

*New England School of Law*  
*Rwanda Genocide Prosecution Project*

**A Comparative Study of the Rules Relating to Joinder of Crimes and  
Accused**

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For 1 Credit and UCWR**

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## **I. Introduction and Summary of Conclusions**

The Rules of Evidence and Procedure for the International Criminal Tribunal for Rwanda (hereinafter ICTR) clearly articulate the requirements for the joinder of crimes and/or parties in one indictment. In fact, these Rules are the same Rules established by the International Criminal Tribunal for the Former Yugoslavia (hereinafter ICTY). The main premise for the joinder of crimes and/or parties in one indictment is that there must be a common nexus or transaction among the crimes or offenders. Each of the countries discussed in this memo requires similar provisions for the joinder of crimes and/or parties. Another similarity revealed in this comparative study is the safeguard against double jeopardy that prevents a person from being tried for the same crime twice. However, the Statutes of the ICTR and ICTY do permit the prosecutor to appeal the acquittal of a defendant in certain circumstances, which is in complete contrast to the double jeopardy standard used by the United States and Israel.

Another notable difference between the joinder of crimes and/or parties relates to the joining of murder with other offenses in one indictment. The ICTR and ICTY permit the joinder of murder and other offenses in one indictment as long as it stems from the same transaction or occurrence. This is favorable because the ICTR and ICTY were established exclusively to deal with the genocide and crimes against humanity that were being executed against innocent victims. By allowing the joinder of murder with other offenses relating to a similar transaction, the ICTR and ICTY have created a fair and efficient means of executing justice.

South Africa specifically prohibits murder and other offenses to be joined in one indictment. Other countries permit the joinder of murder with other offenses in one

indictment, however, the judge may be reluctant to do so out of concern that the defendant would suffer from unfair prejudice by having a lesser offense tried with murder.

## **II. Factual Background**

The death of Rwandan President Juvenal Habyarimana, on April 6 1994 incited mass genocide of the Tutsi and moderate Hutu population throughout Rwanda. The perpetrator(s) who actually shot down the plane Habyarimana was flying in have not been identified. Despite the fact that the assailants were unidentified, the Hutu extremists accused the Tutsi army (known as the Rwandan Patriotic Front) and began slaughtering 500,000 to one million civilians in the 100 days following the plane crash. The International Criminal Tribunal of Rwanda was established to bring the individuals responsible for these egregious crimes against humanity to justice and restore hope in a country that has suffered the most horrific genocide in history.<sup>1</sup> The Rules of Procedure and Evidence for the ICTR mirror the Rules of Procedure and Evidence used in the International Criminal Tribunal of the Former Yugoslavia. The requirements pertaining to joinder of crimes and/or parties are clearly documented in Rules 48 and 49. The broad language of these rules is less restrictive than the joinder requirements of the countries discussed hereafter. The joinder of crimes and/or parties allows the prosecutor of the ICTR to bring to justice the parties responsible for committing such atrocious crimes against humanity.

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<sup>1</sup> Michael P. Scharf and Virginia Morris, *An Insider's Guide to the International Criminal Tribunal for Rwanda* 122 (1997).

### III. Legal Discussion

#### **A. Joinder Requirements for Crimes and/or Parties in the International Criminal Tribunal for the Former Yugoslavia**

The International Criminal Tribunal for the Former Yugoslavia (hereinafter ICTY) recognized the need for structured guidelines regarding the Rules of Evidence and Procedure. In his critique for the ICTY, Professor Michael Scharf articulated, “In many respects, the Yugoslavia Tribunal is a vast improvement over its predecessor. Its detailed Rules of Procedure and Evidence represent a tremendous advancement over the scant set of rules that were furnished for the Nuremberg Tribunal.”<sup>2</sup> The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the Former Yugoslavia since 1991 in accordance with the provisions set forth in the statute.<sup>3</sup> The International Criminal Tribunal for the former Yugoslavia specifically addressed the requirements for joinder of crimes and/or parties in the Rules of Procedure and Evidence of the ICTY.<sup>4</sup>

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<sup>2</sup> Michael P. Scharf, *A Critique of the Yugoslavia War Crimes Tribunal*, 25 *Denv. J. Int’l L. & Pol’y.*, 305 (1997).

<sup>3</sup> W. J. Fenrick, *Some International Law Problems Related to Prosecutions Before the International Criminal Tribunal for the Former Yugoslavia*, 6 *Duke J. Comp. & Int’l L.*, 104 (1995).

<sup>4</sup> Rules of Evidence and Procedure for the Criminal Tribunal for the Former Yugoslavia (Adopted on 11 Feb. 1994, amended on 5 May 1994 and 4 Oct. 1993, and further revised on 30 Jan. 1995), U.N. Doc IT/32/Rev.32, 30 Jan. 1995.

#### **Rule 48 – Joinder of Accused**

Persons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried.

#### **Rule 49 – Joinder of Crimes**

Two or more crimes may be joined in one indictment if the series of acts committed together form the same transaction and the said crimes were committed by the same accused.

In light of these rules one must also view **Rule 2** of the Rules of Evidence and Procedure for the former Yugoslavia which defines a **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 a part of a common scheme, strategy or plan.

There may be occasions where the joinder of defendants can be severed. Relief from joinder would be more appropriate where defendants will offer conflicting defenses, or where joinder would be otherwise prejudicial to a defendant or to the prosecution.<sup>5</sup>

It is unclear whether Rule 82(B) allows the Trial Chamber to order separate trials for one indictment, while trying the accused jointly on other counts. Use of the term “to protect the interests of justice” appears to permit the Trial Chamber to order separate trials when the joinder prejudices the Prosecutions or the defendant.<sup>6</sup>

The jurisprudence of the ICTY does not prohibit the prosecution to combine murder with lesser offenses in one indictment. For example, the Deputy Prosecutor for the ICTY charged several different offenders, in one indictment, with war crimes stemming from alleged mistreatment, sexual assault, and murder of prisoners held at Omarska camp in the former Yugoslavia.<sup>7</sup>

The ICTY prohibits double jeopardy of the defendant under Article 10 of the Statute: No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal.<sup>8</sup> However, the defendant’s right against double jeopardy is not absolute under the Statute for the Former Yugoslavia.

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<sup>5</sup> **Rule 82 – Joint and Separate Trials**

- (A) In joint trials, each accused shall be accorded the same rights as if he were being tried separately.
- (B) The trial chamber may order that persons accused jointly under rule 48 be tried separately if it considers it necessary in order to avoid conflict of interests that might cause serious prejudice to an accused, or to protect the interests or justice.

<sup>6</sup> M. Cherif Bassiouni, *The Law of the International Criminal Tribunal for the Former Yugoslavia* 902 (1996).

<sup>7</sup> See included indictments, Indexed as Tab 3.

<sup>8</sup> Statute for the International Tribunal for the Former Yugoslavia, S.C. Res 827, U.N. SCOR., 47<sup>th</sup> Sess., 3217<sup>th</sup> mtg., art.10(1), U.N. Doc. S/RES/827 (1993) (hereinafter Statute for the Former Yugoslavia Tribunal).



combined with other offenses while other countries require murder to stand alone on an indictment because of the seriousness of the offense.

The ICTR Statute also precludes the double jeopardy of a defendant.<sup>13</sup> Similar, to the ICTY, the Statute for the Rwanda Tribunal does permit the prosecution to appeal a defendant's acquittal in certain circumstances.<sup>14</sup> Therefore, the double jeopardy provision does not absolutely exonerate a defendant who is acquitted.

### **C. Requirements for Joinder of Crimes and/or Parties in South Africa**

#### **Joinder of Parties**

The accused persons must have taken part or have been concerned in the same transaction in order to be joined in the same indictment. Joinder of the accused is only permitted where they have been associated in the same offense, unless they are guilty of different offenses by having been concerned in the same transaction.<sup>15</sup>

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Count 3: Crimes Against Humanity (murder) punishable by Article 3(a) of the Statute of the Tribunal; and  
Count 4: Violations of Article 3 Common to the Geneva Conventions, as incorporated by Article 4(a)  
(murder) of the Statute of the Tribunal.

Counts 5-6

(Crimes Against Humanity)

(Violations of Article 3 common to the Geneva Conventions)

By his acts in relations to the killings at the gravel pit in Nyanza, as described in paragraphs 15 and 16, Georges Rutaganda committed:

Count 5: Crimes Against Humanity (murder) punishable by Article 3(a) of the Statute of the Tribunal; and  
Count 6: Violations of Article 3 Common to the Geneva Conventions, as incorporated by Article 4(a)  
(murder) of the Statute of the Tribunal.

Counts 7-8

(Crimes Against Humanity)

(Violations of Article 3 common to the Geneva Conventions)

By killing Emmanuel Kayitare, as described in paragraph 18, Georges Rutaganda committed:

Count 7: Crimes Against Humanity (murder) punishable by Article 3(a) of the Statute of the Tribunal; and  
Count 8: Violations of Article 3 Common to the Geneva Conventions, as incorporated by Article 4(a)  
(murder) of the Statute of the Tribunal.

International Criminal Law.....

<sup>13</sup> Statute for the International Tribunal for Rwanda, S.C. Res 955, U.N. SCOR, 49<sup>th</sup> Sess., 3453<sup>rd</sup> mtg., art. 9(1), U.N.Doc S/RES/955 (1994) (hereinafter Statute for the Rwanda Tribunal).

<sup>14</sup> Statute for the Rwanda Tribunal, supra note 13, art. 24(1).

<sup>15</sup> A.V. Lansdown, *Outlines of South African Criminal Law and Procedure* 229 (1960).

When two or more persons are charged jointly the court may direct that the trial of the accused is to be held separate from the trial of the other or others. This is permissible at the request of the prosecutor or the accused.<sup>16</sup>

The court also holds persons accountable for an offense that they could not have committed if they committed another offense in the same transaction. If a person who is taking part in any transaction commits an offense and any other person taking part or being concerned in the same transaction commits a different offense, both such persons may be charged with such offenses in the same charge and may be tried thereon jointly.<sup>17</sup>

### **Joinder of Crimes**

Any number of offenses alleged against a person may be joined in the same indictment or charge, unless the charge is murder. If the charge on the indictment is murder, no charge other than murder may be joined.<sup>18</sup> If the acts alleged against the accused do not constitute crimes of the same class or series, and are entirely unconnected in circumstance, it will usually be found to be the better and more convenient course not to join them in one indictment or charge.<sup>19</sup>

### **Splitting of Charges**

If an act or omission constitutes an offense under two or more statutes, or under the common law, the offender is liable to be prosecuted and punished under either statute or common law. The offender is not, however, liable for more than one punishment.<sup>20</sup> Any improper duplication is termed a splitting of the charge. There are several equitable objections to the splitting of a charge. First, sight is lost of the fact that there has only

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<sup>16</sup> *See Id.*

<sup>17</sup> Lansdown, *supra* note 15, at 230.

<sup>18</sup> *See Id.*

<sup>19</sup> *Id.*

been one transaction. Secondly, former counts will rank unfairly as previous convictions in the assessment of sentence for a later count, the imposition of several sentences for on and the same conduct is unjust. Finally, prejudice may result to the accused in his being deprived of an otherwise successful plea of autrefois acquit or autrefois convict when he reappears for trial on one of the split portions of the transaction in question.<sup>21</sup>

#### **D. Canadian Requirements for Joinder of Crimes and/or Parties**

##### **Joinder of Crimes**

At common law, an indictment was not objectionable because it contained more than one count. In fact, it was a common practice for the prosecution to charge an accused in one indictment with all offenses he was alleged to have committed and require him to answer them at the same time.<sup>22</sup> The Canadian Criminal Code requires that every count in an indictment or information shall in general apply to a single transaction.<sup>23</sup> In Canada there is no restriction under the Criminal Code as to the number of counts that may be included in one single indictment. Section 520(1) provides that any number of counts for any number of indictable offenses may be joined in the same indictment.<sup>24</sup>

If an indictment charges murder the basic rule is “no count charging an indictable offense other than murder shall be joined in an indictment to a count that charges murder. Joinder is only authorized where the non-murder count is an indictable offense that arises out of the same transaction as the count that charges murder, or where the defendant

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<sup>20</sup> Lansdown, *supra* note 15, at 230.

<sup>21</sup> *Id.* at 231.

<sup>22</sup> R. E. Salhany, *Canadian Criminal Procedure* 231 (4<sup>th</sup> ed. 1984).

<sup>23</sup> Salhany, *supra* note 22, at 232.

<sup>24</sup> The Honorable Mr. Justice David Watt and Michelle Fuerst, *Tremear's Criminal Code* 967 (1996).

signifies consent to the joinder. The joinder of multiple counts of murder is permissible on the same indictment.”<sup>25</sup>

The fact that two or more counts are contained in the same indictment does not necessarily mean that they must all be tried together. If the trial judge is of the opinion that the accused may be prejudiced in his defense, he may direct he be tried separately upon one or more of the counts.<sup>26</sup>

As a general rule, the court has no jurisdiction to try together counts contained in separate indictments, even with consent of the accused. This is to avoid the possibility of unfair prejudice to the accused from the introduction of evidence on one indictment that may not be admissible on the other. The court also disapproves of trying two counts together where one involves a more serious crime than the other if they are not part of the same transaction.<sup>27</sup> The reason for this rule is that where the offense is a serious one, it is essential that the accused is given a fair trial, and this can be assured only where the jury can give their undivided attention to the serious offense alone.<sup>28</sup>

It may, however, be proper to combine indictable offenses with summary conviction cases in one indictment. This issue was addressed in *R. v. Clunas*. In this case, the accused was charged with assault causing bodily harm and assault. The victim of both offenses was the same but the incidents occurred approximately one day apart.<sup>29</sup> Assault causing bodily harm is an indictable offense while assault is a summary conviction offense. The accused was convicted on both counts after a joint trial was held at the defendant’s request. The defendant issued an appeal on the grounds that it was

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<sup>25</sup> *Id.*

<sup>26</sup> Sulhany, *supra* note 22, at 233.

<sup>27</sup> *Id.* at 234.

<sup>28</sup> *Id.*

improper to join counts of a summary conviction offense and an indictable offense and try them together.<sup>30</sup>

The court relied on the substantially amended Criminal Law Amendment Act, 1985, S.C. 1985, c. 19, s. 119, which permits the joinder of any number of counts for any number of offenses in the same indictment. The court dismissed the defendant's appeal on the premise that, "if one can include, in one indictment, summary conviction offenses and indictable offenses, one should be able to proceed jointly."<sup>31</sup>

The Criminal Code permits the trial judge the authority to avoid conducting more trials than necessary. For example, "at the beginning of a trial where there are separate informations or indictments that should have been charged jointly, it would be open to the trial judge in his discretion to permit the amendment of one document to include the charges or accused from the other in a proper case."<sup>32</sup>

One of the most difficult questions of interpretation for the court arises when a series of prohibited acts, similar in nature, are performed over a certain period of time. The court must decide whether the individual acts together constitute a single offense permitting them to be charged in one single count or whether each act constitutes a separate and distinct offense, requiring a separate count.<sup>33</sup>

The prosecution is generally given a wide discretion when drafting the indictment in deciding whether or not it wishes to treat the acts as cumulative forming a single offense or individually as separate offenses. If the acts have been committed over an extensive period of time, the accused will suffer a serious disadvantage when the acts are

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<sup>29</sup> *Regina v. Clunas* (1992) 70 C.C.C. (3d) 115 (S.C.C.), Watt, *supra* note 24, at 968.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 159.

<sup>32</sup> *Phillips and Phillips v. The Queen* (1983) 3 D.L.R. 4<sup>th</sup> 352.

treated as a single offense.<sup>34</sup> The indictment will be valid since it will appear to charge the accused with one offense. If the court decides that the acts were separate offenses and the prosecution was wrong in treating them as a continuous offense, there is a long line of authority which has held, “any conviction based thereon will be void for uncertainty since the accused would not know of what specific acts he was convicted and of what specific acts he was acquitted.”<sup>35</sup>

### **Joinder of Parties**

Canadian case law is opposed to the joint trial of parties with separate indictments. A trial judge does not have jurisdiction to try together separate indictments under the Criminal Code or under provincial legislation unless that legislation expressly provides otherwise. In *Phillips and Phillips v. The Queen*, the court held, “The joinder of two or more indictments or informations for trial raises fundamentally different problems from those which arise in the joint trials of several persons accused under one indictment or information.”<sup>36</sup>

There can only be a joint trial where the accused parties have been jointly indicted. If the accused have been charged in separate indictments, the general rule is that, “the court has no jurisdiction to try the accused jointly even with their consent unless they plead guilty.”<sup>37</sup> Occasionally this rule has not been applied strictly where the accused were engaged in a joint venture and suffered no prejudice in the circumstances of their trial. Persons who are jointly charged with the commission of an offense, particularly where the essence of the case is that the accused were engaged in a common

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<sup>33</sup> Sulhany, *supra* note 22, at 224.

<sup>34</sup> Sulhany, *supra* note 22, at 225.

<sup>35</sup> Hawkins and Sullivan (1952), 102 C.C.C. 183 (Ont. C.A.); Hortopan, (1964) 2 C.C.C. 306 (C.A.); Wakefield, (1966) 1 C.C.C. 324 (Ont. C.A.), Sulhany, *supra* note 22, at 225.

enterprise, will as a general rule be tried together. The trial judge has the discretion to order separate trials if he is satisfied that the “ends of justice require it.”<sup>38</sup>

## **E. Australian Requirements for Joinder of Crimes and/or Parties**

### **Joinder of Crimes**

In some circumstances several offenses or counts may be included in one indictment. When the case comes before trial the accused is brought before the court and arraigned. There are several defensive pleas which an accused person may adopt other than not guilty. For example, he can plead that he has already been convicted or acquitted for the same offense. If either plea is sustained, he cannot be tried twice for the same offense. The rule that a man cannot be tried twice does not mean that he cannot be tried twice for the same act. For example, “where a man has been convicted of feloniously wounding his wife, and she dies from the wounds after the conviction, he may be tried and convicted of murder.”<sup>39</sup>

Australian case law is similar to the ICTY and ICTR because it permits the joinder of murder with other offenses in an indictment. In *R v. Demirok* the court held:

We think there can be no doubt that the words of r2 of the Sixth Schedule authorize the joining of a count of murder with other counts provided that all the counts are founded on the same facts or form or are part of a series of offenses of the same or similar character.<sup>40</sup>

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<sup>36</sup> *Phillips and Phillips v. The Queen* (1983) 3 D.L.R. 4<sup>th</sup> 352, at 353.

<sup>37</sup> *Salhany, supra* note 22, at 239.

<sup>38</sup> *Watt, supra* note 24, at 968.

<sup>39</sup> *Jean Malor, Outline of Law in Australia* 50 (3<sup>rd</sup> ed. 1969).

<sup>40</sup> *R v. Demirok* (1975) 138 V.R. 244.

In *R. v. Wright and Haigh* the court upheld the joinder of five counts of murder because there was a common nexus between the offenses. The court held:

- (1) Two or more counts of murder charged in one presentment may be treated as a “series of offenses.” Before a series of offenses may be joined in the one presentment there must be some nexus or feature of similarity between the offenses so that they may be regarded as a series of offenses of a similar character.
- (2) The applications would not be granted, as it was proper and convenient that the five counts were joined in one presentment and tried together. The nexus of similarity clearly appeared in the facts alleged by the Crown. The trial judge correctly exercised his discretion to allow the trial to proceed and had due regard to the prejudice, which might be caused to the applicants from a joint trial. The jury was warned repeatedly to consider the case against each accused separately and the evidence bearing on each count was carefully separated in the trial judge’s charge.<sup>41</sup>

The court may also use discretion in order to sever a murder charge from three lesser counts citing Section 341 of the Criminal Code: Separate trials where two or more charges against the same person where:

- (1) Where before a trial or at any other time during a trial the court is of the opinion that the accused person may be prejudiced or embarrassed in his defense by reason of his being charged with more than one offense in the same indictment or that for any other reason it is desirable to direct that the person should be tried separately for any offense or offenses charged in an indictment the court may order a separate trial of any count or counts in the indictment.<sup>42</sup>

*R. v. Hankey* addressed the issue of whether or not a series of acts should be treated as a single transaction.<sup>43</sup> The defense counsel argued that this whole series of

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<sup>41</sup> *R. v. Wright and Haigh* (1983) 1 V.R. 65.

<sup>42</sup> *The Queen v. Hofschuster* (1992) 110 F.L.R. 385.

<sup>43</sup> The indictment charges the accused with a first count of aggravated sexual assault in that at Nunamara in Tasmania on or about the 6<sup>th</sup> of October, 1990 the accused unlawfully and indecently assaulted the complainant by placing his finger in her vagina. Count 2 then alleges that at the same place on the same day he committed the crime of rape upon her. Count 3 is a further count of rape at the same place on the same day and on the same complainant, but at a time subsequent to that referred to in count 2. Count 4 is

acts was essentially a single transaction. As a result, a single count of rape should be charged and that to dissect the episode into as many individual crimes as are theoretically possible is improper, unfair, and prejudicial. The court denied the defendant's motion stating, "In my view the counts charged may properly be joined in this indictment under s. 311(2) of the Criminal Code."<sup>44</sup>

### **Joinder of Parties**

Where there are more parties to a crime than one, their liability may be classified in different degrees according to the extent of their participation. One who, although not the actual perpetrator, aids and abets or takes part in, the commission of a crime at the very time it is committed (although not necessarily present at the scene of it) may rank as a principal offender and suffer the same penalty. Thus, "if two men go out with a common purpose to rob another and one of them kills him, it is no defense for the other to say that it was not he who fired the shot."<sup>45</sup> It is not necessary to prove that the second defendant was acting as a principal offender; it is sufficient for the prosecution to show beyond a reasonable doubt that the second defendant was acting either as an accomplice or as a principal offender.<sup>46</sup> In addition, one who counsels or procures the commission of a felony without being present at it is an accessory before the fact and is liable to the same punishment as the principal offender. A person may also be liable as an accessory

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likewise one of rape with exactly the same details save that it occurred at a time subsequent to that in Count 3. Count 5 is in similar terms, the time being subsequent in Count 4. Count 6 is a second charge of aggravated assault at the same time, place and activity and complainant but alleges an act subsequent in count 1. Count 7 is a charge of indecent assault at the same time and place alleging that the accused placed his tongue against the complainant's vagina unlawfully and indecently. Count 8 is a fifth count of rape in the same terms as the other four counts of rape at a time subsequent to that in count 5.

<sup>44</sup> R. v. Hankey (1991), Supreme Court of Tasmania.

<sup>45</sup> Malor, *supra* note 39, at 218.

<sup>46</sup> Brent Fisse, *Howard's Criminal Law* 42 (5<sup>th</sup> ed. 1990).

after the fact, if he knowingly that a felony has been committed, harbors or otherwise assists the perpetrator.<sup>47</sup>

*R v. Demirok* also addressed the issue of joinder of parties.<sup>48</sup> The Court allowed the husbands appeal for separate trials stating:

- (2) On the appeal it was necessary for the Court to consider whether in the result the trial involved a miscarriage of justice which could have in fact been avoided by the ordering of a separate trial of count (1).
- (3) Notwithstanding the proper conduct of the trial, because of the course of the events that had developed during the cause of the trial itself, there had been a miscarriage of justice.
- (4) Accordingly the appeal should be allowed on the ground that there should have been a separate trial on count (1). In the circumstances both convictions should be quashed and a retrial of the applicant ordered on all three counts.<sup>49</sup>

## **F. British Requirements for Joinder of Crimes and/or Parties**

### **Joinder of Crimes**

There is substantial British case law that in support of the joinder of crimes in one indictment. In *R. v. Kray*, the court relied upon the Indictments Act 1915 to render a decision. The court held, “Offenses of the same or similar character – similar features establishing prima facie case that offenses may be properly and conveniently tried together.”<sup>50</sup> All that is necessary to satisfy the rule is that the offenses should exhibit such similar features as to establish a prima facie case that they can properly and conveniently be tried together.<sup>51</sup>

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<sup>47</sup> Malor, *supra* note 39, at 218.

<sup>48</sup> *R v. Demirok*, The applicant and his wife were charged upon a presentment containing three counts: (1) that he had murdered Mr. O; (2) that he and his wife wounded Mrs. O with intent to murder; (3) that he and his wife wounded Mrs. O with intent to do grievous bodily harm.

<sup>49</sup> *R. v. Demirok* (1975) 138 V.R. 244.

<sup>50</sup> *R. v. Kray* (1969) 1 Q.B. 125.

<sup>51</sup> *Id.* at 126.

*R. v. Kray* addresses the specific issue of whether or not separate trials should be held to avoid prejudice created by two murder charges. Both applicants contend, “the joinder of the two offenses in one indictment was contrary to law, or, alternatively, that the judge wrongly exercised his discretion to continue the trial without severance and thus gave rise to a miscarriage of justice.”<sup>52</sup>

If crimes are not of a similar nature they can not be combined at trial. *In R. v. Tottenham*, the defendant requested that a trial by jury for the offense of common assault and criminal damage to property. Criminal damage to property can be tried summarily only. As a result, the defendant would have no right to a jury trial for that offense. The court denied the defendant’s appeal stating:

The offenses of common assault and criminal damage were not of a similar character, nor part of a series of offenses...for it was quite impossible to say that an attack upon a person could be described in law as similar to an attack on property.<sup>53</sup>

*In R. v. Davis* the court also addressed the issue of one appellant being charged with two counts of murder. The court held, “Although the joinder of two murders in one indictment is undesirable, the fact that in the present case there were two counts did not invalidate the conviction.”<sup>54</sup> The Indictments Act of 1915 does not prohibit the joinder of offenses, including murder, in one indictment.

On the contrary, English case law did not favor the joinder or murder with other offenses. In *Rex v. Jones* the indictment for murder also contained a charge of robbery with violence. The court held, “A trial for murder is too serious a matter to be

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<sup>52</sup> *Id.*

<sup>53</sup> *R. v. Tottenham Justices* (1981) 73 Cr. App. Rep. 55, 145 J.P. 269.

<sup>54</sup> *R. v. Davis* (1937) 3 All E.R. 537.

complicated by having alternative counts inserted in the indictment. In the opinion of this court the proper course in a case like this is to have two indictments so that if the charge of murder fails and it is thought desirable to proceed upon the second charge.”<sup>55</sup>

In *Connelly v. Director* the court challenged the well-established rule that murder should be tried as a separate offense. As a result, a Practice Direction appearing in (1964) 1 WLR 1244 was issued, stating, “it was the opinion of the Court of Criminal Appeal that the rule of practice laid down in *R. v. Jones* should no longer be considered force.”<sup>56</sup> In *Connelly v. Director of Public Prosecutions* the main issue was whether the quashing of a murder conviction enabled the defendant to maintain a plea of autrefois acquit or res judicata against a robbery charge on the same occasion. Defendant also argued issue estoppel, which has been accepted in the criminal law of Australia and the United States but not England. The court held the conviction on the second indictment, charging robbery with aggravation would not be set aside.<sup>57</sup>

In *R v. Bell* the defendant was charged in one indictment for possession of cannabis resin and other counts or handling stolen goods.<sup>58</sup> The defendant argued that the addition of the three handling counts to the single count of possession of cannabis

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<sup>55</sup> *Rex v. Jones* (1937) 3 All E.R. 537.

<sup>56</sup> *Connelly v. Director of Public Prosecutions* (1964) A.C. 1254, 2 All E.R. 401, 2 W.L.R. 1145, 48 Cr. App. Rep. 183.

<sup>57</sup> *Connelly v. Director of Public Prosecutions* the judge held: (I) there had been no abuse of process of the court in proceeding on the second indictment according to the practice prevailing at the time when it was tried, and a plea of autrefois acquit was inapplicable because the essential ingredients of the offenses (robbery and murder) were not the same, nor would the evidence necessary to sustain a charge of robbery suffice to prove a charge of which the appellant would have been found guilty of murder or manslaughter. (II) though the principle of res judicata applied to civil cases, yet, as the issues were not analyzed in the verdict of a jury at a criminal trial as they would be in a judgment giving reasons in a civil case, it might not be, and was not in the present case, possible to deduce in detail the basis of the verdict of an acquittal of murder and accordingly the principle of res judicata did not avail the appellant; though, by an extension of the principle of autrefois, that plea could arise whenever in order to prove the offense alleged on the second indictment the prosecution would be obliged to prove the accused had committed an offense of which he had been either convicted or acquitted, yet that did not avail the appellant here, because it was unnecessary for the prosecution to rely on the fact of murder or manslaughter as part of their proof of robbery.

resin was in breach of the Indictments Act of 1915. The court dismissed the defendant's appeal even though the counts were unrelated:

The joinder could not be justified without there being a sufficient nexus between the unlawful possession of cannabis resin on the one hand and the handling offenses on the other; no nexus existed, nor could it be possibly said that the offenses exhibited such similar features as to establish a *prima facie* case that they could properly and conveniently be tried together in the general interests of justice; therefore, the trial judge was wrong to insist, as he did, on the addition of the handling counts and on allowing the indictment to be amended. However, although the irregularity contravened the terms of rule 9 of the Indictment Rules of 1971, it could not in any way be said to have prejudiced or embarrassed the appellant, for if the matters had proceeded as they should have done, the appellant would have pleaded guilty to the three counts in the composite indictment and also to a single count in the cannabis resin indictment; accordingly, the case was one for the application of the proviso to section 2(1) of the Criminal Appeals Act 1968, and the appeal would be dismissed.<sup>59</sup>

### **Joinder of Parties**

Questions of joinder of offenses or parties are matters of practice on which the court has, unless restrained by statute, inherent power both to formulate its own rules and to vary them in the light of current experience and the needs of justice. There is no rule of law that states the court does not have the jurisdiction to try two defendants together on an indictment containing only two separate counts, each being a count against one defendant alone.<sup>60</sup>

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<sup>58</sup> *R. v. Bell* (1984) 78 Cr. App. Rep. 305, 148 J.P. 524, Crim Lr. 361.

<sup>59</sup> *Id.* at 306.

<sup>60</sup> *R. v. Assim* (1966) 2 Q.B. 249, 2 All E.R. 881, 3 W.L.R. 55, 50 Cr. App. Rep. 224, 130 J.P. 361.

In *R v. Assim* the court also articulated:

As a general rule, it is no more proper to have tried by the same jury several offenders on charges of committing individual offenses that have nothing to do with each other, than it is to try before the same jury offenses committed by the same person that have nothing to do with each other. Where, however, the matters which constitute the individual offenses of the several offenders are on the available evidence so related, whether in time or by other factors, that the interests of justice are best served by their being in one indictment can, subject always to the discretion of the court, be tried together. Such a rule includes cases where there is evidence that several offenders acted in concert but is not limited to such cases.<sup>61</sup>

At common law there could be a joinder of offenders in the same indictment only if they had joined in committing the offense charged, or they were principals or accessories. In *Director of Public Prosecution v. Merriman*, the court expanded the joinder of offenders in two significant ways:

- (1) Where two or more defendants were charged jointly with an offense it was not necessary for the prosecution to prove that each defendant was acting in concert with the other and it was open to the jury to convict each independently of the offense which was the subject matter of the joint charge.
- (2) A joint charge against two or more defendants alleged against each defendant a separate offense committed on the same occasion and as part of the same transaction, the connection between the separate offenses being no more than that, as against the defendant, not only his own physical acts but also those of the other defendants might be relied on by the prosecution as an actus reus of the offense with which he was charged.<sup>62</sup>

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<sup>61</sup> *Id.* at 249.

<sup>62</sup> *Director of Public Prosecutions v. Merriman* (1972) 3 All E.R. 42, 3 W.L.R. 545, 56 Cr. App. Rep. 766, 136 J.P. 659.

## **G. United States Requirements for Joinder of Crimes and/or Parties**

### **Joinder of Crimes**

The Blockburger Test has been widely used by the United States Supreme Court in determining whether or not a specific crime constitutes one or more separate offenses. The applicable rule is that, “where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.”<sup>63</sup> In Blockburger, The U.S. Supreme Court affirmed the decision that the defendant was guilty of two separate offenses for the sale of morphine hydrochloride even though the transaction was the same. The indictment contained five counts. The defendant argued, without success, he should only be punished for the single transaction of selling morphine hydrochloride. The jury returned a verdict against the defendant on second, third and fifth counts. Each of these counts charged a sale of morphine hydrochloride to the same purchaser. The defendant was given a sentence for each individual count.<sup>64</sup>

The United States Supreme Court distinguished the types of charges which may or may not be precluded by double jeopardy in *U. S. v. Dixon*. The Court held:

1. Double jeopardy protections apply to nonsummary criminal contempt prosecution,
2. Double jeopardy precluded prosecution of defendant for drug offense following conviction for criminal contempt based on violation of conditional release order which included prohibition on violation of the drug laws,
3. Double jeopardy precluded prosecution for assault on His wife following prosecution for criminal contempt for violating civil protection order which prohibited assault on her,

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<sup>63</sup> Blockburger v. United States, 284 U.S. 299, 300 (1932).

<sup>64</sup> *Id.* at 299.

4. Double jeopardy protections do not require that subsequent prosecutions satisfy a “same conduct” test.
5. Prosecution for violation of civil protection order by assaulting his wife did not preclude subsequent prosecutions for assault with intent to kill and threatening to kidnap or injure another.<sup>65</sup>

Therefore, the defendant was not completely exonerated under the double jeopardy clause. The prosecution may still proceed on charges of intent to kill and threatening to kidnap or injure another.

The joinder of offenses may also be barred by collateral estoppel. The United States Supreme Court specifically addressed this issue in *Ashe v. Swenson*. Mr. Justice Stewart held:

Where three or four armed men robbed six poker players in the house of one of the victims and the defendant was charged in separate counts with robbery of each of the six poker players and was tried on one count and was acquitted for insufficient evidence in which identity of defendant was the single rationally conceivable issue in dispute, federal rule of collateral estoppel, embodied in the Fifth Amendment guarantee against double jeopardy, precluded subsequent prosecution of defendant for robbery of a different player.<sup>66</sup>

In *Buchanan v. Kentucky*, the United States Supreme Court held, “The court may be charged in the same indictment of two or more offenses, whether felonies or misdemeanors, if the offenses are of the same or similar character or are based on the same acts or transactions connected together or constituting parts of a common scheme or plan.”<sup>67</sup>

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<sup>65</sup> U.S. v. *Dixon*, 509 U.S. 688 (1993).

<sup>66</sup> *Ashe v. Swenson*, 397 U. S. 436 (1970).

## Joinder of Parties

Two or more defendants may be charged in the same indictment if they are alleged to have participated in the same act or transaction or in a series of acts or transactions constituting an offense or offenses.<sup>68</sup>

There is a preference in the federal system for joint trials of defendants who are indicted together.<sup>69</sup> Defendants may be indicted together if they are alleged to have participated in the same series of acts or transactions constituting offenses.<sup>70</sup> In some instances, the joinder of parties may place an undue burden on the defendants. Rule 14 of the Federal Rules of Criminal Procedure provides a safeguard to this problem. If it appears that a defendant or the government is prejudiced by a joinder of defendants for trial, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever relief justice requires. In *Zafrio v. U.S.*, the United States Supreme Court did not allow the trial of multiple defendants to be severed even though a prejudice was shown.<sup>71</sup>

Joinder requirements are specifically addressed in Rule 8(b) of Federal Rules of Criminal Procedure:

Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.<sup>72</sup>

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<sup>67</sup> *Buchanan v. Kentucky*, 483 U.S. 402 (1978).

<sup>68</sup> *Id.* at 408.

<sup>69</sup> *Zafrio, et al v. United States*, 506 U.S. 534 (1993).

<sup>70</sup> *Id.* at 538.

<sup>71</sup> In *Zafrio v. U. S.*, 506 U. S. 534 (1993), Justice O'Connor stated, "Rule 14 does not require severance as a matter of law when codefendants present mutually exclusive defenses. While the rule recognizes that joinder, even when proper under Rule 8(b), may prejudice either a defendant or the Government, it does not make mutually exclusive defenses prejudicial per se or require severance whenever prejudice is shown. Rather, severance should be granted only if there is a serious risk that a joint trial would compromise a specific trial right of a properly joined defendant or prevent the jury from making a reliable judgment about guilt or innocence.

<sup>72</sup> *Id.* at 537.

## **H. Israeli Requirements for Joinder of Crimes and/or Parties**

### **Joinder of Crimes**

The law in Israel permits multiple charges in a single indictment if certain conditions are met. The law states: Any number of charges may be joined in the same statement of indictment if based on the same facts or similar facts or on a series of acts so connected with each other as to constitute a single affair.<sup>73</sup>

Israeli law also prohibits Double Jeopardy. Criminal Procedure Law provides that “No person shall be tried for an act constituting an offense in respect of which has been acquitted or convicted; provided that if the act caused the death of another person, he may be tried therefor notwithstanding that he has previously been convicted of some other offense constituted by such act.”<sup>74</sup>

### **Joinder of Parties**

The requirements for the joinder of parties is similar to the other countries discussed in that a common nexus is necessary among the offenses. Any number of persons may be charged in the same statement of charge if each of them was a party to all or any of the offenses contained in the statement of charge, either as an accessory or otherwise, or if the charge is in respect to a series of acts so connected with each other as to constitute a single affair; provided that the non-joinder of any part to the offense shall not be a bar to the trial of the other party.<sup>75</sup> One or more plaintiffs may join a number of

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<sup>73</sup> U. Yadin, *The Israeli Criminal Procedure Law 13 (1967)*.

<sup>74</sup> *Id.* at 31.

<sup>75</sup> *Id.* at 32.

claims against the defendant(s) if the claims against the defendant(s) arise jointly, severally, or alternatively out of one transaction.<sup>76</sup>

The trial court may use its discretion if a joint trial creates an unfair prejudice against one of the defendants. At any stage before the verdict, the court may order a separate trial of any charge contained in the statement of charge or of any accused charged jointly with others.<sup>77</sup>

### **Analysis**

The ICTR should follow the precedent established by the ICTY Rules of Procedure and Evidence which were incorporated into the ICTR Rules of Procedure and Evidence as opposed to following the jurisprudence of the countries discussed previously regarding the joinder of crimes and/or parties. While there are some similarities between the ICTR and other national legislation, the ICTR provides the prosecutor with more flexibility.

The ICTR was established for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of the neighboring states between 1 January 1994 and 31 December 1995.<sup>78</sup> The sheer magnitude of these crimes requires the joinder of crimes and/or parties. The ICTR is responsible for prosecuting crimes against hundreds of thousands of victims. It would be absolutely unthinkable to require a separate indictment for each count of murder committed during the genocide. It would also be impractical to require that murder not be combined with other offenses on one

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<sup>76</sup> Amos Shapira and Keren C. Dewitt-Arar, *Introduction to the Law of Israel* 306 (1995).

<sup>77</sup> *Yadim*, *supra* note 73, at 32.

indictment. Therefore, the flexibility provided by the ICTR to combine murder with other offenses is essential to administer justice in a fair and efficient manner.

It is unlikely that the countries discussed previously ever contemplated such atrocities as genocide and other crimes against humanity when forming joinder requirements. It is difficult to imagine that countries such as England, South Africa and Canada would discourage the joinder of multiple counts of murder and other offenses in one indictment given the present facts of the situation in Rwanda. However, given the established case law and statutory authority of these countries, it is unlikely the charges would be combined in South Africa and it's only a possibility that Canada, England and Israel would permit joinder under these circumstances. Most judges are reluctant to join crimes and/or parties because unfair prejudice may result toward the defendant. Australian jurisprudence resembles the ICTR because it allows the joinder of murder and other offenses in one indictment more readily than the countries discussed previously. However, the requirements are stricter than the ICTR because there must be a common nexus between each offense.

The ICTR, like the United States and Israel, protects the defendant from being tried for the same crime twice, otherwise known as double jeopardy. However, the right to appeal an acquittal would not be permitted under the jurisprudence of Israel or United States criminal law. The Prosecutor has a tremendous benefit under the ICTR because the Rules of Evidence permit the prosecutor to appeal an acquittal of the defendant.<sup>79</sup>

The requirements for joinder of parties is similar between the ICTR and the countries discussed previously. Each allows the trials of joint persons to be severed if the

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<sup>78</sup> Statute for the Rwanda Tribunal, *supra* note 13.

<sup>79</sup> Statute for the Rwanda Tribunal, *supra* note 14.

interests of justice require it. A joint trial cannot place an undue burden or unfair prejudice on the prosecutor or the defendant.<sup>80</sup>

### **Conclusion**

The Prosecutors of the ICTR should follow the Rules of Evidence established by the ICTY which were incorporated into the ICTR. The preclusion of a murder charge with other offenses would severely impede the progress of the prosecutors for the ICTR. The ICTR was established in response to the egregious crimes committed against hundreds of thousands of people. The Rules of Evidence and Procedure of the ICTR will allow the prosecution to hold a person or persons accountable for the crimes against humanity committed in Rwanda and neighboring states between 1 January 1994 and 31 December 1994.<sup>81</sup> The permissibility of multiple offenses, including murder is appropriate considering the function and purpose of the ICTR, which is to adjudicate the persons responsible for committing such deplorable international crimes against humanity, in a fair and efficient manner.

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<sup>80</sup> See note 5.

<sup>81</sup> See note 13.