

A Response to DeFalco's: *The Proper Interpretation of "Most Responsible" at the ECCC*

By Michael G. Karnavas*

The ECCC has jurisdiction over "senior leaders of Democratic Kampuchea and those who were most responsible" for certain crimes within the ECCC's jurisdiction. Randle DeFalco's article Cases 003 and 004 at the Khmer Rouge Tribunal: The Definition of "Most Responsible" Individuals According to International Criminal Law, concludes that the suspects in Cases 003 and 004 fall within the meaning of "most responsible" and that the only legally sound option is to bring the cases to trial. DeFalco's analysis is result-determinative and based on the premise that if the suspects are not found "most responsible" there will be no other trials and the suspects would escape criminal responsibility. Although DeFalco's basic approach to determine the meaning of "most responsible" is sensible, through his analysis he commits several errors that lead him to his pre-determined conclusion. DeFalco's conclusions are unsurprising when considering his association with Documentation Center of Cambodia ("DC-Cam") and interest in verifying its pre-determined conclusion that genocide and crimes against humanity occurred in Cambodia. This article analyzes DeFalco's arguments.

1. Introduction

The Extraordinary Chambers in the Courts of Cambodia ("ECCC") was established to bring to trial the "senior leaders of the Democratic Kampuchea and those who were most responsible" for crimes and serious violations of Cambodian law and international humanitarian law committed from 17 April 1975 to 6 January 1979.¹ The meaning of the terms "most responsible" and "senior leaders" is contentious because they are not defined in the ECCC's founding documents, the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea ("Establishment 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 ("Agreement"). These terms are critical to the cases that come before the ECCC because they define who will ultimately be tried.

In the first case before the ECCC ("Case 001"), former Khmer Rouge prison chief, Kaing Guek Eav (alias Duch) sought an acquittal on the basis that he was not covered by the terms "senior leader" or "most responsible," and therefore fell outside the personal jurisdiction of

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¹ 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, 6 June 2003, Preamble.

the ECCC.² The Supreme Court Chamber found that Duch fit within the Court’s personal jurisdiction, which it found limited to “senior leaders of the Khmer Rouge who are among the most responsible and non-senior leaders of the Khmer Rouge who are also among the most responsible.”³ It found that the terms “senior leaders” and “most responsible” were not jurisdictional requirements, but were meant to guide investigatorial and prosecutorial policy.⁴ Yet, the Supreme Court Chamber failed to define “most responsible.”

DC-Cam legal advisor Randle DeFalco published an article in which he considers the meaning of “most responsible” in relation to Cases 003 and 004 at the ECCC.⁵ DeFalco concludes that the presumed suspects in Cases 003 and 004 fall within the meaning of “most responsible,” and that the only legitimate course of action is to proceed to trial.⁶ DeFalco arrives at his conclusion by analyzing the Supreme Court Chamber’s Judgment in Case 001, the applicable law of the ECCC, and international criminal jurisprudence and procedure from the various international criminal tribunals. DeFalco identifies two major criteria – the gravity of the crimes and the level of responsibility of the accused – and surmises, based on the jurisprudence he reviewed, that there is a “theme” of a “preference for prosecution.”⁷ He then looks at the allegations against the presumed suspects in Cases 003 and 004 and concludes that these suspects fall within the meaning of those most responsible.⁸

While DeFalco’s basic approach to determine the meaning of “most responsible” is sensible, he commits several errors in order to reach his pre-determined conclusion. He errs by assuming that any potential discontinuation of Cases 003 and 004 would be the result of outside influence, and not legal principle, by failing to consider relevant contextual information in the ECCC’s negotiation history and by making faulty comparisons to other tribunals where no meaningful similarities can be drawn. Most importantly, DeFalco fails to recognize that the point of judicial investigation is to determine whether there is sufficient evidence to proceed to trial.

DeFalco’s analysis is flawed and the consequence of a result-determinative analysis. DeFalco’s analysis is based on the argument that the presumed suspects in Cases 003 and 004 must be tried because they are alleged to be “most responsible,” and if they are not tried by the ECCC, they will escape criminal responsibility. DeFalco’s pre-determined conclusion colors his analysis of the meaning of the term “most responsible” and whether the presumed suspects in Cases 003 and 004 fit within that term. This article will address the errors in DeFalco’s analysis and will explain that the term “most responsible” was intended by the ECCC’s founders to be narrowly construed.

² *Case of Kaing Guek Eav alias Duch*, 001/18-07-20007/ECCC/SC, Appeal Judgement, 2 February 2012, F28, para. 44.

³ *Id.*, para. 81.

⁴ *Id.*, para. 79.

⁵ Randle C. DeFalco, *Cases 003 and 004 at the Khmer Rouge Tribunal: The Definition of “Most Responsible” Individuals According to International Criminal Law*, 8 GENOCIDE STUDIES AND PREVENTION 2 (2014) (“DeFalco, *Cases 003 and 004*”).

⁶ *Id.* at 45.

⁷ *Id.* at 49-54, 55.

⁸ *Id.* at 56-58.

2. DeFalco's flawed arguments: *facilitating a confirmation bias*

As a point of departure, DeFalco explains the controversy surrounding Cases 003 and 004.⁹ He then summarizes the Supreme Court Chamber's decision on personal jurisdiction in the Case 001 Judgment, but does not find it to be helpful in defining the terms.¹⁰ DeFalco decides to look to the negotiating history surrounding the establishment of the ECCC and its applicable law, but finds that the terms were never defined by the Royal Government of Cambodia ("RGC") or the United Nations ("UN").¹¹ He then finds direction in Article 12(1) of the Agreement, which states that:

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

Correctly finding that Cambodian law "provides scant guidance," DeFalco moves on to consider jurisprudence and procedure from the Special Court for Sierra Leone ("SCSL"), the International Criminal Tribunal for the former Yugoslavia ("ICTY"), and the International Criminal Court ("ICC"), from which he identifies two major criteria: the gravity of the crimes, and the level of responsibility of the suspect.¹² DeFalco concludes that "from an overview of practice at the SCSL, ICTY and to a lesser extent the ICC, ... [g]enerally, it is clear that individuals qualify as 'most responsible' when implicated in serious crimes."¹³ After setting out the allegations against the presumed suspects in Cases 003 and 004 based on leaked documents purported to be the Introductory Submissions in the two cases, he concludes that the suspects fall within the meaning of "most responsible."¹⁴ He asserts that any failure of the cases to go to trial should be viewed as a product of bad faith or unsound professional judgment.¹⁵

Controversy Surrounding Cases 003 and 004

Cases 003 and 004 have been controversial because there is disagreement as to whether the suspects involved may be considered "most responsible." Initially, the Co-Prosecutors disagreed about whether to open investigations into Cases 003 and 004, because they

⁹ DeFalco, *Cases 003 and 004*, at 46-47.

¹⁰ *Id.* at 47-48; *Case of Kaing Guek Eav alias Duch*, 001/18-07-2007-ECCC/TC, Judgement, 3 February 2012, para. 57. The Supreme Court Chamber held that the jurisdiction of the ECCC is limited to "senior leaders of the Khmer Rouge who are among the most responsible [and] non-senior leaders of the Khmer Rouge who are among the most responsible."

¹¹ DeFalco, *Cases 003 and 004*, at 48-49.

¹² *Id.* at 49-55.

¹³ *Id.* at 55.

¹⁴ *Id.* at 56-58.

¹⁵ *Id.* at 58.

disagreed as to whether the suspects may be considered “most responsible.”¹⁶ The Pre-Trial Chamber was unable to reach a supermajority in adjudicating the Co-Prosecutors’ disagreement, which resulted in the opening of judicial investigations in both cases.¹⁷ The Co-Investigating Judges closed the judicial investigation in Case 003 in April 2011, without charging any suspects.¹⁸

On 9 October 2011, Co-Investigating Judge Siegfried Blunk resigned, stating that although he would not allow himself to be influenced by government pressure, he did not want allegations to call into doubt the integrity of the proceedings in Cases 003 and 004.¹⁹ Reserve International Co-Investigating Judge Laurent Kasper-Ansermet replaced Judge Blunk in November 2011.²⁰ However, the Supreme Council of Magistracy refused to approve his nomination.²¹ One month after taking up the position vacated by Judge Blunk, he unilaterally reopened the judicial investigation in Case 003.²² This move was not recognized by his national counterpart, Judge You Bunleng. Judge You Bunleng asserted that Judge Kasper-Ansermet lacked the legal authority to resume the judicial investigation into Case 003.²³

In March 2011, Judge Kasper-Ansermet resigned because he felt unable to perform his work due to what he considered obstruction by Judge You Bunleng.²⁴ Former ICTY prosecuting senior trial lawyer Mark Harmon was sworn in as the new Co-Investigating Judge on 26 October 2012.²⁵ In February 2013, Judges You Bunleng and Harmon issued a press release appearing to contradict each other as to whether Case 003 remained open or had been

¹⁶ In a press release dated 8 September 2009, the acting International Co-Prosecutor stated: “The Acting International Co-Prosecutor has no plans to conduct any further preliminary investigations into additional suspects at the ECCC. In forwarding to the Co-Investigating Judges these 5 new suspects for judicial investigation, the Acting International Co-Prosecutor agrees with the statement of the former International Co-Prosecutor of 5 January 2009 that this last set of cases to be prosecuted would lead to a more comprehensive accounting of the crimes that were committed under the DK regime during 1975-79.” Press Release, *Statement of the Acting International Co-Prosecutor: Submission of Two New Introductory Submissions*, 8 September 2009, [available at](http://www.eccc.gov.kh/sites/default/files/media/ECCC_Act_Int_Co_Prosecutor_8_Sep_2009_(Eng).pdf) [http://www.eccc.gov.kh/sites/default/files/media/ECCC_Act_Int_Co_Prosecutor_8_Sep_2009_\(Eng\).pdf](http://www.eccc.gov.kh/sites/default/files/media/ECCC_Act_Int_Co_Prosecutor_8_Sep_2009_(Eng).pdf).

¹⁷ See ECCC Internal Rules (Rev. 8), Rule 71(4)(c): “A decision of the Chamber requires the affirmative vote of at least four judges. This decision is not subject to appeal. If the required majority is not achieved before the Chamber, in accordance with Article 20 new of the ECCC Law, the default decision shall be that the action or decision done by one Co-Prosecutor shall stand, or that the action or decision proposed to be done by one Co-Prosecutor shall be executed.”

¹⁸ *Case 003*, 003/07-09-2009-ECCC/OCIJ, Notice of Conclusion of Judicial Investigation, 29 April 2011, D13.

¹⁹ Press Release: Statement by the International Co-Investigating Judge, 10 October 2011, [available at](http://www.eccc.gov.kh/sites/default/files/media/correctedECCC-INT-CIJ%2010%20Oct%202011%20(Eng).pdf) [http://www.eccc.gov.kh/sites/default/files/media/correctedECCC-INT-CIJ%2010%20Oct%202011%20\(Eng\).pdf](http://www.eccc.gov.kh/sites/default/files/media/correctedECCC-INT-CIJ%2010%20Oct%202011%20(Eng).pdf).

²⁰ Press Release: Statement from the International Co-Investigating Judge, 19 March 2012, <http://www.eccc.gov.kh/en/articles/press-release-international-reserve-co-investigating-judge>.

²¹ See United Nations Spokesperson for the Secretary-General on Cambodia, Press Statement, 20 January 2012, [available at](http://www.un.org/sg/statements/?nid=5815) <http://www.un.org/sg/statements/?nid=5815>.

²² *Case 003*, 003/07-09-2009-ECCC/OCIJ, Order on Resuming the Judicial Investigation, 2 December 2011, D28.

²³ Press Release: Statement by National Co-Investigating Judge, 26 March 2012, <http://www.eccc.gov.kh/en/articles/press-statement-national-co-investigating-judge-0>.

²⁴ Press Release: Statement from the International Co-Investigating Judge, 19 March 2012, <http://www.eccc.gov.kh/en/articles/press-release-international-reserve-co-investigating-judge>.

²⁵ Press Release: Mark Harmon Sworn in as International Co-Investigating Judge, 19 November 2012, <http://www.eccc.gov.kh/en/articles/mark-harmon-sworn-international-co-investigating-judge>.

closed.²⁶ Judge Harmon stated that the investigation remained open, and the ECCC's monthly Court Reports issued since that date have referred to ongoing investigations in both Cases 003 and 004, including several field missions and witness interviews.²⁷

DeFalco appears to be convinced that there is government influence and that the Co-Investigating Judges are not doing their job properly. Rather than immediately jumping to the conclusion that there has been and continues to be government interference, DeFalco should have neutrally considered the matter.

First, the two Co-Prosecutors disagreed as to whether the suspects were "most responsible," with the National Co-Prosecutor explaining that she had "thoroughly examined" the material and that she maintained that the suspects in Case 003 were not senior leaders or those who were most responsible during the period of Democratic Kampuchea.²⁸ Such a disagreement is understandable even without any supposed government interference, simply because the meaning of the term "most responsible" is undefined by the Court's founding documents and is a flexible term. Moreover, as discussed *infra*, the drafters intended the scope of the term to be quite narrow.

Second, after judicial investigations were opened, *both* Co-Investigating Judges, National and International, closed the judicial investigation in Case 003 without charging any suspects. International Co-Investigating Judge Blunk, who possessed international law experience and had worked as a judge at the Special Panels for Serious Crimes in East Timor, after having worked as a judge in Germany for 26 years,²⁹ explained that "[f]or Cases 003 and 004 we have conducted an in-depth analysis of the origin and meaning of the term 'most responsible' and developed a set of criteria based on the ECCC Law, and the jurisprudence of international tribunals, especially the one for Sierra Leone because its jurisdiction was limited similarly to persons who bear 'the greatest responsibility.'"³⁰

When Co-Investigating Judge Blunk later resigned half a year after the Case 003 investigation had been closed, he stated that he did so not because the government had interfered with his work, but because there could be public perception that it had done so. He explained that he had even initiated contempt of court proceedings against the Cambodian Minister of Information for stating that Cases 003 and 004 could not proceed.³¹

²⁶ Press Release: Statement by the Co-Investigating Judges Regarding Case 003, 28 February 2013, *available at* <http://www.eccc.gov.kh/sites/default/files/media/ECCC%20OCIJ%2028%20Feb%202013%20En.pdf>.

²⁷ Monthly Court Reports are available on the ECCC website at <http://www.eccc.gov.kh/en/public-affair/publication>.

²⁸ Press Release: Statement by the National Co-Prosecutor Regarding Case File 003, 10 May 2011.

²⁹ See brief biography of Co-Investigating Judge Blunk, available on the ECCC website, at <http://www.eccc.gov.kh/en/persons/dr-siegfried-blunk/>.

³⁰ Thomas Miller, *KRT Judge Talks Court Controversies*, PHNOM PENH POST, 18 August 2011, *available at* <http://www.phnompenhpost.com/national/krt-judge-talks-court-controversies>.

³¹ Press Release by the International Co-Investigating Judge, 10 October 2011, *available at* [http://www.eccc.gov.kh/sites/default/files/media/correctedECCC-INT-CIJ%2010%20Oct%202011%20\(Eng\).pdf](http://www.eccc.gov.kh/sites/default/files/media/correctedECCC-INT-CIJ%2010%20Oct%202011%20(Eng).pdf):

After his appointment on 1 December 2010, the International Co-Investigating Judge of the ECCC proceeded with investigations in Cases 003 and 004 in the expectation that a previous statement

Finally, Co-Investigating Judge Harmon continues to actively investigate Cases 003 and 004, in contradiction to DeFalco's claim that the cases "languish"³² in the investigative stage where they risk being "shuttered."³³ The Co-Investigating Judges have not yet charged any suspect,³⁴ indicating that they have not yet found "clear and consistent evidence" that the suspects are senior leaders or among those most responsible for crimes within the Court's jurisdiction.³⁵

Instead of undertaking a neutral analysis of the controversy, DeFalco seeks to confirm his pre-determined conclusion by starting with the assumption that failure to bring Cases 003 and 004 to trial is a result of government interference. He fails to recognize that the Co-Investigating Judges may have had legitimate disagreements as to whether the suspects are most responsible, or that evidence to support the International Co-Prosecutor's allegations may be lacking. Reasonable judicial minds can reasonably disagree in interpreting the law and assessing the facts.

The ECCC's Negotiation History

DeFalco very briefly considers the negotiation history of the ECCC³⁶ and finds that the term "most responsible" was never defined by the RGC or the UN. He finds that the precise identities of suspects to be tried at the ECCC or the specific number of people to be tried

reportedly made by the Cambodian Prime Minister during a meeting with the Secretary-General that these cases "will not be allowed" did not reflect general government policy.

However, on 10 May 2011, the Cambodian Minister of Information stated "If they want to go into Case 003 and 004, they should just pack their bags and leave." Although the International Co-Investigating Judge initiated Contempt of Court proceedings against him and expected this to be a warning to other government officials, last week the Cambodian Foreign Minister reportedly stated "On the issue of the arrest of more Khmer Rouge leaders, this is a Cambodian issue... This issue must be decided by Cambodia" (Cambodia Daily 5 Oct 2011).

Although the International Co-Investigating Judge will not let himself be influenced by such statements, his ability to withstand such pressure by Government officials and to perform his duties independently could always be called in doubt, and this would also call in doubt the integrity of the whole proceedings in Cases 003 and 004.

Because of these repeated statements, which will be perceived as attempted interference by Government officials with Cases 003 and 004, the International Co-Investigating Judge has submitted his resignation to the Secretary-General as of 9 October 2011.

³² DeFalco, *Cases 003 and 004*, Abstract, p. 45, 46, 47, 56. The terms "languish" and "languished" appear six times in the article.

³³ *Id.* at 45, 46, 48.

³⁴ Although recent news reports indicate that one suspect in Case 004 has been summoned to the tribunal which may indicate that the Co-Investigating Judges intend to charge her. *See* Kuch Naren & Lauren Crothers, *Case 004 Suspect Called to Tribunal, Official Says*, CAMBODIA DAILY, 12 August 2014, available at <http://www.cambodiadaily.com/news/case-004-suspect-called-to-tribunal-official-says-66283/>.

³⁵ *See* ECCC Internal Rules, Rule 55(4) which provides that "clear and consistent" evidence is required for charging.

³⁶ DeFalco's consideration of the Supreme Court Chamber's decision in the Case 001 Judgment concerning personal jurisdiction will not be addressed, since DeFalco correctly concludes that the Supreme Court Chamber's jurisprudence is unhelpful because it did not define the term "most responsible."

were never specified.³⁷ While DeFalco is correct that a review of the negotiation history does not resolve the lack of clarity in the term “most responsible,” his review of the negotiation history is quite superficial. A closer look reveals that the term “most responsible” was included in the ECCC’s personal jurisdiction to ensure that Kaing Guek Eav *alias* Duch could be prosecuted.³⁸

A review of the negotiation history reveals that “most responsible” was intended to mean Duch. Prior to Duch being placed into custody in April 1999, whenever referring to the personal jurisdiction of the proposed court, the RGC mostly referred to the prosecution of senior leaders.³⁹ The UN also similarly referred to “leaders”⁴⁰ until its Group of Experts issued a report proposing an international tribunal similar to the ICTY and ICTR be established that should “focus upon those persons most responsible for the most serious violations of human rights during the reign of Democratic Kampuchea. This 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.”⁴¹ The Group of Experts pointed out that the available documentary evidence “appears quite extensive for some atrocities, most notably the operation of the interrogation centre at Tuol Sleng [S-21, where Duch was Chairman]. For other atrocities, documentary evidence that directly implicates individuals, whether at the senior governmental level or the regional or local level, is currently not available and may never be found....”⁴² This indicates that even the Group of Experts had Duch in mind when proposing this language.

³⁷ DeFalco, *Cases 003 and 004*, at 49.

³⁸ Duch was the chairman of the S-21 detention facility in Phnom Penh, where more than 12,000 prisoners are estimated to have been tortured and executed. See *Case of Kaing Guek Eav alias Duch*, 001/18-07-2007-ECCC/TC, Judgement 26 July 2010, E188, para. 23.

³⁹ See Stephen Heder, *The Personal Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia as Regards Khmer Rouge “Senior Leaders” and Others “Most Responsible” for Khmer Rouge Crimes: A History and Recent Developments*, 26 April 2012, (“Heder, *Personal Jurisdiction*”), at 5-8, available at <http://www.cambodiatribunal.org/sites/default/files/reports/Final%20Revised%20Heder%20Personal%20Jurisdiction%20Review.120426.pdf>. In 1991 round of peace negotiations, the Cambodian Government expressed that it still looked forward to trying “the Khmer Rouge ringleaders ... at an appropriate time.” It indicated that in addition to “top leaders,” “other leaders would be considered on a case-by-case basis. . . .” In 1993, Cambodian Prime Minister Hun Sen proposed to UN Secretary-General Boutros Boutros-Ghali that “Khmer Rouge leaders be tried before an International Tribunal” both for the crimes they committed while in power from 1975 to 1979 and for more recent atrocities. See also Hor Namhong 3 July Interview with BBC, SPK, 5 July 1991, FBIS EAS-91-130, 8 July 1991, p. 39; Chea Sim Optimistic About Beijing SNC Talks, Kyodo Bangkok, 13 July 1991, FBIS EAS-91-135, 15 July 1991, p. 36; Wants Trial for Khmer Rouge, *the Nation* (Bangkok), 14 July 1991, p. A3. Hun Sen Urges Khmer Rouge Expulsion from SNC, Phnom Penh Samleng Pracheachon Kampuchea Radio, 7 April 1993, FBIS EAS-93-066, 8 April 1993, p. 57-58.

⁴⁰ UN GA Res. 52/135, UN Doc. A/RES/52/135 (1998) noting that “no Khmer Rouge leader has been brought to account for his crimes[.]” Kofi A. Annan, *Human Rights Questions: Identical letters dated 15 March 1999 from the Secretary General to the President of the General Assembly and the President of the Security Council*, 53rd Sess., Agenda Item 110(b), UN Doc. A/53/850-S/1999/21 (16 March 1999).

⁴¹ Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135, UN Doc. No. A/53/850 and S/1999/231, Annex, 18 February 1999, para. 110, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/059/72/PDF/N9905972.pdf?OpenElement>.

⁴² *Id.*, para. 55.

The Group of Experts' recommendations concerning establishing an ICTY/ICTR style of tribunal were not accepted,⁴³ nor did the RGC or UN ever state that its recommendations concerning personal jurisdiction were accepted. Following the Group of Experts' mission to Cambodia, the Group Chairman Sir Ninian Stephen stated at a press conference that only "top leaders" would be prosecuted.⁴⁴ In March 1999, the Group of Experts' report was submitted by the UN Secretary-General to the General Assembly and to the Security Council.⁴⁵ However, according to historian Stephen Heder, "[c]ontradicting the carefully-qualified text of [the UN Group of Experts] report, [the UN Secretary-General] claimed they had concluded there was sufficient evidence to justify legal proceedings against Khmer Rouge leaders, *omitting mention of any other potential suspects*."⁴⁶

Following the Group of Experts' mission to Cambodia, Duch came into the public eye in April 1999 and began giving interviews. He was placed into the custody of a military tribunal in May 1999. According to Heder, Prime Minister Hun Sen was compelled to place Duch in detention "to shut him up."⁴⁷ It was at this time that the phrase "most responsible" was added to RGC and UN discussions of the Court's jurisdiction, to ensure that Duch could be prosecuted by any future tribunal even though he was not considered to be a senior leader. According to the UN Special Representative for Human Rights in Cambodia, Thomas Hammarberg, a source DeFalco failed to consider, "[Duch] had no leading position in the party but is regarded as highly responsible for the mass killing. If he were not indicted, there would definitely be questions."⁴⁸

According to Heder's earlier 2003 article, during negotiations, the UN Office of Legal Affairs:

suggested several forms of words that might be appended to the basic limitation on 'senior leaders' to cover Duch, such as those 'who, because of their special functions or duties, were most responsible for crimes and serious violations;' or were 'most notorious perpetrators of crimes serious violations;' or – as it had originally suggested – who were 'most responsible for crimes and serious violations.' In communications to UN member states, [the UN Office of Legal Affairs] now talked in terms of a trial of 'senior leaders of the Khmer Rouge et al,' while Hun Sen reminded Special Representative Hammarberg that the 'et al' must not include anyone who – like Chea

⁴³ The Court ultimately established was instead a domestic Cambodian court with international technical assistance. Article 2 new of the Establishment Law confirms that the ECCC is "established in the existing court structure."

⁴⁴ Stephen Heder, *The Personal Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia as Regards Khmer Rouge "Senior Leaders" and Others "Most Responsible" for Khmer Rouge Crimes: A History and Recent Developments*, 26 April 2012, ("Heder, *Personal Jurisdiction*"), at 21, available at <http://www.cambodiatribunal.org/sites/default/files/reports/Final%20Revised%20Heder%20Personal%20Jurisdiction%20Review.120426.pdf>.

⁴⁵ See identical letters dated 15 March 1999 from the Secretary-General to the President of the General Assembly and the President of the Security Council, UN Doc. No. A/53/850 and S/1999/231, 16 March 1999, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/059/72/PDF/N9905972.pdf?OpenElement>.

⁴⁶ Stephen Heder, *Cambodia, Nazi Germany and the Stalinist Soviet Union: Intentionality, Totalitarianism, Functionalism and the Politics of Accountability*, (Draft for Presentation at the German Historical Institute, Washington, DC, 29 March 2003), p. 49 (emphasis added).

⁴⁷ *Id.* at 51-52.

⁴⁸ See Heder, *Personal Jurisdiction*, p. 27, quoting "Thomas Hammarberg to Ralph Zacklin, 2 July 1999."

Sim, Heng Samrin and himself – could be credited with having ‘helped to overthrow the genocide.’⁴⁹

As long as the wording used would cover Duch, the UN appears to have been unconcerned about the exact language used in the statute that would govern the Court. In talks between the RGC and the UN held in July 2000 on, *inter alia*, the scope of personal jurisdiction, “the UN delegation underlined that the issue was a political one, which the Cambodian authorities had to decide upon.”⁵⁰ The UN commented on Article 1 of the draft Establishment Law that “the formulation of this article is a political decision to be taken at the national level.”⁵¹

Even after the “most responsible” language was included in the draft Statute, in discussing the draft at a parliamentary meeting, Senior Minister in charge of the Council of Ministers Sok An stressed that the law aimed “to try a small targeted group,” a “group that is not widespread,” defined “distinctly and obviously to the smallest number,” and which excluded “all the lower ranks and the rank-and-file” from prosecution.⁵² “Other members of Hun Sen’s Party declared that except for senior leaders, everyone else ‘who used to serve in the Democratic Kampuchea regime,’ including political and military cadre and combatants, need ‘not worry at all’ about being prosecuted.”⁵³

DeFalco limits his analysis to an overview of the conclusions reached by Heder (in a recent article on the issue⁵⁴) and former United States Ambassador-at-large for War Crimes David Scheffer concerning how personal jurisdiction was addressed during negotiations to create the ECCC.⁵⁵

⁴⁹ Stephen Heder, *Cambodia, Nazi Germany and the Stalinist Soviet Union: Intentionality, Totalitarianism, Functionalism and the Politics of Accountability*, (Draft for Presentation at the German Historical Institute, Washington, DC, 29 March 2003), p. 53.

⁵⁰ Heder, *Personal Jurisdiction*, at 35, citing Hans Corell, Note to the Secretary-General Subject: Trial of Khmer Rouge – discussions in Phnom Penh 4-7 July 2000, 7 July 2000.

⁵¹ *Id.* at 35, citing “Phnom Penh, 7 July 2000 at 3:00 PM: Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea.”

⁵² Stephen Heder, *Cambodia, Nazi Germany and the Stalinist Soviet Union: Intentionality, Totalitarianism, Functionalism and the Politics of Accountability*, (Draft for Presentation at the German Historical Institute, Washington, DC, 29 March 2003), p. 54.

⁵³ *Id.*

⁵⁴ Heder has published multiples articles addressing the negotiation history of the ECCC. The article reviewed by DeFalco is Heder’s 1 August 2011 article *A Review of the Negotiations Leading to the Establishment of the Personal Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia*, which is available at <http://www.cambodiatribunal.org/sites/default/files/A%20Review%20of%20the%20Negotiations%20Leading%20to%20the%20Establishment%20of%20the%20Personal%20Jurisdiction%20of%20the%20ECCC.pdf>. Heder later published *The Personal Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia as Regards Khmer Rouge “Senior Leaders” and Others “Most Responsible” for Khmer Rouge Crimes: A History and Recent Developments*, in 26 April 2012. This article appears to be a revised and edited version of the 2011 article. It is available at <http://www.cambodiatribunal.org/sites/default/files/reports/Final%20Revised%20Heder%20Personal%20Jurisdiction%20Review.120426.pdf>.

⁵⁵ DeFalco, *Cases 003 and 004*, at 48-49. DeFalco also briefly notes that the object and purpose of the Agreement cannot be considered when defining the term “most responsible” as the VCLT requires, because doing so “results in problems of circularity” and because “there is no apparent plain meaning” of the term. *Id.* at 50.

DeFalco's reliance on Heder's recent article on the negotiation history is problematic, given Heder's underlying motivation in writing on this topic. Heder is co-author of the book *Seven Candidates for Prosecution: Accountability for the Crimes of the Khmer Rouge*. This book was republished in 2004, during the ECCC's establishment and in anticipation of the Co-Prosecutors' preliminary investigations.⁵⁶ Heder then worked as an analyst for the Co-Prosecutors in 2006,⁵⁷ which at the time was investigating the surviving "candidates for prosecution" that Heder had identified in his book just two years earlier. In December 2006, Heder transferred to the Office of the Co-Investigating Judges ("OCIJ") to work as an investigator – essentially to investigate the Introductory Submission he assisted in drafting (a profound conflict of interest ignored by the OCIJ).⁵⁸ After either resigning because he was unhappy with a decision to close the investigation into Case 003, or having his contract terminated,⁵⁹ he wrote *The Personal Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia as Regards Khmer Rouge "Senior Leaders" and Others "Most Responsible" for Khmer Rouge Crimes: A History and Recent Developments*, in which he summarized at length the negotiations for the establishment of the ECCC and concluded that "the most reasonable interpretation, legally speaking" of the ECCC's personal jurisdiction is

⁵⁶ STEPHEN HEDER & BRIAN TITTEMORE, *SEVEN CANDIDATES FOR PROSECUTION: ACCOUNTABILITY FOR THE CRIMES OF THE KHMER ROUGE* (March 2004). The report was originally published in June 2001 through the War Crimes Research Office, Washington College of Law, American University. The 2004 version of the report was republished in cooperation with the Documentation Center of Cambodia.

⁵⁷ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC, Co-Prosecutors' Request to Hear a Further 2 Experts and 13 Witnesses in the First Phase of the Trial and Notice of Intention to Put 7 Video-Clips Relating to Nuon Chea Before the Trial Chamber Pursuant to Rule 87(4), 5 July 2011, E93/7, para. 9; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ, Request for Information Concerning Potential Conflict of Interest, 10 January 2008, A121; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ, OCIJ Letter to the Defence, Request for Information Regarding an Eventual Conflict of Interest, 24 January 2008 ("OCIJ 2008 Letter to the Defence"), A121/I, p. 1.

⁵⁸ Heder may have held various positions within the OCIJ over the years. According to a December 2009 OCP filing, Heder was employed as an OCIJ Investigator and later "retain[ed] consultative status" with the OCIJ. See *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ, Co-Prosecutors' Request for Appointment of Experts, 14 December 2009, D281, para. 18; See *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ/PTC, Application for Disqualification of OCIJ Investigator Stephen Heder and OCIJ Legal Officer David Boyle in the Office of the Co-Investigating Judges, 8 July 2009.

⁵⁹ In May 2011, Heder sent an email to the Co-Investigating Judges, which stated: "In view of the judges' decision to close the investigation into Case File 003 effectively without investigating it, which I, like others, believe was unreasonable; in view of the UN staff's evidently growing lack of confidence in your leadership, which I share; and in view of the toxic atmosphere of mutual mistrust generated by your management of what is now a professionally dysfunctional office, I have concluded that no good use can or will be made of my consultancy services." See *Safeguarding Judicial Independence in Mixed Tribunals: Lessons from the ECCC and Best Practices for the Future*, INTERNATIONAL BAR ASSOCIATION REPORT, September 2011. On 12 June 2011, 12 June 2011, the Co-Investigating Judges issued a press release, stating: "In view of questions by the media regarding recent attempts by certain OCIJ staff members who have obtained new jobs outside of OCIJ, to portray their departure as 'resignation' in protest over the CIJs' decision to close investigations in Case 003, the CIJs emphasize that they welcome the departure of all staff members who ignore the sole responsibility of the CIJs in this issue; the CIJs also emphasize that they are able to deal with Cases 003 and 004 in a competent and timely manner with remaining staff members, supplemented if necessary by short-term contractors." Press Release, Public Statement by Co-Investigating Judges, 12 June 2011. On 18 August 2011, the Phnom Penh Post published an interview with Co-Investigating Judge Siegfried Blunk in which Judge Blunk stated: "After the contract of [Mr. Heder] was not renewed by our Office for certain reasons, he obviously had an axe to grind, and in a toxic letter tried to portray the termination of his contract as his 'resignation' leveling all sorts of allegations at our Office. He would be well advised to bear in mind his post-contractual obligations." Thomas Miller, *KRT Judge Talks Court Controversies*, PHNOM PENH POST, 18 August 2011.

that it should include mid-level CPK leaders.⁶⁰ This conclusion is at odds with his earlier writings, which had analyzed the negotiations surrounding the establishment of the ECCC, and had concluded that the intention on both the RGC side and the UN side was to try “senior leaders-plus-Duch.”⁶¹ His more recent argument as to the meaning of “senior leaders” and “most responsible” must be considered as an effort to promote the thesis of his book and widen the jurisdiction of the Co-Investigating Judges.

DeFalco simply skims the negotiation history as summarized by Heder and Scheffer and fails to consider the drafters’ intent concerning the truly narrow scope intended by the term “most responsible” – a consideration that assuredly would have resulted in an undesired conclusion.

Cambodian Law

After concluding that the negotiation history is unhelpful in defining “most responsible,” DeFalco turns to Cambodian law, and correctly determines that “Cambodian law provides scant guidance.”⁶² However, he errs by concluding that “a comparative analysis of Cambodian and ECCC procedural law governing investigatory powers suggests that discretion to dismiss charges against individuals who could likely be successfully prosecuted for serious crimes should be construed extremely narrowly, as such a power is not explicitly provided for in either body of law.”⁶³ This misunderstands the extraordinary nature of the ECCC, as a specially constituted court of limited duration and limited jurisdiction.

Unlike normal Cambodian courts, the ECCC was intended to prosecute only “senior leaders and those who were most responsible” because it would not be practical to prosecute the otherwise potentially huge number of suspects. Comparing investigatorial discretion to dismiss cases in regular Cambodian courts to investigatorial discretion at the ECCC is comparing apples to oranges. Furthermore, it is ridiculous to assert that investigatorial discretion should be construed narrowly because “such a power is not explicitly provided for” when Articles 1 and 2 of the Establishment Law and Articles 1 and 2 of the Agreement do clearly limit the Court’s personal jurisdiction to senior leaders and those most responsible. If this is not considered to be a jurisdictional limitation on the Court, it must at the very least, as the Supreme Court Chamber found,⁶⁴ guide investigatorial discretion.

⁶⁰ DeFalco, *Cases 003 and 004*, p. 42.

⁶¹ Stephen Heder, *Cambodia, Nazi Germany and the Stalinist Soviet Union: Intentionality, Totalitarianism, Functionalism and the Politics of Accountability*, (Draft for Presentation at the German Historical Institute, Washington, DC, 29 March 2003), p. 54.

⁶² DeFalco, *Cases 003 and 004*, p. 50. DeFalco considered Cambodian law because Article 12(1) of the Agreement states: “The procedure shall be in accordance with Cambodian law. Where Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, guidance may also be sought in procedural rules established at the international level.”

⁶³ *Id.*

⁶⁴ *Case of Kaing Guek Eav alias Duch*, 001/18-07-2007-ECCC/SC, Appeal Judgement, 3 February 2012, F28, paras. 44-81.

International Jurisprudence and Procedure

DeFalco next turns to a consideration of international jurisprudence and procedure from the SCSL, ICTY, and the ICC.⁶⁵ DeFalco's basic criteria for determining who may be considered "most responsible" are correct, according to OCIJ, Trial Chamber, and ICTY jurisprudence.⁶⁶ These are: **a.** the gravity of the alleged crimes and **b.** the degree of responsibility of the individual in question. The error DeFalco makes is in his attempt to distill "themes of International Personal Jurisdiction Jurisprudence" from the international jurisprudence he considered.

Based on the jurisprudence he reviewed, DeFalco surmises that there is a *theme* in international jurisprudence of a *preference* for prosecution. He reasons that "only the ICTY has declined to prosecute a suspect based on finding him not amongst those 'most responsible' and this finding merely resulted in the suspect's prosecution in domestic courts."⁶⁷ If DeFalco is referring to the fact that the SCSL did not find that any suspects should not have been prosecuted because they did not bear "greatest responsibility," this, of course, depended on a myriad of factors, such as which suspects were chosen for prosecution and whether the suspects' ever challenged their prosecution on the grounds that they did not bear "greatest responsibility."

The fact that the SCSL did not find any suspects or accused to fall outside the meaning of "greatest responsibility" says nothing about whether the suspects in Cases 003 and 004 should be prosecuted or investigated at the ECCC. Furthermore, the ICTY's decisions to refer cases to national courts were not made based on any "preference for prosecution" but because of the UN Security Council's completion strategy for the ICTY.⁶⁸ Had the cases not been referred to national courts, they would have been prosecuted at the ICTY because the ICTY does not have a limited personal jurisdiction.⁶⁹

DeFalco states that unlike cases at the ICTY which are referred to national courts through the Rule 11*bis* procedure, the suspects in Cases 003 and 004 "would escape potential criminal liability altogether"⁷⁰ if they are not prosecuted at the ECCC. He finds this to be "a major

⁶⁵ DeFalco, *Cases 003 and 004*, at 51-55.

⁶⁶ See, e.g., *Case 003*, 003/07-09-2009-ECCC-OCIJ, Decision on Personal Jurisdiction and Investigative Policy Regarding Suspect, 2 May 2012, D48, para. 16; *Case of Kaing Guek Eav alias Duch*, 001/18-07-2007-ECCC/TC, Judgement 26 July 2010, E188, para. 22; *Prosecutor v. Lukić & Lukić*, IT-98-32/1-AR11bis.1, Decision on Milan Lukić's Appeal Regarding Referral, 11 July 2007, para. 25; *Prosecutor v. Kovačević*, IT-01-42/2-I, Decision on Referral of Case Pursuant to Rule 11*bis*, 17 November 2006, para. 20; *Prosecutor v. Trbić*, IT-05-88/1-PT, Decision on Referral of Case under Rule 11 *bis* with Confidential Annex, 27 April 2007, para. 19; *Prosecutor v. Janković*, IT-96-23/2-PT, Decision on Referral of Case under Rule 11*bis*, 22 July 2005, para. 19.

⁶⁷ DeFalco, *Cases 003 and 004*, at 55.

⁶⁸ See Security Council Resolution 1503, UN Doc. No. S/Res/1503, 28 August 2003.

⁶⁹ The ICTY Statute, Art. 1; Security Council Resolution 1534, UN Doc. No. S/Res/1534, 26 March 2004. The ICTY has competence to prosecute and try "persons responsible for serious violations of international humanitarian rights law." It does not limit its jurisdiction like the SCSL or ECCC. However, as a part of its completion strategy, the Security Council requested that the Tribunal take measures, including the transferring of cases involving intermediate and lower rank accused to competent national tribunals.

⁷⁰ DeFalco, *Cases 003 and 004*, at 55.

departure from the core principle of individual criminal responsibility that defines [international criminal law].”⁷¹ DeFalco asserts that because someone is suspected of a crime, there is a principle of international criminal law that that person *must* be prosecuted, *regardless* of any jurisdictional limitations on the courts. Not so. DeFalco provides no legal authority supporting his assertion, which, by all accounts, is grounded in emotive and evasive rhetoric.

There are alleged to have been many thousands of persons in Cambodia who bear some responsibility for the crimes that occurred during the Khmer Rouge period. DeFalco seems to believe that a “core principle” in international criminal law is violated by the fact that these persons have not been prosecuted, and as such seems to argue (at least by inference) that the ECCC should not have a limited personal jurisdiction, but should have jurisdiction over *all* persons.

Had the RGC and the UN intended to ensure that no person could “escape potential criminal liability” they would not have restricted the Court’s jurisdiction to senior leaders and those most responsible. DeFalco’s argument does not relate to the meaning of “most responsible.” Instead it takes issue with including the term “most responsible” in the Court’s founding documents. This is a policy-driven argument, grounded in situational ethics. Judges are not politicians in robes. They have no remit to decide where the RGC and the UN *should* have set the jurisdictional contours on who is to be prosecuted at the ECCC. The objective to hold individuals accountable for crimes must not be confused with the criteria set by the applicable law to do so. As the United States Seventh Circuit explained:

Knowledge of objectives is helpful, often vital, in interpreting and applying rules. But objectives must not be confused with criteria. Where certainty is at a premium, sound law-making requires the setting forth of clear and definite criteria rather than general directives to decide each case in the manner that will maximize the attainment of the law’s objectives. The latter approach, carried to the extreme, would reduce all law to an admonition to do what’s right.⁷²

Given the agreed objectives and criteria by the RGC and UN in setting the jurisdictional contours of the ECCC, judicial restraint in interpreting who or what constitutes “most responsible” would be salutary.

DeFalco’s Conclusion that the Suspects in Cases 003 and 004 are “Most Responsible”

Finally, DeFalco goes through the allegations against the individuals he believes are suspects,⁷³ based on documents he found on the internet purporting to be leaked copies of the Introductory Submissions in Cases 003 and 004 and on some allegations made in Heder’s

⁷¹ *Id.*

⁷² *Herrman v. Cencom Cable, Inc.*, 999 F.2d 223, 226 (7th Cir. 1993).

⁷³ The identities of the suspects in Cases 003 and 004 have not been made public by the Court; however, purported court documents leaked to the press have identified certain suspects.

book *Seven Candidates for Prosecution*.⁷⁴ DeFalco concludes that based on the allegations: “trials in both cases appear to be the only defensible course of action at this juncture and any other outcome should be viewed as a product of bad faith or unsound professional judgment.”⁷⁵ He asserts that if the cases are dismissed, “such action would deeply compromise the already fragile integrity of the ECCC as a legal institution.”⁷⁶ DeFalco does not have the benefit of reviewing the material cited in the Introductory Submissions or the material gathered during the several years of judicial investigation, unlike the Co-Investigating Judges. Yet, he presumes to know the only legally sound result that the Co-Investigating Judges could reach.

The allegations made in the Introductory Submissions are mere allegations made after preliminary investigations. The International Co-Prosecutor was required to determine, after only a preliminary investigation, that the suspects were “most responsible” before he could file Introductory Submissions naming them.⁷⁷ The International Co-Prosecutor’s opinion was disputed by his national colleague, and apparently also by Co-Investigating Judges You Bunleng and Blunk (at least in relation to some of the suspects), since they concluded the Case 003 investigation without issuing charges. The point of the judicial investigation is to determine whether there is sufficient evidence to support the allegations made in the Introductory Submissions. The International Co-Prosecutor’s preliminary determination cannot simply be accepted without a full judicial investigation. For the Co-Investigating Judges to fail to conduct a full investigation and to reach *their own* conclusion as to whether any suspect can be considered “most responsible” would be an abdication of their judicial functions.⁷⁸

Furthermore, in concluding that the suspects in Cases 003 and 004 are “most responsible,” DeFalco makes faulty comparisons. DeFalco compares the allegations in Cases 003 and 004 to the ICTY *Lukić, Milošević, and Delić* cases, which were not referred to national courts by the ICTY because the accused in those cases were considered to be “most responsible.”⁷⁹ He also points out that at the SCSL, the Prosecutor brought charges against twelve accused, even though, according to DeFalco, the “greatest responsibility” language in the SCSL Statute is narrower than “most responsible.”⁸⁰

As the ICTY, SCSL and ECCC deal with completely different factual scenarios, no meaningful comparison may be made between cases at the different tribunals. Perhaps Milan Lukić was considered “most responsible” for certain crimes that occurred in the former Yugoslavia and perhaps these crimes were less grave than those that allegedly occurred in

⁷⁴ DeFalco, *Cases 003 and 004*, at 56-57.

⁷⁵ *Id.* at 58.

⁷⁶ *Id.* at 46.

⁷⁷ ECCC Internal Rules, Rule 53. “If the Co-Prosecutor has 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.”

⁷⁸ ECCC Code of Judicial Ethics, 5 February 2007, Arts. 5(3), 5(4). Judges shall perform all judicial duties properly and expeditiously. Judges shall deliver their decisions without undue delay.

⁷⁹ DeFalco, *Cases 003 and 004*, at 58.

⁸⁰ *Id.*

Cambodia. This tells us nothing about whether the suspects in Cases 003 and 004 are “most responsible” for their alleged crimes. Perhaps there were twelve people who bore greatest responsibility for crimes that occurred in Sierra Leone. This also tells us absolutely nothing about how many people may have been “most responsible” for crimes that occurred in Cambodia.

The only legitimate comparison to determine whether the suspects in Cases 003 and 004 are “most responsible” would be to compare the gravity of their alleged crimes and their alleged level of responsibility to that of those who were convicted in Cases 001 and 002. DeFalco failed to make this comparison.

3. Conclusion

The legal definition “most responsible” is malleable. For example, in the ICTY *Lukić* case (in which International Co-Investigating Judge Mark Harmon was the senior prosecuting lawyer), the prosecution argued that the case should be referred to a state court “[d]espite the obvious gravity of the crimes....”⁸¹ *Lukić*, who preferred to be tried by the ICTY rather than at the BiH State Court (and serve his sentence in a BiH prison), argued that “the level of responsibility of the accused and the gravity of the crimes charged are incompatible with transfer.”⁸² At trial, obviously, the parties’ positions were reversed. This brings to mind a quote by English Judge Lord Atkin, which has been quoted by Judge David Hunt at the ICTY:

I know of only one authority which might justify the suggested method of construction:

“When I use a word,” Humpty Dumpty said in rather a scornful tone, “it means just what I choose it to mean, neither more nor less.” “The question is,” said Alice, “whether you can make words mean so many different things.” “The question is,” said Humpty Dumpty, “which is to be master – that’s all”.⁸³

Because the term “most responsible” is malleable, it is especially important to consider the ECCC’s negotiation history and the intent of the drafters of the Court’s founding documents. As discussed above, they considered the term to have a very narrow scope. Whether the suspects in Cases 003 and 004 will fall within this narrow scope will depend on the results of the judicial investigation, not on the mere allegations made by the International Co-Prosecutor or the pre-formed opinion of DeFalco.

DeFalco’s analysis is based on the argument that the suspects of Cases 003 and 004 must be tried because they are alleged to be “most responsible,” and if they are not tried by the

⁸¹ *Prosecutor v. Lukić & Lukić*, IT-98-32-I, Request by the Prosecutor under Rule 11 bis, 1 February 2005, para. 25. See also para. 15.

⁸² *Prosecutor v. Lukić & Lukić*, IT-98-32-I, Submission of Defence Counsel for Milan Lukić Pursuant to Order of 30 June 2006, 4 September 2006, opening para.

⁸³ *Prosecutor v. Slobodan Milošević*, IT-02-54-AR73.4, Dissenting Opinion of Judge David Hunt on Admissibility of Evidence in Chief in the Form of Written Statements, 21 October 2003, para. 19 (internal citations omitted).

ECCC, they will escape criminal responsibility. The errors in DeFalco's analysis were the result of the result-oriented approach DeFalco took in drafting his article. He cherry picked through relevant material to ensure a desired result.

DeFalco pre-determined that the suspects in Cases 003 and 004 are "most responsible" for crimes within the jurisdiction of the Court and set out to write his article in an attempt to demonstrate this and to encourage the Co-Investigating Judges to indict the suspects. DeFalco likely took this approach because he is a legal advisor to DC-Cam, an organization created to verify a pre-determined conclusion that genocide and crimes against humanity occurred in Cambodia.⁸⁴ Because it was written by an advisor to DC-Cam, DeFalco's article cannot be considered a neutral analysis of the law. It is a polemic, intended to influence the Co-Investigating Judges toward a desired result.

Considering DeFalco's position and purpose, the greatest flaw in his argument is perhaps unsurprising. The problem with DeFalco's logic is obvious: the judicial investigation is being conducted for the purpose of determining whether there is sufficient evidence that the suspects committed the crimes alleged and whether they are among those most responsible for the commission of crimes. It is only once this investigation has been completed and the evidence analyzed that such a determination can be properly made.

DeFalco's conclusion is based on emotional reasoning masquerading for rational legal analysis. In failing to objectively assess the law, DeFalco displays a profound lack of appreciation of the basic tenants of the Rule of Law, including the principle of the presumption of innocence⁸⁵ and the procedural system in place at the ECCC.

⁸⁴ DC-Cam, originally a field office for Yale University's Cambodian Genocide Program, was created as a result of the United States of America's Cambodian Genocide Justice Act in 1994. *See* 22 U.S.C. 2656, Part D, §§ 571–74. The Cambodian Genocide Justice Act assumes that crimes against humanity and genocide occurred in Cambodia. DC-Cam's mandate was to "collect relevant data on crimes of genocide committed in Cambodia." *Id.*, § 572. "a. In General. – Consistent with international law, it is the policy of the United States to support efforts to bring to justice members of the Khmer Rouge for their crimes against humanity committed in Cambodia between April 17, 1975, and January 7, 1979. b. Specific Actions Urged. – To that end, the Congress urges the President – 1. to collect, or assist appropriate organizations and individuals to collect relevant data on crimes of genocide committed in Cambodia...." This is still part of its mission today. The DC-Cam website states: "DC-Cam is working to reconstruct Cambodia's modern history, much of which has been obscured by the flames of war and genocide." DC-Cam website, *available at*: <http://www.dccam.org/About/History/Histories.htm>.

⁸⁵ Establishment Law, Art. 35 new. "The accused shall be presumed innocent as long as the court has not given its definitive judgment. In determining charges against the accused, the accused shall be equally entitled to the following minimum guarantees, in accordance with Article 14 of the International Covenant on Civil and Political Rights." International Covenant on Civil and Political Rights, 16 December 1966, UNTS vol. 999, p. 171, Art. 14(2). "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."