

Jurisdiction *Ratione Personae* of the Extraordinary Chambers in the Court of Cambodia: Peace vs. Justice

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Abstract

A provision concerning the jurisdiction *ratione personae* (personal jurisdiction) of the Extraordinary Chambers in the Court of Cambodia (ECCC) is vague and it may be envisaged that the drafters failed to take into account the definition of both “senior leaders” and “those most responsible” clauses. The ECCC can interpret personal jurisdiction to promote either peace or justice. In either case the conception of personal jurisdiction will be critically different. If taking the justice approach, the ECCC could indict more individuals who were responsible for crimes under its jurisdiction. But if favoring peace, there will be fewer individuals to be indicted.

To examine the drafting history 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 Democratic Kampuchea (the Agreement) is evident that the drafters took the peace approach because they were not in a position to create tribunals to try each individual who was involved in the Khmer Rouge atrocities. However, the original approach of the UN and the Royal Government of Cambodia (RGC) was likely towards justice, and it shifted to peace after the UN encountered international pressure and the RGC encountered internal upheaval. Eventually, they targeted only a few senior leaders and those who were most responsible for conceptualizing serious crimes and violations. It might be conceived that Cambodia could enjoy peace and political stability because the vast majority of Khmer Rouge culprits did not fear being prosecuted under the ECCC jurisdiction. Therefore, they would be less likely to participate in armed struggle in response to any appeal made by their former leaders to retaliate against the establishment of the tribunal.

In consideration of the contemporary situation in Cambodia, this paper observes that the drafters might be correct in opting out for the peace approach in order to maintain political stability and public security. Yet, the justice approach remains important for long term social sustainability and development. In addition, although a judicial process is conducted adhering to fundamental human rights, fairness and the due process of law, the standards of the ECCC is still low because of limiting personal jurisdiction to only a few individuals. This paper also finds that the ECCC was created based on a compromise between these approaches but that it is likely to put more stress on peace than justice. In the end, it might achieve only relative justice.

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Introduction

The Extraordinary Chambers in the Court of Cambodia (ECCC) was created to try suspects accused of committing heinous and monumental crimes during the Khmer Rouge period, formally known as the Democratic Kampuchea (DK) regime after the Constitution was adopted in 1976. The Khmer Rouge groups came to power on April 17, 1975 and ruled Cambodia for a period of almost four years. They instituted brutal policies in Cambodia and turned the country into the so-called killing fields which took millions of lives (Rummuel 2004: 159–62). On Christmas of 1978, Vietnam invaded Cambodia with the National United Front for the National Salvation of Kampuchea (NUFNSK). NUFNSK was mostly composed of former Khmer Rouge cadres who had fled to Vietnam during the Khmer Rouge period after a series of internal purges. These cadres and the Vietnamese armies entered Cambodia and successfully toppled the Khmer Rouge regime on January 7, 1979.

On June 21, 1997, the Royal Government of Cambodia (RGC) formally requested assistance from the United Nations (UN) to pursue prosecuting Khmer Rouge crimes to bring a long overdue end to the impunity. The UN responded positively to the RGC's request and they negotiated drafting a bilateral agreement to create a tribunal to that end.

There was *prima facie* evidence that international and domestic crimes had been committed by all the warring factions in Cambodia and by their foreign partners (Rummuel 2004: 193–4) who actively participated in the long war. But only the Khmer Rouge groups would be brought to trial¹ because their actions were manifestly extreme human rights abuses that constituted genocide (Genocide Convention 1948), war crimes (Geneva Conventions 1949) and crimes against humanity as defined in the Statutes of International Criminal Court (ICC) known as the Rome Statute (Part II of the Rome Statute except crime of aggression).²

The very first Article of the ECCC 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 (hereafter “the ECCC Law”)³ states that:

The purpose of this law is to bring to trial *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, that were committed during the period from 17 April 1975 to 6 January 1979 [emphasis added].

The jurisdiction *ratione personae* (personal jurisdiction)⁴ of the ECCC (Article 1 and 2 of the

ECCC Law) extends to cover only *senior leaders of Democratic Kampuchea* (hereafter “senior leaders”) and *those who were most responsible for serious violations of Cambodian and international law* (hereafter “those most responsible”). These clauses establish personal jurisdiction under the ECCC Law as confined to a natural person or physical entity. Corporate bodies are not under ECCC jurisdiction. Not all perpetrators would be held accountable for their crimes committed during the DK regime. Only those who are judged according to the jurisdiction *ratione personae* of the ECCC to have been *senior leaders* and *those most responsible* for crimes as stipulated in Articles 3(new), 4, 5, 6, 7 and 8 of the ECCC Law would be prosecuted. The purpose of this study is to analyze the criteria of personal jurisdiction of the ECCC and to ask why such criteria were adopted.

1. Vague Provisions Concerning Personal Jurisdiction

Personal jurisdiction for a criminal court usually defines the power of the court to adjudicate and issue a binding rule over individuals within its authority. It is supposed to indicate people who fall under any specific judicial mechanism.⁵ A special court such as the ECCC should be able to identify the special characteristics of the individuals who are under its jurisdiction. Identical clauses describing personal jurisdiction can be found both in the ECCC Law and 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 Democratic Kampuchea adopted on June 6, 2003 (hereafter “the Agreement”). These two sources lack the additional explanations necessary to define the two categories of personal jurisdiction.⁶

The Secretariat of the Royal Government Task Force (hereafter The Task Force)⁷ notes that only a small number of people will fall within this jurisdiction and will be tried by the ECCC (The Task Force 2006: 6). It is doubtful how they knew that only a *small number* of people would be prosecuted because neither the Agreement nor the ECCC Law indicates it. The Task Force may well be correct in pointing out that low-level and medium-ranking Khmer Rouge members who are *not* most responsible for serious crimes will not be prosecuted (*ibid*). However, it does not produce any criteria to distinguish between *those most responsible* and the rest. Thus, it is ambiguous what level of responsibility can be construed as *those most responsible*.

In regard to individual criminal accountability, those who committed crimes should be held responsible for their actions according to the *justice phase* as set out in the decision of the Special Court for Sierra Leone (SCSL) in Prosecutor v. Kallon *et al* (para. 16, 17, 18 & 19) in which the court considered two phases (the *peace phase* and the *justice phase*).⁸ The RGC might not have considered bringing all the former Khmer Rouge officials to trial because of complicated issues concerning

national reconciliation. The RGC often exerted influence over a question on who should be prosecuted in order to maintain peace and public security (Heder 2006: 54). In addition, Prime Minister Hun Sen claimed that prosecuting the Khmer Rouge would risk sending the country back to civil war (Kelly 2006: 39). However, the ECCC Law indicates that the prosecutions should be pursued without exclusion based on rank. Article 29(2) states: “[t]he position or rank of any Suspect shall not relieve such [a] person of criminal responsibility or mitigate punishment.” Accordingly, the provision concerning personal jurisdiction is flimsy and as an unfinished task remains open to debate.

1.1 Senior Leaders

The term “senior leaders” does not indicate only a head of an institution but also embraces other important leaders of relevant institutions. The combination of the two terms “senior leader” means a certain level of rank among political roles – but it does not signify only the highest body of an organization, unit, group or department because the term “senior leaders” is not specific to any level of DK organization or structure. It might be interpreted as even extending to the middle administrative or managerial levels within an institution,⁹ although, it is necessary to prove the individual’s membership of the DK regime or organization.

Article 1 of the Charter of the Nuremberg Tribunal defined personal jurisdiction over major war criminals of the German Axis to be based on seniority (Schabas 2006: 145). It has been debated whether all of the accused actually fulfilled this criterion (*ibid*). Such limitations did not appear in the Statutes of the International Criminal Tribunal of the former Yugoslavia (ICTY) and the International Criminal Tribunal of Rwanda (ICTR). But in the case of the SCSL, its Statute covered the prosecution of “persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leone Law. ...”¹⁰ The SCSL Trial Chamber saw the “those who bear the greatest responsibility” clause as a jurisdictional requirement under which the indictment should be authorized if it is satisfied that there is “sufficient information to provide reasonable grounds for believing that the accused is a person who bears the greatest responsibility.” (Prosecutor v. Fofana para. 27 & 29). Compared to the ECCC Law, this clause may cover both “senior leaders” and “those most responsible” clauses. According to the drafting history of the SCSL Statute, the UN Secretary-General suggested that the “those most responsible” clause denotes both types of personal jurisdiction as the result of a leadership or authority position of the accused, and a sense of the gravity, seriousness or massive scale of the crime.¹¹ This is different from the ECCC jurisdiction where either category becomes an important element for proving personal jurisdiction. Therefore, the prosecution may prove only “senior leaders” or “those most responsible” is sufficient.

Schabas (2006: 146) observed that the SCSL stressed leadership roles rather than leadership

positions, rank and the severity of the crimes or massive scale of destruction. In the context of the ECCC Law, the leadership role does not embrace the content of the “those most responsible” clause, but it embraces the “senior leaders” clause. Therefore, the jurisprudence of the SCSL is not applicable to the ECCC. It is difficult to define who the senior leaders were. Heder notes that the focus on senior leaders under the ECCC jurisdiction in favor of the accused (2006: 54) with defendants claiming that they were not senior leaders – only Pol Pot was. It is because the ECCC Law does not clearly define senior leadership or levels of responsibility. On the other hand, it could be understood as covering many possible defendants unless they were the lowest ranking soldiers. Thus, endorsing “senior leaders” under the personal jurisdiction of the ECCC remains ambiguous.

1.2 Those Most Responsible

The “those most responsible” clause is a common language used in ordinary life. It does not contain any precedent of legal interpretation in Cambodian law. The “those most responsible” clause may be used to prosecute all former Khmer Rouge officials regardless of their rank or positions (the ECCC Law Article 29(2)) including both the top leaders and the lowest officials. Their prosecution might be qualified under the “those most responsible” clause which falls within the personal jurisdiction of the ECCC, but the conviction would depend on whether subject-matter jurisdiction has been proved beyond reasonable doubt after which the accused could be punished accordingly. The “those most responsible” clause is basically understood as criminally responsible persons, a usage which does not differentiate between those who assisted in committing the crime or those who carried the main responsibilities for the crime. For example, in the SCSL Statute, the “those who bear the greatest responsibilities” clause (Article 1 and 15 of SCSL) was used against both Charles G. Taylor, former President of Liberia (Prosecutor v. Taylor) and Alliew Kondewa, farmer and herbalist who was prosecuted along with Hinga Norman who was the Minister of Interior for Sierra Leone (Prosecutor v. Norman, *et al*) even though Article IX of the Lomé Agreement (formally known as Peace Agreement between the Government of the Sierra Leone and the Revolutionary United Front of Sierra Leone adopted on July 7, 1999) provided amnesty for those perpetrators. In this sense, the term “greatest responsibility” does not necessary limit personal jurisdiction based on rank or the seriousness of the crimes. It merely limits personal jurisdiction based on accountability of the person who committed the crimes defined as subject-matter jurisdiction of the tribunal.

At least, there are two categories of personal jurisdiction covering the “those most responsible” clause admissible under the ECCC. First, it could be to target those who have leadership roles in masterminding crimes via a systematic structure or organization. For instance, the Head of S-21, a notorious Khmer Rouge prison and his superiors may fall under this option. Secondly, it could include the low-ranking officials who committed the crimes regulated under the ECCC Law but only on the

condition that they were the principal offenders, co-defendants or carried the main responsibility for committing the crimes. This option does not presuppose a systematic organization or structure for committing the crimes. The subordinates who assisted the principal offenders in perpetrating the crimes might not be liable because they were not senior leaders or did not carry the highest responsibility. This interpretation seems to contradict Article 29(1) of the ECCC Law which states that “[a]ny suspect who planned, instigated, ordered, aided and abetted, or committed the crimes referred to in Article 3(new), 4, 5, 6, 7 and 8 of this law shall be individually responsible for the crime.”

In this sense, the “those most responsible” clause seems to be difficult to evade because even those who aided other culprits in committing crimes also carried responsibility. It could be argued that those who aided and abetted these crimes were not the most responsible because they were not the main culprits. Article 29(1) could also be rejected on the grounds that it is not a specific element of personal jurisdiction. It is a general provision governing criminal responsibility. Article 1 specifically indicates the important elements of personal jurisdiction as a procedural provision. Thus, the term *aided* and *abetted* in Article 29(2) are not applicable if the culprits are not deemed the most responsible persons.

A question may be raised concerning the second category: whether a membership of the DK regime or organization is required. In this context, it may not be required because there is no provision articulating such a requirement. The Co-Prosecutors may expand the scope of the prosecution to target even those who were not members of the DK regime or organization as long as there is evidence to prove that they carried the most responsibility for the crimes as regulated under the ECCC jurisdiction.

Following to the above analysis, the scope of defining the “those most responsible” clause can vary. Both terms “senior leaders” and “those most responsible” provide no exact scope of the coverage. Moreover, there was no rule or law in the Cambodian legal system regarding “senior leaders” or “those most responsible” clauses articulated during or after Khmer Rouge period. Such gaps generate ambiguities relating to personal jurisdiction, and can be interpreted variously based on individual understanding. Consequently, the term “those most responsible” was not construed to encompass specific meanings and the concluding agreement on personal jurisdiction remains vague.

2. Drafting History Approaching Personal Jurisdiction

A drafting history of the Agreement could help us to examine the coverage of personal jurisdiction in order to determine why such ambiguous clauses were adopted. During the course of the establishment of the ECCC, there were various options as to how personal jurisdiction could have

been articulated. It could be subsumed into four categories of coverage from broad to narrow as following: First, both Cambodian citizens and foreigners who committed international crimes in Cambodia should be prosecuted.¹² If this idea were adopted into law, various Cambodian factions as well as certain citizens of foreign nations such as Vietnam, China and the US would be open to prosecution because of their direct involvement in Cambodia's conflicts. This would be applicable only if the ECCC were an international tribunal. Second, the prosecution should target all members of the Khmer Rouge organization.¹³ This implies a large group because the Khmer Rouge organization existed decades before they came to power and decades after they actually collapsed. Third, only members of the Khmer Rouge during the height of their regime would be targeted including lower officials such as village chiefs and militias.¹⁴ Again, this would cover a large number of people. Finally, the drafters agreed on limiting personal jurisdiction to *senior leaders* and those who were *most responsible* (Article 1 of the Agreement).¹⁵ It seems that they might have intended to target only a few people because they tried to narrow down the scope of personal jurisdiction of the ECCC. However, Rajagopal (1998: 6) suggested that "[t]he targets should include not only the political leadership of the KR [Khmer Rouge] in the Central Security Committee but also the second-rung leadership and senior military commanders, commune-level, political and military leaders, as well as other individuals against whom there is evidence." Therefore, individual criminal responsibility should be a vital issue to be considered.

In fact, it was obvious that the drafters might have had different opinions based on their political views. But it does not mean that each person holding the same political interests has the same stance. For the purpose of this study, two positions of the drafters (the UN and the RGC) will be examined to look at the historical background of the adopting of personal jurisdiction.

2.1 Original Position of the RGC

The Khmer Rouge trials were brought to international attention on June 21, 1997 after the RGC sent a formal request to the UN asking for assistance to try the remaining Khmer Rouge leaders. They requested an international tribunal similar to those responding to the genocide and crimes against humanity in Rwanda and the former Yugoslavia. The RGC asked that similar assistance be given to Cambodia to try the remaining Khmer Rouge leaders.¹⁶ The request indicated a lack of resources and expertise for trying Khmer Rouge crimes found to be in grave breach of Cambodian and international law. It correctly addressed the universality of dealing with the grave breaches of human rights in Cambodia by indicating personal jurisdiction:

"We hope that the United Nations and international community can assist the Cambodian people in *establishing the truth about this period* and bringing *those responsible* to justice"¹⁷ [emphasis added].

In the June 21 letter, the term “those responsible” implies a broad delineation of personal jurisdiction likely including those responsible for committing crime(s). If it had been endorsed into law, it might have covered more individuals than the existing provisions. Furthermore, the June 21 letter appealed for establishing the truth about the Khmer Rouge period so it should include the groups who masterminded the crimes for example, leaders and decision-makers including those who were responsible for the political strategies of the regime and those who were involved and assisted in committing the crimes as defined in the ECCC Law. Thus, as regards the personal jurisdiction of the ECCC, the seriousness or gravity of the crimes might not be in question. It would generally hold them responsible for their crimes without any distinction based on the rank or position of the Khmer Rouge incumbents.

The terms “those responsible” in the June 21 letter could correctly represent the original position of the RGC for establishing the personal jurisdiction of the ECCC because it was the first evidence provided in the official written form and signed by the then Co-Prime Ministers of Cambodia prior to the outbreak of factional fighting in July 1997. The Letter was drafted by UN personnel (Hammarberg 2001: 3) but there was no evidence to prove that the RGC was pressured to sign the letter because it was clear that the RGC took the initiative in creating the tribunal to try Khmer Rouge crimes (Sok 2001, 8–9). It was observed at the beginning that the RGC was in a position to bring more defendants than the existing provisions because it was not limited only to those most responsible for committing serious crimes and violations.

2.2 Original Position of the UN

The UN’s position becomes visible by looking at its various institutions. First, the UN Commission on Human Rights (CHR) issued its Resolution concerning Human Rights in Cambodia in April 1997 requesting that “the Secretary-General, through his Special Representative, in collaboration with the Centre for Human Rights, examine any request by Cambodia for assistance in responding to past serious violations of Cambodian and international law as a means of bringing about national reconciliation, strengthening democracy and addressing the issue of individual accountability”¹⁸ [emphasis added].

By concentrating on “individual accountability”, it literally means that all of the criminally responsible persons connected with Khmer Rouge crimes should fall under the jurisdiction of the tribunal because individual accountability does not respect limitations based on leadership or the gravity of the crimes. But the CHR might not have intended to bring every felon to justice because it only seems to have been concerned that there were no Khmer Rouge leaders who had been brought to account for their crimes.¹⁹ This was similar to the RGC’s position in requesting the UN to bring

“those responsible” to trial. Such a similarity arose from the fact that the UN Special Representative in Cambodia was working closely with the RGC to set up early efforts to try Khmer Rouge crimes. This was conveyed to the CHR by the Special Representative to facilitate the RGC’s request for assistance. They were likely aware of each other’s positions before issuing the June 21 letter. Thus, the original position of the UN was similar to the RGC’s position in term of the scope of personal jurisdiction in that it did not limit personal jurisdiction according to seniority, the seriousness of the crimes or the leading role where it comes to criminal responsibility.

Secondly, the UN General Assembly’s position is made clear through various resolutions requesting that the Secretary-General negotiate with the RGC to create a tribunal to try Khmer Rouge crimes. The UN position was incorporated in Resolution 52/135 of 27 February 1998 in response to the RGC’s request for Khmer Rouge trials which enshrined exactly the same clause as the CHR’s Resolution concerning personal jurisdiction as “individual accountability” (A/RES/52/135, para. 16).

It therefore seems undeniable that the UN’s original position was to set up a wide range of personal jurisdiction. This means that any individual who committed crimes as defined in the subject-matter jurisdiction would fall under the personal jurisdiction of the ECCC.

3. Political Challenge and Pressure

Although the UN and RGC basically agreed on personal jurisdiction during the early stages, the negotiations uncovered an intense difficulty in term of developing formulas and power sharing within the ECCC administration. Neither the UN nor RGC would accede. They had different stances about creating the tribunal on the grounds of credibility and sovereignty. The UN expressed concerns over credible standards of justice and criticized the existing Cambodian court system as being unqualified due to the fact that the Cambodian judiciary was infamous for inadequate judicial administration resulting from corruption and incompetence (A/RES/53/850, para. 133). The UN also demanded that the law should be equally applied but RGC insisted on exempting certain individuals who contributed to peace and national stability, and some government officials suggested that trials should be limited to those Khmer Rouge officials who did not surrender themselves to the RGC at the time of the Experts’ visit (A/RES/53/850, para. 104). Political challenge and pressure over drafting personal jurisdiction of the ECCC were most likely relevant to internal upheaval in Cambodia and international pressure of the UN member states to the UN Secretary-General and the RGC.

3.1 Internal Upheaval in Cambodia

The last Khmer Rouge defection to the RGC in the late 1998 inaugurated a new lack of political will to create an international tribunal. The RGC withdrew its support from the international tribunal after Cambodia experienced massive Khmer Rouge defections and saw peace approaching. In such circumstances, the RGC might be cautious with any action that could undermine the new achievement in bringing the last Khmer Rouge fighters into society. Taking legal action against them could alter political efforts for national reconciliation. That was because political instability and a lack of public security are key concerns in the Cambodian political arena.

According to Sok An's statement made in New York on January 13, 2003, it was perceived that the RGC was trying to defend its position on the creation of the Khmer Rouge tribunal by stating, "[w]hen the Cambodian Co-Prime Ministers requested the United Nations for assistance in organizing the process for a Khmer Rouge trial, it was an appeal for assistance but not for the substitution of our institutions, which have continued to pursue these efforts" (Sok 2003: 2). This was an attempt by the RGC to indicate that the tribunal would be controlled by the Cambodian judiciary as a domestic court so that the assistance of the international community would not reflect any influence over the administration of the tribunal. However, the June 21 letter precisely mentioned creating a tribunal similar to ICTY and ICTR. So the statement may be seen as deviating from the June 21 letter, because international tribunals such as ICTY and ICTR are not characterized as domestic courts. Therefore, his argument that the government's appeal was not a substitute for the existing Cambodian court system made clear the real intention of the RGC.

Comparing the June 21 letter and the final product of the Agreement in 2003, it becomes obvious that the RGC changed its position during the course of the negotiations. There could be two reasons for this change. First, the RGC thought that tolerance could further national reconciliation by integrating former Khmer Rouge fighters into the Royal Armed Forces of Cambodia (RAFC) after Noun Chea and Khieu Samphan defected to the RGC in December 1998 and brought with them thousands of the remaining Khmer Rouge fighters. Secondly, creating a tribunal to try former Khmer Rouge leaders might destroy recent achievements in national reconciliation. Hammarberg (2001: 2) takes this view, suggesting that "[t]he only argument against arrests and trials was the risk of further unrest and civil war." Additionally, he observed that the RGC changed its position on creating an international tribunal because Khmer Rouge issues were no longer a threat against peace in Cambodia (*ibid*). It seems that the RGC unexpectedly changed its stance.

In late December 1998, Hun Sen delivered a statement that Cambodians should "dig a hole to bury the past" (Amnesty International 1999: 4). This means that Cambodian people should forget the

past atrocities of the Khmer Rouge regime by accepting national reconciliation. This entirely contradicted the content of the June 21 letter. It seems possible that the RGC had no intention of trying Khmer Rouge crimes at all. Later, Prime Minister Hun Sen publicly declared his assurance that low-ranking former Khmer Rouge officials who were involved in the atrocious regime would not be prosecuted.²⁰ These comments resulted from political changes in Cambodia, especially related to the development in the Khmer Rouge's situation. These narrower terms were defended by Sok An (2002: 6) in Stockholm: "[w]hatever we do must not damage our peace and stability ...". He clearly indicated that peace was the most important factor. Such arguments definitely drove the RGC to the approach which limited personal jurisdiction.

3.2 International Pressure

Clauses that described personal jurisdiction explicitly changed from the early to the final General Assembly resolutions relating to the Khmer Rouge trials, and were influenced by political development in Cambodia. For example, the UN Secretary-General's position was virtually made based on recommendations of the Group of Experts. These experts were appointed to assess remaining evidence and to conduct applicable legal analysis relevant to former leaders of the DK regime. They concluded that the overwhelming majority of the opinion obtained during their visit to Cambodia in November 1998 was to prosecute the remaining Khmer Rouge leaders. According to the team "...the term 'leaders' should be equated with all persons at *the senior levels* of Government of Democratic Kampuchea or even of the Communist Party of Kampuchea" (A/RES/53/850, para.109) and also considered another type of personal jurisdiction as "... focus[ing] upon *those persons most responsible for the most serious violations of human rights* during the reign of Democratic Kampuchea" [emphasis added]. This would include senior leaders bearing responsibility for the abuses as well as those at lower levels who were directly implicated in the most serious atrocities (A/RES/53/850, para.110). For example, in the report of the Secretary-General, the phrase "Khmer Rouge officials" was used to describe individuals who were supposed to be tried by the ECCC (A/RES/53/850, para. 45, 48, 59, 65, 71, 105 and 209(1)). The UN Legal Experts described Ta Mok, as a "senior leader" but they considered Noun Chea, the former President of Kampuchean People's Representative Assembly (KPRA), Brother No. 2 and Khieu Samphan, the former President of DK State Presidium as "senior officials" (A/53/850, para. 45). There was no relevant law to distinguish the meanings of these two terms: a senior leader and a senior official. They might have used them without considering the impact of these terms. Generally speaking, the term "senior official" seems to have a lower ranking than the term "senior leader". These terms were the key guideline for the UN negotiators to conclude the agreement. As a result, there were remarkable differences to the terms contained in the ECCC Law previously. For example, "those most responsible for the most serious violation" was replaced with the "those most responsible" clause, and to the term "leaders" the adjective "senior"

was added, resulting in “senior leaders.”

The UN General Assembly Resolution 53/145 of March 8, 1999 limited personal jurisdiction to “Khmer Rouge leaders” (para. 16) but the UN General Assembly Resolution 54/171 of February 15, 2000 (para. 10) and Resolution 55/95 of February 28, 2001 (para. 17) used a sophisticated and narrow conceptualization of personal jurisdiction in which “the Khmer Rouge leaders most responsible for the most serious violations of human rights” were conflated with “senior leaders” and “those responsible”. The change seems to correspond to the Report of Experts, which used exact wording on personal jurisdiction but did not explicitly delineate personal jurisdiction in the report. Furthermore, the change could stabilize Cambodia’s position after observing how the last Khmer Rouge defection to the RGC had mustered the previously lacking political will of the Cambodian side to establish a reliable tribunal.

The principal negotiator Under-Secretary Hans Corel commented during an interview after concluding the final draft of the Memorandum of Understanding that “my hands are tied” (Etcheson 2006b: 18). This comment referred to pressures by the UN member states over disputes with the RGC.²¹ Certain countries such as the US, Japan, France and Australia cooperated to put pressure on both the UN and the RGC to reach a conclusion of the agreement. It is believed that the US played a pivotal role in molding the negotiation between the UN and the RGC (Etcheson 2006a). These efforts might have achieved the compromise leading to the agreement between the UN and RGC before the General Assembly issued its resolution (A/RES/57/228) to instruct the Secretary-General to resume negotiations with the RGC on the remaining controversies.

The Secretary-General placed two conditions concerning personal jurisdiction. First, relating to amnesty, he indicated that there was only one person who received a royal pardon in 1996 in connection to Khmer Rouge crimes, and this issue should be decided by the tribunal (A/RES/57/769, para. 16(d)). Second, he reiterated personal jurisdiction in respect to senior leaders and those who were most responsible for crimes under the subject-matter jurisdiction of the proposed tribunal (A/RES/57/769, para. 16(e)) as already mentioned in Article 1 and 2 of the ECCC Law of 2001.

The term “those responsible”, first used in the June 21 letter, was to indicate personal jurisdiction for the proposed tribunal and subsequently, “senior leaders” and “those most responsible” clauses were formally articulated in the ECCC Law and the agreement. In this light, personal jurisdiction might encompass a large number of culprits. However, that had been dramatically changed and was replaced with a narrower articulation at a later stage. This seems to be part of a compromise relating to the changes in the Cambodian political climate.

Finally, “senior leaders” and “those most responsible” clauses were added to personal jurisdiction to limit the inclusion of possible suspects in exchange for political stability and peace. In so doing, the ECCC is only able to achieve a relative justice which does not respond to each crime committed during the DK regime. At first, the UN took a strong justice approach, but after being pressured, it abandoned this approach in favor of a compromise with the RGC. During the course of the negotiations, however, it was clear that personal jurisdiction was a sensitive issue and the language describing personal jurisdiction changed remarkably from broad coverage during the early stages to narrow coverage later. The position of the RGC towards the establishment of the tribunal changed in late 1998 and extensive delays almost made it impossible to put it into practice. Eventually, this also affected the UN’s position. The position of the RGC radically shifted from a justice approach to a peace approach, emphasizing political stability, public security and peace, and dedicated to national reconciliation. In contrast, the justice approach emphasized that everyone is subjected to equal treatment before the law, and those who committed Khmer Rouge crimes should be tried by a competent judicial mechanism developing toward complete justice and the due process of law.

4. Analysis of Peace and Justice Approach

Under criminal accountability, anyone who has committed crimes should be held responsible for their actions in accordance with the law. The ECCC jurisdiction seemingly does not target everyone who committed crimes, since it limits personal jurisdiction to “senior leaders” and “those most responsible.” Such limitations have given possible culprits the leeway to escape from justice. Yet it balanced the political accountability of the drafters. The threats and opportunities of the peace and justice approaches held for the ultimate performance of the ECCC is an issue that should be thoroughly examined before supporting either approach. The applicability may be based on the actual circumstances and interests of Cambodian society rather than on a real prioritization of either peace or justice. Public security is vital to the Cambodian community. The international community might also have understood the scope of the catastrophe that the Cambodian people had endured. They may not want to see the Cambodian people placed under risk; even if the chance of serious instability is only minor. In doing so, justice may not be effectively maintained.

Peace researchers classify peace into two types: negative and positive peace. Negative peace simply represents an absence of direct violence, (for example, a cessation of hostilities) and positive peace represents the removal of structural and cultural violence (Galtung 1969: 183, and Rama 2005: 28). In the Cambodian case, there was no direct violence during the negotiation period (1999 – 2003), but the country had just emerged from factional fighting in July 1997, and the ideology of hatred and the needs for revenge probably still existed. Thus, it might have been risky to take the justice approach.

The justice approach should not be used only for obtaining a short-term negative peace but to gain the durable peace necessary for a healthy society.

Consequently, the analysis of the peace and justice approaches can be examined depending on the specific issues influencing applicability and the necessity of rigorous deliberation. For the purpose of this analysis, those who argue for peace tend to focus on the issue of political stability in Cambodia and those who argue for justice focus on the issue of equality before the law.

4.1 Breach of Equality before the Law

In contrast to a peace approach, the principle of equality before the law is protected under the Constitution. Article 31(2) spells out that “Every Khmer citizen shall be *equal before the law*, enjoying the same rights, freedoms and fulfilling the same obligations regardless of race, color, sex, language, religious belief, political tendency, birth origin, social status, wealth or other status” [emphasis added]. The Provisions Relating to Criminal Law and Procedure Applicable in Cambodia during the Transitional Period (UNTAC Law) also incorporates this principle.²² The ECCC Law also endorses it and reiterates the principles enshrined in the International Covenant on Civil and Political Rights (ICCPR).²³ Cambodia is a party to it and ratified it on May 26, 1992.²⁴ Article 14 again enshrines the principle of equality before the law. Theoretically, there is sufficient legal ground to apply this principle in Cambodia. However, personal jurisdiction is limited to only senior leaders and “those who were most responsible for Khmer Rouge crimes, temporal jurisdiction is limited to the height of the Khmer Rouge regime (April 17, 1975 – January 6, 1979), and territorial jurisdiction is limited to the Cambodian border. Thus, one might ask whether such exclusions are acceptable under international practice and norms.

According to the practice of previous international tribunals such as the Nuremberg Tribunal, Tokyo Tribunal, ICTY, ICTR and SCSL, all perpetrators and those who committed international crimes were prosecuted either by a domestic court or an international tribunal. High-ranking officials were mostly prosecuted under the jurisdiction of the international tribunal in order to get rid of their possible influence over the tribunal and to guarantee its independence and neutrality. Thus, any attempts to limit the criminal responsibility of individuals based on rank or status could be criticized for being against the principle of equality in international human rights law. The ECCC would become the first judicial mechanism ostensibly excluding some individuals who were responsible for international crimes. In conclusion, adopting the personal jurisdiction of the ECCC may lead to: (1) confused interpretations due to ill-defined textual provisions and (2) inequality before the law due to criminal exclusion.

4.2 Political Stability and Public Security Concerns

Cambodia is a fragile state which might easily fall into civil war and violence. This is because its political institutions are not strong enough to guarantee political stability. Cambodia was one of many countries that returned to civil war after concluding a peace agreement because the Khmer Rouge faction did not abide by the Comprehensive Political Settlement on Cambodia's Peace Agreement in 1991 which called for disarmaments. They returned to the forest to take up guerrilla warfare again, continuing for several years.²⁵ Due to frequent political upheavals, many aspects of Cambodian society deteriorated including a weakening the judicial system. The principle of multi-party democracy with a constitutional monarchy (Article 50–51 of the Constitution) was restored after a UNTAC-sponsored election in May 1993. Additional time is necessary to construct a genuine political capacity for administering credible justice.

To demand that a massive number of former Khmer Rouge fighters be brought before the ECCC in pursuit of justice may result in their return to the battlefield. Such an assumption is supported by Bassiouni (1997: 13) who claimed that “the attainment of peace to end conflicts cannot be totally served from the pursuit of justice whenever that may be required in the aftermath of violence.” This may be interpreted as meaning that justice alone cannot guarantee peace or end conflict and additional compromise in other areas may be required.

By taking the peace approach, the burden of political accountability is lighter if criminal responsibility is not universally upheld. This would allow the UN and the RGC freedom from confrontation and possible social unrest perpetrated by the prospective accused and their associates. Therefore, the drafters had to remember that by casting a massive number of individuals into criminal accountability, they would also have to assume a certain responsibility for the tumultuous consequences. Bassiouni (1997: 19) observed that political accountability must create accountability mechanisms to achieve justice from the prosecution of all potential violators in order to find the truth. In the end, one cannot deny that political stability plays a primary role in promoting sustainable development, and special attention should be paid not to place Cambodia in jeopardy or to destroy political stability.

5. Conclusion

A large amount of evidence has been reviewed and assessed to prosecute the remaining DK leaders (Linton 2002: 96–9). In addition, the ECCC Law was adopted merely based on the peace approach rather than on legal grounds to prosecute individuals according to their criminal responsibility. Scholars still agree that there can be no peace without justice, especially when addressing international crimes where a concerned state apparently ignores its responsibility to uphold justice.

It is clear that both the UN and the RGC generally agreed on personal jurisdiction except where concerning the royal pardon for Ieng Sary in which the UN demanded that he should be prosecuted (Jarvis 2002: 6–11). Generally, both sides agreed that only former DK members would be prosecuted. It seems that the drafters did not discuss issues of personal jurisdiction in detail during the course of their negotiations.

Because personal jurisdiction is not clearly articulated, alternative interpretations are surely possible. This would generate doubtful standards of justice for trying long overdue Khmer Rouge crimes. The ECCC Law could become a political tool for Cambodia to end the Khmer Rouge chapter by merely punishing a few culprits for the death of nearly two million innocent people rather than to create a reliable judicial mechanism to try everyone responsible for their crimes and thereby upholding justice and human rights (Etcheson 2004: 181–205). It has often been noted that political interventions over the judiciary contributed to diminishing the independence of the judiciary as enshrined in various Cambodian laws including Article 109 of the 1993 Constitution and Article 1 of UNTAC Law. Nonetheless, trying only certain individuals without fairness before the law will be perceived as unequal treatment, even if the ECCC is able to maintain high standards of judicial functioning for cases brought before it.

Legal principles set out in the ECCC Law concerning personal jurisdiction was only at providing a global view and it was entirely left up to the ECCC to interpret it based on two approaches: (1) the peace approach; and (2) the justice approach. These approaches may be applied together based on an attitude of compromise to decide personal jurisdiction in order to prevent having either too few or too many accused. Theoretically either approach may prevail over the other, but pragmatically, peace will probably prevail over justice. In addition, the peace and justice approaches may also take different directions. For instance, pursuing justice may be postponed for the interest of peace but it could still be sought later. Generally speaking, there is no perfect justice. Eventually, the ECCC may be able to offer a relative justice. Hence, the ECCC might be required to consider both peace and justice in a balanced way during its proceedings.

Notes

1 See Article 1 of the ECCC Law and the Agreement.

2 Article 5(1) of the Rome Statute states that:

The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

(a) The crime of genocide;

- (b) Crimes against humanity;
 - (c) War crimes;
 - (d) The crime of aggression.
- 3 The ECCC Law was adopted by the National Assembly in 2001 and amended and promulgated by Royal Decree in 2004 to coordinate the principles of the Agreement between the UN and RGC on June 6, 2003.
 - 4 Jurisdiction "*ratione personae*" derives from Latin. It is a combination of *ratione* and *personae* in which *ratione* means "by reason" and *personae* means "person".
 - 5 Article 2 of the same law reiterates personal jurisdiction with the same wording as provided in Article 1 of the ECCC Law with the clauses: "...*senior leaders* of Democratic Kampuchea and those who were *most responsible* for the crimes and serious violations...." that is, the ECCC shall have personal jurisdiction only over the physical persons of DK officials who fall under the two following categories: first, those who held high-ranking positions as "senior leaders" during DK period (April 17, 1975 – January 6, 1979), and second, those persons who were most responsible for the crimes defined as subject-matter jurisdiction of the ECCC.
 - 6 The studies conducted by Stephen Heder and Brian D. Tittmore, War Crimes Research Office, Washington College of Law, American University and Coalition for International Justice have suggested that there are seven candidates for the prosecution of Khmer Rouge crimes under the jurisdiction of the ECCC. The above suggestion was made based on private examinations of existing archival evidence collected and compiled by the Documentation Centre of Cambodia (DC-Cam), a non-governmental organization which conducted extensive research into relevant Khmer Rouge materials. These archives were mainly collected from the former S-21 and the residences of the former Khmer Rouge leaders in Phnom Penh. Such recommendation was made based on very limited knowledge of the available evidence of the Khmer Rouge crimes, even though there were million casualties and large-scale destruction. Of course, it was not suggested that only those seven candidates should be brought before the ECCC (Heder 2004: 1–2). This was contradicted to the Group of Experts established pursuant to the UN General Assembly Resolution 52/135. It correctly provided no list of people who should be prosecuted, but roughly indicated that there could be 20 to 30 people, and confirmed that the prosecutor should be independently responsible for prosecution (A/RES/53/850, para. 110). Therefore, official investigations conducted by the ECCC would be able to expand upon hidden facts and evidence based on interview with both witnesses and victims and interrogation of the accused.
 - 7 The RGC established the Task Force to be responsible for drafting legislation and negotiating with the UN to create a tribunal to try Khmer Rouge crimes. It was headed by Sok An, Deputy Prime Minister and Minister of the Council of Ministers of the RGC.
 - 8 According to the judgment, a *peace phase* is a period of political reconciliation such as negotiations to adopt a political resolution or agreement. But a *justice phase* is a period to process tribunal seeking individual criminal responsibility; therefore, such amnesty is not applicable.
 - 9 Accordingly, "senior leaders" may be interpreted to comprise those Khmer Rouge individuals who held managerial authority in their departments and possessed political power within the leading DK apparatus, especially those members of the CPK Standing Committee, members of the GDK, Zonal Committee, the State Presidium and permanent members of the Kampuchean People's Representative Assembly (KPRA). It was remarkable that each high-ranking Khmer Rouge official assumed many leadership roles within various institutions. For example, Son Sen was the Defence Minister of the GDK and also a member of the CPK (Carney 1989: 101). It is certain that those Khmer Rouge officials who were promoted after the fall of the DK regime were not held accountable under the "senior leaders" clause (A/RES/53/850, para. 108).
 - 10 See Article 1 of the SCSL Statute.
 - 11 Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, paras. 29–30.
 - 12 The Former King Norodom Sihanouk publicly suggested bringing Americans and other foreigners to trial. See "King Father declared not to answer as witness after being insulted [In Khmer Language]," *Samleng Yovachun Khmer Newspaper*, September 7, 2007. Such views were shared by several former Khmer Rouge officials. For

- example, Noun Chea's wife argued that it was unfair not to prosecute crimes relating to Vietnam's invasion and the US's bombing, See *Khmer Amatak* (a Cambodian Newspaper in Khmer language), Vol. 517, September 21, 2007.
- 13 See Ear, Meng Try, "Justice and Reconciliation in Cambodia", *Searching for the Truth* [Khmer Version], January 2006, Vol. 73, p. 40.
 - 14 See Songpol, Kaopatumpit, Genocide: Former Khmer Rouge leaders engage in an unusual war of words at a public forum in a Cambodian town, available at <<http://asiarecipe.com/camkhmer.html>>, (last visited October 20, 2007).
 - 15 Sok An stated in the National Assembly session on December 29, 2000 that "...personal jurisdiction is to target trials under the ECCC jurisdiction limited to senior leaders and those most responsible persons who carried the most serious culpability in a very narrow sense...." The record was published in the *Searching for the Truth Magazine* [Khmer Language], Vol. 15, p. 45.
 - 16 See RGC's letter signed by then-Co-Prime Ministers, Prince Norodom Ranariddh and Hun Sen to the UN Secretary-General of June 21, 1997 requesting for the UN assistance for the creation of the tribunal to try Khmer Rouge crimes, available at: <<http://www.dccam.org/Archives/Chronology/Chronology.htm>>, (last visited June 22, 2007).
 - 17 *Ibid.*
 - 18 See the UN Human Rights Commission Resolution 1997/49 dated April 11, 1997, para. 11.
 - 19 *Ibid.*, para. 72.
 - 20 See *Kyodo News International*, Inc., published on January 10, 2001, "Hun Sen calls on former Khmer Rouge members not to panic," available at: <http://www.findarticles.com/p/articles/mi_m0WDQ/is_2001_Jan_15/ai_70384482>, (last visited July 28, 2007).
 - 21 The resumed negotiation took place on two different occasions. The first stage was conducted in New York in January 2003 to prepare a series of exploratory meetings to gain a better understanding about the tasks, common ground and to identify of various issues which lay before the negotiators (A/RES/57/769, para. 9). The second stage was conducted in Phnom Penh in March 2003 to focus on technical issues (A/RES/57/769, paras. 18-19).
 - 22 Article 66 of the UNTAC Law states that "The principle of equality of all persons under penal law requires that punishments applicable in Cambodia be the same in all provinces or zones...."
 - 23 See Article 35(new) of the ECCC Law.
 - 24 See Cambodia's Status of Ratification of the ICCPR, available at: <<http://www.ohchr.org/english/countries/ratification/4.htm>>, (last visited July 12, 2007).
 - 25 The Khmer Rouge stopped being a military threat after the defection of Noun Chea and Khieu Samphan to the RGC in late 1998.

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