Who Are Most Responsible in International Criminal Law?

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By: Dr. Joseph Rikhof

On 28 November 2019, a hearing will begin before the Pre-Trial Chamber (PTC) of the Extraordinary Chambers in the Court of Cambodia (ECCC) in Case 003, the MEAS Muth case (see here while for an overview of the proceedings in the ECCC, see here). The hearing is an appeal of the two separate closing orders of the national and international co-investigating judges of November 28, 2018 resulting from a disagreement between them about whether MEAS Muth was subject to the ECCC's personal jurisdiction as "a senior leader or one of the persons most responsible for crimes committed during the period of 17 April 1975 to 6 January 1979 in the Democratic Kampuchea" (DK)(article 2 of the law establishing the ECCC, see here). As this issue is also at the heart of the two other remaining cases

before the ECCC, namely the YIM Tith and AO An case and the PTC has already found that another person, IM Chaem, did not fall within this category (see here), an overview of this notion of 'most responsible' is timely.

Most responsible before the international tribunals

While the Statutes of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) do not use the phrase "most responsible" but only refer to "responsible" (articles 1 of the ICTY Statute, see here, and the ICTR Statute, see here), the Statute for the Special Court of Sierra Leone (SCSL) does have such a provision, namely article 1, which reads:

The Special Court shall … have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone. (see here)

With respect to the latter, an excellent article by Professor Jalloh explains the history of this provision as well as the legal interpretation by both the Trial (TC) and Appeals Chamber (AC) of the SCSL (see here). The legal interpretation focused on two issues, a procedural and a substantive one. The debate about the procedural issue was whether the notion of most responsible was a jurisdictional one in the sense that if it was found that a person did not fall within this category, the case would be dismissed or alternatively whether it was primarily a guideline for the prosecutor to prioritize cases to pursue. The substantive issue related to the question of whether the phrase "most responsible" was limited to what he calls "political-military leaders" or could also include a "killer-perpetrator" (at 880-883). With respect to the procedural issue, the AC was of the view that the notion of most responsible was not a jurisdictional requirement but rather a guidance for the prosecutor (at 893-897). The substantive matter was resolved in favour of the broad interpretation that both categories of perpetrators identified by Professor Jalloh could be encompassed within the concept of most responsible (at 883).

While the statutes of the ICTY and ICTR, as indicated above, did not use the term 'most responsible', in practice because of the larger number of cases to be considered with limited resources, some type of prioritization did occur (see Jalloh at 875-877). However, when the United Nations put pressure on the tribunals to complete their work, some of the newer documents emanating from them did start using this language when putting in place a strategy to become more efficient (see here) followed by jurisprudence implementing this approach (see Jalloh at 877). This completion strategy is explained as follows by the ICTY:

Under its completion strategy, the ICTY has concentrated on the prosecution and trial of the most senior leaders while referring other cases involving intermediate and lower-rank accused to national courts.

There are two main categories of cases that the ICTY has referred to national judiciaries in the region of the former Yugoslavia:
1. A large number of files from cases that were investigated to different levels by the Tribunal's Prosecution which did not result in the issuance of an indictment by the ICTY.
2. A small number of cases in which the Tribunal issued indictments against named suspects. (see here)

Thirteen persons in seven cases (see here) have been subject to these so-called 11bis cases (named after the provision in its Rules of Evidence and Procedure of the ICTY regulating such transfers, see here, where article 11bis(C) refers to "the level of responsibility of the accused"). This level of responsibility is related to both the de jure or de facto rank or position of the accused in the political or military hierarchy and the actual role played in the commission of the crimes, especially whether he orchestrated the actions of others, and thereby inflicted more damage than he could have otherwise (Ademi and Norac, paragraph 29; Kovacevic, paragraph 20; Ljubicic, paragraph 19; Mejakic et al, paragraph 26; Stankovic and Jankovic, paragraph 19; Todovic and Rasevic, paragraph 23; and Trbic, paragraph 20, which contains the above listing of factors). The reasoning in the judgments has been rather brief with most concluding quickly that the person should be transferred based on these criteria. It is interesting to see that, unlike in the SCSL cases, the roles of defence and prosecutor were reversed on the issue of most responsible with the defence arguing that the accused was most responsible in order to prevent a transfer to a national jurisdiction and the prosecutor arguing the opposite.

Most responsible at the ICC

The ICC does not contain a specific provision limiting its personal jurisdiction to persons most responsible in that article 1 of the Rome Statute refers merely to "persons" (see here). However, the notion of the level of responsibility has played a role in determining one of the factors related to admissibility in article 17 in its statute, namely gravity; article 17(1) states:

Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
(d) The case is **not of sufficient gravity** to justify further action by the Court.

In a 2003 policy paper, the Prosecutor indicated that he "should focus its investigative and prosecutorial resources on those who bear the greatest responsibility, such as the leaders of the State

or organization allegedly responsible for those crimes." (here, at 7) In its decision on the *Lubanga* arrest warrant, Pre-Trial Chamber I endorsed this point of view, noting that the focus on such leaders was justified because these persons are "the ones who can most effectively prevent or stop the commission of those crimes," which in turn underpinned the idea that the court's primary purpose in prosecuting was prevention of such crimes, rather than retribution (see here at paragraphs 50-63).

The Appeals Chamber disagreed in an appeal by the prosecutor of the PTC decision and found that the emphasis on persons most responsible would impose too high a threshold for investigations (see here at paragraphs 73-82). As a result, subsequent Pre-Trial Chambers have broadened and elaborated further on the gravity requirements by pointing to the following factors: the scale of the alleged crimes (including assessment of geographical and temporal intensity); the nature of the unlawful behaviour of the crimes committed; the means employed for the execution of the crimes; the impact of the crimes and the harm caused to victims and their families; and the **groups of persons that bear the greatest responsibility** for the crimes committed (see Situation in Kenya at paragraph 62; Situation in Cote d'Ivoire at paragraphs 201-206; Situation re vessels of Comoros, Greece and Cambodia at paragraph 21; and Situation in Afghanistan at paragraphs 80-86)

For instance, in the situation Cote d'Ivoire, the PTC said this re persons most responsible:

The Prosecutor submits that the individuals likely to be the focus of the Prosecutor's future investigations are high-ranking political and military figures who allegedly played a role in the violence. (at paragraph 205)

while in the Afghani situation, the PTC made this observation:

In relation to potential cases concerning alleged crimes committed by the US forces and the CIA, the Prosecutor submits that the gravity is demonstrated by the level of responsibility of potential offenders, the number and the seriousness of the crimes, the possible responsibilities within the command structure, and the impact on the victims. (at paragraph 83)

A new policy paper on preliminary investigations by the Prosecutor followed suit in 2013 (see here at paragraphs 59-65) by setting out the following criteria:

61. The Office's assessment of gravity includes both quantitative and qualitative considerations. As stipulated in regulation 29(2) of the Regulations of the Office of the Prosecutor, the factors that guide the Office's assessment include the scale, nature, manner of commission of the crimes, and their impact.

62. The scale of the crimes may be assessed in light of, inter alia, the number of direct and indirect victims, the extent of the damage caused by the crimes, in particular the bodily or psychological harm caused to the victims and their families, or their geographical or temporal spread (high intensity of the crimes over a brief period or low intensity of crimes over an extended period).

63. The nature of the crimes refers to the specific elements of each offence such as killings, rapes and other crimes involving sexual or gender violence and crimes committed against children, persecution, or the imposition of conditions of life on a group calculated to bring about its destruction.

64. The manner of commission of the crimes may be assessed in light of, inter alia, the means employed to execute the crime, the degree of participation and intent of the perpetrator (if discernible at this stage), the extent to which the crimes were systematic or result from a plan or organized policy or otherwise resulted from the abuse of power or official capacity, and elements of particular cruelty, including the vulnerability of the victims, any motives involving discrimination, or the use of rape and sexual violence as a means of destroying groups.

65. The impact of crimes may be assessed in light of, inter alia, the sufferings endured by the victims and their increased vulnerability; the terror subsequently instilled, or the social, economic and environmental damage inflicted on the affected communities.

Most responsible at the ECCC

The first case to address the issue of persons most responsible in the context of article 2 of its statute was the Dueck case. In 2012, the highest level of this institution, the Supreme Court Chamber, on appeal from the Trial Chamber judgment, discussed the concept of most responsible in some detail (see here at paragraphs 44-79). First of all, the Supreme Court Chamber looked at the procedural issue of whether most responsible is a legal requirement or related to the investigative and prosecutorial policies of the organs of the ECCC. It came to the conclusion, as had been the case with the SCSL, that it was not a legal requirement but “constitutes investigatorial and prosecutorial policy which guides the Co-Investigating Judges and Co-Prosecutors in exercising their independent discretion in investigating and prosecuting the most serious offenders falling within the ECCC’s jurisdiction.” (paragraph 74 with the reasoning for this conclusion starting at paragraph 63)

With respect to the meaning of the sentence “senior leader or one of the persons most responsible”, the Chamber came to the conclusion, again along the same lines as the SCSL that this phrase “refers to two categories of Khmer Rouge officials that are not dichotomous. One category is senior leaders of the Khmer Rouge who are among the most responsible, because a senior leader is not a suspect on the sole basis of his/her leadership position. The other category is non-senior leaders of the Khmer Rouge who are also among the most responsible.” (at paragraph 57) The latter would include “those at lower levels who are directly implicated in the most serious atrocities. (at paragraph 55)

The first two cases prosecuted at the ECCC did not pose a problem with respect to the question of personal jurisdiction as Dueck has been in charge of the infamous Security Prison 21 (or S-21 prison) in Phnom Penh, where thousands had been tortured and died and as such fit within the category of most responsible. Similarly, the accused in the second case, NUON Chea and KHIEU Samphan, had been the founding members and leaders in the communist party of Cambodia, and were clearly senior leaders. However, the cases of the other four accused have been problematic.

In the case to be argued later this month, that of MEAS Muth who had been a Central Committee Member, a Deputy Secretary of the General Staff, Secretary of Division 164, which included the navy, and Secretary of the Kampomg Som Autonomous Sector, the two co-investigating judges issued two separate closing orders on 28 November 2018, due to a disagreement about whether he was subject to the ECCC's personal jurisdiction as a senior leader or one of the persons most responsible; the international judge was of the view that this test was met while the national judge came to the opposite conclusion (see here). The international judge held that while MEAS Muth was not a senior leader as such, he was very close to the senior leadership and should be considered most responsible based on the combination of that position and the nature and impact of his actions including the character and magnitude of his crimes, leading to the conclusion that both his position and conduct "mark him out as a major player in the DK structure and as a willing and driven participant in the brutal implementation of its criminal and inhuman policies" (see here at paragraphs 32-38 and 456-469). The decision of the national judge is not available in English, (see here)

The same dilemma occurred in the case of YIM Tith, who had been the secretary or highest functionary in a number of different regions called zones. The national co-investigative judge found that he did not fall within the personal jurisdiction of the ECCC under either category (see here). The international co-investigative judge reached a different conclusion on 28 June 2019 (see here at paragraphs 27-32 and 992-999), based on the fact that YIM was most responsible for the major role he had played in large scale atrocities in the regions he controlled, his wholeheartedly subscribing to the ideology underlying these crimes while implementing the "inhuman societal model" of the communist party (at paragraph 999).

These diverging views had already arisen earlier on 16 August 2018 with the same judges in the case of AO An, the secretary in one zone and deputy secretary in another, where the following had been said in conclusion by the national co-investigative judge: "AO An's participation in the commission of crimes was non autonomous inactive non creative and indirect which is far different from Duch's active direct and creative participation. Moreover AO An did not participate in making CPK policies" (see in general here at paragraphs 421-433, 461-466 and 536-553 while the conclusion can be found in paragraph 553). The international judge was of the view (see here at paragraphs 49-54 and 697-712) that given his elevated formal positions - the two highest levels of the government below that national political leadership - as well the nature and gravity of the crimes committed - the genocide of the Cham community in the central zone which was "relentless in its pace, all encompassing in its reach, coldly methodological and merciless in its operation" - he was a person most responsible. (at paragraph 708)

There has been one PTC decision on this issue, namely of June 28, 2018 in the case of IM Chaem who had been a secretary in two different zones. This decision was an appeal by the international co-investigative judge of the closing order of 22 February 2017 (with written reasons on 10 July 2017) of him and his national colleague saying that the ECCC had no personal jurisdiction over IM Chaem (see here at paragraphs 11-19). The PTC upheld the closing order (at paragraph 81) with the majority of

three national judges in agreement with this conclusion without further reasoning (at paragraph 92) and the two international judges dissenting in a more detailed opinion (at paragraphs 321-340). The minority started their discussion by setting out the general principles of the notion of most responsible by saying that both the gravity of the crimes and the level of the accused need to be examined while:

this assessment must be done from both a quantitative and a qualitative perspective. There is no exhaustive list of factors to be considered in undertaking this review nor is there a mathematical threshold for casualties or a filtering standard in terms of positions in the hierarchy The determination of personal jurisdiction rather requires a case by case assessment taking into account the general context and the personal circumstances of the suspect. (at paragraph 321)

With respect to the gravity of the crimes of IM Chaem, a number of factors were considered, such as the number of victims, the geographic and temporal scope and manner in which they were committed as well as the number of separate incidents, the nature and scale of the crimes as well as their impact on the victims. (at paragraph 327). IM Chaem fulfilled this requirement as she had been responsible for crimes against humanity in a number of zones in multiple locations. (at paragraphs 327-331) As to her level of responsibility, not only had she held a number of *de jure* high-ranking positions in multiple geographic areas, she also had had senior *de facto* roles as part of the inner circle of the Khmer Rouge hierarchy. (at paragraphs 332-338).

Conclusion

The notion of most responsible has played a role in all the international criminal institutions, from the ICTY and ICTR to the SCSL and ECCC to the ICC. While its role differed because in some instances it was the result of direct language in the statutes of these organizations and was related to the prosecutorial exercise of prioritizing cases (such as the SCSL and ECCC), and while in others this exercise was used in an indirect fashion as part of a completion strategy (ICTY and ICTR) or part of a gravity assessment in the larger determination of whether a case was admissible (ICC), the substantive parameters of this concept have become very similar in all institutions. The jurisprudence in all these five institutions has indicated that most responsible entails an examination of both the position (*de jure* or *de facto*) of a person and the scale and seriousness of the crimes committed by that person.

While the general principles developed in this context have been very similar, the application of those principles has differed in that the ECCC has been the most stringent in finding a person most responsible and it is likely that persons who did not fall in this category at the ECCC would have met a different fate at the other four institutions. It is interesting to note in this context that each time that a person has been found not to be most responsible, it has been the result of a decision by a Cambodian judge while the international judges invariably found the opposite. With only a few cases remaining at the ECCC, the continuance of which hinges on whether they were most responsible, the MEAS Muth hearing at the end of the month has become an existentialist feature of the ECCC in that if the PTC will decide again that he is not most responsible although he is the most senior in function

and action of the remaining cases, the ECCC will have to close its doors.

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