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DATE: August 6, 2008
RE: Joinder and Severance in International Criminal Law and its implications for the ECCC.

I. Introduction

The doctrine of joinder – trying multiple defendants simultaneously for the same or related crimes – is well-recognized in international criminal law. Proceedings in the Extraordinary Chambers of the Courts of Cambodia (ECCC) will likely deal with this issue as various individuals are charged and tried for their alleged participation in crimes committed during the Khmer Rouge period. The first question, therefore, is what, if anything, ECCC legislation has to say about joinder? The answer is that the Law on the Establishment of the Extraordinary Chambers, the Internal Rules of the ECCC and Cambodia’s Code of Criminal Procedure are all silent on the issue of joinder.

While ECCC procedural legislation contains no explicit guidelines on joinder and severance, the legislation does give guidance as to how the ECCC should handle issues on which its legislation is silent. Article 33 of the Law on the Establishment of the Extraordinary Chambers states “[i]f [the] existing procedure do not deal with a particular matter . . . guidance may be sought in procedural rules established at the international level.” It will be important, therefore, to examine the rules of procedure and jurisprudence of the various international courts and tribunals on the subject of joinder and severance in order to guide ECCC proceedings.

II. Efficiency and the Rights of the Parties Underlie the Rules Governing Joinder and Severance

ECCC core documents, like those of other international courts and tribunals, contain basic provisions that aim for procedural efficiency and seek to guarantee the procedural rights of the various individuals involved in proceedings. What is common across the legislation of the

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various international criminal courts and tribunals is a concern for: 1) justice and efficiency; 2) the right of the accused to a fair trial free from unnecessary prejudice or undue delay; and 3) the rights of victims and witnesses. As we will see, these concerns dictate how various international courts have dealt with joinder and severance.

Article 33 of the Law on the Establishment of the Extraordinary Chambers calls for the ECCC to “ensure that trials are fair and expeditious . . . with full respect for the rights of the accused and for the protection of victims and witnesses.” Additionally, Article 33 states that “the Extraordinary Chambers of the Trial Court shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights.”¹ Article 35 of the Law on the Establishment of the ECCC entitles the accused to the right “to be tried without delay.”² The Internal Rules of the ECCC also contain provisions meant to safeguard the rights of the various parties to the proceedings.³ The core documents of other international courts and tribunals contain similar guarantees for efficiency and protections for the rights of the accused as well as victims and witnesses.⁴ Thus, it will be useful for the ECCC to look at how international criminal courts and tribunals have related these general concerns to issues of joinder and severance.

¹ The relevant portions of those provisions lay out the following protections for the accused: the right to be tried “without undue delay” and “not to be compelled to testify against himself or confess guilt.”

² Law on the Establishment of the Extraordinary Chambers as Amended 27 October, 2004. No. NS/RKM/1004/006, Article 35, §c [hereinafter Establishment Law].

³ Extraordinary Chambers in the Courts of Cambodia, Internal Rules as Revised on 1 February 2008 (Rule 21 states that “proceedings before the ECCC shall be brought to a conclusion within a reasonable time.” This provision can be read as both guaranteeing the rights of the accused to a trial without undue delay and as well as demanding the court to ensure efficiency in proceedings).

⁴ For example, Article 68 of the Rome Statute of the International Criminal Court (ICC), calls on the court to “take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.” Article 67 of the Rome Statute protects the right of the accused to be tried “without undue delay.” The statutes of the International Criminal Tribunal for Yugoslavia (“ICTY”), the International Criminal Tribunal for Rwanda (“ICTR”) and the Special Court for Sierra Leone (“SCSL”) all have all been interpreted to provide for similar guarantees.

II. The Jurisprudence of International Courts and Tribunals Provide Guidance on Joinder and Severance.

A. International Courts and Tribunals Have Permissive Rules on Joinder and Severance.

The core instruments of major international courts and tribunals contain specific procedural provisions allowing joinder and severance. For example, Article 64 of the Rome Statute allows the Trial Chamber of the ICC to order joinder or severance “as appropriate” and upon notice to the parties. Rule 136 of the ICC Rules of Evidence and Procedure is more specific – “persons accused jointly” are to be tried jointly, unless the Trial Chamber “orders that separate trials are necessary, in order to avoid serious prejudice to the accused, to protect the interests of justice, or because a person jointly accused has made an admission of guilt.”

The rules of the ICTY and the ICTR are almost identical to each other with respect to provisions governing joinder and severance. Rule 48 of both the ICTY and ICTR Rules of Evidence and Procedure provides that “[p]ersons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried.” Similarly, Rule 48 of the Rules of Procedure and Evidence for the Special Court for Sierra Leone provides that the court may indict and jointly try individuals accused of the “same or different crimes committed in the course of the same transaction.”

B. Limited Presumption that Individuals Accused or Indicted Jointly be Tried Jointly.

The key difference between the ICC rules regarding joinder and those of the ICTR, ICTY and SCSL is that under the former individuals accused jointly *must* be tried jointly while rules of the latter state that the court *may* allow joinder. Accordingly, in the *Katanga et al.* case, the ICC’s Trial Chamber has interpreted Article 64 and Rule 136 to create a presumption of joinder for individuals accused jointly.⁵ It is not clear what the *Katanga et al.* court meant by “persons

⁵ Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07, Decision on Joinder of the Cases Against Germain Katanga and Mathieu Ngudjolo Chui, pgs. 7-9 (Pre-Trial Chamber I, 10 March 2008). Additionally, the Trial

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accused jointly” – in other words, whether the presumption of joinder applies only to individuals who are *charged* (or indicted) jointly, or whether the term “accused” embraces a broader definition – for example, where individuals indicted separately who have been accused of participating in the same or similar crimes. In *Katanga et al.* the Pre-Trial Chamber was dealing with a joint arrest warrant application from the prosecution.⁶ Because the ICC’s arrest warrant is functionally similar to the pre-indictment stage before the ECCC, it would be fair to say that the *Katanga et al.*, suggests a presumption of joinder for individuals indicted jointly.

Comparatively, the rules of the ICTR, ICTY and SCSL state that persons charged with the same or different crimes *may* be tried jointly. Some jurisprudence from the ICTR and the ICTY also suggests that there is a presumption of joint proceedings for persons accused jointly. For example, in addressing Defense Counsel’s motion for severance, the ICTR has said that there is a “preference for joint trials of individuals accused of acting in concert in the commission of a crime.”⁷ The ICTY has not been as explicit as the ICTR or the ICC, but has in a number of decisions suggested that individuals accused jointly should be tried jointly.⁸

Although there is some indication that charging or indicting individuals jointly creates a presumption of joinder it should only be seen to apply to situations where a prosecutor has submitted a joint indictment, and defense counsel has not challenged it with a motion for severance. However, where defense counsel has challenged a joint indictment with a motion for severance, courts have subjected the facts and allegations in the indictment to the same test for joinder (explained below) as they would separate indictments.⁹

Chamber has ruled that joinder may be ordered at the pre-trial phase. To hold otherwise (that joinder is not allowed at the pre-trial stage), the Trial Chamber noted, would be “cumbersome,” especially in light of its duty to promote efficient proceedings. *Katanga et al.*, 9.

⁶ *Id.* at pg. 3-4.

⁷ The Prosecutor v. Bagosora, Kabiligi, Ntabakuze & Nsengiyumva, Case No. ICTR-98-41-T, Decision on Request for Severance of Three Accused, ¶3 (Trial Chamber I, 27 Mar. 2006) [*hereinafter Bagosora*, Decision on Request for Severance of Three Accused].

⁸ *Cf.* Prosecutor v. Brdanin & Talic, Case No. not listed, Decision on Motions by Momir Talic for a Separate Trial and for Leave to File a Reply, ¶20 (Trial Chamber II, 9 Mar. 2000) (The Trial Chamber stated that it “considers that it is in the interests of justice . . . that these accused, charged as they are with offences arising from the same course of conduct, should be tried together.” The Trial Chamber’s discussion is in the context of prejudice and interests of justice, but nonetheless seems to suggest that individuals accused or indicted jointly are preferably tried jointly); Prosecutor v. Delalic & Delic, Case No. not listed, Decision on Motions for Separate Trial Filed by the Accused Zejnil Delalic and the Accused Zdravko Mucic, ¶8 (Trial Chamber, 25 Sept. 1996) (Explaining that accused who have been jointly charged are entitled to severance “upon a proper showing” under Rule 82).

⁹ *See Bagosora et al.*, Decision on Request for Severance of the Three Accused; *Brdanin, et al.*; *Delalic, et al.*

C. Individuals Indicted Separately May be Tried Jointly.

The ICTR and SCSL rules of procedure contain specific provisions that allow individuals indicted separately to be tried jointly. ICTR Rule 48 *bis* states that “[p]ersons who are separately indicted, accused of the same or different crimes committed in the course of the same transaction, may be tried together.” SCSL Rule 48 (A) is identical to the ICTR rule. The ICTY Rules of Evidence and Procedure do not contain a provision concerning individuals who are separately indicted. As such, ICTY decisions have treated applications for joinder as motions to join separate indictments and proceed to trial jointly, effectively allowing individuals indicted separately to be tried jointly.¹⁰

D. Individuals Accused of the Same or Different Crimes Committed in the Course of the Same Transaction May be Tried Jointly.

The ICTR, ICTY and SCSL Rules all provide that a court may grant joinder if the persons accused jointly are alleged to have committed the same or different crimes in the course of the **“same transaction.”**¹¹ The ICC Rules of Evidence and Procedure, in contrast, do not contain any such language. The only ICC decision addressing a request for joinder, *Katanga, et al.* dealt with the issue of whether the proceedings of two accused could be joined at the pre-trial stage. The court did not address the Prosecutor’s basis for joinder, and therefore did not mention whether it would use the “same transaction” test to determine whether joinder would be appropriate in different cases.

Rule 2 of the ICTY and ICTR Rules of Evidence and Procedure define “transaction” as **“[a] number of acts or omissions whether occurring as one event or a number of events, at the same or different locations and being part of a common scheme, strategy or plan.”**

¹⁰ See Prosecutor v. Popovic, Beara, Nikolic, Borovcanin, Tolimir, Miletic, Gvero, Pandurevic & Trbic, Case Nos. IT-02-57-PT, IT-02-58-PT, IT-02-63-PT, IT-02-64-PT, IT-04-80-PT, IT-05-86-PT, Decision on Motion for Joinder. ¶1-3 (21 September 2005); Prosecutor v. Meakic, Gruban, Knezevic, Fustar, Banovic, Case Nos. IT-95-4-PT, IT-95-8/1-P, Decision on Prosecution’s Motion for Joinder of Accused, Introduction and Background, Disposition (The Trial Chamber, 17 September 2002).

¹¹ International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, R. 48 (*as amended* 10 Nov. 2006) [hereinafter ICTR Rules of Procedure]; International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, R. 48 (*as amended* 22 Sept. 2006) [hereinafter ICTY Rules of Procedure]; Special Court for Sierra Leone, Rules of Procedure and Evidence, R. 48 (*as amended* 24 Nov. 2006) [hereinafter SCSL Rules of Procedure].

ICTR jurisprudence has provided the most detailed criteria for this definition, which the SCSL has also adopted.¹² According to this approach, the acts must:

- “1. Be connected to material elements of a criminal act. For example the acts of the accused may be non-criminal/legal acts in furtherance of future criminal acts;
2. The criminal acts which the acts of the accused are connected to must be capable of specific determination in time and space, and;
3. The criminal acts which the acts of the accused are connected to must illustrate the existence of a common scheme, strategy or plan.”¹³

ICTR and SCSL decisions have rarely discussed the first element of the test outlined above, and have instead considered the second and third criteria under one analysis. For that reason the most contentious arguments for and against joinder arise out of whether or not a set of allegations “illustrate[s] the existence of a common scheme, strategy or plan.” The ICTY has not adopted the precise parameters of the ICTR/SCSL test laid out above, focusing instead on the plain meaning of “same transaction” provided by Rule 2 of the Rules of Evidence and Procedure.¹⁴ Nevertheless, like the ICTR and SCSL, the ICTY has focused its inquiry on whether or not a set of allegations demonstrate a “common scheme, strategy or plan” and that the “accused committed crimes during the course of it.”¹⁵

E. Common Scheme Strategy or Plan

In determining what constitutes the same transaction for purposes of joinder the most important question for international courts is whether there is a common scheme, strategy, or

¹² Prosecutor against Sesay, Brima, Kallon, Gbao, Kamara & Kanu. Case Nos. SCSL-2003-05-PT, SCSL-2003-06-PT, SCSL-2003-07-PT, SCSL-2003-09-PT, SCSL-2003-13-PT, Decision and Order on Prosecution Motions for Joinder, ¶29 (The Trial Chamber, 27 January 2004).

¹³ The Prosecutor v. Bagosora, Kabiligi, Ntabakuze & Nsengiyumva, Case Nos. ICTR-96-7, ICTR-97-34, ICTR-97-30, ICTR-96-12, Decision on the Prosecutor’s Motion for Joinder, ¶116 (Trial Chamber II, 29 June 2000) [hereinafter *Bagosora et al*, Decision on the Prosecutor’s Motion for Joinder]

¹⁴ *E.g. Brdanin., et al.*, ¶20.

¹⁵ *Id* (What is notable about the ICTR and SCSL jurisprudence regarding “same transaction” is that “non-criminal/legal” acts may form the basis for joinder between multiple accused individuals. Including non-criminal acts as a basis for joinder potentially gives prosecutors and courts wide latitude in seeking joinder. Of course, the acts alleged to form part of the same transaction must still “illustrate the existence of a common strategy, scheme or plan.” The ICTY has not explicitly ruled whether acts which are non-criminal/illegal may form part of the same transaction for purposes of joinder but the *Brdanin et al.* decision seems to suggest otherwise at ¶20).

plan. Courts have generally given wide latitude to a Prosecutor's allegations that a set of facts and circumstances amount to a common scheme or strategy, even granting joinder for individuals accused of committing crimes in separate geographic locations, at different times, or as members of multiple political or military organizations

i. Considering Factual Allegations

International courts have limited themselves to considering the factual allegations contained in the charging documents, indictments and related submissions in determining whether joinder is appropriate.¹⁶ Indeed, various decisions have stressed that in considering a motion for joinder, a court must keep in mind that it is not the stage where proof is established.¹⁷ A decision on joinder is not one on the substantive merits of the prosecutor's allegations; the purpose is "not [to have] two trials; one at the joinder stage, one at the trial stage."¹⁸

ii. Alleging Conspiracy

The ICTR has asked whether the allegations made by the Prosecutor establish a conspiracy if proven at trial. If the answer is yes, then there is a basis for joinder.¹⁹ At least one ICTR decision has stated that as a presumption, individuals accused of conspiracy to commit genocide should be tried jointly.²⁰ According to one ICTY decision, however a court may still grant joinder where the Prosecutor cannot show that there has been a conspiracy between the accused in terms of "direct coordination or agreement."²¹ To that extent, alleging and proving conspiracy should not be looked at as a threshold requirement for joinder. Rather, courts seem to treat it as a sufficient, but not necessary requisite for joinder.

¹⁶ *Bagosora et al.*, Decision on the Prosecutor's Motion for Joinder ¶120; *Meakic, et al.*, "The Law" section, second to last paragraph.

¹⁷ *Bagosora et al.*, Decision on the Prosecutor's Motion for Joinder ¶121; *See also Brdanin et al.*, ¶22.

¹⁸ *Bagosora et al.*, Decision on the Prosecutor's Motion for Joinder ¶121.

¹⁹ *Id.* at ¶123.

²⁰ Prosecutor v. Barayagwiza, Case No. ICTR-91-19-I, Decision on the Prosecutor's Motion for Joinder and Decision on Barayagwiza's Extremely Urgent Motions for Lack of Jurisdiction and for Waiver of Time Limits Under Rule 72 (A) and (F) of the Rules, ¶16 (Trial Chamber I, 6 June 2000) [hereinafter *Barayagwiza*, Decision on the Prosecutor's Motion for Joinder].

²¹ Prosecutor v. Brdanin & Talic, Case No .

This aspect of the jurisprudence on joinder may have important consequences for the ECCC as Article 4 of Law on the Establishment of the Extraordinary Chambers makes “conspiracy to commit acts of genocide” a substantive offense. If individuals are accused of conspiracy to commit genocide under Article 4 there may be a strong basis for presuming that the “same transaction” test is satisfied and the co-accused should be tried jointly.

iii. Establishing common scheme when accused are members of different organizations.

In *Barayagwiza et al*, the Trial Chamber granted the Prosecutor’s motion for joinder for accused who were alleged to have acted as co-conspirators in acts of genocide by way of their involvement in media organizations that incited genocide in Rwanda.²² In that case, one group of the accused were alleged to belong a Hutu newspaper that spread extremist ideology, while another group of accused (including some of those who were alleged to be part of the newspaper) were alleged to have set up a radio station with the same purpose.²³ While there was some overlap between the groups, at least one of the accused was a member of only one of the two media organizations. Key to the Trial Court’s reasoning in allowing joinder was the fact that the two media organizations “collaborated closely in conducting a campaign . . . preparing lists of those to be killed.”²⁴

In *Brdanin, et al.*, one of the accused claimed that joinder was inappropriate because the prosecution presented him as a civilian and political leader while the co-accused was presented as a military man.²⁵ The Trial Chamber denied the motion for separate trial, noting that joinder has been “approved . . . upon the basis that [the charges] relate in substance to the same campaign of destruction, the same period of time, the same area . . . [i]t is not necessary for all the facts to be identical.”²⁶ Although there was some dispute whether the supporting material submitted by the Prosecution demonstrated whether the co-accused were members of the same

²² Prosecutor v. Barayagwiza, Case No. ICTR-97-19-I, Decision on the Prosecutor’s Motion for Joinder And Decision on Barayagwiza’s Extremely Urgent Motions for Lack of Jurisdiction and for Waiver of Time Limits under Rule 72 (A) and (F) of the Rules ¶10, 13-14 (Trial Chamber I, 6 June 2000).

²³ *Id.* at ¶13.

²⁴ *Id.*

²⁵ *Brdanin, et al.*, ¶5.

²⁶ *Id.* at ¶20 (quoting Prosecutor v. Kovacevic, Case No. IT-97-24-AR73, Decision Stating Reasons for Appeals Chamber’s Order of 28 May 1998, Separate Opinion of Judge Shahabuddeen, P. 3.)

“Crisis Group,” the court’s reasoning did not turn on resolving that allegation, and seemed to suggest that regardless of whether that fact could be established, there would nonetheless be grounds for joinder.²⁷

iv. Establishing common scheme when accused committed crimes in different locations or at different times.

When considering whether factual events differing in time and location nevertheless form part of the same transaction the ICTY and ICTR have asked whether there is a sufficient nexus between the alleged acts of the accused.²⁸ Confronted with indictments alleging crimes committed in multiple locations at different times, the courts have generally granted joinder where the indictments contain common facts, or where the prosecution has alleged a broader common scheme or plan that ties the events together.²⁹

In *Ntakirutimana et al*, the Trial Chamber granted the prosecutor’s motion for joinder where two groups of accused were separately indicted and charged with involvement in events that occurred in different locations.³⁰ The allegations involved massacres at two separate locations – Mugonero and Bisesero.³¹ One group of accused allegedly participated in the first massacre at Mugonero, pursued survivors who had fled and continued attacks, along with other accused individuals, at Bisesero.³² The court noted that “the acts of the accused may form part of the same transaction notwithstanding that they were carried out in different areas and over different periods, providing that there is a sufficient nexus between the acts committed in the two areas.”³³

Much of the *Ntakirutimana* court’s reasoning relied on the fact that the indictments contained common facts and allegations. The trial chamber also rejected the Defense’s argument

²⁷ See *id.* at ¶22-23.

²⁸ Prosecutor v. Martić, Stanišić, Simatović & Seselj, Case Nos. IT-95-11-PT, IT-03-69-PT, IT-03-67-PT, Decision on Prosecution Motion for Joinder, ¶19 (Trial Chamber III, 10 November 2005); Prosecutor v. Ntakirutimana, Ntakirutimana & Sikubwabo, Case Nos. ICTR-96-10-I, ICTR-96-17-T, Decision on the Prosecutor’s Motion to Join the Indictments ICTR 96-10-I and ICTR 96-17-T, ¶21 (Trial Chamber I, 22 February 2001).

²⁹ See *Ntakirutimana, et al.*; *Popović, et al.*

³⁰ *Ntakirutimana et al.*, ¶1.

³¹ *Id.* at ¶19.

³² *Id.*

³³ *Id.* at ¶21.

that the acts differed with regard to victims and the degree to which each accused participated.³⁴ To satisfy the same transaction test, the Trial Chamber noted “[t]here is no requirement that the scheme, strategy or plan be identical. A strategy or plan may change, or be adapted, but so long as it remains common in nature and purpose it will satisfy the requirements of Rule 48 *bis*.”³⁵

Similarly in *Popovic et al*, the Trial Chamber granted the Prosecutor’s motion for joinder of 9 individuals who were accused of participating in a campaign to remove Muslims from two areas in the former Yugoslavia.³⁶ The defense argued that the acts of the accused did not form part of the same transaction because “they related to two distinct joint criminal enterprises which occurred during distinct time periods” and because the accused played greater or lesser roles in the criminal enterprise.³⁷ The Trial Chamber rejected these arguments, agreeing with the Prosecution that the fact that the factual allegations relating the two enterprises were “closely linked” demonstrated that there was a sufficient nexus between them to justify joinder.³⁸ Furthermore, the court stressed that for purposes of defining “same transaction for purposes of Rule 49, the various acts of the accused can be found to have a common purpose even if they do not overlap in time or place.”³⁹

III. Discretionary Factors

If a court has determined that a set of acts meet the “same transaction” requirement for joinder it must still ask whether separate trial would nonetheless be appropriate. Rule 136 of the ICC Rules of Evidence and Procedure allows the Trial Chamber to order separate trials as necessary, “in order to avoid serious prejudice to the accused, to protect the interests of justice, or because a person jointly accused has made an admission of guilt.” Rule 82, common to both the ICTY and ICTR Rules of Evidence and Procedure, states that the “Trial Chamber may order that persons accused jointly under Rule 48 be tried separately if it considers it necessary to avoid a *conflict of interest that might cause serious prejudice to an accused or to protect the interests*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Popovic, et al.*, ¶10-11.

³⁷ *Id.* at ¶13.

³⁸ *Id.* at ¶14-16.

³⁹ *Id.* at ¶17.

of justice (emphasis added).” Rule 82 of the SCSL Rules of Evidence and procedure is identical to the ICTY and ICTR rules governing severance.

The ICTR, ICTY and SCSL have interpreted some of the language of Rule 82, which describes when a court may order severance of “person jointly accused,” as a discretionary test of whether or not joint proceedings are appropriate in the first place. For example, the Trial Chambers of the ICTR have considered “conflict of interest that might cause serious prejudice to an accused” and “the interests of justice” as discretionary factors that weigh for or against joinder, whether arising out of a Prosecutor’s motion for joinder⁴⁰ or Defense Counsel’s motion for severance.⁴¹ Similarly, the ICTY has identified a number of discretionary factors arising out of the language of Rule 82 that the Trial Chamber has used as a test for determining when joinder is appropriate.⁴² All of the courts and tribunals, therefore, agree that granting or denying joinder is a matter of the court’s discretion.⁴³

Effectively, then, once the “same transaction” test has been met, the ICTR, ICTY and SCSL have considered requests for joinder or severance as a discretionary matter, to be analyzed based on factors emanating from concerns for efficiency and the rights of witnesses and victims on one hand and the rights of the accused on the other. For example, the ICTR has stated that in exercising its discretion regarding joinder, the Trial Chamber “must weigh the overall interests of justice and the rights of the individual accused.”⁴⁴ The ICTY’s approach is slightly different, including all of its factors under a single “discretionary factors” analysis.⁴⁵ While the ICTR and ICTY have framed this analysis in slightly different terms, the ICTR approach emphasizing “interests of justice” and the ICTY emphasizing “discretionary factors,” both use the same or similar factors in their analysis – balancing the right of the accused to a trial free from prejudice and conflicts of interests against concerns for efficiency and justice.

⁴⁰ *E.g. Bagosora et al.*, Decision on Prosecutor’s Motion for Joinder, ¶140-44.

⁴¹ *E.g. Prosecutor v. Nyiramasuhuko & Ntahobali*, Case No. ICTR-97-21-T, Decision on the Motion for Separate Trials, ¶12-26 (Trial Chamber II, 8 June 2001) (discussing the various discretionary factors that would compel the court to order separate proceedings).

⁴² *E.g. Popovic et al.*, ¶19.

⁴³ *Martic et al.*, ¶35; *Bagosora, et al.*, Decision on the Prosecutor’s Motion for Joinder, ¶140-142 (noting that [t]he decision to grant joinder lies within the discretion of the Tribunal”); *Sesay, et al.*, ¶27.

⁴⁴ *Bagosora et al.*, Decision on the Prosecutor’s Motion for Joinder, ¶142.

⁴⁵ *Popovic et al.*, ¶19.

A. Conflict of interest and serious prejudice to the accused.

The ICTY and ICTR have addressed arguments that granting joinder can lead to a conflict of interest that might cause serious prejudice to the accused for a number of reasons, thereby justifying separate trials. The following arguments have been made for severance under the rubric of conflict of interest and prejudice: 1) undue delay; 2) evidentiary prejudice; and 3) antagonistic witness testimony and defense strategies.

i. Delay

Article 13 of the Agreement between the United Nations and the Royal Government of Cambodia grants the accused “the rights enshrined in Articles 14 and 15 of the 1996 International Covenant on Civil and Political Rights,” which include the right of the accused to be tried without undue delay. Furthermore, the various international criminal courts and tribunals agree that delay is a factor to be examined when considering joinder and severance.⁴⁶ Some courts have analyzed delay under the first clause of Rule 82, which protects the accused from “serious prejudice”⁴⁷ while other courts have analyzed delay under the second clause of Rule 82 – “interests of justice.”⁴⁸ Whether delay is analyzed under either of the two clauses makes no difference as far as the jurisprudence regarding it is concerned - in either case, the court will use a balancing test, weighing the benefits of joinder against the possibility and extent of delay.

In their decisions courts have looked at the totality of the situation and balanced it against reasons favoring joinder. Most of the international criminal courts and tribunals have acknowledged that some amount of delay is inevitable in joint trials and have not allowed that reality to deny an otherwise meritorious motion for joinder.⁴⁹ In *Bagosora et al.* the Trial Chamber identified four factors a court might utilize in considering undue delay: “length of delay, the reason for the delay, the defendant’s assertion of his right, and prejudice to the defendant.”⁵⁰ The Trial Chamber, however, emphasized that the factors it laid out were not

⁴⁶ *Bagosora et al.*, Decision on the Prosecutor’s Motion for Joinder, ¶147.

⁴⁷ *See id.*

⁴⁸ *See* Prosecutor v. Ngirumpatse, Nzirorera & Kajelijeli, Case No. ICTR-98-44-I, Decision on the Prosecutor’s Motion for Joinder of Accused and on the Prosecutor’s Motion for Severance of the Accused, ¶31 (29 June 2000, Trial Chamber II).

⁴⁹ *See Bagosora et al.*, Decision on the Prosecutor’s Motion for Joinder, ¶148; *see also* Prosecutor v. Kunarac & Kovac, Case No. unlisted, Decision on Joinder of Trials, ¶11 (The Trial Chamber, 9 February 2000).

⁵⁰ *Bagosora et al.*, Decision on the Prosecutor’s Motion for Joinder, ¶149.

meant to be talismanic, rather, the chamber insisted “there is no formula as to what constitutes unreasonable delay, there is no inflexible rule, each case has to be looked at” on its own.⁵¹

Other decisions have used a more general test, asking whether joinder will significantly increase the length of trial and/or create delays to the start of trial. In *Martic et al.* the Trial Chamber rejected the Prosecutor’s motion for joinder on the basis that joint proceedings would result in undue delay and therefore “prejudice the rights of all four accused to a fair and expeditious trial.”⁵² In that case one of the accused had been in detention for over 3 years, another for over 2 years.⁵³ The Trial Chamber reasoned that joinder would ultimately “adversely affect the length of [the] trial” of trial for both of the detained accused.”⁵⁴ The Trial Chamber also noted that joinder would delay the start of the trial against at least one of the co-accused as the other co-accused were in different pre-trial stages and were not ready for trial.⁵⁵

Whether the all of the co-accused are at the same stage in proceedings is an important consideration. In *Kunarac et al.*, the Trial Chamber denied a Defendant’s motion for joinder, reasoning that joinder of one of the accused with two co-accused that were prepared to go to trial would result in undue delay. The Trial Chamber noted that the co-accused had “gone past the point of preparation for the trial where any further postponement would be in the interests of justice.”⁵⁶ In coming to its decision, the Trial Chamber stressed that the right of the accused “to a trial without undue delay . . . has to be assessed in light of the same right of others.”⁵⁷ What the Trial Chamber was saying, essentially, is that a Defendant’s motion for joinder on the basis that he is due a speedy trial must be weighed against the delays it might cause other accused.

ii. Presentation of Prejudicial Evidence

Defendants often argue that joinder will prejudice them due to the large amount and complexity of evidence that will be presented during the proceedings. The courts have generally addressed two arguments regarding this kind of prejudice: first, that the sheer amount of evidence makes trial cumbersome and confusing, and second, that evidence presented to

⁵¹ *Id.* at ¶150.

⁵² *Martic et al.*, ¶52

⁵³ *Id.* at ¶48-49.

⁵⁴ *Id.* at ¶50.

⁵⁵ *Id.* at ¶48-50.

⁵⁶ *Kunarac et al.*, ¶10-11.

⁵⁷ *Id.* at ¶11.

implicate one of the co-accused will prejudice other co-accused to whom the evidence does not relate – essentially that evidence or testimony directed against one co-accused will “contaminate” another.

International courts have generally dismissed the argument that joint trials will prejudice the co-accused because of the amount and complexity of evidence that will be produced at trial. For example, in *Bagosora et al.* the defense counsel’s argued that “there would be over forty counts to be dealt with in one trial” and “that such a trial would be unwieldy” in terms of dealing with evidence.⁵⁸ Defense counsel also submitted case law that supported the notion that “it would be unreasonable to expect a jury to grasp and retain evidence in its entirety concerning separate acts of individual accused.”⁵⁹ The Trial Chamber rejected these arguments, noting the difference between a jury trial and one where judges make decisions: “[i]n a jury trial, where intricate legal issues have to be explained to the jury, the situation may become confusing to them, whereas when the trial is by Judges alone, this concern does not arise.”⁶⁰

The other main argument raised by the defense with regard to prejudice arising from joinder is that evidence presented against one accused will ‘contaminate’ the merits of a co-accused’s case. As with prejudice arising from the amount of evidence, courts have generally dismissed this argument, reasoning that judges are capable of mitigating the possibility of prejudice.⁶¹ Additionally they have pointed to Rule of Procedure 82 (common to both the ICTR and ICTY), which provides that “[i]n joint trials, each accused shall be accorded the same rights as if he were being tried separately.”

In *Popovic et al.* defense counsel for two of the co-accused argued that because the two were not charged with some of the crimes that the other co-accused were charged with, “all the evidence presented to substantiate the allegation that their co-accused committed [those] crimes would prejudicially affect [the] trial” of the two co-accused.⁶² Citing the Trial Chamber in *Bagosora et al.*, the *Popovic et al.* Trial Chamber noted the unique character of trial in international tribunals: “Chambers of the Tribunal, unlike certain domestic criminal courts are made up of professional judges who are able to exclude that prejudicial evidence from their

⁵⁸ *Bagosora et al.*, Decision on the Prosecution’s Motion for Joinder, ¶71-72.

⁵⁹ *Id.*

⁶⁰ *Id.* at ¶145.

⁶¹ *E.g. Popovic et al.*, ¶30.

⁶² *Id.*

minds when it comes to determining the guilt of a particular accused.”⁶³ The *Popovic et al.* court noted “that the fact that evidence will be brought relating to one accused and not to another is a common feature of joint trials. On basis of the submissions and the allegations in the indictment the Trial Chamber is of the view that this *in itself* will not cause serious prejudice to the accused.”⁶⁴

This is not to say, however, that a court would never deny a motion for joinder based on a defense counsel’s argument that prejudice could arise from evidence against one co-accused contaminating the case of another. Indeed in *Popovic et al.* the Trial Chamber suggested that prejudice might be shown through “concrete allegations of specific prejudice that is likely to result” from joinder.⁶⁵ Insofar as courts have recognized that there are certain unavoidable consequences of joinder with regard to evidence, defense counsel will have to demonstrate that any prejudice arising from joinder is “particularly or unusually prejudicial so as to justify severance.”⁶⁶

iii. Antagonistic witnesses testimony and defense strategies.

Other than delay and evidentiary prejudice, Defense Counsel have made the following arguments that joinder will lead to conflict of interest that will prejudice the accused: that co-accused might be forced to testify against each other or that defense counsel for the various co-accused would likely adopt antagonistic defense strategies. While the ICTY and ICTR have rarely (if ever) refused a motion for joinder or granted severance based on these arguments, they have laid out criteria that would compel a court to order separate trial based on prejudice arising from conflict of interest.

In *Nyirimasahuko et al.*, defense counsel argued that “their intention to call another Accused party to the same trial, notably to testify with respect to the Accused, might create a conflict of interest.”⁶⁷ The Trial Chamber noted that the defense did not specify the conflict of interest that would arise by calling a co-accused as a witness and rejected the argument and that the “simple intimation that the Accused intends to call his co-Accused on his behalf is not

⁶³ *Id.* (internal quotations omitted).

⁶⁴ *Id.* (quoting *Brdanin et al.*, Decision on Motions by Momir Talic for a Separate Trial, ¶20).

⁶⁵ *Id.* at ¶30.

⁶⁶ See *Bagosora et al.*, Decision on Request for Severance of the Three Accused, ¶8.

⁶⁷ *Nyirimasahuko et al.*, ¶17.

enough for the Chamber to determine that there will be a conflict of interest sufficient to warrant a separate trial.”⁶⁸ The Trial Chamber did, however, elaborate on how it would have treated a more substantive argument and defined “conflict of interest sufficient to warrant a separate trial.”⁶⁹ Drawing on common law principles, the Trial Chamber required a “threshold showing such an allegation of conflict of interest is to meet, as follows: firstly, a bona fide need for the testimony, secondly the specific substance of the testimony, thirdly the exculpatory nature and effect of the testimony and lastly the probability that the exculpatory testimony would follow severance, that is, the likelihood that the co-Accused would in fact testify.”⁷⁰

Defense counsels have also argued that trying multiple accused jointly may result in conflicts over their defense strategy. In some cases, co-accused may give evidence or testimony that contradicts or incriminates another co-accused. Defense counsels have argued such situations lead to a conflict of interest which justifies separate trial. In *Bagosora et al.*, Defense Counsel for one of the accused argued that “the Bagosora witnesses will introduce evidence which is prosecution-oriented and highly prejudicial to the defense cases of all four defendants . . . [f]urthermore the, testimony will include evidence which does not currently form part of the Prosecution evidence against the defendants.”⁷¹ Defense Counsel went on to argue that no procedural mechanism other than severance “could adequately mitigate this prejudice.”⁷² The *Bagosora et al.* Trial Chamber, however, rejected Defense Counsel’s argument noting that “[r]equests to sever trials on the basis of hostile or inconsistent defenses have been repeatedly rejected by Chambers of the international tribunals.”⁷³ The court reasoned that there was no difference between alleging prejudice arising from mutually antagonistic defenses and prejudice arising from disagreement in strategy.⁷⁴ In both cases the court stated, the issue was one of evidentiary prejudice: “[i]f evidence is adduced which, in the opinion of the co-Accused is, prejudicial to their interest, then they will have the opportunity . . . to cross-examine the witness on any matter.”⁷⁵

⁶⁸ *Id.* at ¶19.

⁶⁹ *Id.* (quoting *Barayagwiza et al.*, ¶9).

⁷⁰ *Id.*

⁷¹ *Bagosora et al.*, Decision on Severance of Three Accused, ¶4.

⁷² *Id.*

⁷³ *Bagosora et al.*, Decision on Severance of Three Accused ¶5.

⁷⁴ *Id.* at ¶8.

⁷⁵ *Id.*

In *Brdanin et al.*, the court similarly rejected a defense counsel’s argument that one of the co-accused might give testimony that incriminates another co-accused or vice versa.⁷⁶ The Trial Chamber emphasized that “[a] joint trial does not require a joint defense and necessarily envisages the case where each accused by seek to blame each other.”⁷⁷ The decision goes on to say, however, that “there could possibly exist a case in which the circumstances of the conflict of the accused are such as to render unfair a joint trial against one of them, but the circumstances would have to be extraordinary.”⁷⁸ None of the international courts or tribunals have addressed what may amount to “extraordinary circumstances” with regard to prejudice arising from co-incrimination.

In its only decision regarding joinder, the SCSL was more sympathetic to the argument that joint proceedings would prejudice the accused than either the ICTR and ICTY. In *Sesay et al.*, the Trial Chamber found that “there exists both a factual and legal basis reasonably justifying a joint trial”⁷⁹ (essentially that the “same transaction” requirement had been met) but nonetheless denied the Prosecutor’s request for joinder of two separately indicted groups of accused. The Trial Chamber stated that “the mere allegation that [the accused] were two distinct and separate entities . . . a point not disputed but indeed confirmed by the Prosecution . . . raises a specter of potential conflict in defense strategy and the possibility of mutual recrimination derogating from the rights to which each Accused is entitled to in the context of separate trials.”⁸⁰ Thus, the Trial Chamber concluded, it must “exercise its discretion against granting the application for joinder.”⁸¹ The Trial Chamber’s decision did not elaborate on specific facts that drove its decision. The Trial Chamber simply decided that within its discretion, the potential for prejudice and delay outweighed the benefits of procedural efficiency.⁸²

B. Interests of Justice and Efficiency

Rule 82 of the ICTY/ICTR/SCSL provides that “[t]he Trial Chamber may order that persons accused jointly under Rule 48 be tried separately if it considers its necessary to avoid a

⁷⁶ *Brdanin et al.*, Decision on Motions by Momir Talic, ¶29.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Sesay et al.*, ¶37.

⁸⁰ *Id.* at ¶39.

⁸¹ *Id.* at ¶41.

⁸² *Id.* at ¶46-48.

conflict of interest that might cause serious prejudice to an accused, or *to protect the interests of justice* (emphasis added).” While the language suggests that “interests of justice” are only to be considered in light of severance (in other words, that justice requires severance), to the contrary courts have used the phrase “interests of justice” as a basis for analyzing a requirement for joinder. Of the three courts that have adopted the this approach, the SCSL has been most explicit in emphasizing that the need for a prosecutor to show that joinder is “in the interests of justice” emanates from various rights contained its legislature.⁸³

In exercising its discretion to grant or deny joinder, the ICTR Trial Chamber has found that it “must weigh the overall interests of justice and the rights of the individual accused.”⁸⁴ The following factors have been identified by various decisions as discretionary factors to be considered against the rights of the accused: 1) judicial economy,⁸⁵ in other words: “savings in time and expense;”⁸⁶ 2) protection of witnesses;⁸⁷ 3) consistency of verdicts,⁸⁸ and 4) “consistent and detailed presentation of the evidence.”⁸⁹

i. Judicial Economy

Issues of time and expense are related to the amount of witnesses and evidence that will be presented before the court in a joint proceeding. The most important inquiry for a court is to what degree witnesses and evidence are common to the co-accused. If witnesses and evidence are common to almost all of the co-accused, the court’s discretion will usually fall in favor of joinder. Thus, in *Popovic et al.* the Trial Chamber granted a motion for joinder where the prosecution “posit[ed] that if the six cases were tried separately, the trials would likely last 93-95 months (7-8 years), whereas joint trial would take only 18-24 months (1-2 years).”⁹⁰ The court reasoned that much of the evidence and witnesses were common to all of the co-accused, therefore “[c]onsidering that the Prosecution would be presenting much of the same evidence in

⁸³ *Sesay, et al.*, ¶38.

⁸⁴ *Bagosora et al.*, Decision on the Prosecutor’s Motion for Joinder, ¶142.

⁸⁵ *Martic et al.*, ¶43.

⁸⁶ *Id.* at ¶142.

⁸⁷ *Popovic et al.*, Decision on Motion for Joinder, ¶25.

⁸⁸ *Id.*; *Bagosora et al.*, Decision on the Prosecutor’s Motion for Joinder, ¶143.

⁸⁹ *Bagosora et al.*, Decision on the Prosecutor’s Motion for Joinder, ¶144.

⁹⁰ *Popovic et al.*, Decision on Motion for Joinder, ¶21-22.

each trial, joinder will permit the Trial Chamber to proceed with the case more efficiently.”⁹¹ Thus the court concluded, “promoting judicial economy” was a factor militating in favor of joinder.⁹²

In *Martic et al.* the Trial Chamber, despite finding that the Prosecutor’s allegations established that the acts of the co-accused formed part of the same transaction,⁹³ denied the Prosecutor’s motion for joinder on the basis of judicial economy and efficiency.⁹⁴ The following factors which were key to the Trial Chamber’s decision to deny joinder: first, that few of the witnesses were common to all of the co-accused, the Trial Chamber noting that of “274 Prosecution witnesses who would be called in a joint trial,” only 29 would be common to one set of co-accused, and that one accused, Martic, with many “witnesses of no relevance to his case.”⁹⁵ The court went on to reason that joinder would “increase . . . the length of the trial for each accused” and that it was “questionable whether there would be any saving in the overall costs incurred.”⁹⁶

ii. Protecting Witnesses and Victims

Another factor that courts have considered as part of their discretionary analysis is balancing the interests of witnesses and victims against those of the accused. For example, various ICTY and ICTR decisions have identified the protection of witnesses and victims as one of the discretionary factors the court should consider in determining whether or not joinder is appropriate. These courts will typically consider how many of the witnesses are common to all of the co-accused, with specific concern for minimizing the need for witnesses to travel to the proceedings numerous times, or to give traumatic testimony repeatedly.

In *Ntakirutimana et al.*, the Trial Chamber noted that 16 out of 18 of the witnesses were common to the co-accused and stated that joinder “would allow for better protection for the witnesses by limiting their travel to the Tribunal.”⁹⁷ Likewise, in *Barayagwiza* the Trial Chamber considered the commonality of witnesses to be “a relevant consideration for granting the motion

⁹¹ *Id.* at ¶22.

⁹² *Id.*

⁹³ *Martic et al.*, ¶33.

⁹⁴ *Id.* at ¶59.

⁹⁵ *Id.* at ¶39.

⁹⁶ *Id.* at ¶41.

⁹⁷ *Ntakirutimana et al.*, ¶27.

for joinder,” agreeing with the Prosecution’s contention that joinder “would ease the burden and enhance the safety of witnesses by avoiding the need for them to make several trips to the Tribunal and a repetition of testimony.”⁹⁸

In *Popovic et al.*, the court was careful to express the balance of interests it was striking between protecting the rights of witnesses and the rights of the accused. The Trial Chamber granted joinder, noting that “[t]he issue of protecting witnesses . . . may or may not favour joinder depending on the circumstances . . . but in this case it supports the single-trial outcome.”⁹⁹ The court went on to extol the benefits of joinder for the interests of witnesses – “witnesses will not need to travel to the Hague, give direct testimony and answer questions from judges multiple times.”¹⁰⁰ The *Popovic et al.* court also noted that it was in the interests of justice for both parties (including the accused) if “witnesses are more likely to be available if called to testify once during the course of the next 1-2 years . . . than if they were expected to come to the Tribunal . . . during the course of the next 7-8 years.”¹⁰¹

In *Popovic et al.*, Defense Counsel argued that even in a single trial, witnesses would have to give traumatic testimony multiple times as they were examined and cross-examined by counsel for the various parties. The Trial Chamber rejected this argument stating that “[o]n balance, however, it would seem that the need for witnesses to give potentially traumatic direct testimony on six separate occasions over a period of several years would be more burdensome than consecutive cross-examinations in a single trial.”¹⁰²

In some cases courts have refused motions for joinder based on the discretionary factor of witness interests. In *Kunarac et al.*, the Trial Chamber refused a Prosecutor’s motion for joinder in part because some of the accused in the joint indictment had not been apprehended.¹⁰³ The Trial Chamber reasoned that “the fact that four other accused on the separate indictment remain at large means that witnesses in any case may well have to be recalled to testify in the future.”¹⁰⁴ The Trial Chamber also noted the following concerns for witnesses: “[o]n the one hand, the fear and inconvenience” that they might face being called to testify multiple times before the Tribunal and “[o]n the other hand, for practical and emotional reasons, witnesses also

⁹⁸ *Barayagwiza*, ¶19-21.

⁹⁹ *Popovic et al.*, Decision on Motion for Joinder, ¶25.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at ¶26.

¹⁰² *Id.* (internal parentheses omitted).

¹⁰³ *Kunarac et al.*, ¶12.

¹⁰⁴ *Id.*

need to know when they will be required to testify and not be subjected to repeated postponements of trials.”¹⁰⁵ Where joinder would have little or no beneficial effect on the interests of witnesses, that discretionary factor typically weighs against joinder.

iii. Consistency of Witness Testimony, Evidence and Verdicts

Courts have found that joinder allows it to hear witness testimony and consider evidence that would otherwise be heard in multiple proceedings concerning in a single proceeding. Therefore courts have considered it in the interests of justice to render consistent findings regarding witness testimony and evidence. The *Popovic et al.* decision noted that having all of the witnesses in one proceeding “serves the interests of justice more generally, because if different Trial Chambers dealing with the same subject matter have different witnesses available to them, there is a risk that their subsequent evaluation of the evidence, and ultimately their findings, will be inconsistent.”¹⁰⁶ Similarly, the *Bagosora et al.* decision emphasized that “joinder allows for a more consistent and detailed presentation of the evidence.”¹⁰⁷

ICTY and ICTR decisions have also stressed that joinder allows for greater consistency in verdicts as a result of a consistent assessment of evidence and witnesses. The *Popovic et al.* decision noted that there is a “fundamental and essential public interest in ensuring consistency in verdicts.”¹⁰⁸ Similarly, the *Bagosora et al.* decision stated that “joinder may reduce the risks of contradictions in the decision rendered when related and indivisible facts are examined.”¹⁰⁹

¹⁰⁵ *Id.*

¹⁰⁶ *Popovic et al.*, ¶26.

¹⁰⁷ *Bagosora, et al.*, Decision on the Prosecutor’s Motion for Joinder, ¶144.

¹⁰⁸ *Popovic, et al.*, ¶26.

¹⁰⁹ *Bagosora, et al.* Decision on the Prosecutor’s Motion for Joinder, ¶144.