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IPS
WSBA International Practice Section

IN THIS ISSUE

Student Liaison Introduction

Greetings International Practice Section newsletter readers:

I would like to introduce myself as this year's student liaison. I am in my final year of law school at Seattle University. I am honored to help in the publication of this newsletter and to get more involved with the practice section in general.

Because of my interest in public and private international law, I have dedicated much of my professional life in foreign language, non-profit, education, business, and arbitration fields. I hope to use my legal work and study in American employment and tort law to aid international clients in the future. Currently, I extern in a federal district court for Western Washington, gaining experience in federal courts to cater to international clients.

I look forward to meeting, working with, or aiding you in any way I can throughout the remainder of the year as the student liaison.

~Ryan C. Castle

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Membership Renewal Reminder

Please remember to renew your membership. The section would like to ensure you continue to receive the benefits of membership.

Chair Column

By KoKo Huang

Dear International Practice Section Members,

As we start another section year, I am excited to serve as your chair and work with the Executive Committee to continue to offer the same member benefits that you have come to expect from our section. As always, our focus is to provide section members with benefits that enrich your practice and allow you to network with your colleagues. If you have not already done so, please renew your membership as the new section year started on Oct. 1, 2012. You can renew your membership at http://wsba.org/Legal-Community/Sections/Join-a-Section.

The Executive Committee is already hard at work. We planned our Foreign Lawyers Reception, which was held on Thursday, November 1, 2012 at Davis Wright Tremaine. It's a great opportunity for local attorneys to meet with foreign licensed attorneys, judges, and legal scholars who are studying at local law schools. Have you ever thought about practicing law in China, Japan, or anywhere else? This is your chance to find out what it's actually like. We also hosted our section's Holiday Happy Hour on December 5, 2012 and we plan to offer the section's regular annual events: the Law Student Reception in spring 2013, and the Annual General Meeting in July 2013.

In addition to these annual events, members will continue to receive free mini-CLEs. These CLEs generally qualify for 1.5 credits per CLE. Our most recent CLE was on U.S. export control regulations, presented by Lawrence Ward at Dorsey & Whitney. A detailed summary is available in this newsletter. Stay tuned for several new CLEs this year on topics such as ethics and Ethiopian law. While most of the CLEs are held in downtown Seattle over the lunch hour, we will try to reach our members on the eastside and in the north-end by offering one CLE in each location this year.

Want to get more involved with the section? There are several ways for members to participate. If there is a CLE topic that you would like to present, please let us know. We are always looking for new speakers and venues for the mini-CLE program. We also welcome contributions to the section newsletter. And if you are interested in helping us with any of the receptions or have other ideas for programming, please let me know.

Most importantly, take advantage of your membership and stay connected with the section. We promote section events and contact members through our email listserv, the section's blog at www.globalgavelnews.org, and the section's pages at the WSBA Web site, http://wsba.org/Legal-Community/Sections/International-Practice-Section. On occasion, WSBA broadcasts email announcements to members on behalf of the section. If you are not receiving these emails, please check your profile at myWSBA (http://www.mywsba.org/) and make sure that it allows emailed communications. These emailed notices are different than those of the section's listserv, which is an opt-in member discussion forum.

This should be another great year for the section. One of my goals this year is to increase member involvement, so please reach out to me at koko.huang@jacksonlewis.com if you have any ideas for the section or are interested in volunteering.

INTERNATIONAL JOINT VENTURES, A PRACTICAL APPROACH

by Milton R. Stewart and Ryan D. Maughn

As the globalization of world markets continues unabated, American businesses seek to explore and develop capabilities to internationally source or distribute goods, services or intellectual property. The recent economic downturn has only made taking advantage of strategic opportunities through international alliances more appealing. All but the largest companies lack the infrastructure, resources, experience and management strength to enter international markets de novo. Business alliances of various forms allow companies to access the global marketplace more economically and effectively. Regulatory, cultural, language and currency differences make partnering in the form of an international joint venture (IJV) an attractive option.

IJVs are also an effective way to enter a new market quickly. But partnering with, sharing the risks and taking advantage of another firm's local resources and expertise can be a treacherous undertaking without proper planning and understanding. This article summarizes the attributes, advantages and disadvantages of IJVs, and, perhaps more importantly, examines the practical aspects of structuring and operating joint ventures. It will identify common mistakes made by participants in joint ventures and, conversely, provide practical insight in structuring joint ventures, leading to higher probabilities of success.

IJV DEFINED

There is no single legal definition of a "joint venture." The term is best defined by the existence of certain characteristics, understandings and arrangements. An international joint venture is often described as the joining together of two or more business partners from separate jurisdictions to exchange resources, share risks and divide rewards from a joint enterprise. Usually, but not always, one of the partners is physically located in the jurisdiction of the joint venture. An IJV has elements of a partnership, but is typically formed for a defined purpose or specified project, and, therefore, is usually limited in purpose, scope and duration. The contributions of the joint venture partners often differ and tend to be specified based on the capabilities of each partner and the nature of the venture.

Although legal agreements are required to create and sustain international joint ventures, in order to prosper, IJVs must be practical, living and evolving relationships. Continued positive interaction and dialogue between the business decision-makers after the formation of the joint venture is critical. Circumstances change and the management team and the joint venture itself must be capable of changing with them.

LEGAL STRUCTURES AND ATTRIBUTES

The joint venture can be a contractual arrangement between the two joint venture partners in which the basis of the understanding and the governing terms are contained in a written agreement. More commonly today, the parties may create an equity joint venture by forming an entity, owned, in agreed proportions, by the respective parties or specially funded subsidiaries, or by purchasing equity in an existing entity. The new entity can take the form of a limited liability company, a corporation or one of the many other forms of entity available under applicable national, state or local law.

The form of joint venture chosen, whether contractual or equity, typically denotes the level of intensity with which the parties are pursuing the joint venture. The equity joint venture is generally used for closer, longer term collaborations where the level of investment is higher. Equity joint ventures may be more difficult to wind up because, in addition to terminating the contractual agreement, the parties often choose to liquidate the assets held by the entity, and such liquidations can be time-consuming.

Whether an equity joint venture or one based upon contract, the relationship between the joint venture parties should always be governed by a definitive written agreement containing the essential terms governing the overall relationship. The attributes and provisions of

such agreements are discussed in more detail later in this article.

In addition to the definitive agreement, the parties may enter into ancillary contractual agreements that address certain specific components of the venture. For instance, the joint venture entity may enter into a distribution agreement with one of the joint venture partners (typically the one located in the host country), and a license agreement with the other joint venture partner for access to intellectual property rights necessary for the venture.

ADVANTAGES AND DISADVANTAGES OF IJVs

Advantages

International joint ventures allow for much faster and less costly access to foreign markets than can be achieved by purchasing an existing company in the jurisdiction or starting a new venture. IJVs provide quick access to channels of distribution, and they provide access for the non-resident partner to knowledge and know-how of the local marketplace, which substantially enhances the probability of success for the venture. The resident partner also often has existing relationships with key suppliers and customers, and proficiency in the local language and customs.

These benefits can be especially critical to a small or medium-sized business that does not have the capital, resources or expertise necessary to pursue the opportunity unless it is able to share the risks and the costs through an alliance such as an international joint venture. IJVs allow the partners to move quickly, cost effectively and with credibility (provided by the reputation of the resident partner) in the local marketplace.

The parties to an IJV can also take advantage of complementary lines of business and synergies that may exist between the two companies.

Disadvantages

An international joint venture can result in a frustrating experience and ultimately a failure if it lacks adequate planning and strategy. Factors such as marketplace developments, technology issues, regulatory uncertainties and economic downturns can be difficult to anticipate and can have a debilitating impact on IJVs.

By their nature (and like all partnerships), profits derived from an IJV are diluted because they are shared. Management issues can arise, in spite of having adequate mechanisms in place to resolve disputes, because of different management philosophies of the partners. The partners also may discover that they do not share expectations and are not flexible enough to change and accommodate the evolving needs of the business.

Joint ventures are often difficult to capitalize as an entity, particularly in respect to debt, because they are finite in their duration and therefore lack permanence. Unless an IJV is adequately capitalized, its debt financing, if available at all, may have to be guaranteed, in whole or in part, by the joint venture partners, which can increase their level of risk in the venture.

Another potential disadvantage of an IJV is the possibility of the creation of a competitor or a potential competitor in the form of one's own joint venture partner. This can, as later discussed, be addressed by non-competition, non-solicitation and confidentiality provisions in the definitive joint venture agreement.

JOINT VENTURE FACTS OF LIFE

While the rate of return from a joint venture can be very high and therefore enticing to prospective partners, approximately 50% of all joint ventures fail. The likelihood of early problems is high; a significant portion of cross-border alliances have considerable financial and operational problems during the first years of operation. Their continued survival and success after "hitting the wall" requires ownership flexibility and long-term support. In fact, flexibility and evolution are the keys to successful international joint ventures. It has been said by more than one commentator that up to half of all joint ventures end up modifying their scope by expanding the proposed business or entering into new businesses not

contemplated when the joint venture was formed and the initial agreement signed.

Management autonomy is critical. A joint venture whose management is dominated by either party or whose hands are tied unless both parties agree on operational issues is unlikely to succeed.

Although lawyers tend to abhor 50/50 relationships, the data suggest that 50/50 joint ventures work better than others, perhaps because of the balance of terror and the need for collaboration and cooperation. As a corollary, joint ventures between equally strong partners tend to work better than those between partners of unequal strength. Similarly, ventures between partners with complementary strengths work better than ventures between partners with overlapping strengths and commonalities.

JOINT VENTURE MISTAKES

Oddly enough, a common joint venture mistake often cited by participants in failed joint ventures is "cutting yourself too good a deal." A joint venture is a partnership and, like all partnerships, functions well and rewards the participants best if it is structured as a "win-win" scenario for both partners. The parties should focus on jointly making money from customers instead of from each other as a result of an unbalanced or one-sided venture.

Another commonly cited mistake in joint ventures is the lack of an exit strategy. Although it is difficult at the inception of a partnership to plan for its end, this is essential given that the nature of a joint venture is often to be temporary and finite in duration.

Parties also often cite insufficient planning as a principal cause for failure in IJVs. In the excitement and rush to get the project going or to take advantage of a perceived market opportunity, too few joint venture partners think through the challenges and adopt a definitive strategic and tactical business plan. Even if such a plan is developed, attention must be paid to it as the business opportunity evolves. As mentioned previously, the business plan often requires flexibility as the joint venture develops and encounters the challenges of the market place.

Another common mistake is "negotiating from the ivory tower." It is critical for those negotiating and structuring the joint venture to communicate with the line and operational managers and technicians who will have to live with the decisions made in structuring the joint venture. Those individuals can often provide valuable input early in the process and save the venture from significant cost and possible failure once underway. Remember, they know things you don't and can't know.

Haste is also a commonly mentioned joint venture mistake. As lawyers know, you can choose only two among speed, quality and price. Moving too quickly often sacrifices quality.

In structuring a joint venture, it is helpful to have chosen preliminarily joint venture management. Experienced management can be critically helpful to both sides in making sure that the important business issues are attended to in the negotiation and documentation of the joint venture agreement.

Perhaps the biggest single mistake a joint venture partner can make in the negotiations regarding the IJV is to not be willing to walk away from a bad deal. As in every business transaction, there should be a point beyond which a joint venture partner will not go in respect to critical business and legal issues. "Chasing the deal" almost always results in a bad deal. One cannot negotiate a good deal unless one is willing to walk away from an unacceptable one.

Lastly, and most importantly, avoid the fatal triangle of wrong deal, wrong partner and wrong reasons. It is critical to do your homework and due diligence. Know whether and if an IJV is the right approach to a marketplace. Find the right partner. Negotiate a win-win deal and document it with a finite and comprehensive agreement that creates a business architecture that allows management the ability to make good decisions and implement them, while allowing for the

flexibility needed for the organization to evolve and change as the marketplace requires.

PRELIMINARY AND DEFINITIVE AGREEMENTS

To avoid some of the pitfalls and common mistakes described above, there are certain principal matters that should be dealt with and certain preliminary steps every prospective joint venture partner should follow. First, start with a term sheet, an agreement in principle or a memorandum of understanding. Any one of these three documents serves as architecture for assuring that all of the salient business and legal issues are discussed and agreed to by the parties before a definitive agreement is drafted. They force the parties to examine the basic components of the arrangement regarding the management, income and profits, and the allocation of risk from "fifty-thousand feet" to ensure a common understanding. At the very least, such documents serve as an estoppel agreement.

In the definitive IJV agreement, the following principal matters should be dealt with comprehensively:

1. Management - It is critical that senior management be chosen early, be independent, have a clear charter and authority, and have clear reporting lines.

2. Governance - The structure of the board of directors of the joint venture entity (or the committee that will provide management oversight in the case of a contract joint venture or a non corporate entity) should be given careful thought and specified with particularity. Fairly obviously, the board should be comprised of an odd number of directors unless impasse is contemplated and dealt with elsewhere in the agreement. It is common for the two joint venture partners' representatives to agree upon the odd numbered director.

3. Relative Contributions of Partners - The agreement should describe in as much detail as possible the respective contributions of the parties, both tangible and intangible. Depending on tax considerations, it may be appropriate to specify values for the respective contributions of the parties.

4. Allocation of Risks and Rewards - In as much detail as possible, the parties should delineate who gets what, where, when, why and how. Dividend distributions, capital calls and allocations of losses (including special tax allocations, if permissible) should be covered.

5. Alternative Dispute Resolution Provisions and Deadlock Provisions - Most joint venture partners will not choose to risk litigation in either of their respective forums. Detailed provisions and procedures for mediation and/or arbitration should be set forth. In addition, consideration should be given to impasse provisions short of mediation or arbitration as a way to resolve deadlocks that are not fatal to the joint venture.

6. Regulatory Issues - All regulatory issues affecting the joint venture should be dealt with and, those that are conditions precedent, should be set forth clearly. Those issues include, but are not limited to, export and import controls, Foreign Corrupt Practices Act (and its equivalent) compliance, companies acts (and their equivalent) and competition law (anti-trust) compliance. In a few jurisdictions, currency repatriation must be addressed.

7. Governing Law - Although the laws of the jurisdiction in which the joint venture will be principally located are commonly chosen to govern, it is not uncommon to provide for a choice of law from a neutral jurisdiction. Often, too, venue is placed in a neutral jurisdiction that is mutually convenient to both parties.

8. Ownership Transfer – In an equity IJV, provisions should set forth the restrictions on the transferability of ownership interests in the joint venture entity. The parties may agree to a variety of possible transfer arrangements, including rights of first offer, rights of first refusal, drag-long rights and tag-along rights.

9. Termination Provisions - Detailed provisions should be inserted regarding when and how the agreement and joint venture terminate. If either party is to have an opportunity to buy the interest of the other party, that mechanism should be both well thought out and set forth in detail.

10. Governing Language - Although a seemingly obvious point, IJV agreements are often written in two languages, particularly for joint ventures between American and Asian companies. One or the other of the language versions should be designated to prevail if there is an alleged inconsistency between the documents and their translations.

11. Non-Competition, Non-Disclosure, Non-Disparagement and Non-Solicitation Provisions - Whether an IJV is dissolved or ends by one party purchasing the interest of another, non-competition provisions may well be appropriate. In addition, parties commonly seek non-disparagement, confidentiality and non-solicitation of employee covenants.

12. Intellectual Property Provisions - The IJV agreement or a separate attached document should clearly delineate all rights to IP, technology, software and the like. In addition, an appropriate licensing agreement should be executed in respect to those "knowledge" items. The IJV agreement should clearly delineate ownership of intellectual property upon dissolution or termination of the joint venture.

CONCLUSION

Efficient and cost effective ways to enter foreign markets that allow companies to share risks and exploit synergies with partner companies continue to drive businesses toward international joint ventures. IJVs can provide access to unique business opportunities and new geographic markets that may not otherwise be available, especially to smaller and medium sized businesses. Companies considering embarking on an international joint venture, however, should be aware of the limitations and risks inherent in the endeavor, and they should take advantage of some of the painful lessons learned over the years. IJVs present tremendous opportunities; however, careful planning, a thoughtful structure and a willingness to remain flexible during the life of the venture are critical to increasing the chances of success.

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The Time is Ticking for Joined Defendants; Using a Clock to Measure the Right to Defense

by Amanda Banik

1. Introduction

The death of Slobodan Milosevic four years into his trial, but prior to the issuance of a verdict, cast serious doubt on the legitimacy of the International Criminal Tribunal for Yugoslavia (ICTY) and its ability to handle complex cases involving politically important figures.[1] In the *Milosevic* case, the court did too little too late to rein in the amount of time that the case was taking and, as a result, never came to a verdict in what was a very important case to victims, donors, and the world.[2]

The Extraordinary Courts in the Chambers of Cambodia (ECCC) is now facing a similar situation as it moves forward in Case 002 against senior Khmer Rouge Leaders Nuon Chea, Leng Sary, and Khieu Samphon. For many reasons, not least among them that three defendants are jointly accused of country-wide crimes occurring more than thirty years ago. Case 002 is likely to be a highly complex case.[3] Further, the defendants are advanced in age and complain of ill health.[4]

The Trial Chambers of the ICTY and the International Criminal Tribunal for Rwanda (ICTR) have also become extremely active in their role in time management to expedite these highly complex cases.[5] According to ICTY Rules of Procedure and Evidence 90(C), the Chamber is required to "exercise control over the interrogation of a witness so as to avoid the needless consumption of time."[6] This mandate has been the justification for sweeping Trial Chamber discretion. Specifically, the tribunals have used this authority to impose concrete time limits within which the parties must present their evidence. However, this search for expediency comes with risks to defendants' rights to a fair trial particularly in the situation, as with ECCC Case 002, where multiple accused sit in the same trial.

[1] Gillian Higgins, *The Impact of the Size*, *Scope*, *and Scale of the Milosevic Trial and the Development of Rule 73bis Before the ICTY*, 7 NW. U. J. INT'L HUM. RTS. 239, 1 (2009); *see also* Transcript of Prosecutor's Opening Statement at 5, Prosecutor v. Miloševic, Case No. IT-02-54-T (Feb. 12, 2002).

[2] Daryl A. Mundis, *The Milosevic Trial: Lessons for the Conduct of Complex International Proceedings. By Gideon Boas*, AM. J. INT'L L. 690, 692, (2008) (noting that Boas supports his view that the case was a managerial nightmare given the more than 1000 witnesses prosecution planned to call, the 46,639 pages of transcript, and the 1.2 million pages of documents prosecution disclosed prior to Milosevic's death).

[3] Case 002, Closing Order, Case File No. 002/19-09-2007-ECCC-OCIJ (Office of the Co-Investigating Judges, 15 Sep. 2010).

[4] Tom Fawthrop, Time is Running Out for Justice at the Khmer Rouge Tribunal, THE CAMBODIAN DAILY, at 35, Dec. 16, 2009,; *see also* Daniel Ten Kate, Cambodian Court Fights Time in Trying Aging Khmer Rouge Leaders, BLOOMBERG, Aug. 6, 2008.

[5] GIDEON BOAS, THE MILOSEVIC TRIAL: LESSONS FOR THE CONDUCT OF COMPLEX INTERNATIONAL CRIMINAL PROCEEDINGS 163 (2007). *See generally* Higgins, *supra*, note 1. For an example of a highly activist court in a situation of even single defendant, see *Prosecutor v. Perisic*, Decision on Application of Rule 73bis and Amendment of Indictment, IT-04-81-PT, 15 May 2007; *see also Prosecutor v. Radovan Karadzic*, Case No. IT-95-5/18-PT, Prosecution Submission Pursuant to Rule 73*bis*(D), 31 Aug. 2009 (evidencing a trend toward highly activist Pre-Trial Chamber management); *Prosecutor v. Ndayambaje et al.*, Case No. ICTR-98-42-T, Scheduling Order Rule 54 of the Rules of Procedure and Evidence, 13 Dec. 2006; *Prosecutor v. Popovic et al.*, Case No. IT-05-88-T, Order on Close of Prosecution Case-In-Chief, Rule 98*bis* Proceedings, Defense Rule 65*ter* Filings, Pre-Defence Conference and Commencement of the Defence Case, 29 Nov. 2007; *Prosecutor v. Milutinovic et al.*, Case No. IT-05-87-T, Decision on Use of Time, 9 Oct. 2006.

[6] While the ECCC Rules have no specific rule about time management, Rule 99(7) notes that the Chamber may have a trial management meeting to facilitate fairness and expediency, suggesting that responsibility for striking this balance lies with the ECCC Chambers as in the ICTY and ICTR.

While the jurisprudence of both the ICTY and ICTR accord the Trial Chambers broad discretion to manage the trial, that discretion is not without limits.[7] The equality of arms principle requires proportionality between the parties such that "neither party is put at a disadvantage when presenting its case."[8]

The Appeals Chamber can review the Trial Chamber for abusing its discretion in trial management.[9] The Appeals Chamber has determined that the Trial Chamber must provide sufficient analysis to show that the time allotment is "'objectively adequate' to allow the party to fairly set forth its case."[10]

Generally, the ICTY and ICTR Trial Chambers have not considered the burden on the prosecution to be multiplied by the numerous defendants.[11] In early submissions to the Trial Chamber, ECCC Co-Prosecutors have argued for "significantly more time than any individual Defence team as they are prosecuting four cases not defending one."[12]

This approach may be too simplistic, however. The basic principle underlying joinder is that so much of the evidence the prosecutor will rely on against one of the accused simultaneously implicates others of the accused.[13] The Trial Chambers' approach thus far has been that the prosecutor facing two defendants has essentially to prove two cases. But, the principle behind joinder says that the prosecutor, in presenting little more than one case, simultaneously implicates the joined accused.

Acting on this flawed logic, the ICTY and ICTR have struck an exceptionally disproportionate balance and have thus placed impermissibly restrictive time limitations on defendants in an effort to expedite the proceedings. During both the prosecution's presentation of evidence and the defendants' presentation of evidence, the ICTY and ICTR implement strict time limits based on flawed proportionality reasoning. These time limits infringe on the defendants' rights to a fair trial by denying them the opportunity to present a full defense. The concerns raised primarily by defense counsel at the ICTY and ICTR—where these limitations have been put into practice—merit consideration as the ECCC approaches Case 002.

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[7] *Prosecutor v. Prlic et. al.*, Decision on Defendant's Appeal Against "*Decision Portant Attribution Du Temps A La Defense Pour La Presentation Des Moyens A Decharge*", IT-04-74-AR73.7, 1 July 2008, par. 15; *see also Prosecutor v. Ndayambaje et. al,* Decision on Joseph Kanyabashi's Appeal Against the Decision of Trial Chamber II of 21 March 2007 Concerning the Dismissal of Motions to Vary his Witness List, ICTR-98-42-AR73, 21 Aug. 2007, par. 10.

[8] *Prosecutor v. Prlic et al.*, Case No. IT-04-74-AR73.8, Decision on Petkovic's and Praljak's Appeals Against the Trial Chamber's Decision on Adopting Guidelines for the Presentation of Defense Evidence, 18 July 2008, par. 18 (quoting *Prosecutor v. Oric*, Case No. IT-03-68-AR73.2, Interlocutory Decision on Length of Defence Case, 20 July 2005, par. 7).

[9] *Prosecutor v. Prlic et al.*, Case No. IT-04-74-AR73.8, Decision on Petkovic's and Praljak's Appeals Against the Trial Chamber's Decision on Adopting Guidelines for the Presentation of Defense Evidence, 18 July 2008, par. 7.

[10] *Prosecutor v. Prlic et al.*, Case No. IT-04-74-AR73.4, Decision on Prosecution Appeal Concerning the Trial Chamber's Ruling Reducing Time for the Prosecution Case, 6 Feb. 2007, par. 15.

[11] *Prosecutor v. Prlic et al.*, Case No. IT-04-74-AR73.8, Decision on Petkovic's and Praljak's Appeals Against the Trial Chamber's Decision on Adopting Guidelines for the Presentation of Defense Evidence, 18 July 2008, par. 20; *Prosecutor v. Prlic et al.*, Case No. IT-04-74-PT, Decision Adopting Guidelines on Conduct of Trial Proceedings, 26 Apr. 2006, par. 5 (using time taken in Prosecution's examination in chief as guideline to calculate time for combined defense to conduct their six individual cross-examinations); *see also Prosecution v. Ndayambaje et. al,* Decision on Joseph Kanyabashi's Appeal Against the Decision of Trial Chamber II of 21 March 2007 Concerning the Dismissal of Motions to Vary his Witness List, ICTR-98-42-AR73, 21 Aug. 2007, par. 26 (noting reasoning of Trial Chamber in which it divided number of witnesses per accused).

[12] Case 002, Co-Prosecutor's Response to "Leng Sary's Request for an Expedited Decision on Certain Issues Raised at the Trial Management Meeting," Case No. 002/19-09-2007-ECCC/TC, 24 May 2011, par 8.

[13] *Prosecutor v. Ntakirutimana et al.*, Case No. 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, 22 Feb. 2001; *see also Prosecutor v. Popovic et al.*, Case No. IT-02-57-PT et al., Decision on Motion for Joinder, 21 Sept. 2005, par. 13-17; *see generally* Marwan Sehwail, Joinder and Severance in International Criminal Law and its Implications for the ECCC, Aug. 6, 2008, available at http://www.dccam.org/Abouts/Intern/Interns_2004_2011.htm.

After examination of these practical problems, the ECCC should implement a reinterpreted version of this time limitation mechanism. This article will consider a variety of the concerns raised and will subsequently offer concrete suggestions as to ways the ECCC could improve upon this flawed but necessary endeavor to strike an appropriate balance between a defendant's right to a fair trial and the right of both the defendant and the interested community in an expedient trial.

2. Imposition of Time Limitations Prior to Defense Presentation of Evidence

The Trial Chambers at the ICTY and ICTR go through a similar process for allocating time to the defense for the presentation of each individual's evidence. Pursuant to ICTY and ICTR Rule *73ter* the Chamber accepts submissions, relies on statements from the parties, and allots time to each individual defendant.[14] The Trial Chamber must consider the objective adequacy of the time to present a defense.[15] While the Trial Chamber has the duty to prevent undue delays, the Appeals Chamber has held that "considerations of judicial economy should never impinge on the rights of the parties to a fair trial."[16]

Equality of arms cannot be satisfied by a purely mathematical equation – in other words, assigning defendants the same number of hours as the prosecution does not create equality. Yet, the time allotted to the collective defense generally equates with that given to the prosecution. The Trial Chamber avers that it comes to this nearly exactly equal number of hours by cutting out repetitive witnesses and evidence, mandating that defense utilize procedural streamlining such as submitting written testimony rather than *viva voce* witnesses, and eliminating witnesses that would go beyond the scope of the indictment.[17] It further claims to eliminate some portion of time for witnesses common to many defendants as the time to introduce and give background on that witness would not be necessary multiple times over.[18]

Though the Chamber states that this is the manner in which it trims down the time that defense council presents its defense, the Chamber is not required to explicitly state what evidence was repetitive or outside the scope of the indictment. Rather, vague reliance and review of parties' submissions satisfies the Appeals Chamber that the Trial Chamber has provided sufficient analysis of the defense teams' cases.[19] However, this opaque determination provides little guidance to the parties and does little to prove the legitimacy of the courts' decisions.

This might not be a problem except that the amount of time cut from the defense can be quite large. For example, in *Prlic*, the court reduced Prlic's request for 128 hours to 80 hours, defendant Praljak requested 110 hours, which the court reduced to 50 hours, and defendant Petkovic requested 91 hours which the court reduced to 50 hours. Interestingly, the combined total time allotted to the six defendants was 301 hours and the time allotted to the prosecution in the same case was 316 hours. This near equality coupled with opaque reasoning gives the court's reductions the look of arbitrariness. It gives the appearance of general disregard for the parties' own assessments of time necessary to present their full defenses.

It seems too coincidental that the court's analysis resulted in the time required for the

[14] *See Prosecutor v. Prlic et al.*, Decision on Defendant's Appeal Against "*Decision Portant Attribution Du Temps A La Defense Pour La Presentation Des Moyens A Decharge*", IT-04-74-AR73.7, 1 July 2008, par. 3.

[15] *Prosecutor v. Prlic et al.*, Case No. IT-04-74-AR73.4, Decision on Prosecution Appeal Concerning the Trial Chamber's Ruling Reducing Time for the Prosecution Case, 6 Feb. 2007, par. 15.

[16] *Prosecutor v. Prlic et al.*, Decision on Defendant's Appeal Against "*Decision Portant Attribution Du Temps A La Defense Pour La Presentation Des Moyens A Decharge*", IT-04-74-AR73.7, 1 July 2008, par. 16.

[17] *Prosecutor v. Prlic et al.*, Case No. IT-04-74-T, Decision Allocating Time to the Defense to Present its Case, 25 Apr. 2008.

[18] *See Prosecutor v. Prlic et al.*, Decision on Defendant's Appeal Against *Decision Portant Attribution Du Temps A La Defense Pour La Presentation Des Moyens A Decharge,* IT-04-74-AR73.7, 1 July 2008, par. 27.

[19] *Id.* at par. 48.

accused to utilize different strategies to present their full defenses being nearly the same time as the prosecution took to present its case. While the closer the numbers are, the easier it is to feel that the allocation was fair between the two adversaries – prosecution and collective defense – it has been often repeated that in these complex, joined cases numbers are not the indication of equality. Rather, the benchmark of fairness is proportionality, which must take strategic variance into account. Therefore, less numeric equivalence might be better indication of proportional balance between the prosecutor and each *individual* defendant.

Furthermore, this suspicious proportion is all the more unsatisfactory given that each defendant likely has to address a fair amount of the case the prosecution presented. Given the basic idea of joinder, each defendant is facing much of the prosecution's total case rather than one sixth of it as the Chamber reasoned in *Prlic*. Though the prosecution still has the heavier burden of proving its case beyond a reasonable doubt as compared to the defendant, it is more logical to assume that the proportional time six defendants would require to present their full defenses would cumulatively take more time than the prosecution's single case.

A. Defense Objections to Restrictions on Time

An important problem in joined cases, affecting the equality of arms between prosecution and defense, is that one or more of the other accused may adopt the defense that another of the joined defendants is the truly culpable one. This situation leaves the implicated defendant facing multiple adversaries rather than just the prosecutor. Already an issue at the ECCC, given the civil parties' position against the accused in addition to the prosecutors, the role of the other defendants needs to be considered.

Defendant Nyiramasuhuko faced this problem at the ICTR.[20] Nyiramasuhuko submitted that two of the other accused essentially joined together with the prosecution against her. The Trial Chamber in that case cited the ICTY stating that a joint trial does not require a joint defense and that the conflict between two accused would have to be extraordinary to be beyond what the rules allowing joinder envision.[21] Thus, making no procedural changes to protect Nyiramasuhuko's rights to present a full defense, the Trial Chamber left the accused essentially facing three adversaries.

The ICTY Appellate Chamber has held that in determining the appropriate amount of time for an accused to present his case, the Trial Chamber is permitted to assume that defense will utilize procedures designed to expedite the process.[22] This permitted assumption is vague in that it provides no guide or limit on the extent to which the chambers can presume a defendant will utilize expedited procedures. Defendant Petkovic, one of the six joined defendants in *Prlic*, trying to determine how the court envisioned reducing the time needed for his defense, hypothesized that he call no *viva voce* witnesses at all.[23] Even reducing the time required to present his defense without witnesses, the court's reduction still required that Petkovic further shorten his case.

While Petkovic's hypothetical reduction is obviously an extreme position, it is illuminating to see the impact of the court's allocation on the strategy options remaining to defense in this position. Permitting this arbitrary assumption places a great deal of strategic decision-making power in the judges' hands rather than within the power of defense counsel. Though defense should not be entitled to present its case in an unnecessarily lengthy manner, defendants should be permitted to utilize procedural tools to their advantage. In some instances this might be highly expedited and in others this might be a more drawn out process.

Additionally, at the ICTY and ICTR, common witnesses will necessarily be questioned by one

[20] *Prosecutor v. Nyiramasuhuko et al.,* Case No. ICTR-98-42-T, Decision on Nyiramasuhuko's Motion for Separate Proceedings, a New Trial, and Stay of Proceedings Rules 82(B) and 72(D), Rules of Procedure and Evidence, 7 April 2006, para. 67.

[21] *Id.*

[22] *Id.* at par. 23.

[23] *Id.* at par. 44

of the defendants first with other accused having time to ask questions after following the cross-examination rotating model. This means that one defendant will introduce the witness and give background in a light favorable to that defendant's strategy, which might not be favorable to another defendant who intended to call the witness as well. Further, it is possible that the witness will not be properly introduced at all as each defendant would only have a limited amount of time for questions and might choose to abbreviate introductory information in favor of substantive questions. As already discussed, the accused rarely find points of agreement between themselves and there is no guarantee one defendant's questions would come out through the other defendants' questioning. Thus arbitrary time limits could force poor advocacy as the counsel might require more time than what is allotted to fully examine a witness.

This might not be as large a problem at the ECCC as it was in the ICTY given the judges' role in questioning witnesses at the ECCC. Following the civil law tradition, the judges at the ECCC took a very active role in questioning witnesses in Case 001.[24] If the judges act in a similar manner in Case 002, perhaps the common witnesses will not be as large a problem as the judges could largely establish the foundational background of the witness and the parties would only address particular matters relevant to each individual's case.

Further, while each defendant in *Prlic* was only afforded one-sixth of the time that the prosecution had on direct to cross examine a prosecution witness, the prosecution was afforded one hundred percent of the time defense used on direct for prosecution's cross.[25] Because proportionality, the benchmark of fairness, cannot be satisfied by mathematical equality, the court should not simply assign one hundred percent of the time to the prosecution with no further analysis. Because the defendants' role is to poke holes in the prosecution case, the prosecution should receive the amount of time necessary to ensure he can prove his case beyond a reasonable doubt. However, this may not be one hundred percent of the time of each defendant – it may be more or less. The court should uphold the principles of proportionality taking all parties into consideration: the individual defendants, the prosecution, and the civil parties in ECCC Case 002.

B. Prosecution Objections to Restrictions on Time

The primary objections of the prosecution at this stage of the trial revolve around the way that each defendant questions the witnesses of other accused. The central problem is whether defendants questioning the witnesses of other accused should be considered direct or cross-examination. That is, whether defendants putting questions to a witness called by another accused may use leading questions as though it were a cross-examination.[26] However, in some instances, the witnesses of other defendants are hostile to the examining accused.

While the prosecution suggested that the Trial Chamber limit leading questions to only those witnesses that the Chamber considered to be hostile to examining defendant, the court rejected this model as too complex.[27] Rather than setting bright line standards, the Trial Chamber noted that it expected defense counsel to avoid leading questions when it would undermine the credibility of the testimony. However, the Trial Chamber left the determination to be made on a case by case basis.[28] Overall, the prosecution has basically

[24] Open Society Justice Initiative, Recent Developments at the Extraordinary Chambers in the Courts of Cambodia, Nov. 2009, at 9.

[25] *Prosecutor v. Prlic et al.*, Case No. IT-04-74-AR73.8, Decision on Petkovic's and Praljak's Appeals Against the Trial Chamber's Decision Adopting Guidelines for the Presentation of Defense Evidence, 18 July 2008, par. 21 (stating that because the prosecution is the *only adversary* the accused faces, it is appropriate that the prosecution have equal time on cross examination as defense used on direct).

[26] *Prosecutor v. Prlic et al.*, Case No. IT-04-74-T, Decision on Prosecution Motion Concerning the Use of Leading Questions, The Attribution of Time to the Defense Cases, the time Allowed for Cross-Examination by the Prosecution, and Associated Notice Requirements, 4 July 2008, par. 11.

[27] *Id.* at par. 20.

[28] *Id.* at par. 17.

supported the reasoning of the Trial Chamber in its decisions limiting time afforded to the defendants' cases.

C. Maintaining a Consistent Understanding of the Position of the Defendants and Prosecution in Joined Cases

Each defendant receives a proportion of the prosecution's time based essentially on the number of defendants in the case. However, this is a flawed understanding and reverses the notion underlying joinder. Rather, the prosecution's single case implicates the multiple accused. While certainly portions of the prosecution's case will speak more to only some of the accused, the basic assumption justifying joinder is that more evidence speaks to all of the defendants than just to some. Therefore, the prosecution only has to prove one case while the defendants each individually must poke holes in that case with respect to his own guilt.

Also, each defendant must present his or her own defense based on his or her own strategy in answer to the prosecution's body of evidence amassed against the defendant.

Rather than relying on arbitrary notions of proportions and timing, the tribunals should effectively make use of other expediting procedures. Specifically, the prosecution should narrow its case to the appropriate breadth and simplicity such that it will allow him to present his case expeditiously. By tailoring the prosecution's case narrowly, the defendants will be able to answer the prosecution's allegations within a reasonable timeframe. It might also allow for more agreement between the defendants if prosecution strategy is clearer than it was in *Prlic.*

D. Reliance on Time Limits as Enforceable Guidelines

The ECCC should undertake an analysis of each party's case prior to presentation of evidence just as the ICTY and ICTR do. Based on this analysis, the Chamber should issue an expectation of the time each party will require to present its evidence. The time necessary for defendants' cross-examinations should also be less monitored based on time and more stringently reined in through evidentiary rules.

The Trial Chamber should enforce its expectations of time through strict adherence to other evidentiary standards. Repetition should be excluded, relevance should be tightly monitored, and questions outside the scope of the indictment should be permitted only on the most scrutinized basis. The Chamber should quickly cut off parties not adhering to these standards, making irrelevant diatribes or other speeches that disrupt courtroom procedure. However, the Trial Chamber should allow parties to make their own strategic determinations within the bounds of the procedural and evidentiary rules. This will enable the Trial Chamber to streamline courtroom procedure prior to delving into the substantive issues of the case.[29]

While the substance of the witness' testimony will dictate general notions of time allocation, the defendant must have the opportunity to fully challenge the prosecution's, civil parties', and other antagonistic defendants' witnesses. If it appears that the parties are not in good faith attempting to adhere to the guidelines the Trial Chamber set as a reasonable time, the Chamber should exercise its broad trial management authority to enforce the guidelines it set in the beginning. If however, the parties do not make a good faith effort, complying with the rules of evidence, to meet the time expectation set by the Chamber, it should step in and at least enforce previously set time guidelines. The Chamber must stop discussion that does not conform to Rule 87 evidentiary rules whether the party has remaining time under the guideline or not. While the Trial Chamber cannot permit wasted time, it should allow a party to move forward in good faith expeditiousness according to that party's theory of the case.

[29] GIDEON BOAS, THE MILOSEVIC TRIAL: LESSONS FOR THE CONDUCT OF COMPLEX INTERNATIONAL CRIMINAL PROCEEDINGS 282 (2007).

E. Transparency

While the ICTY has explicitly stated that the Trial Chamber need not itemize the areas in which it reduces time from defense cases, the ECCC should consider requiring much more information from the Trial Chamber than the ICTY does. The fact that the Trial Chamber does not justify its reductions gives the look of arbitrariness and illegitimacy. If the Trial Chamber were more clear or reasoned in its reductions, all the parties could more appropriately address contentious issues. Further, if the parties are dissatisfied with the reductions, the appeals can be made on more concrete grounds. The need to reduce repetition, avoid arguments outside the scope of the indictment, and streamline the trials cannot be allowed to cast a veil of illegitimacy over the proceedings.

F. Allocation of Time for Individual Defendants' Presentation of Evidence

The Trial Chambers in Case 002 should consider allocating time for each individual defendant to present his evidence just prior to the time that he would present it and in some circumstances, after other defendants have already presented their evidence. This would allow the Chambers to consider the individual's circumstances as well as to consider what time might be needed additionally in order to accommodate evidence that other defendants might have presented against which this accused would need to defend himself.

Even if the court chose to set out guidelines on time, as the ICTY does, prior to any defendant's presentation of evidence, the court should specifically allow for reallocation or adjustment of time if other accused have presented new evidence against that particular defendant. Not only would this improve consideration of the defendant as an individual rather than as a group of accused, it would also ensure that this defendant is not facing multiple accusers with only time allotted to consider evidence presented by the prosecution.

G. Implement a Monitoring System

A critical component of this time limitation system is being able to consistently monitor the time each party used. The ECCC should consider replicating the monitoring systems used at the ICTY as those procedures have seemed to be effective in providing measurable records of the time used by each party.[30] These records should be public and reviewable. This will also contribute to transparency as parties can dispute the records if they believe something to be incorrect. The Chambers can also refer to the records as it continues to exercise its authority to manage Case 002.

3. Conclusion

While time constraints seem to be an effective way of curtailing the excessive and repetitive nature of a trial with many similarly positioned defendants and overlapping evidence, it is still a work in progress. Tribunals, including the ECCC, should take the opportunity to continue to improve upon these systems in joined cases.

AN INTRODUCTION TO U.S. EXPORT CONTROL REGULATIONS

CLE Summary by Kristin Whinfrey

U.S. export controls arise from three different bodies of law. The first are trade embargoes administered by the U.S. Department of Treasury's Office on Foreign Assets Control . Trade embargoes extend to all U.S. origin goods and services regardless of strategic or military non-importance. There are exceptions for *de minimis* reexports to embargoed nations and potentially for items furthering humanitarian

[30] *Prosecutor v. Prlic et al.*, Case No. IT-04-74-T, Decision Adopting Guidelines for the Presentation of Defense Evidence, 24 Apr. 2008, par. 21 (giving Registry instructions on time recording); *see* also *Prosecutor v. Prlic et al.*, Case No. IT-04-74-T, Time-Monitoring; Period ending 09 August 2007, Internal Memorandum, 9 Aug. 2007.

policy. An embargo may also be limited, as is the case for North Korea and Libya.

The second are Export Administration Regulations (EAR) administered by the U.S. Commerce Bureau of Industry and Security (BIS). The EAR regulates dual-use items and lists all of these on its Commerce Control List (CCL). The BIS provides steps to follow to determine whether obtaining a license is necessary. If doubt still exists after taking these steps, one can file a commodity classification request to the BIS without having to pay a fee to get clarity. The two most important questions when working with the EAR are (1) what is the item that is being exported and (2) who is the end-user or what is the end-use.

The third body is the International Traffic in Arms Regulations (ITAR) administered by the U.S. State Department's Directorate of Defense Trade Controls (DDTC). The DDTC is staffed with military personnel and ITAR governs all export and temporary import of defense articles and services enumerated in the U.S. Munitions List (USML). Exceptions under ITAR are fewer than under EAR.

Violations of any of the export controls range from slaps on the wrist by the appropriate agency to civil and criminal fines. Moreover, there is a strong indication that penalties will be less severe if the party in violation is forthcoming and cooperative with the respective agency.

U.S. export controls are based largely on Cold War era challenges and may be outdated in the face of an increasingly globalized economic system and elusive national security threats. Therefore, export controls are likely to be overhauled in the near future. The Obama Administration has expressed a proposed goal to promote efficiency through "four singles": a single control list, a single enforcement agency, a single IT system, and a single licensing agency. Items on the USML list would be moved to the CCL list. However, some members of Congress are against this and want the CCL list moved to the USML list. Nonetheless, export control regulation will likely be getting an overhaul in the near future.

Hot Topic: International Business and Trade News Vis-à-Vis the Pacific Northwest

~ Ryan C. Castle ~

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