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PROSECUTING THOSE BEARING “GREATEST RESPONSIBILITY”: THE LESSONS OF THE SPECIAL COURT FOR SIERRA LEONE

CHARLES CHERNOR JALLOH*

This Article examines the controversial article 1(1) of the Statute of the Special Court for Sierra Leone (SCSL) giving that tribunal the competence “to prosecute those who bear the greatest responsibility” for serious international and domestic crimes committed during the latter part of the notoriously brutal Sierra Leonean conflict. The debate that arose during the SCSL trials was whether this bare statement constituted a jurisdictional requirement that the prosecution must prove beyond a reasonable doubt or merely a type of guideline for the exercise of prosecutorial discretion. The judges of the court split on the issue. This paper is the first to critically assess the reasons why the tribunal’s judges disagreed in the interpretation of this seemingly simple legal question. It then attempts to discern the common ground in the judicial reasoning, and argues that the ultimate conclusion that “greatest responsibility” implied that leaders as well as the worst killers may be prosecuted is a welcome jurisprudential contribution to our understanding of personal jurisdiction in international criminal law. The paper makes several contributions to the literature. First, it takes up and highlights a widely ignored but important legal question. Second, it demonstrates why the

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reasoning of the Appeals Chamber was results-oriented and wrong. Finally, it identifies the lessons of Sierra Leone and builds on them to offer preliminary recommendations on how the greatest responsibility conundrum can be avoided when drafting personal jurisdiction clauses for future ad hoc international penal tribunals.

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I. INTRODUCTION

The Special Court for Sierra Leone (“SCSL” or “the court”) was established through a bilateral treaty between the United Nations and the Government of Sierra Leone (GoSL) signed on January 16, 2002.¹ The SCSL’s *jurisdiction ratione materiae*² included crimes against humanity, war crimes, other serious violations of international humanitarian law, as well as various offenses under Sierra Leonean law prohibiting the abuse of underage girls, wanton destruction of property, and arson.³ Though the Sierra Leonean conflict started in March 1991,⁴ the jurisdiction *ratione temporis*⁵ only covers the crimes perpetrated after November 30, 1996.⁶ This means that, over the objections of the national authorities, the international community, as represented by the U.N., only supported prosecution of the atrocities committed during the second half of the conflict.⁷ With respect to *ratione loci* jurisdiction,⁸ the Court was authorized to prosecute the crimes that occurred within the territory of Sierra Leone.⁹

Given the SCSL’s limited subject matter, temporal, and territorial jurisdiction,¹⁰ it is evident that the U.N.’s goal was to establish an ad hoc tribunal with a narrower and more focused mandate compared to the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR), which had been created by the Security Council (“UNSC” or “the Council”) in 1993 and 1994, respectively.¹¹

1. Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, U.N.-Sierra Leone, Jan. 16, 2002, 2178 U.N.T.S. 137 [hereinafter U.N.-Sierra Leone Agreement].

2. BLACK’S LAW DICTIONARY 930 (9th ed. 2009) (directing reader from *jurisdiction ratione materiae* to *subject-matter jurisdiction*).

3. Statute of the Special Court for Sierra Leone arts. 2–5, Jan. 16, 2002, 2178 U.N.T.S. 145 [hereinafter SCSL Statute].

4. U.N. Secretary-General, *Report on the Establishment of a Special Court for Sierra Leone*, ¶ 25, U.N. Doc. S/2000/915 (Oct. 4, 2000) [hereinafter Secretary-General, *Report on SCSL*].

5. BLACK’S LAW DICTIONARY 930 (9th ed. 2009) (directing reader from *jurisdiction ratione temporis* to *temporal jurisdiction*).

6. U.N.-Sierra Leone Agreement, *supra* note 1, art. 1(1); Secretary-General, *Report on SCSL*, *supra* note 4, ¶ 25.

7. *See* SCSL Statute, *supra* note 3, art. 1(1).

8. *See* BLACK’S LAW DICTIONARY 1377 (9th ed. 2009) (“By reason of place.”).

9. U.N.-Sierra Leone Agreement, *supra* note 1, art. 1(1).

10. Secretary-General, *Report on SCSL*, *supra* note 4, ¶¶ 1, 12, 27.

11. S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993); S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

Article 1(1) of the U.N.-Sierra Leone Agreement, and its annexed statute, defined the Court's *ratione personae* jurisdiction—that is, the “power to bring a person into its adjudicative process.”¹² It gave the SCSL competence in the following terms: “to prosecute persons who bear the *greatest responsibility* for serious violations of international humanitarian law and Sierra Leonean law . . . including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.”¹³

A. Greatest Responsibility Jurisdiction and Its Significance

There is no aspect of the Court's jurisdiction that was more controversial than the notion that it should prosecute only those persons bearing “the greatest responsibility” for what happened in Sierra Leone during the second half of that country's notoriously brutal conflict. Indeed, the idea of greatest responsibility had been controversial from the moment the UNSC proposed the phrase to the U.N. Secretary-General (UNSG) as a way to define the SCSL's personal jurisdiction in the resolution that it requested him to negotiate with the GoSL to establish the court.¹⁴ Several factors explain why this qualified personal jurisdiction was contentious, which in turn, make the issue worthy of further study in this article.

First, while both the UN-Sierra Leone Agreement and the SCSL Statute included the phrase, neither specified what it meant.¹⁵ Yet, both instruments gave prominence to the idea as each mentioned the phrase at least twice: first, in the personal jurisdiction provision in Article 1(1),¹⁶

12. BLACK'S LAW DICTIONARY 930 (9th ed. 2009).

13. SCSL Statute, *supra* note 3, art. 1 (emphasis added). The Agreement between the United Nations and Sierra Leone also provided, in Article 1, as follows:

(1) There is hereby established a Special Court for Sierra Leone 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.

(2) The Special Court shall function in accordance with the Statute of the Special Court for Sierra Leone. The Statute is annexed to this Agreement and forms an integral part thereof.

U.N.-Sierra Leone Agreement, *supra* note 1, art. 1.

14. See S.C. Res. 1315, ¶ 3, U.N. Doc. S/RES/1315 (Aug. 14, 2000). For an account of the controversy, see *Report on SCSL*, *supra* note 4, ¶¶ 29–31.

15. Charles Chernor Jalloh, *Special Court for Sierra Leone: Achieving Justice?*, 32 MICH. J. INT'L L. 395, 413 (2011).

16. SCSL Statute, *supra* note 3, art. 1(1); U.N.-Sierra Leone Agreement, *supra* note 1,

and second, in the clause setting out the powers of the prosecutor in Article 15 of the Statute.¹⁷ Although the framers appeared to have included these two provisions to underscore the court's narrow jurisdiction and to ensure that the prosecutions would stay within the strict boundaries that they had demarcated, Article 1 and Article 15, when taken separately but also when considered together, sent two apparently contradictory messages.

When taken separately, the provisions in Article 1 suggested, at least to the defense counsel and their clients, that the greatest responsibility phrase established a jurisdictional requirement that the prosecution must fulfill.¹⁸ A (perceived) failure to do so meant that the defense could challenge the non-compliance before the judges. If successful, the defendants would not be prosecutable by the tribunal. When taken together, Article 15 and Article 1 gave rise to a debate about the actual mandate and function of the prosecutor, in particular, the extent and limits of his discretion in deciding whom to prosecute. Effectively, the defendants sought to take advantage of the vagueness of the greatest responsibility formulation in both provisions, attempting to further curb the scope of the prosecutorial power by suggesting that the prosecutor had acted beyond his competence in seeking to prosecute them instead of others.¹⁹ The problem is that the prosecution's fight to keep its turf tended to exaggerate the broad scope of its authority and further masked the real nature of greatest responsibility jurisdiction.

Second, although the UNSC, the U.N. Secretary-General, and the GoSL purportedly agreed on the meaning of "greatest responsibility" in the letters that they exchanged during the negotiations of the court's founding instruments,²⁰ the correspondence was marked by sharp disagreement and ultimately left a measure of ambiguity regarding the actual purpose and implications of the phrase.²¹ So, once the tribunal

art. 1.

17. SCSL Statute, *supra* note 3, art. 15(1).

18. Jalloh, *supra* note 15, at 414–15.

19. See discussion *infra* Part III.B–C.

20. U.N. President of the S.C., Letter dated Jan. 31, 2001 from the President of the Security Council addressed to the Secretary-General, para. 1, U.N. Doc. S/2001/95 (Jan. 31, 2001) [hereinafter Letter dated Jan. 31, 2001 from Pres. of S.C.].

21. Yet, undoubtedly because of awareness of the controversies that dogged this phrase in Sierra Leone, the draft statute for the Special Tribunal for Kenya, which ultimately failed to obtain sufficient support in that country's Parliament, at least attempted to provide a definition. See Special Tribunal for Kenya Bill, pt. I, § 2 (Jan. 28, 2009), available at http://www.kenyalaw.org/Downloads/Bills/2009/The_Special_Tribunal_for_Kenya_Statute_20

was established and became operational, it would only take a matter of time for the issue to boil to the surface and for the judges to be asked to give their rulings on the subject.

Third, starting with the International Military Tribunal at Nuremberg (“IMT” or “Nuremberg Tribunal”) continuing through the ad hoc ICTY and ICTR and the permanent International Criminal Court (ICC), the thrust of international criminal law has been to focus on prosecuting the top leaders and architects of mass atrocities.²² However, this was the first time that the language mandating the prosecution of only those bearing *greatest responsibility* was introduced into the statute of an ad hoc, international, penal tribunal.²³ Though on one level this could be argued to be an innovation in the SCSL, the reality is that, as this article will show, the vague greatest responsibility phrase was more of an explicit limitation on the court’s jurisdiction in terms of the number of people that it would eventually prosecute.²⁴

While the SCSL’s work is nearing completion, with appeals judgment outstanding solely in the case involving former Liberian President Charles Taylor as of this writing,²⁵ the debate about the nature and scope of greatest responsibility is important for a proper assessment of the jurisprudential legacy of the court. More significantly, it seems crucial because it might offer useful lessons for future formulations of personal jurisdiction in other international criminal courts. Indeed, while both the ICTY and ICTR were endowed with personal jurisdiction to investigate and prosecute “persons responsible,” since the establishment of the SCSL, it appears that the “greatest responsibility” threshold has become the gold standard for the framing of *ratione personae* jurisdiction in contemporary international criminal courts.

09.pdf.

22. See discussion *infra* Part II.A–B.

23. See SCSL Statute, *supra* note 3, art. 1(1).

24. See *infra* Part II.B. In fact, the President of the Special Court later presented the uniquely structured personal jurisdiction as an “innovation in the structure of international courts and tribunals.” GEOFFREY ROBERTSON, FIRST ANNUAL REPORT OF THE PRESIDENT OF THE SPECIAL COURT FOR SIERRA LEONE (2002–2003), available at <http://www.scsl.org/LinkClick.aspx?fileticket=NRhDcbHrcSs%3d&tabid=176>.

25. Oral hearing of the appeal commenced at 10:00 a.m. on Jan. 22, 2013. Prosecutor v. Taylor, Case No. SCSL-03-01-A, Decision on Urgent Motion for Reconsideration or Review of “Scheduling Order,” (Dec. 5, 2012), available at <http://www.scsl.org/LinkClick.aspx?fileticket=%2fE4wpxbRjr8%3d&tabid=191>; Jennifer Easterday, *Parties In Taylor Trial Make Appeals Submissions*, THE TRIAL OF CHARLES TAYLOR (Jan. 22, 2013), <http://www.charlestaylortrial.org/2013/01/22/parties-in-taylor-trial-make-appeals-submissions/>.

Surprisingly, although a decade-long controversy persisted over the meaning of greatest responsibility at the court, the question of what exactly the phrase means and the benchmark, if any, that the prosecutors of international criminal courts with an expiry date should use to select those persons most deserving of prosecution inside their own courtrooms, as opposed to domestic ones, seems to have escaped the attention of scholars.²⁶ Perhaps the general feeling outside the defense bar at the SCSL was that resolving this question would not change the outcome in the concrete cases brought by the prosecution, or that, as Professor David Cohen has argued, this type of narrow personal jurisdiction essentially relieved the court of the burden of deciding whether to prosecute any middle or lower ranking perpetrators.²⁷ Or it may be that, as Professor William Schabas has suggested, academic lawyers recognized greatest responsibility as a rather vacuous concept that said more about donor generosity in the first court, which would be funded entirely by donations from states, than something with “any autonomous legal meaning.”²⁸

Yet, the moral and practical dangers of glossing over “greatest responsibility” jurisdiction will remain for time and resource constrained international criminal tribunals. The SCSL’s attempt to grasp this proverbial nettle appears to, therefore, have wider significance for other penal courts tasked with a similar mandate. This is all the more so because states increasingly resort to the greatest responsibility formula popularized by the court to indicate the attitude that the expensive work of international criminal tribunals should generally be limited to trials of only a handful of top leaders instead of a large number of perpetrators, including lower ranked suspects.²⁹

It is against this backdrop that this Article, which seeks to fill the current gap in the literature, will attempt to discern the meaning of “greatest responsibility” personal jurisdiction. Its general aims are

26. Although a Westlaw TP-ALL database search of the phrase “those who bear the greatest responsibility” returned approximately 120 results, only one article seems to have taken up the issue. See Sean Morrison, *Extraordinary Language in the Courts of Cambodia: Interpreting the Limiting Language and Personal Jurisdiction of the Cambodian Tribunal*, 37 CAP. U. L. REV. 583, 610–14 (2009).

27. David Cohen, “Hybrid” Justice in East Timor, Sierra Leone, and Cambodia: “Lessons Learned” and Prospects for the Future, 43 STAN. J. INT’L L. 1, 11 (2007) (discussing the creation of the SCSL).

28. W.A. Schabas, *Genocide Trials and Gacaca Courts*, 3 J. INT’L CRIM. JUST. 879, 882 n.11 (2005).

29. See *infra* notes 75–79 and accompanying text.

twofold. First, to determine how that phrase was developed, interpreted, and applied for the first time in international criminal law at the SCSL. Essentially, even as the court introduced this phrase to our lexicon, I will examine whether the judges advanced our understanding of this type of narrow way of setting out personal jurisdiction, and, if so, how and if not, why not. Second, to situate the SCSL's experience within the broader normative evolution of international criminal justice. The idea is to identify, to the extent possible, the types of lessons that should be learned for future tribunals that might be expressly created with a limited mandate of bringing only the architects of the core crimes to justice. Besides the moral dilemma inherent in conferring impunity on some through their non-prosecution, while prosecuting a few others, it is important to determine whether the SCSL devised a principled approach to greatest responsibility that might serve at least as a starting point for considerations of who should be the targets for internationally supported prosecutions from among a mass of perpetrators.

Overall, while noting that the U.N., in particular the Security Council, made some problematic jurisdictional choices that ultimately resulted in the SCSL conducting an inadequate number of prosecutions compared to the ICTY and the ICTR, I will argue that the court's jurisprudence on this question has offered international criminal law a useful starting point regarding how to determine who it is that may be said to bear *greatest responsibility* for the purposes of prosecution in an international criminal court. That said, I will show that the interpretation preferred by the majority of the SCSL judges focused more on ensuring that those before the court would actually be tried rather than engaging the more challenging issue about how we might best distinguish between those that have greater versus lesser degrees of individual criminal responsibility for the international crimes committed in a given armed conflict.

B. Structure of the Article and Main Arguments

The article is organized as follows. Part II provides a brief overview of the way that personal jurisdiction has been expressed in international criminal courts from the watershed Nuremberg International Military Tribunal to the present. By reviewing the personal jurisdiction clauses of prior ad hoc courts, this section of the paper will demonstrate that the focus of such tribunals has generally been to punish only a limited group of persons in high-ranking leadership positions. The tendency to emphasize the so-called big fish, instead of small fish, continued as a general matter with the modern ICTY and ICTR, and due to a variety

of factors, including concerns about costs and speed, reached its apex by the time the SCSL was formally established.

In Part III, I examine the fierce disagreement regarding the meaning of “greatest responsibility,” which, driven by the challenges made by some defense counsel, arose between the judges of the two trial chambers at the SCSL. I will show that Trial Chamber I correctly determined that greatest responsibility was intended to be both a jurisdictional requirement and a guideline for the exercise of prosecutorial discretion, while Trial Chamber II incorrectly interpreted it *solely* as a type of guidance for the exercise of prosecutorial discretion. Although the Appeals Chamber weighed in to endorse what I respectfully submit was the wrong interpretation, thereby weakening the value of the court’s case law on this issue, there was sufficient common ground among the majority of the SCSL judges. We can therefore discern a clear jurisprudential path holding that greatest responsibility personal jurisdiction should be understood to include both those in leadership and high ranking positions as well as their most cruel underlings, whose conduct was so outrageous and beyond the pale that it merited international, rather than domestic, investigation and prosecution.

In Part IV, I use established methods of treaty interpretation in an attempt to locate the ordinary meaning of the phrase “to prosecute persons who bear the greatest responsibility” in light of the text, object and purpose of the SCSL Statute and the drafting history of that provision, as well as the tribunal’s judicial practice. In this regard, I assess the extent to which the solution proffered by the appeals court judges was consistent, or inconsistent, with the apparent intention behind the greatest responsibility clause articulated in Article 1. I will contend that had the Appeals Chamber adopted a different reading of the law, it would still have been able to dispense justice—contrary to what it implied in its judgment—and in that way, would have made a better contribution to the court’s ultimate jurisprudential legacy.

Part V draws some conclusions. I offer preliminary reflections on ways treaty drafters might in the future alleviate some of the challenges inherent in deploying the greatest responsibility personal jurisdiction standard as the statutory mandate for the investigation and prosecution of some of the world’s worst crimes.

II. PERSONAL JURISDICTION IN INTERNATIONAL CRIMINAL LAW FROM NUREMBERG TO FREETOWN

A. *The Nuremberg and Tokyo Tribunals Had Limited Personal Jurisdiction*

Although unique in its terminology, the SCSL is not alone in having a restricted personal jurisdiction.³⁰ In fact, there is a discernible trend to limit international tribunal prosecutions to a relatively small group of political and military leaders deemed most responsible for the widespread violence.³¹ This doctrinal attitude dates back to the origins of modern international criminal law.³² It is predicated on the pragmatic recognition that individual accountability at the international level, when compared to domestic legal systems, can only be meted out swiftly and efficiently in relation to a small group of perpetrators. Thus, by circumscribing the scope of international trials in the hope of deterring the top brass, rather than all of them together with their subordinates, international penal law also carves out an informal division of labor between national and international criminal jurisdictions. One way it increasingly does this is to devise institutional mechanisms to ensure that the planners, leaders and others responsible for fomenting heinous international crimes are prosecuted at the international level wherever the relevant national jurisdictions are unable or unwilling to prosecute.³³ This arrangement anticipates that the middle and lower ranking suspects would be investigated and prosecuted in domestic courts so that there is no impunity gap.³⁴ This general approach finds expression in the personal jurisdiction clauses of international criminal courts and in their

30. See generally Morrison, *supra* note 26, at 605–15 (discussing the limiting language in personal jurisdiction statutes of ad hoc and hybrid tribunals, as well as the manner in which that language has been interpreted).

31. See Morrison, *supra* note 26, at 588. See generally Cohen, *supra* note 27.

32. See Charter of the International Military Tribunal art. 6, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter IMT Charter]; see also Memorandum to President Roosevelt from the Secretaries of State and War and Attorney General, § III (Jan. 22, 1945), available at <http://avalon.law.yale.edu/imt/jack01.asp> (noting that the “outstanding offenders are, of course, those leaders of the Nazi Party and German Reich who since January 30, 1933, have been in control of formulating and executing Nazi policies”).

33. See, e.g., ICC-OTP, *Prosecutorial Strategy 2009–2012*, para. 19 (Feb. 1, 2010) [hereinafter *Prosecutorial Strategy*]; Office of the Prosecutor, *Report on Prosecutorial Strategy*, pt. II, ICC (Sept. 14, 2006) [hereinafter *Report on Prosecutorial Strategy*].

34. See, e.g., *Prosecutorial Strategy*, *supra* note 33, para. 19; *Report on Prosecutorial Strategy*, *supra* note 33, pt. II.a.

practice.³⁵

Article 1 of the IMT Charter declared as its purpose “the just and prompt trial and punishment of the *major* war criminals of the European Axis.”³⁶ Under the heading “Jurisdiction and General Principles,” Article 6 specified that the tribunal “shall have the power to try and punish persons who . . . whether as individuals or as members of organizations, committed . . . crimes against peace[,] . . . war crimes[,] . . . [and] crimes against humanity.”³⁷ In a provision that seems to be more about the modes of participation in international crimes than about personal jurisdiction as such, Article 6 spelled out the types of individuals that were envisaged to fall within the personal jurisdiction as those “[l]eaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes” and, moreover, placed responsibility on these individuals “for all acts performed by any persons in execution of such plan.”³⁸ The Tokyo Tribunal essentially reflected an identical position in Articles 1 and 5 of its statute,³⁹ although its geographic focus was on the “major war criminals in the Far East,”⁴⁰ whereas the IMT addressed those who masterminded the atrocities committed in the European theatre.⁴¹

Despite some criticisms of those tribunals as “victor’s justice,”⁴² as part of their achievements, they did prosecute and convict high-ranking government officials associated with the German and Japanese wartime regimes. In the Nuremberg Tribunal, these ranged from Herman

35. See SCSL Statute, *supra* note 3, art. 1(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, U.N.-Cambodia, art. 1, June 6, 2003, 2329 U.N.T.S. 117 [hereinafter U.N.-Cambodian Agreement]; U.N.-Sierra Leone Agreement, *supra* note 1, art. 1(1); Morrison, *supra* note 26, at 587–88.

36. IMT Charter, *supra* note 31, art. 1 (emphasis added).

37. *Id.* art. 6.

38. *Id.*

39. *Id.* art. 1–6; *cf.* International Military Tribunal for the Far East arts. 1–5, Jan. 19, 1946, 4 U.S.T. 20, T.I.A.S. No. 1589 [hereinafter IMTFE Charter], available at <http://www.jus.uio.no/english/services/library/treaties/04/4-06/military-tribunal-far-east.xml>.

40. IMTFE Charter, *supra* note 39, art. 1.

41. IMT Charter, *supra* note 32, art. 1.

42. William A. Schabas, *Victor’s Justice: Selecting “Situations” at the International Criminal Court*, 43 J. MARSHALL L. REV. 535, 537 (2010) (quoting Prosecutor v. Tadic, Case No. IT-94-1-T, Decision on Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, ¶ 21 (Int’l Crim. Trib. for the Former Yugoslavia Aug. 10, 1995)).

Goering, the “Successor Designate”⁴³ to Adolf Hitler, to the commander in chief of the Germany Navy, Admiral Karl Doenitz, who later replaced the *Fuehrer* after he committed suicide, and to a number of other highly ranked military and civilian officials.⁴⁴ Those prosecutions set the stage for the subsequent American and other allied national prosecutions of World War II offenses within their respective zones of occupation under Control Council Law 10.⁴⁵ Even in the setting of allied country prosecutions, it was, at least initially, mainly senior military officers that were tried.⁴⁶ These officers spanned from lieutenant colonels to majors, captains, and generals, as exemplified by, for instance, the *United States v. Pohl* case.⁴⁷

Similarly, at the International Military Tribunal for the Far East (IMTFE), twenty-eight of the eighty initially detained “Class A war criminals” were prosecuted, eighteen of whom were military officers.⁴⁸ United States Army General Douglas McArthur effectively shielded Japanese Emperor Hirohito from prosecution.⁴⁹ However, the list of the others put on trial included four former Japanese premiers, six generals, several former ministers of war and foreign affairs, ranking ambassadors, and other important advisers on matters of state.⁵⁰

This brief summary appears sufficient to confirm that, although not employing the “greatest responsibility” language to delimit their personal jurisdiction, from the genesis of international criminal justice,

43. International Military Tribunal, *Indictment*, app. A, in 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 27 (Oct. 6, 1945) [hereinafter IMT, *Indictment*, app. A], available at <http://avalon.law.yale.edu/imt/counta.asp>.

44. *Id.*

45. NUREMBERG TRIALS FINAL REPORT app. D (Dec. 20, 1945) (Control Council, Law No. 10, art. III), available at <http://avalon.law.yale.edu/imt/imt10.asp>.

46. See *id.* art. 2; IMT, *Indictment*, app. A, *supra* note 43.

47. *United States v. Pohl*, Indictment of the International Military Tribunal, Trials of the War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, vol. 5 (Jan. 13, 1947), available at <http://avalon.law.yale.edu/imt/indict4.asp>.

48. *United States v. Araki*, Indictment of the International Military Tribunal for the Far East, app. E (1946), reprinted in DOCUMENTS ON THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: CHARTER, INDICTMENT, AND JUDGMENTS 63–69 (Neil Boister & Robert Cryer eds., 2008) [hereinafter *Araki Indictment*]; see also TIMOTHY P. MAGA, JUDGMENT AT TOKYO: THE JAPANESE WAR CRIMES TRIALS 2 (2001) (noting that the eighty indicted men classified as “Class A war criminal suspects” including, “war ministers, former generals, economic and financial leaders, an imperial advisor, an admiral, and a colonel . . . were accused of plotting and carrying out a war of conquest; murdering, maiming, and ill-treating civilians and prisoners of war; plunder; rape; and ‘other barbaric cruelties’”).

49. HERBERT P. BIX, HIROHITO AND THE MAKING OF MODERN JAPAN 587 (2000).

50. *Araki Indictment*, *supra* note 48, app. E.

the focus of cases in the ad hoc international courts has not been to prosecute everyone that might have committed a crime. Rather, the objective has been to prosecute a smaller number of leaders, architects, and planners of the mass atrocities. As with national criminal law, the assumption, although not yet empirically proven, seems to be that this philosophy will deter specific individuals as well as others, in a more general sense, who might otherwise emulate them in their repugnant conduct. Indeed, the persons tried, both at Nuremberg and at Tokyo, were those that largely held important political and military posts in the government hierarchy. For the most part, these were not direct perpetrators of crimes, but people who used, or rather abused, their positions of authority to order, instigate, or encourage subordinates to commit reprehensible crimes.⁵¹ The convicted perpetrators were deemed more culpable than their junior partners and enforcers who actually implemented their orders.⁵² In any event, in the other instances where the direct perpetrators of the crimes were prosecuted through national level prosecutions, the gravity, brutality, and scale of their crimes generally served as ample justification for their investigation, prosecution, and punishment.

B. Contemporary International Tribunals Also Have Limited Personal Jurisdiction

The ICTY and ICTR adopted similar ways of defining their personal jurisdictions as the IMT and IMTFE immediately after World War II. The context of their establishment suggested that they were also created to bring the top perpetrators of international crimes to justice. Perhaps reflecting what may have been the golden age of international criminal justice, and its perceived high potential to assist in solving the intractable problems of impunity in post-conflict situations, in their respective jurisdictional provisions, the statutes of the U.N. twin tribunals both provided in their Article 1 that they “shall have the power to *prosecute persons responsible* for serious violations of international humanitarian law.”⁵³ This was notably distinct from the

51. See *supra* notes 43, 47 and accompanying text.

52. See generally IMT, *Indictment*, *supra* note 43, app. A (referring to misuse of high-ranking positions, personal influence, and intimate connections in the statement of responsibility for individuals indicted).

53. See S.C. Res. 955, *supra* note 11, Annex I, art. 1 (emphasis added); U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), U.N. Doc. S/25704, Annex I, art. 1 (May 3, 1993) [hereinafter ICTY

formulation used in the later Sierra Leone court conferring on the tribunal “the power to prosecute persons who bear the greatest responsibility” for the serious international humanitarian and Sierra Leonean law violations that took place in the context of that country’s conflict.⁵⁴

It is true that in the resolutions preceding the creation of the ICTY and ICTR, the UNSC repeatedly emphasized its determination to bring to justice all those persons responsible for the commission of international crimes.⁵⁵ But those decisions should be understood in context. They were taken at a time when the international community was faced with bitter and ongoing conflicts characterized by atrocity crimes and a climate of ongoing hostilities in which stopping the further commission of heinous offenses was an obvious international policy goal.⁵⁶ They were thus worded in a way that exaggeratingly suggested that more than a limited group of perpetrators would be prosecuted and punished by each of those institutions. This emphasis makes sense given the clear deterrent goal of international criminal law. The reality proved to be different, however, although far more than the IMT and IMTFE, the U.N. tribunals have also succeeded in prosecuting a large part of the middle management of the atrocities in the former Yugoslavia and Rwanda respectively. Sometimes, for various pragmatic reasons, such as the need to show concrete results in the early days, those ad hocs even ended up with prosecutions of otherwise insignificant perpetrators, such as Dusko Tadic and Jean-Paul Akayesu, who were not necessarily the most culpable persons in the grand scheme of things—at least when it comes to their official ranks. In other words, even though those individuals were important, they were ultimately minor players who were not the brains behind the massive offenses committed in the Balkans and Africa during the early 1990s.

The problem is that the initial enthusiasm for international criminal

Statute] (emphasis added). Articles 6 and 5 of the ICTY and ICTR Statutes, respectively, clarify that the jurisdiction of the tribunal only applies to natural persons. ICTY statute, *supra*, art. 6; S.C. Res. 955, *supra* note 11, Annex I, art. 5. Under Articles 15(1) and 16(1), the prosecutor’s role is to prosecute “persons responsible” for the serious violations of IHL committed in the former Yugoslavia. S.C. Res. 955, *supra* note 11, Annex I, art. 15(1); ICTY statute, *supra*, art. 16(1). U.N.S.C. Res. 808 and Res. 955 decided on February 22, 1993, and November 8, 1994, respectively, to establish the tribunal to prosecute “persons responsible.” S.C. Res. 808, U.N. Doc. S/RES/808, ¶ 1 (Feb. 22, 1993); S.C. Res. 955, *supra* note 11, art. 1.

54. See SCSL Statute, *supra* note 3, art. 1.

55. S.C. Res. 827, *supra* note 11, ¶ 2; S.C. Res. 955, *supra* note 11, ¶ 1.

56. S.C. Res. 827, *supra* note 11; S.C. Res. 955, *supra* note 11.

justice, which coincided with the end of the Cold War and a new era of East–West cooperation in the Council, did not last. In the intervening years between the creation of the ICTY and ICTR tribunals in 1993 and 1994,⁵⁷ and the Sierra Leone court in 2002,⁵⁸ there had been much discussion among the powerful countries (especially the United States) about the viability of the ad hoc Chapter VII tribunal model.⁵⁹ The so-called “[t]ribunal fatigue,”⁶⁰ driven primarily by concerns about the slow pace of the international trials and the spiraling costs of those U.N. courts,⁶¹ is said to have taken hold of the UNSC and the United States government in particular.⁶² It therefore seems like a deliberate decision, in a move to what was perceived to be a more financially viable and a more politically acceptable model, to limit the jurisdiction of future courts, like the SCSL, to prosecuting only a handful of persons in leadership positions deemed to bear greatest responsibility for the serious international humanitarian law violations committed during the West African nation’s war.

Interestingly, although the phrasing of the personal jurisdiction clause that granted the SCSL authority was a departure from the equivalent personal jurisdiction language in the statutes for the U.N. Chapter VII tribunals,⁶³ the ICTY and ICTR, in their respective Rules of Procedure and Evidence,⁶⁴ jurisprudence,⁶⁵ and Completion Strategies,⁶⁶ now use similar language expressing the greatest

57. S.C. Res. 827, *supra* note 11; S.C. Res. 955, *supra* note 11.

58. U.N.-Sierra Leone Agreement, *supra* note 1, art. 1(1), (23).

59. David J. Scheffer, Remarks, *Challenges Confronting International Justice Issues*, 4 NEW ENG. INT’L & COMP. L. ANN. 1, 4–6 (1998).

60. Scheffer, *supra* note 59, at 1.

61. Morrison, *supra* note 26, at 587–88; Sean D. Murphy, Contemporary Practice of the United States Relating to International Law, *State Department Views on the Future of War Crimes Tribunals*, 96 AM. J. INT’L L. 482, 483 (2002).

62. Scheffer, *supra* note 59, at 2.

63. Compare SCSL Statute, *supra* note 3, art. 1(1) (“greatest responsibility”), with S.C. Res. 955, *supra* note 11, art. 1, and S.C. Res. 827, *supra* note 11, art. 2 (“persons responsible”).

64. International Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, Rule 11 *bis*, 28, U.N. Doc. IT/32/Rev. 45 (Dec. 8, 2010); International Tribunal for Rwanda, Rules of Procedure and Evidence, U.N. Doc. ITR/3/REV.1 (June 29, 1995).

65. Prosecutor v. Luckic, Case No. IT-98-32/1-PT, Decision on the Referral of Case Pursuant to Rule 11 *bis* with Confidential Annex A and Annex B, ¶¶ 28, 30 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 5, 2007); Prosecutor v. Todović, Case No. IT-97-25/1-AR11*bis*.1, Decision on Savo Todović’s Appeal Against Decision on Referral under Rule 11 *bis*, ¶¶ 19–22 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 4, 2006).

66. S.C. Res. 1503, U.N. Doc. S/RES/1503 (Aug. 28, 2003); Completion Strategy for the International Criminal Tribunal for Rwanda, transmitted by letter dated Oct. 3, 2003 from the

responsibility limitation.⁶⁷ As the tribunals came under increased political pressure from the council to wrap up their work, they have had to identify the top layer deemed most responsible and appropriate for trial within their jurisdiction.⁶⁸ They now leave it to the willing national jurisdictions to pursue the remainder of the fugitives, either through independently initiated prosecutions of lower ranked suspects or voluntary acceptance of transferred cases of the alleged middle level perpetrators to national courts.⁶⁹

Similarly, in the other ad hoc criminal court negotiated by the U.N. with one of its member states around the same time period as the SCSL, the Extraordinary Chambers in the Courts of Cambodia (ECCC or Cambodia Tribunal), the international community adopted a similarly worded jurisdictional provision.⁷⁰ This lends further credence to the idea of tribunal fatigue taking hold at the level of U.N. member states, although a different set of factors including a government that was not always necessarily acting in good faith, were at play in the Cambodia context, as compared to the Sierra Leone negotiations with the U.N., which demonstrated strong national-political will to deal with the question of accountability for the international crimes experienced during the conflict.

Be that as it may, Article 1 of the ECCC Law empowered it to prosecute the “*senior leaders of Democratic Kampuchea and those who were most responsible for the crimes.*”⁷¹ Much like the Sierra Leone Court, which was also territorially and temporally confined in its ability to prosecute compared to the ICTY and ICTR, the Cambodia Tribunal was intended to carry out a limited number of prosecutions of senior leaders along with those apparently deemed to possess the greatest level

Secretary-General addressed to the President of the Security Council, U.N. Doc. S/2003/946, para. 6 (Oct. 6, 2003).

67. See *supra* notes 63–66.

68. Murphy, *supra* note 61, at 483 (on U.S. encouragement of ad hoc tribunal completion strategies); Pierre-Richard Prosper & Michael A. Newton, *The Bush Administration View of International Accountability*, 36 NEW ENG. L. REV. 891, 897 (2002) (on U.S. support for the greatest responsibility limitation).

69. Prosper & Newton, *supra* note 68, at 896–97.

70. Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, as amended, Reach Kram., No. NS/RKM/1004/006, Oct. 27, 2004 (Cambodia) [hereinafter ECCC Law], available at http://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf and http://www.eccc.gov.kh/sites/default/files/legal-documents/Kram_and_KR_Law_amendments_27_Oct_2004_-_Eng.pdf (unofficial translation).

71. ECCC Law, *supra* note 70, art. 1; U.N.-Cambodian Agreement, *supra* note 35, art. 1.

of responsibility.⁷²

In the same vein, although having a distinctive multilateral treaty basis, vis-à-vis the ad hoc tribunals, Article 1 of the Rome Statute of the permanent Hague-based International Criminal Court (ICC) defines the competence of the global penal court as the power to “exercise its jurisdiction over *persons* for the most serious crimes of international concern.”⁷³ There is plainly no explicit limitation on the ICC’s personal jurisdiction, although it appears that most states were clearly more interested in having a broad personal jurisdiction for the permanent international tribunal than a narrower one.⁷⁴

On the other hand, this might have been less of an issue since various restrictions were imposed on the permanent court’s jurisdiction through several carefully negotiated substantive provisions that gave the first bite at the prosecutorial apple to states. However, rather interestingly, the ICC Prosecutor has in her policy papers, strategy documents and emerging practice interpreted this reference to personal jurisdiction as mandating a focus only on those “who bear the greatest responsibility.”⁷⁵ The foregoing brief review suggests that, as states have developed more experience designing and managing international criminal tribunals, they increasingly seem to prefer to confer a relatively narrow type of personal jurisdiction—at least when it comes to the more

72. ECCC Law, *supra* note 70; U.N.-Cambodian Agreement, *supra* note 35, art. 1. Although, even though it is expected to only prosecute a handful of people, Article (1) of the Statute of the Lebanon Tribunal has, perhaps as a reflection of a lesson learned by the Secretary-General about the controversies of greatest responsibility, returned to use of the phrase “to prosecute persons responsible.” S.C. Res. 1757, Annex, art. 1, U.N. Doc. S/RES/1757 (May 30, 2007).

73. Rome Statute of the International Criminal Court art. 1, July 17, 1998, 2187 U.N.T.S. 90 (emphasis added).

74. *See id.* art. 1 & pmbl.

75. *See* ICC-OTP, *Paper on Some Policy Issues Before the Office of the Prosecutor* 7 (Sept. 2003), available at http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf (stating that the Office of the Prosecutor will “focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organization allegedly responsible for those crimes” (emphasis omitted)); *see also* *Prosecutorial Strategy*, *supra* note 35, para. 19 (“In accordance with this statutory scheme, the Office consolidated a policy of focused investigations and prosecutions, meaning it will investigate and prosecute those who bear the greatest responsibility for the most serious crimes, based on the evidence that emerges in the course of an investigation.” (emphasis omitted)); *Report on Prosecutorial Strategy*, *supra* note 35, para. 2(b); Luis Moreno-Ocampo, *The International Criminal Court: Seeking Global Justice*, 40 CASE W. RES. J. INT’L L. 215, 221 (2008) (stating that “[m]y role is to prosecute those bearing the greatest responsibility for the most serious crimes”).

prominent, situation-specific ad hoc international criminal courts like the SCSL. Much of this was concern about controlling spiraling costs and keeping the international justice project on the cheap.

This broader international context helps to explain why the U.N., and in particular the Security Council, introduced the problematic “greatest responsibility” personal jurisdiction into international criminal law’s lexicon through the SCSL Statute. It therefore suggests reasons to be cautious in celebrating the addition of this phrase into our vocabulary because of what it implies. The phrase effectively signals the reduced political will amongst states to ensure the broadest possible investigations and prosecutions of perpetrators of serious international offenses that reach beneath the top layer to uncover others, perhaps of a lesser rank, who should also be held accountable for mass crimes. On the other hand, it may be countered that settling on a particular and more realistic phraseology for personal jurisdiction is part of the maturing of international criminal tribunals. It can also be seen as a way to manage the currently high expectations about what these courts can realistically contribute in societies torn apart by brutal conflict.

Be that as it may, at the end of the day, more than any other factor, the UNSC’s decision to limit the jurisdiction of the SCSL to those with greatest responsibility was driven by pragmatic, political, economic, and other *realpolitik* considerations. This in turn affected the mandate that the court was given—essentially, to investigate and prosecute a handful of persons in leadership positions based on a strict personal, temporal, and territorial jurisdiction,⁷⁶ which would help to ensure, it was hoped at the time, that all the court’s trials would be completed within three years.⁷⁷

III. THE JUDICIAL DEBATE REGARDING THE MEANING OF GREATEST RESPONSIBILITY IN THE SPECIAL COURT FOR SIERRA LEONE

A. *Approaches to Interpretation of Greatest Responsibility*

Once indictments were issued and suspects were arrested, some of

76. See SCSL Statute, *supra* note 3, art. 1(1).

77. As I have argued elsewhere, the number of persons that it was expected would be prosecuted by the SCSL reportedly totaled between two to three dozen. See Jalloh, *supra* note 15, at 420–22. Unfortunately, the tribunal, partly because of this constrained greatest responsibility mandate and a conservative prosecutorial interpretation of that language, only successfully completed about nine cases. *Id.* For a court that operated for over ten years, this meant that the tribunal averaged less than one case per year. *Id.* (criticizing the “extremely small number of trials” ultimately carried out).

the defense counsel at the SCSL immediately filed motions asking the judges to clarify the exact scope of Article 1(1) of the SCSL Statute, which is entitled “Competence of the Special Court.”⁷⁸ As the provision is key to the analysis in this article, and was reproduced in essentially the same form in Article 1(1) of the UN-Sierra Leone Agreement, to which the statute was an annex, it is worth setting out in full, as follows:

The Special Court shall, except as provided in subparagraph (2), 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.⁷⁹

In construing this clause, honing in for now on the vague italicized portion, at least three possible interpretations can be discerned.⁸⁰

The first is that Article 1(1) required the prosecution of the persons deemed most responsible or most culpable for the serious crimes perpetrated in Sierra Leone. On this view, a key criterion for selection could be the rank or position held by the persons in this category and whether they were the movers and shakers behind the conflict and the widespread commission of the crimes. This interpretation, which as we shall see later was apparently the one preferred by the prosecution,⁸¹ would emphasize the leadership status of the suspect and whether the suspect had the capacity to impact the general course of events over the years of the war, but failed to prevent or punish the wrongful conduct of the perpetrators. The thrust would effectively be on the top *political* and or *military leaders* who committed, planned, instigated, ordered, or otherwise aided and abetted the heinous international crimes that were perpetrated by the combatants under their command, control and supervision. For convenience, in this Article, we may call this the *political-military leader* category.

78. SCSL Statute, *supra* note 3, art. 1; *see, e.g.*, Prosecutor v. Norman, Case No. SCSL-04-14-PT, Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction Filed on Behalf of Accused Fofana, ¶¶ 1–2 (Mar. 3, 2004).

79. SCSL Statute, *supra* note 3, art. 1(1) (emphasis added); *See* U.N.-Sierra Leone Agreement, *supra* note 1, art. 1.

80. Further on in this Article, I will examine the second part of that phrase reading as follows: including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.

81. *See* discussion *infra* Part III.C.

A second interpretation implied by the greatest responsibility language in the above provision was that the court prosecutor could scour the lower rank and file who perpetrated the various crimes within the SCSL's jurisdiction and select from among them those who did not necessarily hold high ranking positions in the military or political structures of the various parties to the conflict. Instead, he would choose those who were most cruel and most notorious for the brutality and depravity of their crimes. In other words, the jurisdiction could be read as a directive to pursue the worst persons, killers, or ordinary combatants whose criminal acts caused the most harm, to the most victims, in the most brutal way during the period falling within the SCSL's temporal jurisdiction. We could refer to this group of prospective suspects bearing greatest responsibility as the *killer-perpetrator* category.

Irrespective of which of the above two categories a particular defendant falls into, it is likely that he would argue that he fell outside the jurisdiction of the court because he was merely a foot soldier, rather than a political or military leader, and vice versa. But many lawyers might perhaps agree more with the third plausible interpretation of the first part of Article 1(1). In this view, asserting that the tribunal has power to prosecute those bearing greatest responsibility would indicate that individuals from either, or better yet, both the *political-military leadership* and the *killer-perpetrator* categories are prosecutable. The latter interpretation of the clause, its drafting history,⁸² as well as the SCSL's practice seems to confirm that the last is ultimately the better and more flexible way to construe the greatest responsibility personal jurisdiction—at least from a prosecutorial and, perhaps, even an interest-of-justice perspective.

The simplicity with which these three plausible interpretations of Article 1(1) of the SCSL Statute are suggested here belies the fierce judicial discord on how best to interpret this phrase amongst the judges of Trial Chambers I and II. It also masks the fact that the prosecution faced a steady stream of challenges from the defense, throughout some of the trials, claiming that the accused should not be prosecuted because they were not among those envisaged to fall within the jurisdiction of the tribunal. Indeed, so much time and energy was wasted by lawyers and judges debating the meaning of greatest responsibility that it might even have had a chilling effect on the prosecutor's decision not to

82. See discussion *infra* Part IV.B.

pursue additional suspects for the crimes apparently committed in Sierra Leone.

Nonetheless, despite curiously reaching divergent legal conclusions as to whether Article 1(1) was a jurisdictional requirement (Trial Chamber I)⁸³ or a mere guideline for prosecutorial strategy (Trial Chamber II),⁸⁴ the SCSL judges were in general agreement that the phrase mandating the prosecution of those bearing greatest responsibility contained in the tribunal statute implicitly included what I have here characterized as the *political-military leadership* and *killer-perpetrator* categories.⁸⁵ Put differently, even though the phrase “greatest responsibility” was highly divisive when debated during the Freetown trials,⁸⁶ a lesson from the SCSL case law is that the greatest responsibility phrase should, as a *prima facie* matter, be interpreted as a broad jurisdictional grant capable of covering both different types of actors and different types of conduct in a given armed conflict.⁸⁷

That said, as I will endeavor to show shortly, a review of the relevant case law demonstrates that there was conflation of several important questions that muddied the greatest responsibility waters even further. For analytical purposes, these could be broken down into the following sub-issues: (1) whether the phrase to prosecute persons bearing greatest responsibility established a jurisdictional threshold or was a type of guidance for the prosecutor’s determination of whom to prosecute; (2) if so, the timing or stage of the proceedings during which an accused should raise the objection that the tribunal lacks authority to try him because he did not bear greatest responsibility; (3) the evidentiary burden that the defense would have to discharge if they chose to raise the issue (and the nature of the prosecution’s burden to counter it); (4) the role of the evidence and judges in the assessment of greatest responsibility; and, finally, (5) the consequences of positive or negative findings on jurisdiction for the defendant, the prosecutor, and the tribunal itself. For space reasons, the next part of this Article will only take up analysis of the first of these five issues.

83. *Norman*, Case No. SCSL-04-14-PT, Decision on the Preliminary Defence Motion, ¶ 27.

84. *Prosecutor v. Brima*, Case No. SCSL-04-16-T, Judgment, ¶ 653 (July 20, 2007).

85. *Compare Norman*, Case No. SCSL-04-14-PT, Decision on the Preliminary Defence Motion, ¶¶ 23–27, *with Brima*, Case No. SCSL-04-16-T, Decision on Defence Motion for Judgment of Acquittal Pursuant to Rule 98, ¶¶ 30–34 (Mar. 31, 2006).

86. *See, e.g., Brima*, Case No. SCSL-04-16-T, Decision on Defence Motion, ¶¶ 28–29.

87. *Id.* ¶¶ 34–35.

B. Greatest Responsibility as a Jurisdictional Requirement

In the first defense motion to raise the argument that the SCSL was not entitled to try a particular defendant because it lacked the legal capacity or power to do so, the assigned counsel for Moinina Fofana⁸⁸ filed a preliminary jurisdictional challenge before Trial Chamber I on November 17, 2003.⁸⁹ The counsel submitted that the court did not have personal jurisdiction over Fofana because the suspect fell outside the category of persons who bore “the greatest responsibility” for the alleged serious international humanitarian law violations contained in his indictment.⁹⁰

The defense asserted that the personal jurisdiction discussed in Article 1(1) of the tribunal statute could be interpreted in one of two ways.⁹¹ First, as a reference to the leaders of the parties or states bearing the greatest responsibility for the Sierra Leonean armed conflict, including those who had threatened the peace process.⁹² Second, and alternatively, as a way of referring to those individuals responsible for most of the crimes committed during the armed conflict.⁹³ According to the defense, neither Fofana’s indictment nor the subsequent prosecution’s disclosure of evidence supported the view that Fofana belonged to the latter class of persons.⁹⁴ Indeed, under neither

88. Moinina Fofana held the rank as the National Director of War of the CDF, the armed state-supported militia faction involved in the Sierra Leone conflict. See *Norman*, Case No. SCSL-04-14-PT, Decision on the Preliminary Defence Motion, ¶ 42; Prosecutor v. Fofana, Case No. SCSL-2003-11-PT, Preliminary Defence Motion on the Lack of Personal Jurisdiction, ¶ 14 (Nov. 17, 2003), available at <http://www.sc-sl.org/scsl/Public/SCSL-03-11-Fofana/SCSL-03-11-PT-062.pdf>.

89. *Fofana*, Case No. SCSL-2003-11-PT, Preliminary Defence Motion.

90. *Id.* ¶ 2. Rule 72B of the Rules of Procedure and Evidence provides:

Preliminary motions by the accused are (i) objections based on lack of jurisdiction; (ii) objections based on defects in the form of the indictment; (iii) applications for severance of crimes joined in one indictment Rule 49, or for separate trials under Rule 82(B); (iv) objections based on the denial of request for assignment of counsel; or (v) objections based on abuse of process.

Special Court for Sierra Leone, Rules of Procedure and Evidence (amended Mar. 7, 2003), available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=1YNrghd4L5s%3D&tabid=70>. The Rules further provide that “[o]bjections based on lack of jurisdiction or to the form of the indictment, including an amended indictment, shall be raised by a party in one motion only, unless otherwise allowed by the Trial Chamber.” *Id.* at 72C.

91. *Norman*, Case No. SCSL-04-14-PT, Decision on the Preliminary Defence Motion, ¶ 2.

92. *Id.* ¶ 2(a).

93. *Id.* ¶ 2(b).

94. *Id.* ¶ 2.

interpretation could he be deemed among those bearing greatest responsibility and therefore properly within the court's personal jurisdiction.

The prosecution responded that the documents forming the context for the establishment of the SCSL amply showed that the question whether a particular person is one of those who bore the greatest responsibility was a matter of prosecutorial discretion based on the evidence collected during the investigations.⁹⁵ To justify judicial review of the exercise of that discretion, the defendant needed to demonstrate that the prosecutor unlawfully exercised his power or acted based on improper or impermissible discriminatory motives.⁹⁶ The accused had failed to adduce any proof establishing such intentions.⁹⁷ According to the prosecution, although defense counsel had suggested that Fofana was associated with the Civil Defense Forces (CDF) militia that was known more for its work in attempting to restore peace in Sierra Leone, rather than the commission of international crimes, this was not substantiation that he might not ultimately be found among those bearing greatest responsibility.⁹⁸ Fofana was, in any event, a leader fitting that description since he had been the second in command of the CDF organization, as had been alleged in his indictment.⁹⁹

In its unanimous ruling, Trial Chamber I reviewed the drafting history of the provision and correspondence between the U.N. Secretary-General and the Security Council discussing "greatest responsibility" and the former's proposed alternative to use those "most responsible"¹⁰⁰ instead. The judges rightly pointed out that the UNSC's preference was to limit the jurisdiction of the SCSL primarily to the prosecution of those who had played a leadership role.¹⁰¹ But the UNSG had insisted that the greatest responsibility clause should not be taken to imply that personal jurisdiction would only be limited to the political

95. *Id.* ¶ 5; see also *Fofana*, Case No. SCSL-2003-11-PT, Prosecution Response to the Defence Preliminary Motion on Lack of Personal Jurisdiction, ¶ 6 (Nov. 26, 2003), available at <http://www.sc-sl.org/scsl/Public/SCSL-03-11-Fofana/SCSL-03-11-PT-074/SCSL-03-11-PT-074-I.pdf>.

96. *Fofana*, Case No. SCSL-2003-11-PT, Prosecution Response, ¶ 12–14.

97. *Norman*, Case No. SCSL-04-14-PT, Decision on the Preliminary Defence Motion, ¶ 7.

98. *Id.* ¶ 8.

99. *Id.* ¶ 10.

100. *Id.* ¶ 40.

101. *Id.*

and military leaders.¹⁰² He argued that it would also extend to others on the basis of the scale or severity of their crimes.¹⁰³ After this review, Trial Chamber I unanimously concluded that “the issue of personal jurisdiction is a jurisdictional requirement, and while it does of course guide the prosecutorial strategy, it does not exclusively articulate prosecutorial discretion, as the prosecution has submitted.”¹⁰⁴

Having essentially determined that Article 1(1) established a jurisdictional threshold, which the prosecution ought to show it could fulfill, the judges ruled that the prosecution had discharged that burden in the context of that particular case.¹⁰⁵ They were satisfied that Fofana appeared to fall within the court’s personal jurisdiction because there was sufficient *prima facie* evidence tending to show that he held a leadership position as the number two person in the CDF—one of the main parties in Sierra Leone’s armed conflict.¹⁰⁶ They underscored, however, that whether or not he could be found to be among those holding greatest responsibility is a factual and “an evidentiary matter to be determined at the trial stage.”¹⁰⁷ The chamber clarified that, at the stage of the defense’s preliminary motion, it was merely concerned with basic allegations.¹⁰⁸ It therefore correctly underscored that it was not, in reaching this finding, pronouncing Fofana’s final guilt or innocence, which would only be adjudged after the conclusion of his trial.¹⁰⁹

In their judgment on the merits, which followed several years later, Trial Chamber I reiterated its initial holding that Article 1(1) created a jurisdictional requirement.¹¹⁰ However, although the judges had (at the preliminary motions stage) deferred the question of whether Fofana was in actuality one of those bearing greatest responsibility until the end of the trial (because such assessment could only follow after hearing all the evidence against the accused), it appeared to sidestep the issue. It reasoned that the personal jurisdiction requirement did not constitute a

102. U.N. Secretary-General, Letter dated Jan. 12, 2001 from the Secretary-General addressed to the President of the Security Council, para. 2, U.N. Doc. S/2001/40 (Jan. 12, 2001) [hereinafter Letter dated Jan. 12, 2001 from Secretary-General].

103. *Id.* paras. 2–3.

104. *Norman*, Case No. SCSL-04-14-PT, Decision on the Preliminary Defence Motion, ¶ 27.

105. *Id.* ¶ 45.

106. *Id.* ¶ 42.

107. *Id.* ¶ 44.

108. *Id.*

109. *Id.* ¶ 47.

110. *Prosecutor v. Fofana*, Case No. SCSL-04-14-T, Judgement, ¶¶ 91–92 (Aug. 2, 2007).

legal or material ingredient of the crimes. It followed that the prosecutor did not need to prove beyond a reasonable doubt that Fofana was one of those in fact bearing greatest responsibility in order to secure a conviction.

Put differently, at the judgment stage when it decided Fofana was actually guilty, the trial chamber implied that it had accepted the prosecutor's conclusion that the defendant was one of those in fact bearing greatest responsibility for what happened in Sierra Leone. This suggests that it saw the assessment of whether personal jurisdiction existed to try Fofana as being only a relevant question for consideration at the indictment review stage on a standard of reasonable basis to believe, as opposed to a matter to be put to prosecutorial proof beyond a reasonable doubt during or at the completion of the trial.

Two other observations seem pertinent about Trial Chamber I's analysis of the greatest responsibility in Article 1(1). First, it helpfully clarified that the clause should essentially be understood as expressing two separate, if closely related, ideas. To begin with, the phrase confirmed that the prosecution of persons who bear the greatest responsibility constituted a personal jurisdictional requirement before the court and that it is the prosecutor's function in carrying out the mandate that is then prescribed in Article 15.¹¹¹ This meant that the prosecution must establish that a particular suspect fulfilled this criterion by tendering evidence, assessed at the low reasonable basis to believe indictment review threshold, that the person was a *leader* (whether military or political) *appearing* to be one of those bearing greatest responsibility. If the prosecution meets the burden—which would not be difficult because the threshold is very low—of having reasonable grounds to believe that the suspect in question committed the crime charged, then the chamber can properly try the defendant. Conversely, if the prosecution failed to prove even a *prima facie* case against the suspect, showing that the court has jurisdiction over him covering particular crimes on a given territory during an appropriate time period, then the chamber would have to dismiss the case. The court's logic was likely that the suspect did not need to endure an unnecessary trial when the SCSL lacked the basic personal, temporal and subject matter jurisdiction to try him.

A related point is that, unlike the first part of Article 1(1) of the

111. *Norman*, Case No. SCSL-04-14-PT, Decision on the Preliminary Defence Motion, ¶¶ 21, 26, 27.

SCSL Statute, the chamber implied that the second part of the same sentence, “including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone[,]” was not an element of the crime.¹¹² Rather, it was intended to serve as a type of guideline to the prosecutor in his determination of his strategy regarding whom to prosecute.¹¹³ The judges illustrated that the practical focus of who to investigate and try from the perspective of the Council during the negotiations were the important political and military leaders;¹¹⁴ whereas, from Secretary-General Annan’s perspective, it would include the top leaders *plus* anyone else that was found to be among those who carried out the worst of the crimes perpetrated in Sierra Leone.¹¹⁵

Second, Trial Chamber I seemed to confirm the interpretation that the phrase those “who bear the greatest responsibility” was sufficiently flexible phraseology to capture (1) all those who held high ranking positions and (2) those whose crimes were so cruel that they would be among the worst perpetrators of the mayhem during the Sierra Leone Civil War.¹¹⁶ The caveat, of course, was that the judges unanimously, and correctly in my view, determined that the UNSC clearly stated preference for the “greatest responsibility” language signaled that the leadership role of the suspect should be the primary consideration with the severity of a crime and its massive nature bearing only secondary importance to the decision.¹¹⁷

Overall, when assessed using the language of the three-part interpretive scheme suggested above, the Trial Chamber I judges concluded that Fofana fell within the *political-military* leader category instead of the *killer-perpetrator* category, the former being the main criterion that presumably guided his prosecutorial indictment. In fact, in its judgment on the merits, Trial Chamber I found that Fofana was one of the top three men in the so-called Holy Trinity of the CDF organization. It underscored, much like the founders of the SCSL did during the negotiations of the constitutive instruments, that greatest responsibility should, at least partly, be understood as a reflection of

112. *Id.* ¶ 38.

113. *Id.* ¶¶ 24–25, 27.

114. *Id.* ¶¶ 22–25.

115. Letter dated Jan. 12, 2001 from Secretary-General, *supra* note 102, para. 2.

116. *See Norman*, Case No. SCSL-04-14-PT, Decision on the Preliminary Defence Motion, ¶ 39.

117. *Id.* at ¶ 40.

rank or position of the suspect in the organization(s) that perpetrated the crimes within the subject matter jurisdiction of the international tribunal.¹¹⁸ This point, therefore, seems like a helpful clarification to the jurisprudence and the literature on personal jurisdiction in international criminal courts.

C. Greatest Responsibility as a Guideline for Exercise of Prosecutorial Discretion

The Armed Forces Revolutionary Council (AFRC) Case, which was heard by the judges of Trial Chamber II, involved three mutinying soldiers from the Sierra Leone Army who organized a *coup d'etat* that unseated the democratically elected Kabbah government.¹¹⁹ Once they assumed power, the three suspects directed others within their command and control to commit some of the most brutal acts witnessed during the Sierra Leone conflict.¹²⁰ Unlike the *Fofana* case, none of the three defense teams in the AFRC joint trial filed preliminary challenges objecting to the court's assertion of personal jurisdiction over their clients during the limited twenty-one day period following the release of the prosecution disclosure under the SCSL Rules of Procedure and Evidence.¹²¹ It is unclear whether this was just an oversight or a deliberate defense strategy. However, at the halfway point of the trial when the prosecution had rested its case-in-chief, the defendants addressed the issue as part of their no case to answer or motion for judgment of acquittal submissions.¹²²

For example, Brima contended that the reference in Article 1(1) and 15 of the SCSL Statute *to persons who bear the greatest responsibility* was a "limitation on the Court's jurisdiction as to which persons may or may not be prosecuted and creates an evidentiary burden to be satisfied by the Prosecution."¹²³ According to the defense, the prosecutor had not discharged his burden because its witnesses instead showed that other

118. *See id.* ¶¶ 38–40.

119. Prosecutor v. Brima, Case No. SCSL-04-16-T, Judgment, ¶¶ 4, 316, 432, 507 (June 20, 2007).

120. *See, e.g., id.* ¶¶ 233–39.

121. *Norman*, Case No. SCSL-04-14-PT, Decision on the Preliminary Defence Motion; Rules of Procedure and Evidence Rule 72(A), *supra* note 90.

122. *Brima*, Case No. SCSL-04-16-T, Joint Legal Part Defence Motion for Judgment of Acquittal Under Rule 98, ¶¶ 1–2 (Dec. 13, 2005).

123. *Brima*, Case No. SCSL-04-16-T, Decision on Defence Motion for Judgment of Acquittal Pursuant to Rule 98, ¶ 28 (March 31, 2006).

more prominent military leaders higher in rank, not their accused clients who were only *lower ranked non-commissioned officers*, bore greatest responsibility for the heinous offenses perpetrated in Sierra Leone.¹²⁴ In its response, the prosecution made a two-pronged argument. First, there was no jurisdictional threshold that had to be met under Article 1(1). Second, the question of whether an accused is among those who bears greatest responsibility ought to only be determined after the conclusion of the trial.¹²⁵ Alternatively, and in any event, based on the evidence presented up to that point in the trial, a reasonable trier of fact could have found the accused to fall within the court's personal jurisdiction.¹²⁶

In its judgment, Trial Chamber II reviewed the documents discussing the history of the personal jurisdiction provision; in particular, it examined two letters exchanged between the UNSG and the Council in 2001.¹²⁷ The chamber correctly observed that in the January 12, 2001 letter, the UNSC rejected Annan's preferred "most responsible" personal jurisdiction language in favor of retaining its own "'greatest responsibility' formulation."¹²⁸ The Secretary-General had insisted on clarifying that the greatest responsibility should not be taken to mean that the court's personal jurisdiction was limited to "political and military leaders" only, a position which the Council subsequently appeared to approve in its January 31, 2001 reply.¹²⁹ This SCSL chamber found that "greatest responsibility" personal jurisdiction "*solely purports to streamline the focus of prosecutorial strategy.*"¹³⁰ The judges observed that the phrase, understood in its ordinary sense, was intended to include, at a minimum, two groups of perpetrators, at the top of which were the political and military leaders of the parties to the conflict.¹³¹ They emphasized, nevertheless, that the broad language used in the provision implied that an even wider range of individuals, presumably including ordinary combatants whose conduct might have been very egregious, were all potentially prosecutable before the

124. *Id.*

125. *Id.* ¶ 29.

126. *Id.*

127. *Id.* ¶¶ 32–33.

128. *Id.* ¶ 32.

129. *Id.* ¶¶ 33–34.

130. *Brima*, Case No. SCSL-04-16-T, Judgment, ¶ 653 (June 20, 2007) (emphasis added).

131. *Brima*, Case No. SCSL-04-16-T, Decision on Defence Motion, ¶¶ 34–35.

court.¹³²

It seems apparent but surprising that, in reaching two diverging conclusions, the two sets of judges in each of the SCSL trial chambers examined the same drafting history and historical documents. While they agreed on the importance of those documents and relied on the analysis contained therein, each chamber's legal reasoning towards their respective conclusions differed.¹³³ The question is, why? Two reasons stand out. First, it would seem that the judges of Trial Chamber II did not read in their entirety either the drafting history of Article 1(1) and the subsequent correspondence between Secretary-General Annan and the Council. After the Secretary-General's January 12, 2001 letter proposing that the Council switch from its preferred, but apparently narrower, "greatest responsibility" formulation to his alternative and purportedly wider "most responsible" standard for personal jurisdiction, he conceded that, in rejecting his alternative proposal, the Council was thus "limiting the focus of the Special Court to those who played a leadership role."¹³⁴ He pled, however, that the phrase should not be construed to "mean that the personal jurisdiction is limited to the political and military leaders only."¹³⁵ Indeed, in his view, this determination in a concrete case would initially have to be made by the prosecutor and, ultimately, by the court itself. The President of the Council, in a somewhat ambiguous, subsequent reply, stated that the UNSC shared in the Secretary-General's "analysis of the importance and role of the phrase 'persons who bear the greatest responsibility.'"¹³⁶

Second, Trial Chamber I introduced a nuance when it reached the conclusion that greatest responsibility was both a jurisdictional requirement in Article 1(1) and also a description of the prosecutorial duty as fleshed out in Article 15. This group of judges emphasized the second part of the January 12, 2001, letter from the Secretary-General to the Council, in which it accepted that the particular reference made in the second sentence of Article 1(1) would then explicitly encompass "those leaders who, in committing such crimes, have threatened the

132. *See id.* ¶ 35.

133. *Compare id.* ¶¶ 32–34, with Prosecutor v. Norman, Case No. SCSL-04-14-PT, Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction Filed on Behalf of Accused Fofana, ¶¶ 22–25 (Mar. 3, 2004).

134. Letter dated Jan. 12, 2001 from Secretary-General, *supra* note 102, para. 2; *see also* Secretary-General, *Report on SCSL*, *supra* note 4, ¶¶ 30–31.

135. Letter dated Jan. 12, 2001 from Secretary-General, *supra* note 102, para. 2.

136. Letter dated Jan. 31, 2001 from Pres. of S.C., *supra* note 20, para. 1.

establishment of and implementation of the peace process in Sierra Leone.”¹³⁷ Secretary-General Annan understood the second sentence to serve as “guidance to the Prosecutor in determining his or her prosecutorial strategy.”¹³⁸ The UNSC, in a subsequent reply to him, also endorsed that clarification that the words in the second sentence of Article 1(1), following the comma, were intended as a type of guideline to frame the prosecutorial strategy.¹³⁹ This gave credence to the later Trial Chamber I position that the effect of that preference for the greatest responsibility, instead of the people most responsible language, meant that leadership, instead of severity of the crime, ought to be the primary consideration when determining which suspect to prosecute.¹⁴⁰

In other words, even though the two trial chambers used two different routes and Trial Chamber I felt that leadership, as a criterion, was to have primacy over severity, the judges from both chambers were on essentially the same page that greatest responsibility as phrased in the statute meant that both *political military* leaders as well as *killer-perpetrators* could be prosecuted. But Trial Chamber I correctly distinguished between the first sentence of Article 1(1) (which it read as outlining the personal jurisdiction) and the second sentence (which put in place the criteria—later explicitly developed in Article 15—that would serve to guide or circumscribe prosecutorial discretion towards a particular class of obstructionist individuals).¹⁴¹ Whereas, for its part, Trial Chamber II interpreted the second part of the phrase in Article 1(1) as being subsumed by the first and reasoned that both elements, taken as one, did not establish a jurisdictional requirement, but rather, it functioned as additional guidance for the prosecutor’s strategy.¹⁴² In other words, to the latter group of judges, Article 1(1) was not a jurisdictional clause as much as it was a guidance clause. However, the Trial Chamber II ruling appears hard to reconcile with the fact that the rest of the elements in Article 1(1) of the Statute explicitly referred to matters of (geographic, territorial, and temporal) jurisdiction only. The decision also failed to plausibly explain why the same “greatest

137. *Norman*, Case No. SCSL-04-14-PT, Decision on the Preliminary Defence Motion, ¶¶ 38, 40.

138. Letter dated Jan. 31, 2001 from Pres. of S.C., *supra* note 20, para. 1.

139. *Id.*

140. *Norman*, Case No. SCSL-04-14-PT, Decision on the Preliminary Defence Motion, ¶¶ 39–40.

141. *Id.*

142. Prosecutor v. Brima, Case No. SCSL-04-16-T, Judgment, ¶ 653 (June 20, 2007).

responsibility” language separately found its way into Article 15, which stated the functions of the prosecutor.

As we will see presently, when the Appeals Chamber confronted this same question, it adopted lock-stock-and-barrel the Trial Chamber II reasoning that greatest responsibility, as worded in Article 1(1) of the SCSL Statute, was solely a guideline to the prosecutor for the exercise of his discretion instead of a jurisdictional requirement. It is submitted that this conclusion, which effectively endorsed the faulty prosecution and Trial Chamber II reasoning, was not necessarily borne out by the *travaux préparatoires*¹⁴³ of the SCSL’s founding instruments.

D. The Appeals Chamber Weighs In

Because the two trial chambers of the court had disagreed on the interpretation of “greatest responsibility,” it fell to the Appeals Chamber to break the tie and furnish an authoritative interpretation of the clause once and for all. Santigie Borbor Kanu, the third defendant in the *Brima* trial, raised greatest responsibility as his first ground in the appeal of his conviction. He claimed that the trial court erred when it failed to establish its proper jurisdiction over him pursuant to Article 1(1).¹⁴⁴ In assessing his plea, the Appeals Chamber first distinguished separation of power issues relating to the competence of the court, its organizational structure, and the role of the prosecutor as set out in the SCSL Statute vis-à-vis the chambers.¹⁴⁵

To begin, it assessed the role of the prosecutor set out in Article 15.¹⁴⁶ It then observed that, flowing from that rule, he is mandated to act as “a separate organ” and is therefore barred from seeking or receiving instructions from any government or from any other source.¹⁴⁷ Accordingly, the Appeals Chamber concluded, “[i]t is evident that it is the prosecutor who has the responsibility and competence to determine who are to be prosecuted as a result of investigation undertaken by him.”¹⁴⁸ It is then up to the chambers, as the adjudicative organ, to “try

143. See *Norman*, Case No. SCSL-04-14-PT, Decision on the Preliminary Defence Motion, ¶ 40.

144. *Brima*, Case No. SCSL-2004-16-A, Kanu’s Submissions to Grounds of Appeal, ¶¶ 1.1–30 (Sept. 13, 2007), available at <http://www.sc-sl.org/scsl/Public/SCSL-04-16%20AFRC%20APPEAL%20DOCS/SCSL-04-16-A-647%20A.pdf>.

145. *Brima*, Case No. SCSL-2004-16-A, Judgement, ¶¶ 280–81.

146. *Id.*

147. *Id.* ¶ 280 (emphasis omitted).

148. *Id.* ¶ 281.

such persons who the prosecutor has consequently brought before it as persons who bear the greatest responsibility.”¹⁴⁹ Put more succinctly, the decision as to whether someone bears greatest responsibility is made by the prosecutor, during his investigations, and is not one for the judges whose sole function it is to adjudicate the individual cases brought before them.

This position is correct insofar as it demarcates the sharp division of responsibilities between the prosecutorial and judicial organs of the court. But, while generally true, this separation of powers logic should not be taken too far. Indeed, as offered by the appeals court, this general argument is insufficient to dispose of the specific question of who can and should determine who has greatest responsibility for prosecutions before the court. Neither did it resolve the question whether the language is a jurisdictional threshold or only some type of prosecutorial guidance. The result reveals errors in the judicial reasoning. For example, Trial Chamber II had similarly reasoned that, because of the separation of the prosecutorial and judicial roles in the court’s founding instrument, Article 15 of the Statute even implied that the exercise of prosecutorial discretion in bringing a case against a particular accused was not reviewable by the court.¹⁵⁰ This was a broader finding than even the prosecutor would have expected. In fact, he had conceded in the briefing process, both at trial and during the appeal, that a discretionary decision in choosing whom to prosecute is reviewable by the judges if exercised in a manifestly unreasonable manner, for instance, by violating the rights of the accused through abuse of process or where the power is exercised for impermissible or discriminatory motives.¹⁵¹

In a nutshell then, both the Appeals Chamber and Trial Chamber II’s interpretation of Article 1(1), as a whole, was that the language delineated the outer boundaries of how far the prosecutor can go when exercising her discretion. There are obvious difficulties with this conclusion, which the judges did not address in either the trial or appellate decisions. Among other issues, this stance ignores why a traditional jurisdictional provision setting out the competence of an ad

149. *Id.*

150. *Brima*, Case No. SCSL-04-16-T, Judgement, ¶ 654.

151. *Id.* ¶ 643; *Brima*, Case No. SCSL-04-16-T, Decision on Defence Motion for Judgment of Acquittal Pursuant to Rule 98, ¶ 29 (Mar. 31, 2006); *Prosecutor v. Norman*, Case No. SCSL-04-14-PT, Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction Filed on Behalf of Accused Fofana, ¶ 7 (Mar. 3, 2004).

hoc international criminal court would be adopted by the framers of a statute only to be reduced to a simple guideline for prosecutorial policy at a later time. A related concern is that the judges did not speak to the obvious link between Article 1(1), which usually enumerates the personal jurisdiction of the tribunal, with Article 15(1), which defined the power of the prosecutor, when it provided that he or she shall be responsible for the investigation and prosecution of persons who bear the greatest responsibility for the crimes committed in Sierra Leone after November 30, 1996. In other words, why would the drafters adopt Article 15(1) if Article 1(1) serves essentially the same purpose? Conversely, why would they include Article 1(1) if Article 15(1) sufficiently described both the court's jurisdiction and the mandate of the prosecutor? The answer is that they adopted each of these separate provisions because each played a distinctive role in the statute: the former setting out the jurisdiction of the court and the latter outlining the functions and limitations imposed on the prosecutor and his exercise of his power.

In Kanu's appeal, the prosecution had further argued that the Appeals Chamber should not hold the phrase "persons who bear the greatest responsibility" as a test criterion or a distinct jurisdictional threshold.¹⁵² To do so, according to the prosecution, would lead to an "absurd interpretation"¹⁵³ requiring a factual determination at the pre-trial stage that there is no person who has been indicted who bears greater responsibility than the particular accused when it would be impossible to determine the precise scope of criminal liability before the trial concludes. Yet, at the same time, it would be "unworkable to suggest that this determination should be made by the Trial or Appeals Chamber at the end of the trial."¹⁵⁴ By analogy to Article 1 of the ICTY and ICTR Statutes, which provide for prosecution of "persons responsible," the prosecution submitted that construing "greatest responsibility" as a jurisdictional requirement would imply that those other tribunals could only prosecute those who are actually guilty.¹⁵⁵

Adopting the prosecution's line of argument, the Appeals Chamber, in a crucial statement that betrayed the real issue underpinning the court's conclusion, ruled as follows:

152. *Brima*, Case No. SCSL-2004-16-A, Judgement, ¶¶ 274–75.

153. *Id.* ¶ 274.

154. *Id.*

155. *Id.*

[I]t is inconceivable that after a long and expensive trial the Trial Chamber could conclude that although the commission of serious crimes has been established beyond reasonable doubt against the accused, the indictment ought to be struck out on the ground that it has not been proved that the accused was not one of those who bore the greatest responsibility.¹⁵⁶

With respect, the Appeals Chamber, like Trial Chamber II, which first accepted this reasoning, fell into analytical error. For one thing, it assumes that a determination that greatest responsibility was a personal jurisdiction requirement implied that the judges had to find at the pre-trial stage, in violation of the presumption of innocence and before even hearing any evidence, that there is no other person that bore greater responsibility than the particular accused before the court. For another thing, without referring to the prosecution evidence, it suggests that the case would not necessarily have been proved beyond a reasonable doubt. Both these propositions seem untenable. The better view appears to be that advanced by Trial Chamber I, which held in its *Fofana* preliminary decision that an assessment of whether someone can be said to bear greatest responsibility could be handled differently by assessing, during the indictment review stage, whether the prosecution had made out a *prima facie* case that a particular suspect appears to be one of the individuals bearing greatest responsibility for what happened in a particular armed conflict.¹⁵⁷ If there is basic evidence supporting the prosecution's case, then the trial would proceed, much like it would with respect to the other jurisdictional criteria that had to be met, for example, convincing the judges that the suspect appears to have committed crimes within the jurisdiction of the SCSL.¹⁵⁸ Another possibility is for the greatest responsibility issue to be considered at the Rule 98 (no case to answer) stage, when the judges would have heard all the evidence from the prosecution. They could then decide, on the standard reflecting that stage of the process, if there was substantial evidence that—if believed—would appear to support the charges in the indictment such as to put the defendant to answer the prosecution case made up to that point of the trial.

156. *Id.* ¶ 283.

157. Prosecutor v. Fofana, Case No. SCSL-04-14-T, Judgement, ¶¶ 91–92 (Aug. 2, 2007).

158. Prosecutor v. Norman, Case No. SCSL-04-14-PT, Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction Filed on Behalf of Accused Fofana, ¶¶ 28–45 (Mar. 3, 2004).

More fundamentally, the Appeals Chamber, in endorsing the prosecutor's argument, failed to distinguish between the ICTY and the ICTR, both of which were differently situated vis-à-vis the SCSL. Among other things, the question of personal jurisdiction did not arise in the UN twin tribunals in the way it did at the Sierra Leone court, nor did it bear the same type of import, because those other ad hoc courts were not saddled with the same explicit limitations on their jurisdiction or on the powers of the prosecutor as was the SCSL.

The crucial question arises whether the drafting history of the Statute of the SCSL reflected the position taken by the Appeals Chamber and Trial Chamber II. In the next part of this paper, I will argue that the Appeals Chamber misconstrued Article 1 of the Statute. I submit that, clouded by its concern for the practicalities of finding differently on the personal jurisdiction provision for the concrete cases before them, the appeals court misinterpreted the provision. I will contend that Trial Chamber I, which methodically reviewed the greatest responsibility formula with closer and more complete reference to the drafting history, more accurately reflected the intention of the drafters of the SCSL Statute. That intention was that Article 1(1) would establish the personal jurisdiction of the court, while Article 15(1) would further circumscribe the discretion of the prosecutor to pursue only a limited class of suspects deemed to bear greatest responsibility. Ultimately, as I have argued in this paper, despite their various differences, the overall conclusion to draw from the Sierra Leone court case law seems to be that the greatest responsibility language was sufficiently broad to ensure that the tribunal could prosecute individuals from both the *political-leader* and the *killer-perpetrator* groups. That much agreement existed between most if not all of the judges, even if their reasoning towards that conclusion differed.

IV. DISCERNING THE ACTUAL MEANING OF "GREATEST RESPONSIBILITY"

The drafting history of Article 1(1) in the Statute of the SCSL supports the argument that at least part of the provision was initially intended as a jurisdictional requirement, while another part of the provision was intended as a sort of redline not to cross or guideline to limit the prosecutorial strategy. An examination of the ordinary textual meaning of the provisions, in accordance with Article 31 of the Vienna Convention on the Law of Treaties demonstrates this theory. Article 31, in relevant part, provides that:

1. A treaty shall be interpreted in good faith in accordance with the *ordinary meaning* to be given to the terms of the treaty in their context and in the light of its object and purpose. [Emphasis added].

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes . . .

3. There shall be taken into account, together with the context . . .

4. [Any] special meaning given to a term if it is established that the parties so intended.¹⁵⁹

As the agreement between the U.N. and the Government of Sierra Leone constitutes a bilateral treaty,¹⁶⁰ Article 31 of the Vienna Convention on the Law of Treaties (VCLT) is applicable.¹⁶¹ The Statute of the court, which of course contains the identical provision on personal jurisdiction, is an annex to the UN-Sierra Leone Agreement and therefore forms an integral part of the treaty.¹⁶² The ordinary meaning of the phrase “to prosecute persons who bear the greatest responsibility” in Article 1(1) of those two instruments can therefore be read in light of the context; as well as the preamble, object, and purpose of the provision and the statute; the court’s intended role to ensure accountability for international crimes committed in Sierra Leone; and the special meaning accorded to the term by the founders of the SCSL as well as in light of the tribunal’s actual practice.

A. The Ordinary Meaning of “Persons Who Bear the Greatest Responsibility”

Let us examine, using a standard English dictionary, each of the terms in the phrase “to prosecute persons who bear the greatest responsibility.” The *Oxford English Dictionary* defines “person” in various ways. For our purposes the most relevant is the following: “an individual human being; a man, woman or child;” and, as used in a technical legal sense, as “[a] human being (natural person) or body

159. Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention] (emphasis added).

160. See Secretary-General, *Report on SCSL*, *supra* note 4, ¶ 9.

161. Vienna Convention, *supra* note 159, art. 1.

162. SCSL Statute, *supra* note 3, art. 1(1); U.N.-Sierra Leone Agreement, *supra* note 1, art. 1.

corporate or corporation (artificial person), having rights and duties recognized by the law.”¹⁶³ It is clear from even the ordinary dictionary meaning that the term “person” refers most likely to a natural person. So far, all the SCSL prosecutions have related to natural persons, although there is nothing to foreclose trials of legal persons. That said, in the context of this particular Article, this issue does not appear to have a major bearing on the argument here so it need not detain us.

The noun “who” is used “[a]s the ordinary interrogative pronoun, in the nominative singular or plural, used of a person or persons: corresponding to *what* of things.”¹⁶⁴ More specifically, it is “[a]s compound relative in the nominative in general or indefinite sense: Any one that”¹⁶⁵

The term “bear,” which is the root word for “bearing,” means “to carry; to sustain; to thrust, press; to bring forth.”¹⁶⁶ Bearing is therefore “the action of carrying or conveying” or “[t]he carrying of oneself (with reference to the manner); carriage, deportment; behaviour, demeanour.”¹⁶⁷

Of course, “the” is a definite article. As used in Article 1(1) of the SCSL Statute outlining the personal jurisdiction, it modifies or rather particularizes the superlative “greatest” as a way of connoting that the tribunal *is or should be most concerned*. It thus essentially captures the notion of individuals that belong to a class or group of persons bearing relatively greater responsibility, although, admittedly, the idea of those with which it should be most concerned does not necessarily imply exclusivity.

“Greatest” is, of course, the “superlative of great in various senses.”¹⁶⁸ As used ordinarily, “the greatest” is a reference to “[t]hat which is great; great things, aspects, qualities, etc. collectively; also, great quantity, large amount.”¹⁶⁹ When used to describe persons who bear the qualities of “being great,” the *Oxford English Dictionary* clarifies that it is an allusion to persons “[e]minent by reason of birth, rank, wealth, power, or position; of high social or official position; of eminent rank or

163. 11 OXFORD ENGLISH DICTIONARY 597 (2nd ed. 1989) (emphasis omitted).

164. 20 OXFORD ENGLISH DICTIONARY 288–89 (2nd ed. 1989).

165. *Id.* at 289.

166. 2 OXFORD ENGLISH DICTIONARY 20 (2nd ed. 1989).

167. *Id.* at 26.

168. 6 OXFORD ENGLISH DICTIONARY 801 (2nd ed. 1989).

169. *Id.* at 800 (footnote omitted).

place.”¹⁷⁰ Greatest is, more helpfully in our context, an additional way of denoting “conditions, actions, or occurrences; with reference to degree or extent [and of] things, actions, [or] events . . . [o]f more than ordinary importance, weight, or distinction; important, weighty; distinguished, prominent; famous, renowned.”¹⁷¹

As to “responsibility,” it is defined as “[t]he state or fact of being responsible . . . *for* . . . [a] charge, trust, or duty, for which one is responsible.”¹⁷²

From the above definitions, we can distill from the ordinary dictionary meaning of each of the words when combined together and viewed in their context, that the phrase “persons who bear the greatest responsibility” is a description of two separate but not entirely distinct ideas. First, it describes a person of high rank, position, or power who carries out certain actions and brings forth events or conditions of more than ordinary importance, and for which, given the core purpose of the SCSL to administer justice, the tribunal should investigate and prosecute the individual.

Second, and flowing from the above definitions, we can also see that the ordinary meaning of the phrase is also a reference to the degree or amount of something or event that a person engages upon as part of a certain type of behavior—in this case, the commission of crimes during the course of the Sierra Leone armed conflict. Individual criminal liability was rightly deemed necessary for those actions or events. It also reveals the state or fact of being in charge of or of having a duty or obligation towards a person or thing, which was then breached by those persons who fall within the personal jurisdiction of the court. A reference to the drafting history will demonstrate that these two ordinary definitions of the personal jurisdiction provision were also expressed during the negotiations of the agreement creating the SCSL.

As argued above, and as will be further detailed in the next section, focusing specifically on the drafting history, the category of persons over which the court was to have jurisdiction was always going to be limited. The Council’s preference was evidently that the leadership role or command authority of a suspect should be the principal criterion for the application of the greatest responsibility formulation.¹⁷³ Whereas, the

170. *Id.* at 797.

171. *Id.* (formatting omitted).

172. 13 OXFORD ENGLISH DICTIONARY 742 (2nd ed. 1989).

173. U.N. President of the S.C., Letter dated Dec. 22, 2000 from the President of the

Secretary-General's view was that the gravity, scale or massive nature of the crime should also be taken into account, if not the main consideration, for the exercise of personal jurisdiction.¹⁷⁴ Bear in mind that while the former seemingly endorsed the juxtaposition of these two separate ideas, according to Trial Chamber I, the Council ultimately saw the scale or gravity of a particular crime as being of secondary, instead of primary, importance vis-à-vis the leadership or functional positions held by the suspects.¹⁷⁵

B. The Drafting History of "Persons Who Bear Greatest Responsibility"

Under Article 31(2) of the VCLT, in addition to the preamble and annexes, the context for a treaty is additionally comprised of any subsequent agreements relating to the treaty made between all the parties in connection with the conclusion of the treaty.¹⁷⁶

The four paragraphs of the preamble to the UN-Sierra Leone Agreement refer to Security Council Resolution 1315, adopted on August 14, 2000, in which the Council expressed deep concern at the very serious crimes committed within the "territory of Sierra Leone against the people of Sierra Leone and United Nations and associated personnel and at the prevailing situation of impunity."¹⁷⁷ It therefore asked the Secretary-General to negotiate an agreement with the Sierra Leone government to "create an independent special court to prosecute persons who bear the greatest responsibility" for the commission of the serious international and Sierra Leonean law violations committed.¹⁷⁸

The same language contained in the resolution was reiterated verbatim in Article 1(1) of the SCSL Statute, which prescribed the competence of the court and delimited its core jurisdictional components.¹⁷⁹ In the Statute, as opposed to Agreement, however, a clarification was added to the effect of "including those leaders who, in

Security Council addressed to the Secretary-General, para. 1, U.N. Doc. S/2000/1234 (Dec. 22, 2000) [hereinafter Letter dated Dec. 22, 2000 from Pres. of S.C.].

174. See Secretary-General, *Report on SCSL*, *supra* note 4, ¶ 30.

175. Prosecutor v. Norman, Case No. SCSL-04-14-PT, Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction Filed on Behalf of Accused Fofana, ¶ 40 (Mar. 3, 2004).

176. Vienna Convention, *supra* note 159, art. 31(2).

177. S.C. Res. 1315, *supra* note 14, pmbl.; see also U.N.-Sierra Leone Agreement, *supra* note 1, pmbl.

178. S.C. Res. 1315, *supra* note 14, ¶ 1; see also U.N.-Sierra Leone Agreement, *supra* note 1, pmbl.

179. SCSL Statute, *supra* note 3, art. 1(1); S.C. Res. 1315, *supra* note 14, ¶ 3.

committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.”¹⁸⁰ Besides the text of those two instruments, the *travaux préparatoires*¹⁸¹ reveal a subsequent discussion between, on the one hand, internal organs of the U.N. (the Security Council and the Secretary-General), and on the other hand, the U.N. as a single entity vis-à-vis the other party (Sierra Leone).

In Resolution 1315, the UNSC directed the Secretary-General that the personal jurisdiction of the tribunal shall cover only “persons who bear the greatest responsibility for the commission of crimes” in Sierra Leone.¹⁸² As the Secretary-General later tried to explain, the Council intended that phrase to mean two things, which also appear to coincide with the ordinary dictionary meaning discerned in the previous section.¹⁸³

In his Report to the Security Council explaining the steps he had taken to implement Resolution 1315, the Secretary-General suggested that an alternative phrase, “persons most responsible,” replace “greatest responsibility.”¹⁸⁴ Secretary-General Annan rationalized this suggestion as follows:

While those “most responsible” obviously include the political or military leadership, others in command authority down the chain of command may also be regarded “most responsible” judging by the severity of the crime or its massive scale. “Most responsible[,]” therefore, denotes either a leadership or authority position of the accused, and a sense of the gravity, seriousness or massive scale of the crime. It must be seen, however, not as a test criterion or a distinct jurisdictional threshold, but as a guidance to the Prosecutor in the adoption of a prosecution strategy and in making decisions to prosecute in individual cases.¹⁸⁵

However, the Council did not endorse that proposal because, for one thing, it implicitly disagreed that the phrase “those most responsible”

180. Compare SCSL Statute, *supra* note 3, art. 1(1), with U.N.-Sierra Leone Agreement, *supra* note 1, art. 1(1).

181. See *supra* note 140 and accompanying text.

182. S.C. Res. 1315, *supra* note 14, ¶ 3.

183. Secretary-General, *Report on SCSL*, *supra* note 4, ¶ 30; see also Letter dated Jan. 12, 2001 from Secretary-General, *supra* note 105, paras. 2–3.

184. Secretary-General, *Report on SCSL*, *supra* note 4, ¶¶ 29–31.

185. *Id.* ¶ 30.

was broader than the phrase those “bearing greatest responsibility.”¹⁸⁶ The President of the Security Council, in a December 22, 2000 letter, rejected the Secretary-General’s proposed modification to the personal jurisdiction provision.¹⁸⁷ The UNSC reiterated its preference contained in Resolution 1315 that jurisdiction should extend to only those persons who bear the greatest responsibility for the commission of crimes under national and international law.¹⁸⁸ He put it as follows: “The members of the Security Council believe that, by thus limiting the focus of the Special Court to those who played a leadership role, the simpler and more general formulations suggested in the appended draft will be appropriate.”¹⁸⁹ It seems apparent enough, then, that the Council’s main interest was to hone in on those holding a leadership role, as the judges of Trial Chamber I have also confirmed.

In the Secretary-General’s response to the President of the Security Council, which followed about three weeks later (January 12, 2001), he canvassed the difference between the two positions.¹⁹⁰ He then tried to reframe his argument to again reassert the relevance of the gravity, scale and severity of the crimes—a point that he had initially made when he suggested that “the term ‘most responsible’ would not necessarily exclude children between 15 and 18 years of age” from possible responsibility for crimes within the SCSL jurisdiction.¹⁹¹ The question surrounding the responsibility of child soldiers, who had been some of the most notorious perpetrators of atrocities during the war, was one of the thorniest issues for the Sierra Leonean negotiators.¹⁹² So the Secretary-General effectively used that issue as a trump card to emphasize why the gravity of the crimes is a vital consideration in addition to the functional (leadership) position held by the suspect. He wrote in his report, as follows:

While it is inconceivable that children could be in a political or military leadership position (although in Sierra Leone the rank of “Brigadier” was often granted to children as young as 11 years), the gravity and seriousness of the crimes they have

186. See Letter dated Dec. 22, 2000 from Pres. of S.C., *supra* note 173.

187. *Id.*

188. *Id.* para. 1; see S.C. Res. 1315, *supra* note 14, ¶ 3.

189. Letter dated Dec. 22, 2000 from Pres. of S.C., *supra* note 174, para. 1.

190. Letter dated Jan. 12, 2001 from Secretary-General, *supra* note 103, para. 1–2.

191. Secretary-General, *Report on SCSL*, *supra* note 4, ¶ 31.

192. *Id.* ¶ 34.

allegedly committed would allow for their inclusion within the jurisdiction of the Court.¹⁹³

With hindsight, we know that the evidence that came out of the trials never supported this contention. However, the foregoing extract does indicate that at least one of the negotiators, the UNSG, intended the gravity of the conduct to be a crucial element of greatest responsibility personal jurisdiction. The above implicitly accepts that the Council's purpose in framing jurisdiction this way was to limit the prosecutorial investigations to those in leadership position. Going by the reasoning of Trial Chamber I, which discerned this singular thrust that leadership was or should be the determinative criterion for prosecutorial decisions, the massive nature of the crime could and should also be taken into account—albeit as a secondary factor. If this deduction is correct, and it does seem not only correct but also reasonable, it would permit the prosecution of either, or both, of the lower ranked perpetrators in addition to leaders in the same jurisdiction.

In fact, in the same report, one might also recall, Secretary-General Annan had claimed that the wording of Article 1(1) of the draft statute, as the Security Council had proposed it, did “not mean [to limit] personal jurisdiction . . . to the political and military leaders only.”¹⁹⁴ Almost as a tie breaker in case the powers that be in the UNSC continued to disagree with him, he observed that the determination of the meaning of the term “persons who bear the greatest responsibility in any given case falls initially to the Prosecutor, and ultimately to the SLSC itself.”¹⁹⁵ Using this language, the Secretary-General seemed to adopt a negotiating tactic in an attempt to have his way, although he did not later clarify whether his position that the “most responsible” language should not require proof beyond a reasonable doubt,¹⁹⁶ which was ultimately rejected,¹⁹⁷ was also equally applicable to the “greatest

193. *Id.* ¶ 31.

194. Letter dated Jan. 12, 2001 from Secretary-General, *supra* note 103, para. 2.

195. *Id.* (internal quotation marks omitted).

196. See U.N. Secretary-General, Letter dated July 12, 2001 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/2001/693 (July 12, 2001) [hereinafter Letter dated July 12, 2001 from Secretary-General] (indicating acceptance of the agreement by the parties with no subsequent mention of the “most responsible” and “greatest responsibility” language).

197. See SCSL Statute, *supra* note 3, art. 1(1) (containing the language “persons who bear the greatest responsibility”); U.N.-Sierra Leone Agreement, *supra* note 1, art. 1(1) (containing the language “persons who bear the greatest responsibility”).

responsibility” formulation. In a way, he left some ambiguity in the hope that it would help bolster his reading, which invoked Sierra Leone’s concerns as well, to caution the UNSC that it would be up to the court’s prosecutor and judiciary to settle on the final position as to what greatest responsibility jurisdiction ultimately entailed. He thus also sent a message to the prosecutor that he enjoyed a measure of discretion, despite the prescriptive greatest responsibility language contained in the agreement and statute. It would seem that great weight can therefore be attached to the tribunal’s practice in line with that position as well as the VCLT principles.

The Secretary-General’s letter then stated, with explicit reference to the second half of Article 1(1):

Among those who bear the greatest responsibility for the crimes falling within the jurisdiction of the Special Court, particular mention is made of “those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.” *It is my understanding that, following from paragraph 2 above, the words “those leaders who . . . threaten the establishment of and implementation of the peace process” do not describe an element of the crime but rather provide guidance to the prosecutor in determining his or her prosecutorial strategy.* Consequently, the commission of any of the statutory crimes without necessarily threatening the establishment and implementation of the peace process would not detract from the international criminal responsibility otherwise entailed for the accused.¹⁹⁸

The President of the Security Council’s response to the Secretary-General, appeared to endorse the Secretary-General’s two preferred ways of interpreting Article 1(1) in the following terms:

The members of the Council share your analysis of the *importance* and *role* of the phrase “persons who bear the greatest responsibility[.]” The members of the Council, moreover, share your view that the words beginning with “those leaders who . . .” are intended as guidance to the Prosecutor in determining his or her prosecutorial strategy.¹⁹⁹

198. Letter dated Jan. 12, 2001 from Secretary-General, *supra* note 103, para. 3 (emphasis added).

199. Letter dated Jan. 31, 2001 from Pres. of S.C., *supra* note 20, para. 1.

This language was vague in that the reference to the “importance” and “role” of Article 1(1) provision does not entirely specify whether the Security Council felt that the personal jurisdiction phrase is (1) limited to leaders alone, or (2) not necessarily limited to leaders alone because it will include those whose actions were so grave that they merited prosecutions (even if they did not functionally hold high-ranking positions). As to the second sentence of the clause, and arguably by implication, not the first sentence, it appears evident that the UNSC Security Council agreed with Annan that it does constitute a guideline for the prosecutor’s exercise of his discretion without necessarily serving as a legal ingredient or requirement of the crimes. Thus, consistent with the finding of this article as shown in Part III, Article 1(1) offered two separate meanings: the first part of the sentence being a personal jurisdictional threshold; and the second part, especially when read together with Article 15(1) outlining the powers of the prosecutor, establishing a limitation for the prosecutorial application of her discretion though not necessarily foreclosing the extension of the jurisdiction to the *political leaders* and the *killer perpetrators*.

In his last publicly available letter on the greatest responsibility issue, dated July 12, 2001, the Secretary-General notified the Council that the exchange of letters led to modifications of the text in both the draft UN-Sierra Leone Agreement and the Statute annexed to it.²⁰⁰ As this back and forth communication had been an internal conversation between two U.N. organs, he confirmed that “[t]he Government of Sierra Leone was consulted on these changes and by letter of 9 February 2001 to the Legal Counsel expressed its willingness to accept the texts.”²⁰¹ This fact, therefore, made the communication a subsequent agreement between all the parties in connection with the conclusion of the treaty in the Article 31(2) VCLT sense.

In *Fofana*, Trial Chamber I, after meticulously reviewing the above drafting history, had also ruled that the “agreed text resulted in the adoption of the phrase” on personal jurisdiction as articulated in Article 1(1) of the Statute with the specific duties of the prosecutor in that regard prescribed in accordance with Article 15(1).²⁰² It was on this basis that the chamber concluded that “the issue of personal jurisdiction is a

200. Letter dated July 12, 2001 from Secretary-General, *supra* note 197.

201. *Id.*

202. Prosecutor v. Norman, Case No. SCSL-04-14-PT, Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction Filed on Behalf of Accused Fofana, ¶ 26 (Mar. 3, 2004).

jurisdictional requirement, and while it does of course guide the prosecutorial strategy, it does not exclusively articulate prosecutorial discretion, as the Prosecution has submitted.”²⁰³

Upon closer examination, it is clear that Trial Chamber I believed, correctly in my view, that personal jurisdiction created a jurisdictional threshold. However, the nuance in the language is that this group of judges did not say that “greatest responsibility” was a jurisdictional requirement in the entirety of the provision. Rather, they felt that the “*issue* of personal jurisdiction” also contained language purporting to guide the prosecutor on how she should use her power. It follows that it is correct that Article 1(1) was neither exclusively jurisdictional nor exclusively directed at demarcating the contours of prosecutorial discretion. In contrast, Trial Chamber II, for its part, was critical of the judicial colleagues in the other chamber and explicitly determined that the “greatest responsibility” did not create a jurisdictional requirement because it only limited to a small category the number of persons that were to be prosecuted.²⁰⁴ Significantly, the above reading that the two ideas were encompassed in the same phrase as well as in that enumerating the prosecutors duties appears to be confirmed by the contents of the July 12, 2001, letter to the Council, in which the Secretary-General explained as follows:

Members of the Council reiterated their understanding that, without prejudice to the independence of the prosecutor, the *personal jurisdiction* of the Special Court *remains limited to the few who bear the greatest responsibility* for the crimes committed.²⁰⁵

V. CONCLUSION: LESSONS FROM THE SCSL

In taking up previously uncharted terrain, outside the confines of the debates in the trials in Sierra Leone, this Article has shown that it is imperative for the creators of international criminal tribunals to properly delineate their personal jurisdiction. The greatest responsibility formula used at the SCSL was politically convenient for the Council, which was keen to establish a cheap and time limited ad hoc court that would prosecute only a small group of people in Sierra

203. *Id.* ¶ 27.

204. *See* Prosecutor v. Brima, Case No. SCSL-04-16-T, Judgment, ¶ 653 (June 20, 2007).

205. Letter dated July 12, 2001 from Secretary-General, *supra* note 197 (emphasis added).

Leone. But, as I have shown through this original contribution to the literature, without further specificity, such general statements of personal jurisdiction in practice raise serious issues of interpretation and application in concrete cases due to vagueness.

In the Cambodia Tribunal, which has the closest personal jurisdiction wording to that of the Sierra Leone court, an identical concern arose as to the meaning of Article 1(1) of the ECCC Law, which provided for the trial of “senior leaders of Democratic Kampuchea and those who were most responsible for the crimes.”²⁰⁶ This phrase is in one way an improvement on what was used in Sierra Leone in the sense that the first part of the phrase specifically identifies senior leaders while the second part mentions those most responsible. In that way, the ECCC approach apparently adequately addresses the policy concerns of Secretary-General Annan in the Sierra Leone situation: that the leaders, architects, or planners of the mass crimes as well as their followers responsible for grave crimes should all as a *prima facie* matter be deemed prosecutable.²⁰⁷ The legal framework must be clear and accommodating, but the prosecutor should ultimately make the final choice. The Cambodia formulation also reflects the general purpose behind internationally supported criminal prosecutions which, as we saw in our historical review starting with the Nuremberg Tribunal, had always aimed to ensure the prosecution of leaders for their crimes.

The only difficulty is that even the ECCC phrase is still somewhat ambiguous. The second part of the sentence, speaking to those most responsible, suggests a focus on the persons to be tried for the depravity or severity of their acts. Unsurprisingly, taking a cue from the developments respecting their brethren at the SCSL, the defense counsel litigated that issue arguing, at the close of the first trial, that the Cambodia Tribunal lacked jurisdiction over the first defendant Duch.²⁰⁸ The chamber, drawing on the logic of the Sierra Leone Court, determined that the accused, as a senior leader, fell within its personal jurisdiction as one of those most responsible.²⁰⁹ That conclusion was unsuccessfully challenged on appeal.²¹⁰

206. U.N.-Cambodian Agreement, *supra* note 35; *see also* G.A. Res. 57/228, ¶ 1, U.N. Doc. A/RES/57/228 B (May 13, 2003) (approving draft of ECCC Agreement).

207. Secretary-General, *Report on SCSL*, *supra* note 4, ¶¶ 29–30.

208. Prosecutor v. Duch, Case No. 001/18-07-2007/ECCC/TC, Judgment, ¶ 14 (July 26, 2010).

209. *Id.* ¶ 24–25.

210. *Duch*, Case No. 001/18-07-2007-ECCC/SC, Appeal Judgment, ¶ 79 (Feb. 3, 2012).

In terms of lessons learned from Sierra Leone, it seems too early to draw final conclusions as to whether the SCSL jurisprudence will be found well reasoned enough to be followed by other courts. That said, the following tentative observations may be offered with respect to the case law it has bequeathed us on this particular issue. First, this type of clause, spelling out personal jurisdiction, should be avoided. Failing that, if the “greatest responsibility” language needs to be used, it is important to at least attempt to define what the phrase means to say that a court shall prosecute those bearing greatest responsibility. Fortunately, this is in fact what the draft statute of the Special Tribunal for Kenya attempted to do. Again, in that instance, the same logic of focusing on leaders in positions of authority and influence as well as those most vicious in committing the crimes was already evident in the relatively more precise definition that was offered.²¹¹ The drafters of that clause clearly knew of the SCSL experience, since they attempted to resolve some of the thorny issues that led to much ink being spilled by counsel and judges during the court’s decade-long life. Regrettably, because the Kenya hybrid tribunal never saw the light of day, as the bill failed to obtain sufficient support for passage into law in the Kenyan Parliament,²¹² there was a missed opportunity to see whether that clearer phrase would have fared better during the concrete trials of the suspects responsible for the post-election violence, which rocked that country in December 2007.

Second, future ad hoc tribunal statutes should explicitly state whether such a phrase is or is not a jurisdictional requirement that must be proved beyond a reasonable doubt as an element of the crime. It seems obvious that it should not be treated as such, because it would

211. Special Tribunal for Kenya Bill, *supra* note 21, pt. I § 2. The Bill offers the following definition:

“[P]ersons bearing the greatest responsibility” means a person or persons who were knowingly responsible for any or all of the following acts: planning, instigating, inciting, funding, ordering or providing other logistics which directly or indirectly facilitated the commission of crimes falling within the jurisdiction of the Tribunal; *in determining whether a person or persons falls within this category, the Tribunal shall have regard to factors including the leadership role or level of authority or decision making power or influence of the person concerned and the gravity, severity, seriousness or scale of the crime committed.*

Id. (emphasis added).

212. Kenya: *Quorum Stops the Bill on the Establishment of the Special Tribunal to Try Violence*, AFRICAN PRESS INT’L (Fed. 6, 2009), <http://africanpress.me/2009/02/06/kenya-quorum-stops-the-bill-on-the-establishment-of-the-special-tribunal-to-try-violence/>.

otherwise make prosecutions of concrete cases rather difficult and procedurally cumbersome. This is the lesson of the Sierra Leone Court, which struggled throughout its trials to repeatedly make the simple point to defendants and their counsel that the focus of prosecution of persons in leadership positions did not mean that those of lower rank, in effective control, could not also simultaneously or alternatively be pursued by an international court with “greatest responsibility language” as the anchor of its personal jurisdiction. Instead, as we have seen, attempts to judicially settle the issue led to more challenges, in different cases, at different stages of the trial process (pre-trial, trial, and appeal).

Third, and closely related to the second point, if greatest responsibility is to be used to delineate the boundaries of the power that the tribunal prosecutors enjoy, that purpose should be stated explicitly. Although it seems highly unlikely, if there is another separate purpose for employing such language beyond limiting prosecutorial wiggle room, that too should be stated. Indeed, it may be wise to include a provision discussing the relationship between the personal jurisdiction article and the limitations to the prosecutorial mandate. This would help to avoid unnecessary procedural hurdles during trials of the suspects and arguments that the prosecution lacks the power to make choices as to whom to prosecute from among a wide range of potential perpetrators. The obviousness of that position did not make the task of the prosecutor’s in the SCSL any less challenging.

Fourth, though not discussed in this Article *per se*, to put the matter beyond any doubt, consideration should also be given to clarifying that the judges have *ex proprio motu*²¹³ power to review whether the prosecution has fulfilled the personal jurisdiction and other requirements when making a *prima facie* case. It is beyond dispute that it is the duty of the judges to ensure fair trials that respect the rights of the accused take place in a given criminal trial. It is therefore not enough for them to abdicate this function to the prosecution, as one chamber effectively did at the SCSL, by saying that they as judges were not empowered to review the prosecutorial organ or to imply that they were simply there to rubber stamp the prosecutorial *allegations* in an indictment that someone is among those bearing greatest responsibility for the atrocities committed during a particular conflict.

Fifth, the drafters of statutes, especially at the United Nations Office

213. “Of one’s own accord.” BLACK’S LAW DICTIONARY 662 (9th ed. 2009).

of Legal Affairs, should explicitly consider stating the consequences of a finding that personal jurisdictional requirements had either been fulfilled or not. What standard should apply to determine that it had been fulfilled, and at what stages of the trials? If the threshold is not fulfilled, what should happen? Would the tribunal have to release the defendant, and if so, should this be with or without prejudice to the prosecution? These fundamental questions need some important answers. Given the Sierra Leone experience, it may be helpful to indicate whether any such determinations require factual assessments of evidence or are purely legal questions to be considered by the judges even before the prosecution calls any witnesses. If factual assessments are required, then the stage of the trial at which the point should be considered should be delineated keeping in mind the appropriate standard of proof. If it is a legal assessment, that too should guide how the claims can be made, using what evidentiary burden, before reaching the legal conclusion.

Finally, while this Article noted that the ICC Prosecutor has adopted the “greatest responsibility” standard to guide his prosecutorial policy, it may be worth noting that the concern about personal jurisdiction does not arise there in the same way as it did at the SCSL. Although the structure and content of the Rome Statute makes this rather difficult, it may be only a matter of time for a creative defendant to argue that he should not be prosecuted because he is not among those bearing greatest responsibility for what happened in a given conflict. Fortunately, the phrase “greatest responsibility,” though widely used in ICC prosecutorial practice, is not included in the ICC statute in the same way it was in the founding document of the SCSL. Its use in the permanent tribunal is therefore purely a function of prosecutorial policy, which, although logical, could also be changed at any time without requiring any amendments to the Rome Statute. Consequently, as a prosecutorial policy, defendants should not be able to rely on the phrase to mount a jurisdictional challenge, at least one that would cause the same type of difficulties for the court as occurred in Sierra Leone. If a defendant did, it would presumably be relatively easy for the pre-trial or trial chambers to resolve the issue on the ground that the prosecutorial policy is mere policy, rather than a statutory requirement.