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Can A Defendant Be Charged With Offenses Under Two Or More Articles Of The Ictr Statute Based On The Same Act(S)? If So, Can S/He Be Convicted Of Two Or More Crimes Based On The Same Act(S)?

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(In conjunction with the New England School of Law)

MEMORANDUM FOR
OFFICE OF THE PROSECUTOR

ISSUE # 3

CAN A DEFENDANT BE CHARGED WITH OFFENSES UNDER TWO OR MORE ARTICLES OF THE ICTR STATUTE BASED ON THE SAME ACT(S)? IF SO, CAN S/HE BE CONVICTED OF TWO OR MORE CRIMES BASED ON THE SAME ACT(S)?

Prepared by Michael Ashkouri
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1. Memorandum to the Deputy Prosecutor of the ICTR by New England School of Law student Mary Snyder, December 1999
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I-BRIEF ISSUE & SUMMARY OF CONCLUSION

The issue of this memorandum is whether a defendant can be charged with offenses under two or more articles of the ICTR Statute based on the same act(s). If yes, can s/he be convicted of two or more crimes based on the same act(s)?

International Tribunals, National Tribunals, as well as the ICTR rules and precedent provide that the ICTR can charge defendants with offenses under two or more articles of the ICTR Statute based on the same act(s). The precedent of these Tribunals indicates that defendants can be convicted of two or more crimes based on the same act(s). The recent ICTR decision in the *Kayishema and Ruzindana* case is contrary to the great weight of international precedents including that of the ICTR. Should the Prosecution choose to appeal the decision of the Trial Chamber, the joint Appeals Chamber of the ICTY & ICTR is likely to overrule the decision.

II-FACTUAL BACKGROUND

Rwanda is composed primarily of two tribes, the Hutu (majority) and the Tutsi (minority). Over the years, the two tribes have evolved into two separate and distinct ethnic groups.[1]

In 1994, after years of violent clashes between the Tutsi army (the Rwandan Patriotic Front, RPF) and the Hutu extremists, President Juvenal Habyarimana was assassinated when his plane was shot down.[2] The two tribes blamed each other for the assassination. Almost simultaneously, Hutu soldiers began killing Tutsi civilians and moderate Hutus. The Rwandan borders and transportation hubs were sealed off. The

[1] Virginia Morris & Michael Scharf, *The International Criminal Tribunal for Rwanda*, p.49 (1998) [reproduced in accompanying Binder 1 of 2 @ TAB #1].

[2] *Id.* at 53.

United Nations' peacekeeping forces were not permitted to investigate.[3] The killing of the Tutsi population spread throughout the country.[4] The responsibility of the genocide against the Tutsis is shared among several categories of individuals: "the planners, the 'military' superiors and subordinates, and the unwilling accomplices."[5] The international community, United Nations, and the Security Council reacted to the killings by adopting Resolution 955 establishing the International Criminal Tribunal for Rwanda.[6]

Upon its creation, the International Criminal Tribunal of Rwanda incorporated a set of Rules of Procedure and Evidence. These Rules permit the Tribunal to administer the number and degree of crimes committed in Rwanda. The Tribunal is charged with bringing to justice all persons including the planners, the military superiors and subordinates, and the unwilling participants. The Rules provide the Tribunal the authority to implement justice within a reasonable time and through judicially efficient means. Joinder of Offenses, Rule 49, permits the Tribunal to consolidate the prosecution of crimes. This allows for judicially efficient prosecutions, saving the Tribunal time, resources and funds, while providing the defendants a fair trial. This memorandum will discuss Joinder of Offenses at the Tribunal as well as at other national and international tribunals.

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[3] *Id.* at 53-54.

[4] *Id.* at 55. Radio broadcasters instructed the Hutus to complete the murders and "fill the grave." Mass graves were filled and bodies were dumped in the rivers.

[5] *Id.*

[6] *Id.* at 72. The ICTR was adopted by a vote of 13 nations approving, 1 opposing (Rwanda) and 1 abstention (China). Rwanda's reasons for opposing the Tribunal were based on the composition and structure of the Tribunal, failure of the Tribunal to give priority to genocide prosecutions, the prohibition of the death penalty (which Rwandan national courts favor), and the failure to designate Rwanda as the seat of the Rwanda Tribunal.

III-LEGAL DISCUSSION

A. ICTY Statute

The International Criminal Tribunal for the former Yugoslavia (ICTY) statute permits the tribunal to charge and convict a person with two offenses/crimes for the same or factually related conduct.[7] The joinder of crimes/offenses is permissible under Rule 49 of the ICTY statute. Rule 49, Joinder of Crimes provides:

> 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.[8]

The term "transaction" is defined in Rule 2 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.[9]

The availability of joinder is critical in terms of judicial efficiency. It is also a due process concern for the accused as it facilitates trial without undue delay as well as eliminates the possibility of two or more trials for the same or related conduct under two or more criminal statutes.

B. ICTY Case Law

1. Case against Dusko Tadic

The ICTY's first case was that of Dusko Tadic.[10] Tadic was a Serb who participated in the violent acts and effective destruction of the Muslim community in the

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[7] Virginia Morris & Michael Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, vol.1, p. 205 (1995) [reproduced in accompanying Binder 1 of 2 @ TAB #2].

[8] *Id.*

[9] *Id.* at vol. 2, p. 46 [reproduced in accompanying Binder 1 of 2 @ TAB #3].

[10] Michael P. Scharf, *Balkan Justice*, at 98-101 (1997)

Prijedor region of Yugoslavia.[11] The German government arrested Tadic while living in Munich and planned to prosecute him for his conduct in Prijedor.[12] The ICTY stepped in and asked the German government to defer prosecution. The ICTY indicted Tadic and in due time, the German government surrendered Tadic to the jurisdiction of the ICTY.[13]

The ICTY formally indicted Tadic for "thirty-four counts of Breaches of the Geneva Conventions, Violations of the Laws and Customs of War, and Crimes Against Humanity, including murder, rape, and torture of Muslim men and women within and outside the Omarska camp."[14] The indictment was based on the charges that Tadic pulled four named Muslims heading to an assembly area and shot them. In another incident, Tadic shot five men and beat them with wooden clubs. Tadic was also charged with the "participation" in the castration and murder of one prison inmate as well as the torture and murder of other inmates. Tadic was also charged with the rape of a female prison inmate.

Tadic was found guilty of 11 of the 34 counts at the Trial Chamber. Tadic was subsequently found guilty of nine additional charges by the Appeals Chamber when it held that the conflict was international and thus the grave breaches of the 1949 Geneva Conventions apply (Article 2 of the Statute of the Tribunal, namely, willful killing, torture or inhuman treatment, and willfully causing great suffering or serious injury to

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[reproduced in accompanying Binder 1 of 2 @ TAB #4].

[11] *Id.* at 98-99.

[12] *Id.*

[13] *Id.* at 100-101.

[14] *Id.*

body or health).[15] For his role in the "attack, seizure, collection, segregation and forced transfer of civilians to camps, calling-out of civilians, beatings and killings…against non-Serbs on the basis of religious and political discrimination,"[16] Tadic was found guilty of a Crime against Humanity. For his participation in the beatings and grievous violent acts against six civilians,[17] the Trial Chamber found Tadic guilty of Crimes against Humanity and violation of the laws and customs of war. The Tribunal held that Tadic "intended for discriminatory reasons to inflict severe damage to the victims' physical and human dignity."[18] This was a conviction under several statutes (several offenses) based on the same act. For "intentionally assisting directly and substantially in the common purpose of the group to inflict severe suffering upon"[19] three different civilians who were not part of the hostilities at the time, the Tribunal found Tadic guilty of Crimes against Humanity and violations of the laws and customs of war. Once again, the Trial Chamber convicted Tadic of violations of several statutes based on the same act(s). Thus in the Tadic trial, its first, the ICTY held that defendants may be convicted under several statutes for the same or similar conduct. This was subsequently was upheld in the Appeals Chamber.

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[15] *Id.* at 214. See also Dusko Tadic Appeal, Case No. IT-94-1-Appeals Chamber Decision of July 15, 1999, also found at www.un.org/icty/judgement.htm
[reproduced in accompanying Binder 1 of 2 @ TAB #5]

[16] *Id.* at 275, Appendix D: Summary of the Tadic Verdict.

[17] *Id.* at 276.

[18] *Id.*

[19] *Id.* at 276-277.

2. The Case of Gorden Jelisic

Gorden Jelisic, also known as the "Serbian Adolph" was charged with 31 counts.[20] His indictment covered crimes against humanity, violations of the laws and customs of war and genocide for the murder, torture, detention, and abuse of Muslims and Croats.[21] Jelisic pled guilty to 30 counts, including charges of crimes against humanity and violations of the laws or customs of war. He pled not guilty to genocide and was subsequently tried for genocide (the first person to be tried of genocide before the ICTY).[22] The ICTY held that in order for a defendant to be found guilty of genocide, the prosecution must prove the defendant had a "clear knowledge" that he "was participating in the …destruction… of a given group."[23] The Tribunal held that such evidence includes "planning, inciting others, ordering the genocide or other types of participation in the known genocide."[24] The Tribunal held that the prosecution did not provide sufficient evidence that Jelisic had the intent to commit genocide beyond a reasonable doubt. The Trial Chamber held that "the behavior of the accused appears to indicate that, although he obviously singled out Muslims, he killed arbitrarily rather than with the clear intention to destroy a group."[25] The Trial Chamber held that the Prosecutor had not proved beyond all reasonable doubt that the accused was motivated by the *dolus*

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[20] *Prosecutor v. Jelisic*, Case No. JL/P.I.S./441-E [reproduced in accompanying Binder 1 of 2 @ TAB #6].

[21] *Id.*

[22] *Id.* See also Maury D. Shenk, Carrie A. Rhoads & Amy Howe, *International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 34 Int'l. Law. 683 (2000)
[reproduced in accompanying Binder 1 of 2 @ TAB #7].

[23] *Id.*

[24] *Id.*

[25] See *Prosecutor v. Jelisic*, para 108.

specialis of the crime of genocide. He was acquitted of the charge of genocide.[26] Although Jelisic was not convicted of genocide for lack of sufficient evidence, his guilty plea for crimes against humanity and violations of the laws and customs of war based the same or similar conduct was permitted. In acquitting Jelisic of genocide for the lack of proof, the Trial Chamber never suggested that Jelisic could not simultaneously be held guilty of genocide and the other crimes if there had been evidence of his intent to commit genocide.

Whether through convictions or guilty pleas, the ICTY set the precedent for convicting a defendant under two or more statutes for the same act/conduct. Since the International Criminal Tribunal for Rwanda and the ICTY have similarly worded statutes and rules, and share the same Appeal Chamber, this is important jurisprudence for the International Criminal Tribunal for Rwanda to follow.

C. ICTR Statute

Like the ICTY, the International Criminal Tribunal for Rwanda (ICTR) statute permits the tribunal to charge and convict a person with more than one offense/crime for the same or factually related conduct.[27] The Tribunal may charge and convict a person with violations of genocide, crimes against humanity, violations of Article 3 common to

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[26] *Id.*

[27] See Virginia Morris & Michael Scharf, vol. 1, pp. 480-481 [reproduced in accompanying Binder 1 of 2 @ TAB #1]. See also Rules of Procedure and Evidence of the Rwanda Tribunal (as amended in January and July 1996), Rule 49, U.N. Doc. ITR/3/Rev.2, *reprinted in* volume II. Rule 49 was recently re-adopted at the Ninth Plenary Session of 3 November 2000. See www.ictr.org.

the Geneva Conventions and of Additional Protocol II.[28] The joinder of crimes/offenses is permissible under Rule 49 of the ICTR statute.[29] Rule 49, Joinder of Crimes provides:

> 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.[30]

The availability of joinder is critical in terms of judicial efficiency. This is particularly true in the case of the limited resources of the ICTR.[31] It is also a due process concern for the accused as it facilitates trial without undue delay[32] as well as to eliminate the possibility of two or more trials for the same or related conduct under two or more criminal statutes.

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[28] See *Jurisdiction of the ICTR* at www.ictr.org.

[29] *Id.*

[30] *Id.* It is worth noting that Rule 49 of the ICTY and the ICTR is the same Rule, sharing the same language.

[31] *Id.*

[32] *Id*

D. ICTR Case Law

1. The Akayesu Case

The ICTR found Jean-Paul Akayesu guilty of genocide and crimes against humanity, and direct and public incitement to commit genocide.[33] Mr. Akayesu was the bourgmestre of the Taba commune in the Prefecture of Gitarama in Rwanda.[34] His convictions arose out of massacres of ethnic Tutsis in the Taba commune, including extermination, murder, torture, rape, sexual violence, killings of newborns and pregnant women and the cutting of Achilles' tendons to prevent escape of any Tutsis.[35]

The ICTR discussed the elements of incitement to genocide. The Tribunal held that incitement need not be direct but can be implicit.[36] A conviction for Incitement to Genocide may be based on conduct that "plays skillfully on mob psychology by casting suspicion on certain groups, by insinuating that they were responsible for economic or other difficulties in order to create an atmosphere favorable to the perpetration of the crime."[37]

Also critical in this judgment is that the Tribunal held that the ICTR's statute does not establish a hierarchy of norms, but grants jurisdiction over separate offenses on equal

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[33] See *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, *Indictment* [reproduced in accompanying Binder 1 of 2 @ TAB #8]. See also www.un.org/ictr/english/judgment/akayesu.html
See Jose E. Alvarez, *Lessons from the Akayesu Judgment*, 5 ILSA J. Int'l & Comp L. 359 (Spring 1999) [reproduced in accompanying Binder 1 of 2 @ TAB #9].

[34] *Id.*

[35] See Jose E. Alvarez at p. 360.

[36] See *Prosecutor v. Akayesu, Legal Findings* [reproduced in accompanying Binder 1 of 2 @ TAB #8].

[37] *Id.*

footing.[38] The Tribunal held that offenses of genocide, crimes against humanity, and war crimes each have different constituent elements and can lead to multiple convictions even in relation to the same set of facts. The Tribunal applied the doctrine of "notional plurality of offenses," stating that although genocide and crimes against humanity are separate offenses, convictions for both are possible arising out of the same action.[39] The Tribunal held that genocide is a "special intent" crime requiring a special intent to destroy an individual targeted as a member of a group. The victim of the crime of genocide is the group itself rather than the individual alone, and the intent can be inferred contextually from the particular conduct.[40] As for crimes against humanity, the Tribunal held that the conduct must be committed "as part of a widespread or systematic attack directed against a civilian population on discriminatory grounds."[41] It is worthy of note that the conduct must be either widespread or systematic but not both for a conviction of violations of crimes against humanity. The Tribunal did not convict Akayesu of complicity in genocide. The Tribunal held that genocide and complicity in genocide are "mutually exclusive by definition" and that Akayseu could not be convicted of both.[42]

It is worth noting that Akayesu was convicted of genocide, crimes against humanity, and war crimes for the same or similar conduct. It is also critical to keep in mind that although the Tribunal held that each statute has different elements, multiple

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[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

convictions even in relation to the same set of facts is permissible. This is in keeping with the ICTY and international precedent and jurisprudence.

2. The Kambanda Case

Jean Kambanda, a former prime minister of Rwanda, pled guilty to all six counts charged against him, arising out of mass killings of the Tutsi population. These counts included genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, complicity in genocide and crimes against humanity (for murder and extermination).[43]

The Tribunal held that crimes against humanity are crimes that "shock the collective conscience."[44] As for genocide, the Tribunal held that genocide required the element of dolus specialis (special intent) that states the offense was committed with the intent to destroy, in whole or in part, a "national, ethnic, racial, or religious group."[45] It is note worthy that the Tribunal permitted the guilty plea of the defendant for several offenses and violation of various statutes for the same or similar conduct.

Thus, through convictions and guilty pleas, the ICTR has followed the ICTY and international precedent for convicting defendants under two or more statutes for the same act/conduct.

3. The Case of Kayishema & Ruzindana

Clement Kayishema and Obed Ruzindana were indicted for committing genocide and crimes against humanity. Kayishema was a former prefect of the Kibuye region. He

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[43] *Prosecutor v. Jean Kambanda*, ICTR-97-23-S (Sept. 4, 1998), para40 [reproduced in accompanying Binder 1 of 2 @ TAB #10].

[44] *Id.* para. 14.

[45] *Id.* para. 16.

was accused of personal responsibility for the massacre at the Catholic Church and Home St. Jean complex in Kibuye town, the massacre at the stadium in Kibuye, and the massacre at the church in Mubuga. Ruzindana, a businessman from Kigali and Kayishema were accused of directing and personally participating in attacking and killing thousands of persons seeking refuge in the area of Bisesero.[46]

The Tribunal found both men guilty of all charges of genocide. The Tribunal acquitted the defendants of all charges of crimes against humanity. The tribunal held that the charges overlapped with charges of genocide in this particular case.[47] The Tribunal held that the Prosecutor failed to show that any of the murders alleged was outside the mass killing event, within each crime site. These murders formed a part of the greater events occurring in Kibuye during the specific time. The Tribunal reasoned that "in the peculiar factual scenario in the present case, the crimes of genocide, extermination and murder overlap. Accordingly, there exists a *concur d' infractions par excellence* with regard to the three crimes within each of the four crime sites, that is to say these offenses were the same in the present case."[48] In this case the ICTR did not convict the defendants under several statutes for the same act/conduct.

The Trial Chamber held that crimes against humanity /inhumane acts were included within the genocide charges based on murder and extermination. Trial Chamber departed from the holding of the *Akayesu* case, where the defendant was found guilty of both genocide and crimes against humanity for sexual violence. It also ignored the ICTY

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[46] *Prosecutor v. Kayishema & Ruzindana*, ICTR-95-1-T (May 21, 1999) [reproduced in accompanying Binder 1 of 2 @ TAB #11].

[47] *Id.*

[48] *Id.* para. 646-647.

precedent of the *Tadic* case, where the Trial Chamber reasoned that sexual violence could be construed as a crime against humanity/inhumane act.[49]

The Trial Chamber did not convict the defendants of crimes against humanity partially due to a lack of sufficient evidence. The trial Chamber seems to require very specific and detailed evidence in order to convict for both crimes against humanity and genocide based on the same act(s). The Prosecutor should attempt in future cases to specify and provide with exceptional particularity evidence that support a conviction for murder and sexual violence as both a genocide and crime against humanity.[50]

The holding of the *Kayishema & Ruzindana* case is a concerning development since it indicates that the same offenses may not be charged under several statutes if they are based on the same fact pattern. This is counter to the ICTR and ICTY Rule 49 (and its interpretation) which permits joinder of offenses based on the same act/conduct. It is also counter to the ICTY and ICTR precedent. This development raises the possibility that defendants convicted in a similar situation to Kayishema and Ruzindana may walk free without any reprimand for their conduct were the Appeal Chamber to throw out their convictions. Double Jeopardy may not permit the Prosecutor to indict the defendants again for their conduct.

E. International Case Law

1. Nuremberg

On August 8, 1945, the United Kingdom, United States, Union of Soviet Socialist Republics, and France, acting on behalf of the United Nations, established the

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[49] See memoranda to the Deputy Prosecutor of the ICTR by New England School of Law student Mary Snyder, December 1999 [reproduced in accompanying Binder 1 of 2 @ TAB #12].

international Military Tribunal through the London Agreement.[51] The Military Tribunal provided for the trial of war criminals whose offences had no particular geographical location. The constitution, jurisdiction and function of the Tribunal were defined in the Charter annexed to the Agreement.[52]

Twenty-two defendants, the major war criminals, were indicted before the Tribunal.[53] They were indicted for crimes against peace, war crimes, and crimes against humanity. They were also indicted for partaking in the formulation or execution of a common plan or conspiring to commit all of these crimes.[54]

The defendants were indicted under Article 6 of the Charter of the Agreement.[55] The Tribunal stated that:

> The Tribunal established by Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.
>
> The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:
>
> (a) Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties; agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

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[50] *Id.*

[51] Jordan J. Paust, M. Cherif Bassiouni, Sharon A. Williams, Michael Scharf, Jimmy Gurule, Bruce Zagaris, *International Criminal Law*, 710-718 (1996)
[reproduced in accompanying Binder 1 of 2 @ TAB #13].

[52] *Id.* at 712.

[53] Sharon A. Williams, ed., *International Criminal Law*, 8th ed., 291-293 (1995)
[reproduced in accompanying Binder 1 of 2 @ TAB #14].

[54] *Id.* at 292.

[55] *Id.*

(b) War crimes: namely, violations of the laws or customs of war. Such violations shall include, but not limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of the civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons of the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecution on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[56]

This means that any leader, organizer, instigator and accomplice partaking in the formulation or execution of the common plan or conspiracy to commit any of these crimes may be liable for his/her conduct.[57] It is critical that 17 of the defendants were convicted for two or more of the counts in the indictments based on their conduct. Two defendants were convicted of one count. Three defendants were found not guilty.[58]

An example of a multiple indictments and convictions for the same act(s) under several crimes is that of defendant Goering. Defendant Goering was indicted on all four counts of the Tribunal. Goering was the most prominent man in the Nazi regime until 1943. He was Commander-in-Chief of the Luftwaffe, the German Air Force, Plenipotentiary for the Four Year Plan, and was a very close aide to Hitler regarding military and political matters. Goering was convicted for violating Crimes against Peace based on the various leadership positions he held, the conferences he attended, and his public statements. The Tribunal held that he was the planner and prime mover in the

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[56] *Id.*

[57] *Id.*

[58] *See* Paust et al. at 717-718.

military and diplomatic preparation for the German war. He was convicted of War Crimes and Crimes against Humanity [multiple offenses based on the same/similar act(s)] based on his complicity in the use of slave labor, the treatment of war prisoners, spoliation of conquered territory, participation in conferences inciting war, and for the direct order to resolve the Jewish question in the German sphere of Europe (persecution and elimination of the Jewish population).[59] The Goering case is precedent for all international tribunals and an example of a defendant being indicted and convicted of several offenses based on the same or similar act(s).

The Nuremberg Tribunal established the jurisprudence for the subsequent international tribunals. A critical aspect of this jurisprudence is that a defendant may be convicted of several offenses for the same act/conduct. A defendant in Nuremberg may be convicted for murder, deportation and enslavement under the War Crimes and the Crimes against Humanity provisions of the Charter.

2. The Eichman Trial-Israel[60]

Israel tried ex-Nazi officer Adolph Eichman for his conduct and role in the "final solution" in Germany and its occupied territory during World War II. Eichman "was the person directly responsible for the execution of Hitler's orders for the 'final solution' of the Jewish problem in Europe, i.e. the murder of every single Jew on whom the Nazis

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[59] Nuremberg Judgment @ www.yale.edu/lawweb/avalon/imt/proc/judgen.htm [reproduced in accompanying Binder 1 of 2 @ TAB #15].

[60] Lord Russell of Liverpool, *The Record: The Trial of Adolph Eichman for His Crimes Against the Jewish People and Against Humanity* (1962) [reproduced in accompanying Binder 2 of 2 @ TAB #16]. See also www.pbs.org/eichman/charges.htm & www.nizkor.org...scripts/Judgment/Judgement-058.html for text of the Judgment [reproduced in accompanying Binder 2 of 2 @ TAB #17].

could lay their hands throughout the territories of Europe which they had occupied at that time."[61]

Eichman was indicted of four counts of committing crimes against the Jewish People (under Israeli national law). These indictments covered Eichman's role and conduct in: 1) the death of millions of Jews by gassing and other means of extermination at death camps; 2) deporting Jews to collection points for the purpose of executing the "final solution;" 3) organizing the persecution of 20,000 Jews on the night of 9-10 November 1938 (The Night of Broken Glass), the social and economic boycott of the Jews in Germany, mass arrest and deportation; and 4) the destruction of the Jewish people through sterilization and interruption of pregnancies through artificial abortions.[62]

Eichman was additionally indicted of seven counts of crimes against humanity. These indictments covered Eichman's conduct and role in: 1) causing the murder, extermination, enslavement, starvation and deportation of the civilian Jewish population in Germany and other Axis countries; 2) persecuting Jews on national, racial, religious and political grounds; 3) establishing organizations to rob and steal personal property from the Jewish population including the dying and dead Jews for later transportation to Germany; 4) the deportation of over half a million Polish civilians from their places of residence with intent to settle German families in those places; 5) the deportation of residents of Yugoslavia with intent to settle German families in their places; 6) the deportation of tens of thousands of gypsies to extermination camps for the purpose of

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[61] *Id.*, p. x of the Prologue, citing Israeli Prime Minister David Ben Gurion's letter to Argentine's President. Israel clandestinely kidnapped and escorted Eichman out of Argentina after the latter refused Israel's extradition request. David Ben Gurion wrote a letter explaining the reasons behind Israel's radical action since it violated Argentina's sovereignty. Israel tried Eichman for his conduct during WWII and his role in the "final solution."

murder; and 7) the deportation of approximately 100 children from Czechoslovakia to Poland for the purpose of murder, and for being a member of the SS, SD, and the Gestapo.[63] Eichman was also indicted of one count of committing a war crime for causing the ill treatment, deportation and murder of the Jewish inhabitants in Germany, Axis countries and German occupied territories.[64]

The Israeli court convicted Eichman for committing crimes against the Jewish People, crimes against humanity, war crimes, and of being a member of criminal organizations.[65] In relation to Eichman and the German military staff involved in the "final solution," the court held that:

> Everyone who had been "out into the picture," from a certain rank upwards, was aware too that the machinery existed and was functioning, although not all of them knew how each part of the machine operated, with what means, at what pace, and where.
>
> The campaign for extermination, therefore, was one single comprehensive act which cannot be divided into acts or operations carried out by various people, at various times and at different places. One team of people carried it out jointly, at all times and in all places.[66]

The importance of the Eichman conviction is that the defendant was convicted for violations of several statutes, both domestic and international, based on the same act or conduct. The court held that all the various acts that were necessary to implement the "final solution" were part of one act/conduct, rather than separate and independent

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[62] *Id.* at 5.

[63] *Id.* at 6-7. The International Military Tribunal at Nuremberg on October 1946, in accordance with Article 9 of the Nuremburg Charter declared that the SS, SD, and the Gestapo were criminal organizations. This allowed for the prosecution of its members.

[64] *Id.* at 6.

[65] *Id.* at 302.

[66] *Id.* at 324-325.

conduct. This is critical to the ICTR as it provides precedent considering a specific grand scheme act/conduct/or plan to be composed of several smaller acts and that defendants indicted of committing the grand scheme/act may be convicted of violating several statutes based on participating in the grand scheme.

This is a similar situation to the Kayishema and Ruzindana case where the court held that three massacres constituted one act/conduct. The ICTR refused to convict the defendants under two or more Articles of its statute. Instead the ICTR convicted the defendants of Genocide only. Yet the Eichman court convicted the defendant under four different statutes based on the same act/conduct.

3. The Barbie Trial-France

Klaus Barbie was head of the Gestapo in Lyons, France from 1942-1944, during wartime German occupation.[67] He was convicted in absentia for war crimes and sentenced to death. He was later discovered in Bolivia and after political changes in the Bolivia government, which had protected him, he was expelled in 1983.[68] In the mean time, France instituted a new proceeding against Barbie for crimes against humanity based on murder, torture, arbitrary arrests, detentions, and imprisonment. He was held responsible for the death of 4,342 persons, deportation of 7,591 Jews and arrest and deportation of 14,311 members of the French Resistance.[69] He was sent to French Guiana. Upon arrival, he was arrested and extradited to France.

The national court permitted new indictments for crimes against humanity to be instituted based on Barbie's conduct. It did drop the war crimes charges and conviction

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[67] *Supra* note 51 at 1047-1063.

[68] *Id.* at 1047.

because the statute of limitation had expired. After many legal appeals, the trial court, *Cour d'Assises du Rhone* found Barbie guilty of all 340 counts of the seventeen crimes against humanity.[70] Although the conviction of war crimes had to be dropped due to the statute of limitation, France was willing and able to try and convict Barbie again for the international offense of crimes against humanity for the same act/conduct for which he had earlier been convicted of, war crimes.

4. American Law[71]

Defendants in the United States can be and are routinely charged with several offenses based on the same act(s). These defendants are also routinely convicted for several offenses based on the same act(s). United States Federal Rules of Criminal Procedure provide for the joinder of offenses.

a. Federal Rules of Criminal Procedure

In order for a defendant to be convicted for the same conduct/offenses under several statutes, the offenses must have been joined in the indictment. United States' Federal Rules of Criminal Procedure (FRCP) allow such. Joinder of offenses is permitted under FRCP 8 (a). The rule provides:

> Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the

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[69] *Id.*

[70] *Id.* See also Jean-Olivier Viout, *The Klaus Barbie Trial and Crimes Against Humanity*, 3 Hofstra L. & Pol'y Symp. 155 (1999). The punishments contained in a decree rendered in felony cases shall be extinguished after twenty years, counting from the date on which the decree became final. *Id.* at 156, n.9 citing The French Code of Criminal Procedure, Rothman & Co., South Hackensack, N.J. Title VII-Limitation of the Punishment, Article 763 [reproduced in accompanying Binder 2 of 2 @ TAB #18].

[71] For further and detailed study of joinder, please see memorandum to the Deputy Prosecutor of the ICTR by New England School of Law student Andrea L. Varney, May 18, 1998. This section of my memorandum has relied on the research of this student
[reproduced in accompanying Binder 2 of 2 @ TAB #19].

same act or transactions connected together or constituting parts of a common scheme or plan.

United States courts have interpreted this Rule as that in order to join two or more offenses in one indictment, "(1) the crimes must be of the same or similar character, (2) the crimes must be based on the same act or transaction, or (3) the crimes must be based on two or more transactions connected together constituting parts of a common scheme or design."[72] United States courts have construed joinder "broadly to allow liberal joinder and thereby enhance the efficiency of the judicial system."[73] United States courts, as discussed in the following section have permitted convictions of several offenses (under several statutes) based on the joinder elements. The ICTY and ICTR statute is based on U.S. Law and thus U.S. court interpretation of its rules should provide guidance to the ICTY and ICTR. It is worthy of note that the ICTR's corresponding rule is found in Rule 49 as discussed previously.[74]

b. Criminal Case Law

United States courts have permitted Prosecutors to liberally apply FRCP 8 (a), joinder, and charge defendants with several offenses based on the same act(s). The courts have regularly convict defendants of several offenses based on the same act(s).

In doing so, United States courts developed three standards or tests for the use of joinder per Rule 8 (a) in criminal cases. The first standard where joinder is permissible is when the conduct or offense is "the same or of similar character." The defendant in

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[72] *United States v. Quinn*, 365 F.2d 256, 263 (7th Cir. 1966) [reproduced in accompanying Binder 2 of 2 @ TAB #20].

[73] *United States v. Isaacs*, 493 F.2d 1124 (7th Cir. 1974) [reproduced in accompanying Binder 2 of 2 @ TAB #21].

United States v. Cox was convicted of two firearms and six drug violations. At the appeals court, he argued that "the two marijuana, the two firearms, and four drug offenses involved three distinct and unrelated sets of activities and should have been tried separately."[75] The Appeals Court disagreed. The court reasoned that first, the drug charges, although they occurred on separate dates, were of the same or similar character because they comprised "either possession with intent to distribute or conspiracy to possess and distribute a controlled substance."[76] The court's second reason for allowing joinder was that although the firearms and drug violations may not be of the same or similar character, the joinder of the two violations was permissible because they comprised a common scheme or plan under FRCP 8 (a). The scheme or common plan was to possess and distribute, especially since the drugs and firearms were discovered in the defendant's car at the same time.

The defendant in *United States v. Hollis* was convicted of ten counts, including two for insurance fraud and two of mail fraud. The defendant argued that the offenses should not be joined because each occurred on separate dates.[77] The court disagreed

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[74] Rules of Procedure and Evidence of the Rwanda Tribunal (as amended in January and July 1996), Rule 48, U.N. Doc. ITR/3/Rev., reprinted in volume II. See *Supra* note 1.

[75] *United States v. Cox*, 934 F.2d 1114, 1119 (10th Cir. 1991) [reproduced in accompanying Binder 2 of 2 @ TAB #22]. The defendant was first arrested upon a traffic stop by a state police officer in 1987 for speeding. The officer saw a suspicious substance in the car. Upon further search, he discovered it was marijuana. The officer also found unlicensed firearms. The defendant was arrested again in 1988 after distributing cocaine to a government informant. Another search of his car yielded several drug charges. The defendant was arrested again.

[76] *Id.* at 1119.

[77] *United States v. Hollis*, 971 F.2d 1441, 1445-1447 (10th Cir. 1992) [reproduced in accompanying Binder 2 of 2 @ TAB #23]. The defendant and his wife falsely claimed stolen personal property from their house based on a burglary of the house to their insurance company. Mail fraud was charged based on mailing a Sworn Statement in Proof of Loss to their insurance company. Separately, the defendant and his wife lied as to the damages to their business due to a lightening strike on as property loss form mailed to their insurance company.

reasoning that the two offenses were schemes of the "same or similar character."[78] The court reasoned that in each offense, the defendant "defrauded the victim of money through submission of falsified documents,"[79] and thus it was proper and adequate to join the offenses.

United States courts have interpreted the same or similar character test broadly. In *United States v. Valentine* the defendant argued that joinder of weapons and cocaine convictions was not proper because the offenses were not the same or similar in character.[80] The defendant was not permitted to carry firearms due to the nature of a prior conviction.[81] The defendant argued that the Prosecutor "failed to prove that he possessed both the cocaine and the weapons as part of a common plan to sell cocaine for profit."[82] The court held that the joinder was proper and that the Prosecutor had demonstrated the presence of a common plan or scheme through circumstantial evidence showing the guns and cocaine were discovered in the defendant's kitchen at the same time.[83] The court continued that the scheme or common plan of the cocaine and the guns was the "pursuit of unlawful activity."[84]

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[78] *Id*. at 1456.

[79] *Id*.

[80] *United States v. Valentine*, 706 F.2d 282, 289 (10th Cir. 1983) [reproduced in accompanying Binder 2 of 2 @ TAB #24]. The defendant was charged with two counts of possession of cocaine with intent to distribute, one count of distribution, two counts of receipt of firearms after conviction of a crime punishable by imprisonment for a term exceeding one year, and two charges of possession of the same firearms.

[81] *Id*. at 282, 285.

[82] *Id*. at 289.

[83] *Id*.

[84] *Id*.

The second standard where joinder is permissible is when the conduct or offenses are based on the "same act or transaction." The defendant in *United States v. Kinslow* was convicted of kidnapping, interstate transportation of a minor for sexual purposes, and firearms and vehicle offenses.[85] The defendant argued that the count charging him with interstate transportation of a minor should not be joined because it did not establish a scenario contemplated by FRCP 8 (a).[86] The court disagreed and held that the joinder under FRCP 8 (a) was permissible since "all of the counts in the indictment were based on the same transaction and were part of a common plan."[87] The court continued that the word "'transaction' is a word of flexible meaning that may comprehend a series of related occurrences."[88] In applying the law to facts, the court focused on the defendant's conduct. Within a 24-hour period, the defendant escaped prison, took a family hostage, stole its car and traveled to California with its minor daughter.[89]

In *United States v. Isaacs* the defended was convicted of conspiracy, bribery, Travel Act violations, mail fraud, tax evasion, and perjury.[90] The defendant argued that joinder of conspiracy, Travel Act, and mail fraud violations was nor permissible under FRCP 8 (a). In responding, the court held that the term "'transaction' contemplates a series of many acts 'depending not on so much as the immediateness of their connection as upon their logical relationship.'"[91] The court held that the offenses had a logical

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[85] U*nited States v. Kinslow*, 860 F.2d 963, 964-965 (9th Cir. 1988) [reproduced in accompanying Binder 2 of 2 @ TAB #25]. The defendant escaped from prison and held a family hostage in its home, took its firearms, and escaped in its car with its eleven year-old daughter.

[86] *Id*. at 965.

[87] *Id*. at 966.

[88] *Id*., citing *United States v. Friedman*, 445 F.2d 1076, 1083 (9th Cir.), cert. denied, 404 U.S. 958 (1971).

[89] *Id*. at 966.

relationship sufficient to be joined.[92] The offenses were all "connected with, or arose out of, a common plan to corruptly influence the regulation of horse racing…the commonality of proof suffices to establish that the offenses were 'connected together' for the purpose of Rule 8 (a)."[93]

The third standard where joinder is permissible is when the offenses are based on a "common scheme or plan." In *United States v. Gorecki* the court permitted joinder of drug and weapons charges against the defendant. The court reasoned that evidence at the defendant's house showed that he used the house for dealing cocaine, indeed that he had purchased the house from a predecessor dealer for that purpose.[94] The court continued that "under these circumstances, it is reasonable to assume that the firearm could have been used as a vital part of a plan to possess and distribute drugs,"[95] especially since both the drugs and firearm were discovered at the same time and place. The court held that joinder was permissible in this case because it was comported with the purpose of FRCP 8 (a), to promote judicial economy.[96]

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[90] See *United States v. Isaacs*, *Supra,* note 73. The conduct occurred in association with influencing horse racing regulations and competitions.

[91] *Id.*, citing *Moore v. New York Cotton Exchange*, 270 U.S. 593, 610 (1926).

[92] *United States v. Isaacs*, at 1158, *Supra,* note 73.

[93] *Id.*

[94] *United States v. Gorecki*, 813 F.2d 40, 41-42 (3rd Cir. 1987)
[reproduced in accompanying Binder 2 of 2 @ TAB #26].

[95] *Id.* at 42, citing *United States v. Begun*, 446 F.2d 32, 33 (1971).

[96] *United States v. Gorecki* at 42 citing *United States v. Werner*, 620 F.2d 922, 928 (2nd Cir. 1980).

In *United States v. Fortenberry* the court permitted joinder of two car bombing counts and one transporting an unregistered firearm on a commercial airliner count.[97] The court interpreted joinder liberally and the term "transaction" broadly. Transaction "may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship."[98]

United States Rules of Criminal Procedure and the Prosecutors' application of the rules as well as the courts interpretation has been broad. United States courts have interpreted FRCP 8 (a) so that in order to join several offenses in one indictment, (1) the crimes must be of the same or similar character, (2) the crimes must be based on the same act or transaction, or (3) the crimes must be based on two or more transactions connected together constituting parts of a common scheme or design. This liberal and broad interpretation and application affords Prosecutors the ability to charge and the courts to convict defendants for their crimes. The joinder of offenses allows for judicial economy in the prosecution of crimes. Joinder acts to protect the defendants due process rights by avoiding extended and expensive numerous trials for several offenses based on the same act(s). Perhaps paramount of all the reasons, is the protection of the general public-society. Defendants at the trial court (and on appeal) are less likely to walk away free due to a technical acquittal, since various other charges and convictions would still apply. All of these arguments are part of a bigger debate. Joinder of offenses serves the public policy of society.

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[97] *United States v. Fortenberry*, 914 F.2d 671, 674-675 (5th Cir. 1990) [reproduced in accompanying Binder 2 of 2 @ TAB #27]. This was the defendant's second trial. He was convicted of the joined offenses at the first trial. The convictions were overthrown on appeal due to evidentiary issues.

5. South African Law

The law of South Africa is slightly different than American Criminal Law. A person may be charged under several statutes for the same conduct/acts, unless the charge is murder.[99] If a person is charged with murder, no other charge may be joined.[100] If the conduct of the accused does not constitute offenses of the same type, and is unconnected in circumstance, it is encouraged that the offenses not be joined under one indictment.[101]

6. Nigerian Law

Nigerian Criminal Code permits joinder of crimes through judicial amendments. Criminal Code sections 207-211 and specifically section 208 provides:

> (1) Any court may alter or add to any charge or frame a new charge at any time before judgment is pronounced.
>
> (2) Every such alteration or addition or new charge shall be read and explained to the accused and his plea thereto shall be taken.[102]

Section 208 applies to all courts in Nigeria. If the particular court decides that the indictment is erroneous by reason of omissions, or that subsequent evidence provides for a new or different offense, the court may add indictments for new offenses based on the particular act(s).

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[98] *Id.* at 675, citing *United States v. Park*, 531 F.2d 754, 760-761 (5th Cir. 1976).

[99] A.V. Lansdown, *Outlines of South African Criminal Law and Procedure*, p. 229 (1960) [reproduced in accompanying Binder 2 of 2 @ TAB #28].

[100] *I.d.* at 230.

[101] *I.d.*

[102] S.S. Richardson & T.H. Williams, *The Criminal Code of Northern Nigeria*, pp. 155-159 (1963) [reproduced in accompanying Binder 2 of 2 @ TAB #29].

The Criminal Code also permits joinder of offenses and of defendants. Section 221[103] of the Code states in part:

> The following persons may be charged and tried together namely-
>
> (c) persons accused of more than one offense of the same or similar character, committed by them jointly;
>
> (d) persons accused of different offenses committed in the course of the same transaction.

The Code provides specifically for joinder of offenses where the defendants are indicted for the same or similar/related offense. The Code does not address specifically the situation where the defendant may be indicted and convicted for several offenses based upon the same act(s). Yet the courts can amend an indictment to include additional offenses. Thus a defendant may be charged with several offenses based on the same act(s).

IV-CONCLUSION

The Nuremberg Tribunal established the precedent for subsequent international tribunals. National precedents, such as United States law have followed closely. A defendant in Nuremberg could be indicted and convicted for such acts as murder, deportation and enslavement under several statutes within its Charter, such as War Crimes and Crimes Against Humanity. The ICTY and the ICTR have followed Nuremberg and US law (especially since their Rule of Evidence is based on US law) precedent of indictments and convictions under several statutes based on the same conduct. The ICTR's holding in the *Kayishema and Ruzindana* case is not consistent with the Nuremberg, US, ICTY, or ICTR precedent. Although Nuremberg and the US

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[103] *Id.*

cases are not mandatory authority over the ICTR, they are persuasive authority and a precedent that has been followed by the ICTY and should be followed by the ICTR. This is an important argument should the Prosecutor decide to appeal the *Kayishema and Ruzindana* decision in the combined Appeal Chamber of the ICTY & ICTR. It is likely that the combined ICTY & ICTR Appeals Chamber will follow its own as well as international and national precedent by overruling the *Kayishema and Ruzindana* decision.