

The Premature Dismissal of Case 003

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I. Introduction

Upon the conclusion of investigations for Case 003, uncertainty arose whether the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) could fulfill its mandate in “bring[ing] to trial senior leaders of Democratic Kampuchea and those . . . most responsible.”¹ Such allegations have caused much controversy, manifesting a dispute between the International and National Co-Prosecutor involving the future of Case 003. International Co-Prosecutor Andrew Cayley expressed doubt that the ECCC could fulfill its mandate when the Co-Investigating Judges have not performed and requested all reasonable investigative action for the Case 003 investigation.² Conversely, National Co-Prosecutor Chea Leang believed Case 003 investigations were properly concluded as Case 003 suspects were neither “senior leaders [nor] those . . . most responsible.”³

Former International Co-Investigating Judge Siegfried Blunk stressed that the conclusion of the investigations “does not mean the case is dismissed[.]”⁴ Though the public does not know the reasoning behind the conclusion of the Case 003 investigations⁵, sources

¹ *Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 Oct. 2004*, NS/RKM/1004/006 (“ECCC Statute”), Article 2 new.

² *Statement by the International Co-Prosecutor Regarding Case File 003*, 9 May 2011.

³ *Statement by the National Co-Prosecutor Regarding Case File 003*, 10 May 2011.

⁴ Kong Sothnarith, *Tribunal Judge Sees At Least Two Years of Trial Ahead*, 27 Jul. 2011, VOA Khmer. Available at <http://www.voanews.com/khmer-english/news/kr-issues/Tribunal-Judge-Sees-At-Least-Two-Years-of-Trial-Ahead-126277983.html>.

⁵ *Extraordinary Chambers in the Courts of Cambodia Internal Rules, as revised on 23 Feb. 2011* (“ECCC Rules”), Rule 56:

(1): In order to preserve the rights and interests of the parties, judicial investigations shall not be conducted in public. All persons participating in the judicial investigation shall maintain confidentiality. (2) However, the Co-Investigating Judges, may: a) jointly through the Public Affairs Section, issue such information regarding a case under judicial investigation as they deem essential to keep the public informed of the proceedings, or to rectify any false or misleading information; and b) jointly grant limited access to the judicial investigation to the media or other

have assumed that this decision was made based on a determination that the Case 003 suspects had not fulfilled the personal jurisdiction of the court (particularly after National Co-Prosecutor Chea Leang argued such⁶ in her response to Cayley's request for further investigations). Though Chea Leang is not officially speaking on behalf of the Co-Investigating Judges, it is likely that she was informed of and was supporting the Co-Investigating Judge's reasoning for closing the Case 003 investigations.

II. ECCC Travaux Préparatoires Do Not Preclude Case 003 Prosecutions

Khmer Rouge defections throughout the 1990's "prompted [Thomas] Hammarberg[, representative of Kofi Annan for human rights in Cambodia,] to push the possibility of UN involvement in a process of judicial accountability for DK-era crimes[.]"⁷ Co-Prime Ministers Prince Norodom Ranariddh and Hun Sen "signed a letter drafted for them by staff of the UN human rights office"⁸ in which they requested the assistance of the United

non- parties in exceptional circumstances, under their strict control and after seeking observations from the parties to the proceedings. The non-respect of any conditions that the Co-Investigating Judges may impose shall be dealt with in accordance with Rules 35 to 38. (3) Disagreements between the Co-Investigating Judges regarding matters referred to in sub-rule 2 above shall not be submitted to the procedure for settlement of disagreements set out in Rule 72.

Anticipating uncertainty regarding the Case 003 decision, the ECCC Public Affairs Section posted a FAQs section on the ECCC website but, as of July, this seems to have been removed. It can be attained elsewhere though. See <http://dara-duong.blogspot.com/2011/05/frequently-asked-questions-about-case.html>). In the FAQ, while referring to Case 003, the court explains how the "investigations are confidential by law [and t]he Co-Prosecutors, representing the public interest, have as a party to the investigation an ample opportunity to examine whether the investigations were 'credible and impartial.'" (*Id*)

⁶ *Statement by the National Co-Prosecutor*. ("That the suspects mentioned [for] Case File 003 were [neither] senior leaders [or] most responsible during the period of Democratic Kampuchea.")

⁷ Steve Heder, *A Review of the Negotiations Leading to the Establishment of the Personal Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia*, Cambodia Tribunal Monitor, 2 Aug. 2011, 13. Available at <http://www.cambodiatribunal.org/blog/2011/08/review-negotiations-leading-establishment-personal-jurisdiction-extraordinary-chambers>

⁸ *Id*.

Nations in "bringing to justice those persons responsible for the crimes of the Democratic Kampuchea."⁹

Throughout the negotiation process, Hun Sen regularly changed his stance on the personal jurisdiction of the court. At one point, Hun Sen declared that he had "no rights whatsoever to charge this or that person, or to pre-determine how many people will stand trial[.]"¹⁰ In 1999, Hun Sen absconded from this position, "proclaim[ing in a speech] that only four to five (Khmer Rouge leaders) [would] be tried[.]"¹¹ Hun Sen eventually rescinded this statement, "admit[ing] he had committed a faux pas with his declaration that only four or five persons would be tried, telling his ministers 'I should not comment on or say anything that is within the bounds of the judiciary.'¹²

After much deliberation, "the UN team signed the Framework Agreement with the Cambodian government in June 2003[.]"¹³ allowing the ECCC to prosecute "senior leaders of Democratic Kampuchea and those . . . most responsible."¹⁴ This language clearly does "not establish a concrete number of defendants [,] essentially defer[ing] an important question that remains [a] source of dispute at the ECCC today."¹⁵ Despite this ambiguity, there is nothing in

⁹ *Id.* at 14.

¹⁰ *Identical letters dated 19 Mar. 1999 from the Permanent Representative of Cambodia to the United Nations Addressed to the Secretary-General and to the President of the Security Council: Annex: Declaration of Prime Minister Hun Sen of the Kingdom of Cambodia on the Issue of the Trial of Ta Mok, A/53/867 S/1999/298, 19 Mar. 1999, 2.*

¹¹ *Comments on the KR Tribunal Draft Law as Submitted to the Secretary-General by the Cambodian Government, 20 Dec. 1999, 22 Dec. 1999, 5.*

¹² Heder at 31.

¹³ John D. Ciorciari and Anne Heindel, *On Trial: A Khmer Rouge Accountability Process*, Documentation Center of Cambodia, 76.

¹⁴ *ECCC Statute*, Article 2 new.

¹⁵ Heder at 78.

the ECCC travaux préparatoires that precludes the Case 003 prosecutions. Hans Corell, U.N.

Legal Counsel throughout negotiations, wrote in a letter to Khmer Rouge historian Steve Heder

[t]here is absolutely no evidence nor any reason to believe [there] was any kind of . . . agreement delimiting 'who should be prosecuted or not,' [with the] intent [being] the ECCC's investigating judges and the prosecutors should go where the evidence leads them and where the suspects qualify within the two distinct categories of 'senior leaders' and others 'most responsible.'"¹⁶

III. Whether the Co-Investigating Judges Acted Within the Scope of Their Responsibilities in Concluding the Case 003 Suspects Were Neither "Senior Leaders of Democratic Kampuchea" Nor "Most Responsible"

Originating in the French/Cambodian civil legal system, Investigating Judges are envisioned to provide neutrality and objectivity in deciding whether to indict an individual. Similarly, the ECCC Co-Investigating Judges are meant to "conduct investigations impartially"¹⁷ throughout trial. "[J]udicial investigation[s are] compulsory for crimes within the jurisdiction of the ECCC"¹⁸ and Co-Investigating Judges can only issue a Dismissal Order based on lack of jurisdiction or evidence.¹⁹ Further, ECCC Co-Investigating Judges are obligated to "only investigate facts set out in an Introductory . . . or Supplementary Submission"²⁰ and, if the Co-Investigating Judges discover new facts, they must then inform the Co-Prosecutors who shall then submit these new facts in a Supplementary Submission.²¹ ECCC Co-Investigating Judges may charge unnamed suspects as long as the Submissions provide clear and consistent

¹⁶ *Letter from Hans Corell to the Steve Heder*, 25 Jul. 2011.

¹⁷ *ECCC Internal Rules*, Rule 55(5).

¹⁸ *ECCC Internal Rules*, Rule 55(1).

¹⁹ *ECCC Internal Rules*, Rule 67(3) ("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.")

²⁰ *ECCC Internal Rules*, Rule 55(2).

²¹ *ECCC Internal Rules*, Rule 55(3)

evidence in support of such prosecution,²² but the ECCC Rules do not clearly state whether the Co-Investigating Judges may choose to abstain from indicting a name set forth in a Submission. This ambiguity is not of great significance though, because either way the Co-Investigating Judges are meant to objectively determine whether an individual falls under “senior leader of Democratic Kampuchea” or “most responsible” based on the criteria provided by the Prosecution in the Submission(s). This process leaves little latitude for discretion. Given such restrictions, it seems evident that Co-Investigating Judges were meant to deliver judicial decisions and therefore their assessment of “senior leader” and “most responsible” must be objective. Uncertainty has surfaced over whether the Co-Investigating Judges allowed subjective concerns to influence their decision in concluding the Case 003 investigations. In addressing this issue, this paper will assess whether the Co-Investigating Judges in fact conducted the Case 003 investigations impartially by concluding that suspects Sou Met and Meas Mut,²³ “two surviving CPK cadre who held predominately military ranks within the CPK,”²⁴ were neither “senior leaders of Democratic Kampuchea” nor “most responsible.” Since the ECCC documentation does not

²² *ECCC Internal Rules*, Rule 53(1) (“If the Co-Prosecutors have reason to believe that crimes within the jurisdiction of the ECCC have been committed, they shall open a judicial investigation by sending an Introductory Submission to the Co-Investigating Judges, either against one or more named persons or against unknown persons.”)

²³ The Case 003 suspects were never appointed attorneys nor named through public court documents, though activists and the media have leaked the suspects through “confidential” sources. The Co-Investigating Judges are meant to be the only official source of information and therefore the ECCC has emphasized that these leaked names cannot be treated as fact. (Dara Duong, *Frequently asked questions about Case 003*, 22 May 2011, News about the Khmer Rouge Tribunal. Available at <http://dara-duong.blogspot.com/2011/05/frequently-asked-questions-about-case.html>.) Nevertheless, this paper will work off of the assumption that Sou Met and Meas Mut, are in fact the Case 003 suspects.

²⁴ Selwyn Manning, *Leaked Documents Suggests UN Backing Off Khmer Rouge Trials*, 27 Jun. 2011, Scoop Independent News. Available at <http://www.scoop.co.nz/stories/HL1106/S00165/leaked-documents-suggest-un-backing-off-khmer-rouge-trials.html>.

explicitly define such jurisdictional terms, much of this evaluation will be based on different interpretations from ECCC and international jurisprudence.

IV. Objective Assessment of Case 003 Suspects as “Senior Leaders of Democratic Kampuchea”

The ECCC has indicted four individuals²⁵ under “senior leaders of Democratic Kampuchea” based upon “their de facto and de jure hierarchical authority.”²⁶ Among the four indicted, Khieu Samphan filed a preliminary objection claiming he was “not one of the ‘senior leaders’ because, in his capacity as Head of State, he neither led the country nor took part in government or domestic affairs[.]”²⁷ Samphan added that “[t]he notion of effective leadership of a country limits the Chambers’ jurisdiction to prosecuting those responsible for taking actual, concrete and operational decisions at the government level, in accordance with the particular constitutional dispensation of the political regime concerned.”²⁸

The International Criminal Tribunal of the former Yugoslavia (“ICTY”) adopted Rule 11 bis to accelerate the completion of the ICTY by allowing defendants to be “referred to the authorities of a State,”²⁹ sending those who do not fall under “most senior leaders suspected of being most responsible,”³⁰ to national court. The word “‘most’ would suggest that the ICTY

²⁵ Khieu Samphan, Ieng Sary, Ieng Thirith and Nuon Chea. More information available at <http://www.eccc.gov.kh/en/case/topic/2>.

²⁶ *Case 002 Closing Order*, Case No. 002/19-09-2007-ECCC-OCIJ, 15 Sept. 2010, ¶ 1327.

²⁷ *Preliminary Objections Concerning Jurisdiction (Khieu Samphan)*, Case No. 002/19-09-2007-ECCC/TC, 24 Feb. 2010, ¶12.

²⁸ *Id.* at ¶11.

²⁹ *See International Criminal Tribunal of former Yugoslavia's Rules of Procedure and Evidence*, T/32/Rev.44, 8 Dec. 2010, Rule 11 bis.

³⁰ *United Nations Security Council Resolution 1503*, S/RES/1503 (2003), 28 Aug. 2003, *ICTY Rules*, Rule 28(a). (“Concentrat[e] on the prosecution and trial of the most senior leaders suspected of being most responsible for crimes” and allowing all those who do not fall under such limiting terms to be referred to national court.”)

language is narrower, though it is difficult to comprehend much practical difference between the two phrases[.]”³¹ ICTY 11 bis jurisprudence explains that “most senior leaders suspected of being most responsible” are “not [only] individuals who are architects of an ‘overall policy’”³² but also includes “individuals who, by virtue of their de jure and de facto position and function in the relevant hierarchy, are alleged to have exercised such a degree of authority that it is appropriate to describe them as ‘most senior’ rather than ‘intermediate.’”³³ Factors for consideration include permanency of the accused's position,³⁴ temporal scope,³⁵ rank of the accused within the hierarchical structure,³⁶ authority to negotiate, sign or implement agreements,³⁷ control of access to territory,³⁸ number of subordinates³⁹ and actual role of the accused in the commission of the crimes.⁴⁰ The International Criminal Court (“ICC”) also provides some guidance, “focus[ing prosecutions] on senior leaders suspected of being most responsible[.]”⁴¹ In 2006, the ICC determined that “former rebel leader of the Democratic

³¹ Sean Morrison, *Extraordinary Language in the Courts of Cambodia: Interpreting the Limiting Language and Personal Jurisdiction of the Cambodian Tribunal*, 37 Cap. U. L. Rev. 583 2008-2009, 621.

³² *Prosecutor v. Dragomir Milošević*, Decision on Referral of Case Pursuant to 11 bis, Case No.: IT-98-29/1-PT, 8 Jul. 2005, ¶ 22.

³³ *Id.*

³⁴ *Id.* at ¶ 23.

³⁵ *Id.*

³⁶ *Prosecutor v. Rahim Ademi and Mirko Norac*, Decision For Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11bis, Case No. IT-04-78-PT, 14 Sept. 2005, ¶ 22; *Prosecutor v. Vladimir Kovačević*, Decision on Referral of Case Pursuant to Rule 11bis with Confidential and Partly Exparte Annexes, Case No. IT-01-42/2-1, 17 Nov. 2006, ¶ 23.

³⁷ *Milosević Referral Decision* at ¶ 23; *Ademi Referral Decision* at ¶ 23.

³⁸ *Milosević Referral Decision* at ¶ 23.

³⁹ *Id.*

⁴⁰ *Ademi Referral Decision* at ¶ 29; *Lukic Referral Decision* at ¶ 23.

⁴⁰ *Milosević Referral Decision* at ¶ 23; *Ademi Referral Decision* at ¶ 28.

⁴¹ *The Gravity Threshold of the International Criminal Court*, American University Washington College of Law War Crimes Research Office, Mar. 2008, 5, 6. Available at <http://www.wcl.american.edu/warcrimes/icc/documents/WCROReportGravityMarch2008.pdf?rd=1>.

Republic of Congo⁴² Thomas Lubanga, was a “senior leader” based on his exercise of de facto authority.⁴³ Similar to the ICTY, “the concept of ‘senior leader’ [at the ICC] does not [seem to] preclude those holding no formal rank [as long as they] exercise[] significant de facto command or [a] leadership positions[.]”⁴⁴

A. Rank of the Accused Within the Hierarchal Structure

Rank of the accused within the hierarchal structure is a consideration when determining whether one is some form of a senior leader. “[L]egal jurisprudence . . . determin[ing] what rank or title is sufficient to be considered ‘senior [does not exist.] This element must be considered on a case-by-case basis using knowledge of the political and military leadership of, and the accused’s role in,⁴⁵ the respective regime. Accordingly, international jurisprudence can be used to provide guidance but the determination of rank will inevitably be specific to the situation being addressed.

The ICTY has referred a number of defendants to national court partly due to their rank in the hierarchal structure, including Vladmir Kovačević.⁴⁶ The court explained that though Kovačević “may have been in command of others, this was at a battalion level, whereas the military operation in the Dubrovnik area was carried out by a much larger force[.]”⁴⁷ Similarly, Gojko Janković was referred to national court as he only “act[ed] at an intermediate level within

⁴² *The Lubanga Trial at the International Criminal Court*. Available at <http://www.lubangatrial.org/>.

⁴³ *Prosecutor v. Thomas Lubanga Dyilo*, Under Seal Decision of the Prosecutor’s Application for a warrant of arrest, 10 Feb. 2006, Pre Trial Chamber, Article 58, Annex 1, ¶ 68.

⁴⁴ See Ray Murphy, *Gravity Issues and the International Criminal Court*, 17 Crim. L. F. 290, 2006. (Referencing February 2006 Pre-Trial Chamber I Lubanga decision.)

⁴⁵ Morrison at 621.

⁴⁶ *Security Council Resolution 1503*

⁴⁷ *Kovacević Referral Decision* at ¶ 20.

the military hierarchy as a sub-commander of the military police.”⁴⁸ Dragomir Milošević also requested referral but the ICTY refused, taking into account “there was only one echelon of military commanders, i.e. the highest military command, above him.”⁴⁹

Sou Met and Meas Mut were both considered “senior leaders in the Democratic Kampuchea,” with high ranking and influential positions in the Revolutionary Army of Kampuchea (“RAK”). Unlike Kovačević and Janković, Sou Met and Meas Mut did not hold intermediate positions.⁵⁰ “S[ou] Met[,as RAK] Secretary of Division 502[, was] commander of the . . . air force”⁵¹ and “MEAS Mut[as RAK] Secretary of Division 164[, was] commander of the . . . navy.”⁵² Further, Meas Mut “was either a member of the Central Committee of the [Community Party of Kampuchea (“CPK)] or a member of the Assisting Committee of the Central Committee[.]”⁵³ Sou Met “was . . . a member of the Assisting Committee of the [CPK,] one of the highest ranks within the CPK hierarchy.”⁵⁴ Similar to Milošević, Sou Met and Meas Mut held an extremely high rank in the military hierarchy as commanders, and there was only one echelon above them.⁵⁵ Sou Met and Meas Mut were of great importance in the Khmer Rouge hierarchal structure due to their substantial military, division and committee responsibilities.

B. Control of Access To Territory

⁴⁸ *Prosecutor v. Gojko Janković*, Decision on Referral of Case Under Rule 11 bis With Confidential Annex, Case No. IT-96-23/2-PT, 22 Jul. 2005, ¶¶ 4, 20

⁴⁹ *Milosević Referral Decision* at ¶ 23.

⁵⁰ *See Milosević Referral Decision* at ¶ 22.

⁵¹ *Case 003 Introductory Submission*, ¶ 2. Available at <http://www.scoop.co.nz/stories/HL1106/S00165/leaked-documents-suggest-un-backing-off-khmer-rouge-trials.htm>.

⁵² *Id.* at ¶ 2.

⁵³ *Id.*

⁵⁴ *Id.* at ¶ 13.

⁵⁵ Son Sen, the head of RAK forces.

In determining Milošević was a “senior leader,” the ICTY also considered the fact that he “controlled access of UNPROFOR to territory around Sarajevo.”⁵⁶ Similarly, both Sou Met and Meas Mut had direct control and access to specific territories within their respective divisions. As Secretary of Division 502, Sou Met controlled S-22 Security Centre⁵⁷ and Kampong Chnnang Airport Construction Site⁵⁸. As Secretary of Division 164, Meas Mut controlled Wat Eng Tea Nhien Security Centre⁵⁹ and Stung Hav Rock Quarry.⁶⁰

C. Actual Role of the Accused in the Commission of Crimes

The ECCC Group of Experts⁶¹ recognized that “[m]ilitary commanders and civilian leaders are criminally responsible . . . where they order atrocities and they are also generally responsible if they knew or should have known that atrocities were being or about to be committed by their subordinates and they failed to prevent, stop or punish them.”⁶² They also noted that the term “leaders” should not automatically be used to prosecute all persons at senior positions as

⁵⁶ *Milosević Referral Decision* at ¶ 23.

⁵⁷ *Case 003 Introductory Submission* at ¶46. (“Low level Division 502 personnel were taken to S-22 if they were accused of treason[.]”)

⁵⁸ *Id.* at ¶47.

The airport construction site functioned as a re-education or tempering site for DK cadres and was used to supervise ‘bad elements’ from the various RAK units.” Workers died daily due to ‘accidents’ arising from strenuous and unrelenting labor Accordingly to one soldier who was present at the construction site, the workers were subject to execution at any time. Those who did not work to the satisfaction of the guards were often executed in the forest just west of the airfield site. In addition, workers were continually ‘sent away’ fro execution, often being taken in trucks to S-21 or other prisons.

⁵⁹ *Id.* at ¶57.

Witnesses who visited the site in 1979, after the end of the DK period, saw 50 or 60 sets of shackles in a monastery south of the Wat. There were also iron bars and blood on the walls of the monastery. In the early 1980s approximately 200 bodies were recovered from a burial site about 100 meters east of the Wat. The bodies were bound at the wrist and ankle with nylon rope.

⁶⁰ *Id.* at ¶58. (“People who were considered ‘bad elements’ or have ‘tendencies’ were sent to Stung Hav.”)

⁶¹ See generally Group of Experts for Cambodia, *Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135*, U.N. Doc. S/1999/231/Annex, A/53/850/Annex, 16 Mar. 1999.

⁶² *Id.* at 81, 87.

"[t]here may very well be senior leaders who had no knowledge or control over the crimes, while others slightly below the senior level may have been very actively involved."⁶³ Khieu Samphan's preliminary objection is highly dependent on this analysis, as he claims he did not participate or contribute to any "concrete and operational decisions at the government level[.]"⁶⁴

Though the International Criminal Tribunal of Rwanda's ("ICTR") Statute does not include similar terms of limitation,⁶⁵ the ICTR does provide an analysis on the significance of voluntary participation in the commission of crimes.⁶⁶ When the ICTR indicted Jean-Paul Akayesu, the court discussed his actual role in the commission of crimes, noting that he "'consciously chose to participate in systematic killings[,] publicly incited people to kill[,] ordered the killing of a number of persons [and] participated in the killings[.]"⁶⁷ Similarly, at the ICTY, the court took into account Dragomir Milošević's actual role in the commission of crimes such as the orchestration of the "shell[ing] and snip[ing of] the city of Sarajevo for a fifteen- month period[,] killing and wounding thousands of civilians[.]"⁶⁸

Sou Met and Meas Mut were both deeply involved in the commission of crimes in their RAK divisions. Both "were aware of and knowingly participated in a systematic plan to unlawfully detain, forcibly transfer, subject to inhumane treatment and execute RAK personnel across all military divisions, as reflected in the continuous and systematic purges within the RAK of

⁶³ *Id.*

⁶⁴ *Preliminary Objections (Khieu Samphan)* at ¶57.

⁶⁵ *Statute of the International Criminal Tribunal for Rwanda*, Article 1. ("[P]ersons responsible for serious violations of international humanitarian law[.]")

⁶⁶ *Prosecutor v. Serushago*, Case No. ICTR-98-39, Case No. IT-96-23/2-PT, 5 Feb. 1999. ¶¶ 29-30.

⁶⁷ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, 2 Oct. 1998, ¶ 3.

⁶⁸ *Milosević Referral Decision* at ¶¶ 8-10, 19, 21-24.

undesirable elements.”⁶⁹ Sou Met and Meas Mut both “knew about and exercised effective control over the crimes committed by their subordinates due to their senior positions in the RAK [and] their role in a functioning military chain of command, . . . attending high-level RAK meetings, and . . . monitoring the work of the subordinates under their command[.]” Due to such an active and prominent role in the commission of crimes, “their actions resulted in the deaths of thousands of RAK personnel across all divisions [and m]any more personnel suffered forced labor, unlawful detention and inhumane treatment.”⁷⁰

As commander of the RAK forces, Son Sen would “instruct[the cadres] to do whatever they deemed necessary to rid the army of internal enemies [and would] repeatedly emphasize[] the necessity of purging ‘absolutely no-good elements’ within each division.”⁷¹ Meeting minutes from October 1976 indicate that “S[ou] Met [agreed] the Party must ‘dare absolutely’ to continue purges. During the same meeting, Meas Mut . . . declared himself ‘in total agreement and unity with the common goal of eliminating bad elements within the Party.’”⁷² Such statements illustrate Sou Met and Meas Mut’s utmost dedication in orchestrating the indiscriminate murder and inhumane treatment of countless individuals to further the DK cause.

V. Objective Assessment of Case 003 Suspects as “Most Responsible”

Alternatively, the ECCC could find that both Sou Met and Meas Mut were “most responsible.” The Group of Experts recognized that “those persons most responsible for the most serious violations of human rights during the reign of the Democratic Kampuchea . . .

⁶⁹ *Case 003 Introductory Submission* at ¶37.

⁷⁰ *Id.* at ¶41.

⁷¹ *Id.* at ¶38.

⁷² *Id.* at ¶39.

would include senior leaders with responsibility over the abuses as well as those at lower levels who are directly implicated in the most serious atrocities.”⁷³ This would include “certain leaders at the zonal level, as well as officials of torture and interrogation centres such as Tuol Sleng.”⁷⁴ “Most responsible” provides the ECCC with a broader jurisdiction, allowing “some flexibility in not only trying persons near the top of the hierarchy but also the most brutal or notorious perpetrators as well as the indispensable mid-level actors.”⁷⁵ Mid-level cadres “ensur[ed] that the extreme policies and crimes were carried out fully, faithfully, and swiftly”⁷⁶ and therefore their prosecution are of great importance.

The Case 001 Closing Order explained that “[t]he judicial investigation demonstrated that, while [DUCH] was not a senior leader of Democratic Kampuchea, he may be considered in the category of most responsible.”⁷⁷ This assessment was based on the unique nature of S-21, the security center that DUCH was chairman of. As Chairman, DUCH exercised far more power than others in his position throughout the country given S-21’s “direct link to the Central Committee and its role in the detention and execution of CPK cadre.”⁷⁸ “DUCH has filed an objection to falling under “most responsible,” claiming that “[t]hroughout the world, the prison [and] police . . . are . . . under the command of the state”⁷⁹ and accordingly do not yield enough power to be considered “most responsible.”

⁷³ *Report of the Group of Experts* at ¶1110.

⁷⁴ *Id.* at ¶109.

⁷⁵ Kelly Dawn Askin, *Prosecuting Senior Leaders of Khmer Rouge Crimes*, Open Society Justice Initiative, 16 Apr. 2008, 76. Available at <http://www.justiceinitiative.org/publications/jinitatives> (follow “Justice Initiatives, April 2006” hyperlink).

⁷⁶ *Id.* at 77

⁷⁷ *Closing Order indicting Kaing Guek Eav alias DUCH*, Case No. 002/14/08/2006, 18 Jul. 2007, ¶129.

⁷⁸ *Id.* at ¶120.

⁷⁹ *Transcript of Appeal Proceedings: Kaing Guek Eav “DUCH”*, Case File No 001/18-07-2007-ECCC/SC, 28

The ICTY's 11 bis offers some guidance in determining whether an individual falls under "most responsible." In the case of Savo Todović,⁸⁰ when assessing "most responsible," the court discussed "the temporal scope of the crimes charged⁸¹[,] the geographic scope of the crimes charged⁸²[,] the number of persons affected⁸³[and t]he accused's leadership position."⁸⁴ ICTY/R former Prosecutor de Ponte has also noted that "most responsible," includes both functional responsibility and the scope of the crimes. Functional responsibility includes "close investigation of political leadership, security forces and possible paramilitary organizations, among others" while scope of the crimes includes "individuals who have no particularly important functional role [but who] may have distinguished themselves in committing numerous crimes in the most overt, systematic or widespread manner[,], play[ing] a great role in setting the example and encourag[ing] the commission of other gruesome crimes."⁸⁵ "[T]he Pre-Trial Chamber of the International Criminal Court ("ICC") has evaluated similar factors," noting that "most responsible" may include an individual who was a member of a regional group involved in the armed conflict, because of his "'unique role' in the [overall] adoption and implementation of the policy."⁸⁶ Further, *The Report of the Secretary-General on the establishment of a Special Court for Sierra Leone* ("SCSL Report") explained that

Mar. 2011, lines 8-10.

⁸⁰ *Prosecutor v. Todović*, Decision on Savo Todović's Appeal Against Decisions on Referral Under Rule 11 bis, Case No. IT-97-25/1-AR11bis.1, IT-97-25/1-AR11bis.2, 4 Sept. 2006.

⁸¹ *Id.* at ¶13.

⁸² *Id.* at ¶16.

⁸³ *Id.* at ¶25.

⁸⁴ *Id.* at ¶¶17-22.

⁸⁵ See Carla del Ponte, *Prosecuting the Individuals Bearing the Highest Level of Responsibility*, 2 J. Int'l Crim Just. 516, 2004, 2.

⁸⁶ *The Gravity Threshold*, American University at ¶73.

“‘most responsible’ [may] include [those] in command authority down the chain of command . . . judging by the severity of the crime or its massive scale [and therefore m]ost responsible . . . denotes both a leadership or authority position of the accused, and a sense of the gravity, seriousness or massive scale of the crime.”⁸⁷

A. Accused’s Leadership Position

An accused’s leadership position can be highly relevant to the level of responsibility, as “a person holding a high rank or position may have the authority to orchestrate the actions of other people [and] inflict more damage than he would be able to inflict absent such a rank or position[.]”⁸⁸ The *SCSL Report* explained that “most responsible” may encompass “those further down the line of command depending on the severity of crime[.]”⁸⁹ which is certainly applicable to DUCH who was only Chairman of a prison. On the other hand, both Sou Met and Meas Mut were Division Leaders, members of prominent Committees within the DK structure and held high ranks within the military hierarchy and accordingly yielded a great amount of responsibility for atrocities that took place under the scope of their respective divisions.

B. High Level of Participation in Crime

The ICC explained that though Lubanga was only part of a regional group, he still “may be considered among the “senior leaders suspected of being most responsible” for the crimes due to his leadership position and his ‘unique role’ in the [group.]”⁹⁰ Accordingly, as Chairman of S-21, DUCH had a unique role that

⁸⁷ The Secretary-General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, U.N. Doc S/2000/915, 4 Oct. 2000, ¶30.

⁸⁸ *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Decision on Referral of Case Pursuant to Rule 11 bis with Confidential Annex A and Annex B, 5 Apr. 2007, ¶ 28 (hereinafter “*Lukić Referral Decision*”).

⁸⁹ Letter from the President of the Security Council Addressed to the Secretary-General, ¶ 1, U.N. Doc. S/2000/1234, 22 Dec. 2000.

⁹⁰ *Lubanga, Prosecutor's Application for a warrant of arrest* at ¶ 28.

consisted of oversight of the entire S-21 operation including the annotation of confessions and the ordering of executions. S-21 was a very important security centre of DK, considered as an organ of the Communist Party of Kampuchea ("CPK"), reporting to the very highest levels of the CPK leadership, carrying out nation-wide operations and receiving high-level cadres and prominent detainees.⁹¹

A variety of "confessions and related documents authenticated by DUCH . . . reveal the extent to which S21 played an active part in the process of 'attacking' and 'eliminating' enemies."⁹²

Through these confessions, DUCH was exposed to detailed descriptions "not simply of alleged traitorous activities, but also of the structure and operation of all levels of the Party and of all administrative units [and] was therefore in a unique position to understand the DK-wide context of the CPK policies applied at S21."⁹³

Sou Met and Meas Mut were both involved at a high level of participation in DK crimes based upon the unique militaristic nature of their divisions. As head of the navy, Meas Mut

"was responsible for aggressively defending waters claimed by the DK government against intruders [and] captur[ing] or destroy[ing] any Thai or Vietnamese vessels that entered waters claimed by the government[.] The DK navy also attacked many Thai fishing vessels, killing or capturing the Thai fishermen . . . Nationals of other countries were also captured by the DK navy and sent to S-21."⁹⁴

Sou Met, as head of the air force, held a variety of responsibilities including "a series of radar installations . . . located at various places in Cambodia [that] monitored air traffic over Cambodia, Thailand and Vietnam[.]"⁹⁵ monitoring anti-aircraft installations⁹⁶ and "the

⁹¹ *Case 001 Judgment*, Case File/Dossier No. 001/18-07-2007/ECCC/TC, 26 Jul. 2010, ¶ 23.

⁹² *Duch Closing Order* at ¶43.

⁹³ *Id.*

⁹⁴ *Case 003 Introductory Submission* at ¶¶ 59,61.

⁹⁵ *Id.* at ¶73(b).

construction of a military airport near Krang Leav commune, Rolea P'ier district, Kampong Chhnang in the West Zone."⁹⁷

C. Number of Victims

The number of victims an individual was responsible for has also been a relevant consideration. In *Prosecutor v. Semanza*, the ICTR discussed how the number of individuals killed by the accused is a significant factor for indictment.⁹⁸ On appeal, DUCH argued that it was peculiar that he fell under "most responsible" when only "12,373 people were killed at S-21"⁹⁹ as opposed to Chung Chroy in Kampong Chnang, where 150,000 prisoners were killed.¹⁰⁰

As Division Secretaries, Sou Met and Meas Mut were both responsible for the supervision of multiple security centres and labour camps where they "participated in a criminal plan to purge the RAK of all undesirable elements [that] resulted in at least thousands and quite possibly tens of thousands of deaths. In addition, tens of thousands of people were unlawfully detained and used as forced labour."¹⁰¹

VI. Conclusion

The preliminary assumptions this paper has made in no way proves Sou Mets and Meas Mut's culpability, but rather illustrates that the alleged reasoning behind the premature conclusion of Case 003 investigations is in no way definitive. Based upon the travaux and

⁹⁶ *Id.* at ¶73(c).

⁹⁷ *Id.* at ¶73(e).

⁹⁸ *Prosecutor v. Semanza*, Case No. ICTR-97-20, 15 May 2003, ¶571.

⁹⁹ *Transcript of Appeal Proceedings, Kaing Guek Eav "DUCH,"* Case File No. 001/18-07-2007-ECCC/SC, 28 Mar. 2011, line 16.

¹⁰⁰ *Id.* at line 21, 22.

¹⁰¹ *Case 003 Introductory Submission* at ¶73.

supporting ECCC and international jurisprudence, it is difficult to comprehend how the ECCC Co-Investigating Judges *objectively* determined that Sou Met and Meas Mut were neither “senior leaders of Democratic Kampuchea” nor “most responsible” given the mass amount of exculpatory evidence involving both defendants. The culpability of Sou Met and Meas Mut seems objectively reasonable and, accordingly, the Co-Investigating Judges can still restore confidence in the ECCC judicial process by commencing with the Case 003 investigations and sending these suspects to be tried before the court.