.* at ¶ 55.

The ECCC, like the SCSL, is located in the same country where the accused allegedly committed the crimes for which they might be indicted. However, the events in Sierra Leone occurred much more recently than those in Cambodia and, given the decision to move the trial of Charles Taylor to the Hague, it would appear that the threat to public order in Sierra Leone is larger and more severe. Liberian President Ellen Johnson-Sirleaf, among others, expressed concern over Taylor's danger to the public order in Liberia; Taylor not only maintained contact with supporters in Liberia, but was considered to be capable of mobilizing a guerrilla army with the capacity to attack the SCSL.¹²⁷ There does not appear to be any factual evidence that Cambodia would face any threats of even potentially equal magnitude if five additional suspects were charged; the Government is stable and powerful and appears to have the means to quell any disturbances. This suggests that public order, on its own, is not a strong factor weighing against moving forward with additional investigations.

f. Limited Resources/Existence

The Chambers of international/ized criminal tribunals have expressed concern with regard to the courts' limited resources. For example, in the *Celebici* case, the ICTY Trial Chamber noted that the Prosecutor has "finite financial and human resources and cannot realistically be expected to prosecute every offender which may fall within the strict terms of its jurisdiction."¹²⁸ At the same time, there is no indication that resource constraints have ever led to a prosecutor not moving forward with an investigation and/or prosecution.

Relatedly, like all international/ized criminal tribunals with the exception of the ICC, the ECCC will not be in existence indefinitely. While the spirit of the ECCC Framework Agreement only envisioned the trials of a small number of senior leaders and those most responsible, as mentioned *supra*, the Report of Experts envisioned up to 30 accused, so

¹²⁷ Human Rights Watch, *Trying Charles Taylor in the Hague: Making Justice Accessible to Those Most Affected*, June 2006, 203.

¹²⁸ *Celebici* at ¶ 602. The phrase "limited-resource court" has been used with respect to the ICC. See American University Report on Gravity at 11.

adding a small number of new defendants would not alter that vision, especially since no fixed limits were set either on the duration of the ECCC’s existence or on the number of defendants. As a consequence, this factor also does not appear to weigh heavily against the opening of new judicial investigations.

B. The ECCC Pre-Trial Chamber Mandate Indicates It Should Apply a Narrow Scope of Review and a *De Novo* Standard of Review.

The dispute between the Co-Prosecutors is currently before the ECCC Pre-Trial Chamber, awaiting resolution. Because this is a *sui generis* question, it is necessary to conduct an inquiry into the appropriate standard and scope of review to be applied by the Chamber.

The Framework Agreement and the ECCC Law depict the Chamber only as a dispute resolution mechanism for disagreements between the ECCC Co-Prosecutors and Co-Investigating Judges. Article 7 of the Framework Agreement provides that any differences between the Co-Prosecutors or Co-Investigating Judges “shall be settled forthwith by a Pre-Trial Chamber;” Articles 20 *new* and 23 *new* of the ECCC Law contain identical prescriptions. Notably, the ECCC Internal Rules require an affirmative vote of at least four judges, or “the action or decision proposed to be done by one Co-Prosecutor shall be executed.”¹²⁹ No appeal is available from the ECCC Pre-Trial Chamber’s decision.¹³⁰ There is no guidance in the Court’s core documents on the appropriate scope or standard of review that the Pre-Trial Chamber should apply, and no analogous situation is addressed by the Cambodian Criminal Procedure Code (“CPC”).

1. Scope of Review Should Be Limited to Whether or Not the National Prosecutor’s Factors Are Appropriately Considered, and if So, Whether or Not They Have Been Sufficiently Established.

Of all the cases decided thus far by the Pre-Trial Chamber, the most closely analogous one appears to be the Chamber’s review of the Co-Prosecutor’s appeal of the *Duch* closing

¹²⁹ Internal Rules, Rule 71(4)(c).

¹³⁰ ECCC Law arts. 20 *new* and 23 *new*.

order. Closing orders conclude the judicial investigation, much as introductory submissions conclude (at least preliminarily) the prosecutorial investigation. In both situations, in the case of a disagreement, the Pre-Trial Chamber has the authority to determine whether sufficient evidence of crimes within the ECCC's jurisdiction committed by particular persons exists and whether charges should be brought.¹³¹

In their appeal of the *Duch* closing order, the Co-Prosecutors requested that the Pre-Trial Chamber add a mode of liability and additional charges. The ECCC Pre-Trial Chamber noted that neither the Internal Rules nor Cambodian law provides clear guidance on the appropriate scope of review. Due to the nature of the closing order as a conclusion of “the whole investigation in which all Parties have had the possibility to participate” and time limits set out in the Internal Rules, the Pre Trial Chamber reasoned:

[A closing] ... order contains various conclusions of fact and law with regard to all the acts that were subject to investigation. An unlimited scope of review would lead the Pre-Trial Chamber to review the whole investigation, including the regularity of the procedure, in order to reach its own conclusions. Considering the Internal Rules dealing with the role of the Pre-Trial Chamber as an appellate instance and more specifically the time limits set out, the Pre-Trial Chamber finds that the scope of its review is limited to the issues raised by the Appeal.¹³²

The ECCC Pre-Trial Chamber then concluded that it would decide the appeal by examining “whether the acts that were part of the investigation can be characterised as requested by the Co-Prosecutors and whether the Co-Investigating Judges should have included the legal characterization.”¹³³

A similar approach would seem to be appropriate for resolving prosecutorial disagreements. Analogous to the situation above, both Co-Prosecutors had the ability to participate in the drafting of the initial and supplementary submissions. Statutorily, they were obligated to attempt to reach a consensus, but were ultimately unable to come to an

¹³¹ Compare Internal Rules, Rule 67 with Rule 53.

¹³² *Kaing Guek Eav, Public Decision on Appeal against Closing Order Indicting Kaing Guek Eave alias “Duch,”* 5 Dec. 2008, ¶ 29 [hereinafter “*Duch Closing Order Decision*”].

¹³³ *Id.* at ¶ 44.

agreement.¹³⁴ The Co-Prosecutors have expressed these differences in briefs to the Pre-Trial Chamber. From the information made public thus far, it does not appear that the Co-Prosecutors disagree with regard to the sufficiency of the evidence or the jurisdiction of the Court over the alleged crimes. Therefore, the Pre-Trial Chamber does not need to inquire into the existence of an objective threshold basis for the submissions, but may limit itself to the issues raised by the National Co-Prosecutor's brief.

Notably, in one of the rare instances in which the ICTY Prosecutor's discretionary decisions are formally reviewed, the ICTY Referral Bench has developed a narrow scope of review of the Prosecutor's decision not to proceed with a case based on a gravity/level of responsibility analysis, and to instead refer it to a national court under Rule 11*bis* of the ICTY Statute. In *Prosecutor v. Stankovic*, the Referral Bench stated, "[i]n evaluating the level of responsibility of the Accused and the gravity of the crimes charged, the Referral Bench will consider only those facts alleged in the Indictment ... in arriving at a determination whether referral of the case is appropriate. The Bench will not consider facts put forth by the parties in their submissions which go beyond those alleged in the Indictment."¹³⁵ Similarly, Judge Patricia Wald, in her partial dissent in the ICTY *Jelisić* case, emphasized the narrow scope of judicial review in the context of retrials: "In sum, although there may indeed be strong reasons, apart from the legal sufficiency of the evidence, why a Prosecutor might choose not to proceed with a retrial, I do not believe it falls within the judicial function to veto a retrial on "practical" or "policy" grounds."¹³⁶

Applying this approach, it appears appropriate that the scope of review by the ECCC Pre-Trial Chamber be limited to two questions:

A. Whether a judicial investigation should be opened when there is sufficient

¹³⁴ See Internal Rules, Rule 71(3).

¹³⁵ *Prosecutor v. Radovan Stankovic*, Case No. IT-96-23/2-PT, *Decision on Referral of Case under Rule 11 bis*, Referral Bench, 17 May 2005, ¶18 [hereinafter "*Stankovic*"].

¹³⁶ *Prosecutor v. Goran Jelisić*, Case No. IT-95-10-A, Judgment on Appeal, 5 July 2001, ¶ 14 [hereinafter "*Jelisić*"].

evidence that crimes within the Court’s jurisdiction were committed, or if additional factors may also be taken into consideration; and

- B. If additional factors may be considered, whether the three factors raised by the National Co-Prosecutor militate against opening additional judicial investigations.

2. Standard of Review Should Be *De Novo*.

The ECCC Internal Rules expand the role of the Pre-Trial Chamber beyond internal ECCC disputes, granting it jurisdiction over procedural matters related to the investigation of cases and over appeals from decisions of the Co-Investigating Judges during the pre-trial phase of a case.¹³⁷ In the *Duch* detention appeal, the ECCC Pre-Trial Chamber commented on its mandate, stating that it fulfils the role of the Cambodian Investigation Chamber ("*La Chambre d’instruction*") for the ECCC.¹³⁸ The Cambodian Criminal Procedure Code¹³⁹ grants the Cambodian Investigation Chamber broad discretion and authority. For example, CPC Article 261 gives the Investigation Chamber authority to examine the regularity and proper conduct of the proceedings and annul part or all as necessary. Article 262 gives the Investigation Chamber the authority to order additional investigation, and Article 263 allows the Chamber to extend a judicial investigation to include related offences. Following the model of the Cambodian Investigation Chamber would suggest that the ECCC Pre-Trial Chamber should generally have broad authority to intervene.

In the Co-Prosecutors’ appeal of the *Duch* closing order, the ECCC Pre-Trial Chamber highlighted the Cambodian Investigation Chamber’s broad authority “to investigate the case by itself” when “seized of a dismissal order as a consequence of an appeal lodged by

¹³⁷ Article 73 states that “[i]n addition to its power to adjudicate disputes between the Co-Prosecutors or the Co-Investigating Judges ... the Chamber shall have sole jurisdiction over: a) appeals against decisions of the Co-Investigating Judges, as provided in Rule 74; b) applications to annul investigative action, as provided in Rule 76; and c) the appeals provided for in Rules 11(5) and (6); 23(7) and (9); 35(6) and 38(3).” Article 77, on the procedure for pre-trial appeals and applications, provides that the Pre-Trial Chamber has the authority to decide the scope of its review: “The Pre-Trial Chamber may, after considering the views of the parties, decide to determine an appeal or application on the basis of the written submissions of the parties only.”

¹³⁸ *Duch Detention Order Decision* at ¶ 7.

¹³⁹ Code entered into force in Cambodia on 20 August 2007 and was still at the drafting stage when the Internal Rules of the Court were adopted.

the Prosecution or a civil party.”¹⁴⁰ Based on the CPC and the ECCC Internal Rules, the Pre-Trial Chamber found that “it is empowered to decide independently” on the legal characterization of offenses and modes of liability requested by the Co-Prosecutors on appeal. In doing so, “[i]t is bound by the same rules as the Co-Investigating Judges[.]”¹⁴¹ Thus, the Pre-Trial Chamber, in exercising its appellate jurisdiction, appears to have conducted a kind of *de novo* review, putting itself in the place of the Co-Investigative Judges to determine whether their legal characterization was correct.

De novo standard of review of the current dispute between the Co-Prosecutors is supported by Article 71 of the ECCC Internal Rules, which provides the Pre-Trial Chamber with the authority to conduct a fairly intensive review of the facts behind the disagreement. Article 71(4)(b) gives the Chamber the power to order the personal appearance of the Co-Prosecutors, as well as the production of exhibits. Notably, Article 72, on the resolution of disputes between the Co-Investigating Judges, gives the Pre-Trial Chamber similar authority to “order the personal appearance of any parties or experts, as well as the production of any exhibits.” The Pre-Trial Chamber thus appears to have the statutory authority and means to conduct a *de novo* review of the basis for the dispute.

2. Burden of Proof Should be Placed on the National Co-Prosecutor to Show That Substantial Reasons Militate Against Investigation.

The fact that the Co-Prosecutorial dispute is limited to considerations raised by the National Co-Prosecutor that go beyond the statutory threshold for investigations, together with the statutory presumption that the investigation will proceed unless four Pre-Trial Chamber Judges agree to stop it, suggests that the burden should be placed on the National Co-Prosecutor to both prove that her concerns should be considered and that they militate against additional investigations. The appropriateness of placing the burden on the National Co-Prosecutor is supported by the practice of international/ized tribunals.

¹⁴⁰ *Duch Closing Order Decision* at ¶ 42 (citing CPC arts. 277 and 281(3)).

¹⁴¹ *Id.* at ¶ 44.

No other international/ized court has two prosecutors and hence a dispute mechanism to resolve disputes between the prosecutors. With the exception of when the ICC prosecutor seeks to investigate a situation not referred by a State Party or the Security Council, or when the ICTY Prosecutor seeks to transfer a case to a domestic jurisdiction, international chambers are statutorily called upon to review prosecutorial discretion only when issuing an indictment. This is very different than the situation now before the ECCC Pre-Trial Chamber, which requires it to decide which of the Co-Prosecutors' exercise of discretion should trump. Nevertheless, the practice of the international tribunals in reviewing discretionary prosecutorial decisions is instructive with regard to the presumptions employed.

The ICC is the only international criminal tribunal with a pre-trial chamber somewhat similar to the ECCC's. The ICC Pre-Trial Chamber has the authority to review a decision to investigate in one situation: when the ICC Prosecutor initiates an investigation of a situation not referred by a State Party or the Security Council.¹⁴² In this situation, the ICC Pre-Trial Chamber, upon finding a "reasonable basis" to proceed and jurisdictional competency, must then authorize the commencement of a full investigation.¹⁴³

Only if the ICC Prosecutor decides not to proceed with prosecution after completing an investigation may the Pre-Trial Chamber review his decision and then, only at the request of the referring State or the Security Council, or on its own authority if the Prosecutor's decision was based solely on a subjective "interests of justice" analysis.¹⁴⁴ Thus, the ICC Pre-Trial Chamber has its broadest statutory authority to review prosecutorial discretion only

¹⁴² Rome Statute art. 15(3) (requiring the Prosecutor to seek authorization of the Pre-Trial Chamber to proceed).

¹⁴³ *See id.* art. 15(4) ("If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of the case."). In the converse situation, when the ICC Prosecutor decides not to conduct an investigation authorized by the Pre-Trial Chamber or based on a State Party or Security Council referral, he need only inform the Pre-Trial Chamber, which has no apparent authority to review his decision. *See id.* art. 53(1).

¹⁴⁴ *See id.* art. 53(3)(a) (authorizing the PTC to "request" the Prosecutor to reconsider the decision not to proceed with prosecution involving a situation referred by a State Party or the Security Council); art. 53(3)(b) (providing that the decision of the Prosecutor not to proceed with a prosecution based entirely on an interests of justice analysis shall be effective only if confirmed by the Pre-Trial Chamber).

when a decision is based entirely on subjective factors: a finding that a prosecution would not be in the “interests of justice.” If analogized to the dispute between the ECCC Co-Prosecutors, this practice suggests that if there is no dispute regarding the reasonable basis to proceed, the International Co-Prosecutor’s decision to do so should be subject to a high level of discretion. Rather, it is the National Co-Prosecutor’s decision not to proceed on the basis of “interest of justice” factors that should be subject to scrutiny.

The chambers of other international courts primarily have the opportunity to consider prosecutorial discretion to investigate and prosecute when reviewing the prosecutors’ decisions to file indictments. At the ICTY/R, if a Trial Chamber judge is satisfied that the Prosecutor has established a *prima facie* case, he or she must confirm the indictment.¹⁴⁵ Likewise, SCSL Rule 47(E) states that the Judge must approve the indictment if it charges the suspect with a crime(s) within the Special Court’s jurisdiction and if the allegations “if proven, [would] ... amount to the crime or crimes as particularized[.]”¹⁴⁶ Here again, a chamber’s authority to review a prosecutorial decision to proceed when objective factors have been established is narrowly circumscribed. These courts’ chambers must allow an indictment if the prosecutors can present a minimum threshold of evidence.

These sources suggest that once the International Co-Prosecutor has established a reasonable basis to proceed, the ECCC Pre-Trial Chamber must allow additional submissions to be sent to the Co-Investigative Judges unless the National Co-Prosecutor can present countervailing evidence.

How much evidence the National Co-Prosecutor must show may again be drawn from ICC practice. As mentioned above, at that court, as at the ECCC, the prosecutor must initiate an investigation if there is a reasonable basis to proceed. At the ICC, however, the prosecutor

¹⁴⁵ ICTY Statute art. 19(1) (“The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a *prima facie* case has been established by the Prosecutor, he or she shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.”). *See also* ICTR Statute art. 18(1) (same).

¹⁴⁶ *See id.* Rule 47(A) and (E).

may choose not to proceed if there are substantial reasons to believe that an investigation would not be in the interests of justice. A similar “substantial reasons” burden would appear appropriate in the disagreement before the ECCC Pre-Trial Chamber. Following this standard, a judicial investigation should be opened only if the National Co-Prosecutor can offer substantial reasons why the factors she raises militate against additional prosecutions.

VI. CONCLUSION

International precedent suggests that the ECCC Co-Prosecutors may take into account subjective factors in deciding whether there should be a judicial investigation. Yet, further analysis suggests that none of the subjective criteria raised by the National Co-Prosecutor argue strongly against the commencement of new judicial investigations. Ultimately, however, the decision rests with the ECCC Pre-Trial Chamber. The statutory presumptions to move forward with investigations and prosecutions, coupled with the ECCC’s mandate, indicate that the burden should be placed on the National Co-Prosecutor to prove that the three factors she raises should be considered and that there are substantial reasons additional investigations should not be initiated. If she fails to carry this burden, the Pre-Trial Chamber should permit the investigations.