



Joint Trials and the ECCC

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It is expected that if Ieng Sary, Nuon Chea, Khieu Samphan, and Ieng Thirith are indicted by the Extraordinary Chambers in the Court of Cambodia (ECCC) Co-Investigating Judges, they will be tried jointly. In joint proceedings, multiple accused are tried simultaneously for the same or related crimes. This procedural mechanism is called “joinder,” and in theory promotes efficient trials. “Severance,” the obverse of joinder, is a mechanism for separating the cases against jointly charged accused and trying them separately.

The ECCC Establishment Law and Internal Rules contain no provisions explicitly addressing how the Court should handle questions of joinder and severance. Nevertheless, these documents do contain general provisions that, like the core documents of international courts and tribunals, emphasize (1) the importance of judicial 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. For example, Article 22 of the Establishment Law requires 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.” Article 33 states that the ECCC shall “exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law.” Additionally, Article 35 of the Establishment law entitles the accused to the right “to be tried without undue delay.” As at other international courts and tribunals, these guarantees will guide the ECCC’s approach joinder and severance.

The Rules on Joinder and Severance at International Courts

According to Article 33 of the ECCC Establishment Law, “if the existing procedures do not deal with a particular matter . . . guidance may be sought in procedural rules established at the international level.” For this reason, it is appropriate to look at how international courts have addressed this question. In addition to general provisions regarding fairness and efficiency, the core instruments the International Criminal Court (ICC), International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR), and the Special Court for Sierra Leone (SCSL) all have explicit rules addressing joinder and severance. For example, Rule 48, common to the ICTY, ICTR, and SCSL Rules of Procedure and Evidence (RPE), provides that “persons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried.” Essentially, these courts can order joinder or severance of accused as they deem appropriate, often at the request of either the prosecutor or the accused.

The “Same Transaction” Test

If it follows the permissive approach of international courts, when considering a motion for joinder or severance the first question the ECCC will ask is whether the charged persons have committed the same or similar crimes in the course of the “same transaction.” The ICTY, ICTR and SCSL Rules of 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.” Those courts have developed detailed criteria for determining when acts constitute a common scheme, strategy or plan.

Acts are part of the same transaction when they are (1) connected to the material elements of the crime; (2) capable of specific determination in time and space; and (3) illustrate the existence of a common scheme strategy or plan. The first two elements of this analysis are rather easy to satisfy; however, the third element invites more contention. As such, any ECCC analysis would most likely focus on whether or not a common scheme, strategy or plan exists between the accused. When assessing joinder, international courts have generally given wide latitude to a prosecutor’s allegations of a common plan. As a consequence, they have granted joinder even when accused are

alleged to have committed crimes in separate geographic locations, at different times, or as members of different political or military organizations.

For example, in the *Barayagwiza, et al.* case, the ICTR granted a prosecutor's motion to join a group of accused alleged to control a newspaper that spread extremist ideology, and another group alleged to have set up a radio station for the same purpose. In *Brdanin, et al.* case, the ICTY jointly tried an accused who was a member of a political organization and another accused who was a member of a military organization. In that case, the court reasoned that although the alleged facts were not identical, the two accused could be joined because they were alleged to have committed crimes in the same period of time in the same area of the former Yugoslavia.

When these courts have been asked to join accused who committed crimes in different areas and locations, they ask whether there is a sufficient nexus between the alleged acts — essentially, whether a common scheme or plan ties the accused together. In the *Ntakirutimana, et al.* case, the ICTR granted joinder where two groups of accused were separately indicted and charged for acts in two separate locations. One group of accused was alleged to have participated in a massacre at the first location, and then to have pursued survivors as they fled to the second location. The second group of accused was charged with killing the survivors at the second location. In granting joinder, the court noted that the acts of both groups of accused could form part of the same transaction because there was a sufficient nexus between the acts committed in the two areas. In responding to defense counsel's argument that the massacres differed with regard to the identity of the victims and the degree to which each accused participated, the court noted that there was no requirement that the scheme, strategy or plan in each location be identical. Moreover, the scheme may change over time if it remains "common" in its nature and purpose.

The language that these courts use — "common scheme strategy or plan" — in assessing whether crimes were part of the same transaction is evocative of the language of conspiracy or "joint criminal enterprise" liability. For that reason, in assessing whether or not joinder is appropriate, some courts have asked whether, if proven true, the prosecutor's allegations would establish a conspiracy. If they would, there is a basis for joinder. For this reason, some courts have found a presumption that individuals' accused

of conspiracy to commit the same crime should be tried jointly. Nevertheless, the decision of the prosecutor not to allege a conspiracy between accused does not create a presumption against joinder.

Discretionary Factors

The RPE of international tribunals all indicate that once a court finds that joinder's "same transaction" prerequisite has been met, the court must still consider whether separate trials would appropriate to avoid a conflict of interest that might cause "serious prejudice" to the accused, or to protect the "interests of justice." These courts have generally considered the following in assessing whether or not serious prejudice to the accused would justify separate trial: the potential for (1) undue delay in the proceedings; (2) evidence introduced against one accused prejudicing another in a joint trial and; (3) antagonistic witness testimony and disagreements over defense strategy.

In assessing the potential for undue delay, the ICTY and ICTR consider the totality of the situation and weigh the benefits of joinder against the possibility and extent of delay. The ICTR's *Bagosora, et al.* decision identified four factors to consider in assessing the extent of delay: length of delay, the reason for the delay, whether or not the accused asserted his right to speedy trial, and the prejudice delay would cause to the accused. For example, in one ICTY case, the court reasoned that because some of the accused had already been in detention for three years, joining additional accused would adversely affect the length of his trial. This, according the court, was the kind of undue delay from which the rules seek to protect accused.

When prosecutors request joinder, accused often argue that they would suffer prejudice due to the large amount and complexity of evidence that will be presented during the proceedings. First, the sheer amount of evidence may make trial cumbersome and confusing. Second, evidence or testimony implicating one of the co-accused may prejudice other co-accused to whom the evidence does not relate — essentially a "contamination" argument. Courts have generally dismissed both arguments, reasoning

that unlike a trial in front of a jury where the possibility of evidentiary prejudice is great, a judge is able to mitigate such prejudice through his or her professional training.

Accused also typically argue that in joint proceedings they may be forced to testify against each other or that their defense counsel will adopt mutually antagonistic defense strategies. International courts have rarely rejected a request for joinder on this basis, but they have provided guidance about the circumstances under which they might. For example, they have suggested that if a co-accused will not testify in a joint proceeding due to fears of self-incrimination, a court should ask whether severance would prompt him or her to testify. International courts have also suggested that they would order severance when one of the co-accused might give testimony prejudicing the other if the circumstances are “extraordinary,” although they have not elaborated on what conditions might qualify as such.

Interests of Justice and Efficiency

As discussed above, international courts also refuse to grant joinder when necessary to protect the interests of justice. In deciding if to grant or deny joinder, international courts weigh the overall interests of justice against the rights of the individual accused. In doing so, they have considered the following factors: (1) judicial economy (in other words savings in time and expense); (2) the protection of witnesses; (3) consistency of verdicts; and (4) consistent presentation of evidence.

Issues of time and expense are related to the number of witnesses and amount of evidence that will be presented before the court in a joint proceeding. The most important question is to what degree witnesses and evidence are common to co-accused. If witnesses and evidence are common to almost all of the co-accused, courts’ discretion will generally favor joinder. For example in the *Popovic, et al.* case the ICTY granted joinder where the Prosecutor argued that trying the accused separately would lead to redundant presentation of evidence and would increase the estimated time of trial from 1-2 years to 7-8 years. In other cases, courts have refused joinder where, despite the fact that the acts of the co-accused were part of the same transaction, only a fraction of the witnesses would be common to all of the co-accused. Another aspect of this concern is the need to protect witnesses. For example, several ICTY and ICTR decisions have

considered how many of 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 practice however, it is unclear whether joinder has actually shortened the length of trial proceedings in international tribunals. For example at the ICTR individual trials have taken between 30 to 80 days to complete. In cases where groups of accused are being tried jointly, trials have taken anywhere from a year to two and a half years. The *Nyiramasahuko, et al.* case, which involved 6 accused tried jointly took a little over 700 days. On average, it took over 100 days to try each individual – a length of time that is significantly longer than most of the individual trials conducted at the ICTR. Similarly, joint proceedings at the ICTY do not seem to have shortened the length of trial vis-à-vis individual proceedings. Despite this apparent shortcoming, accused have rarely if ever pointed out this inconsistency as an argument against joinder.

Joinder and the Accused at the ECCC

To date, only one accused, Kaing Guek Eav (“Duch”) has been indicted the ECCC Co-Investigating Judges (“CIJs”). Duch was indicted for his role as chairman and secretary of the notorious S-21 torture center in Phnom Penh. Although Duch regularly interacted with some of the other charged persons, the CIJs separated his case from the other four charged persons. Duch was arrested by the Cambodian government in 1999 and transferred to the ECCC’s control only in July 2007. He has been in jail for over nine years. The Cambodian public’s desire to see a trial begin soon together with Duch’s right to a trial without undue delay weigh against the possibility that the Office of the Prosecutor (“OTP”) will seek to join Duch’s indictment with others at this stage.

The remaining charged individuals have yet to be indicted. It is therefore difficult to gauge with certainty which acts they will be tried for and whether or not a joint trial would be appropriate. In the ECCC Provisional Detention Orders, both Nuon Chea and Ieng Sary are accused of being members of Central and Standing Committees of the Communist Party of Kampuchea (“CPK”), two of the highest bodies in the Khmer Rouge regime. Both are said to have wielded significant power in designing and implementing CPK policy. Both may be tried for crimes against humanity, and war crimes. Khieu

Samphan is not alleged to have been part of the Standing Committee of the CPK, but some scholars have said that he promoted the policies of the CPK and monitored their implementation. It is possible that these three charged persons may be jointly indicted.

The fourth charged person, Ieng Thirith, was Minister of Social Action during the Democratic Kampuchea period, is arguably a position of lower rank than the others. Nevertheless, she is accused of rendering support to and encouraging CPK policies. It thus remains to be seen whether Ieng Thirith will be indicted separately, not only because of her lower-level position within the CPK apparatus, but also to avoid a joint trial with her husband, Ieng Sary, a prospect that may raise conflict of interest issues.

At this stage, it is difficult to assess whether or not the ECCC will decide to try these charged individuals jointly or separately. Like others tribunals, the ECCC will want to adjudicate its cases in a quick and efficient manner, and this may weigh in favor of joint proceedings for at least some of the charged individuals.